
NOTES & COMMENTS

THE EROSION OF CONSTITUTIONAL PRINCIPLES IN PRESIDENTIAL IMMUNITY: A CRITICAL ANALYSIS OF *TRUMP V. UNITED STATES*

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I.	INTRODUCTION	12
II.	HISTORICAL PERSPECTIVE ON PRESIDENTIAL IMMUNITY	14
III.	ANALYZING THE HISTORICAL AND CONSTITUTIONAL FOUNDATIONS OF THE MAJORITY	19
	i. Main Opinion – Chief Justice Roberts.....	22
	ii. Concurring – Justice Thomas.....	26
	iii. Concurring – Justice Barrett.....	29
IV.	IMPLIED PRESIDENTIAL IMMUNITY CHALLENGES.....	31
	i. Ambiguous Constitutional Foundation and Separation of Powers.....	31
	ii. Core Constitutional vs. Official vs. Non-Official Acts.....	31
	iii. Accountability v. Functionality.....	32
	iv. Inconsistent Supreme Court Rulings.....	33
V.	CONSEQUENCES AND IMPLICATIONS	34
VI.	CONCLUSION.....	36

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I. INTRODUCTION

For nearly 250 years since the founding of the United States, no president had ever faced formal criminal charges for actions taken while in office—until Donald Trump.¹ Although it may seem morally inconceivable for the nation’s highest executive officer to commit criminal acts while in office, one of the Framers, Alexander Hamilton envisioned a mechanism to address such misconduct: impeachment.² Although Congress has impeached several presidents, prosecutors have historically limited criminal indictments against presidents to actions occurring outside their terms of office.³ *Trump v. United States* marks the first case in which the Supreme Court has considered whether the Constitution grants the President immunity from criminal prosecution.⁴

The Framers designed the Constitution with deliberate intent, granting Congress broad authority through the Necessary and Proper Clause.⁵ This logically suggests that by bestowing expansive powers on Congress while withholding them from the executive branch, the Founders sought to limit the President’s ability to advance personal agendas unchecked.⁶ Yet, the majority opinion in *Trump* diverges from this principle.⁷

Article III of the Constitution establishes the role and authority of the Supreme Court within our democratic framework.⁸ Like the executive and legislative branches, the Court’s power is circumscribed by the Constitution.⁹ Judicial review stands as a cornerstone of the Supreme Court’s function to interpret the Constitution and adjudicate disputes, which was not explicitly enumerated in the Constitution.¹⁰ This authority was first articulated by Chief Justice John Marshall in *Marbury v. Madison*.¹¹ However, the Supreme Court’s primary role is to serve as the ultimate arbiter of the Constitution, not as a legislative body tasked with creating new laws.¹²

¹ *Trump v. United States*, 603 U.S. 593, 602 (2024).

² THE FEDERALIST NO. 69 (Alexander Hamilton).

³ *Trump*, 603 U.S. at 643 (Thomas, J., concurring).

⁴ *Id.* at 605.

⁵ U.S. CONST. art. I, § 8.

⁶ David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 4 (2020).

⁷ See generally *Trump*, 603 U.S. 593.

⁸ U.S. CONST. art. III.

⁹ *Id.*

¹⁰ *Marbury v. Madison*, 5 U.S. 137, 173–74 (1803).

¹¹ *Id.* at 153.

¹² *Id.* at 178.

As the Constitution’s final interpreter, the Supreme Court must balance its decisions within the boundaries of constitutional text and intent.¹³ But what happens when the Court’s interpretations extend beyond those boundaries, prompting society to question its authority? What if the Court creates de facto “laws” through its decisions with minimal to no constitutional foundation? These questions underscore the controversy surrounding the majority’s decision in *Trump v. United States*.¹⁴ This article is neither the first to critique the *Trump* ruling’s lack of constitutional text and judicial precedent, nor will it be the last in the years to come.¹⁵

Historically speaking, conservative justices have occasionally issued rulings that could be characterized as judicially liberal.¹⁶ However, the conservative majority’s decision in *Trump* raises profound concerns about its implications for our democracy.¹⁷ The plaintiff in this case, now almost one year into the second term of his presidency, is experiencing firsthand the real-time consequences of this ruling, including the erosion of foundational checks and balances.¹⁸

The majority’s opinion in *Trump* is a forceful and divisive debate over the scope of implied executive power, with justices on both sides leveling sharp critiques of each other’s legal reasoning, constitutional interpretations, and use of historical precedent.¹⁹ This article will analyze the legal and historical underpinnings of the majority’s rationale and examine the broader consequences of this ruling for the democratic system upon which the United States was founded.

¹³ Supreme Court of the United States, *The Court and Constitutional Interpretation*, <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Jan. 7, 2025).

¹⁴ See *Trump v. United States*, 603 U.S. 593 (2024).

¹⁵ Matthew Brogdon, *Barrett Is Right: Immunity Is Wrong Framework in Trump Case*, LAW360 (Oct. 9, 2024, 11:54 AM), <https://www.law360.com/articles/1888194/barrett-is-right-immunity-is-wrong-framework-in-trump-case>.

¹⁶ Geoffrey R. Stone, *The Behavior of Supreme Court Justices when Their Behavior Counts the Most*, AM. CONST. SOC’Y FOR L. & POL’Y, Sept. 2013, at 6.

¹⁷ *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

¹⁸ *Id.* at 697–98 (Jackson, J., dissenting). See generally Nina Totenberg, *Supreme Court Put Trump Tariffs on a High-Fire Grill, in Bipartisan Scrutiny*, NAT’L PUB. RADIO (Nov. 5, 2025, 6:29 PM), <https://www.npr.org/2025/11/05/nx-s1-5599537/supreme-court-trump-tariffs> (exploring Trump’s circumvention of Congress through his tariff policies); see generally Alicia Bannon, *Supreme Court Must Explain Why It Keeps Ruling in Trump’s Favor*, BRENNAN CTR. FOR JUST. (Aug. 14, 2025), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-must-explain-why-it-keeps-ruling-trumps-favor> (examining the Supreme Court’s role in strengthening the executive branch in the first year of Trump’s second term).

¹⁹ *Id.* at 637, 639–40 (majority opinion); *id.* at 659–60, 685 (Sotomayor, J., dissenting); *id.* at 698–99 (Jackson, J., dissenting).

II. HISTORICAL PERSPECTIVE ON PRESIDENTIAL IMMUNITY

America was founded on the ideology of freedom, with the goal of creating a nation distinct from the king's rule.²⁰ The American Constitution was born out of the colonies' desire for a system free from oppression and fundamentally different from the rule of the king.²¹ While certain elements reflected influences from England, the Federalists ultimately crafted a system that was both revolutionary and uniquely their own.²² The Founding Fathers intended to create the United States as a nation for all its citizens, establishing a democratic government completely unlike the country against which they fought for their freedom.²³ As Thomas Paine wrote in *Common Sense*, "In America, the law is king. [While] in absolute governments, the king is law."²⁴

In Federalist No. 69, it is abundantly clear that the president's power is limited.²⁵ Specifically, many presidential functions are tethered to the phrase "WITH THE ADVICE AND CONSENT OF THE SENATE."²⁶ Additionally, Hamilton outlines the president's liability, stating that a president is "liable to be impeached, tried, and, upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."²⁷ This illustrates that the president is not above the law but is instead held accountable to it.

Presidential immunity is not mentioned once in the Constitution.²⁸ In fact, the debaters at the Constitutional Convention showed little interest in granting any special privileges to the highest executive officer and refused to discuss the idea.²⁹ They were intentional in creating an executive office

²⁰ See Jonathan Gienapp, *National Power and the Presidency*, in *POLITICAL THOUGHT AND THE ORIGINS OF THE AMERICAN PRESIDENCY* 127, 138 (Ben Lowe ed., 2021).

²¹ Trace M. Maddox, "No Superior but God": *History, Post-Presidential Immunity, and the Intent of the Framers*, 81 WASH. & LEE L. REV. ONLINE 333, 354–57 (2024).

²² GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* 564 (1998).

²³ Maddox, *supra* note 21, at 354.

²⁴ THOMAS PAINE, *COMMON SENSE* 75 (Edward Larkin, ed., Broadview Press 2004) (1776).

²⁵ THE FEDERALIST NO. 69 (Alexander Hamilton).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Claire O. Finkelstein & Richard W. Painter, *Presidential Accountability and the Rule of Law: Can the President Claim Immunity if He Shoots Someone on Fifth Avenue?*, 24 U. PA. J. CONST. L. 93, 106 (2022).

²⁹ See generally 4 JAMES MADISON, *THE WRITINGS OF JAMES MADISON: 1787 THE JOURNAL OF THE CONSTITUTIONAL CONVENTION* 192 (Gaillard Hunt ed., 1903); see also *Nixon v. Fitzgerald*, 457 U.S. 731, 772–73 (1982) (White, J., dissenting).

that was powerful but that constrained unchecked ambition.³⁰ Additionally, they were careful not to grant one person “power beyond the law,” the very power that sparked the American Revolution.³¹ However, the founders were aware of their ability to grant immunity to branches of government.³² For example, the Speech and Debate Clause of the Constitution provides immunity for Congress in their legislative acts.³³

The history of immunity has traditionally been based on acts performed in the course of one’s official functions.³⁴ Congress enjoys immunity through its specific legislative actions.³⁵ Similarly, prosecutors and judges are granted immunity based on their specific prosecutorial and judicial duties.³⁶ Prior to *Trump*, no immunity existed that shielded criminal liability based solely on the office the accused holds.³⁷

Purely functional immunity allows for an inquiry whether the individual was truly serving their role or was acting illegally.³⁸ Given the monarchical history of our nation, it cannot be reasonably inferred that the executive office was granted *implied* immunity to shield the president from criminal liability for illegal actions taken in office.³⁹ If the Framers had intended to grant the president absolute immunity from all criminal behavior while in office, why did they not explicitly confer it to the office, as they did with Congress? Furthermore, if they did not believe the president could be held liable, why would they have included Article I, Section 3—the Impeachment Judgment Clause—which expressly states that a president may be criminally convicted, even if not impeached?⁴⁰ These points strongly support the argument that the Framers did not intend to grant the President absolute immunity for his actions and that they sought to ensure any President could be held liable for criminal offenses.⁴¹ This is further reinforced by the fact that the Founders were careful not to create a king who could

³⁰ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 300 (1967).

³¹ *Id.*

³² Maddox, *supra* note 21, at 356.

³³ Finkelstein & Painter, *supra* note 28, at 106.

³⁴ *Fitzgerald*, 457 U.S. at 770.

³⁵ Maddox, *supra* note 21, at 354.

³⁶ *Fitzgerald*, 457 U.S. at 747.

³⁷ *Id.* at 785 (White, J., dissenting).

³⁸ *Id.* at 784.

³⁹ Mitchell Lewis Blackstone, Comment, *Trump v. Vance: The Distraction Argument and Absolute Presidential Immunity*, 99 DENV. L. REV. 201, 203 (2021).

⁴⁰ U.S. CONST. art. I, § 3, cl. 7.

⁴¹ *Id.*

defy the law—the very figure against whom this country had fought to secure its freedom.⁴²

Prior to *Trump v. United States*, the Supreme Court in five cases, and a lower court in one foundational case, considered executive privilege and immunity.⁴³ Of the six cases, four address a president's privilege in relation to subpoenas for testimony or the production of documents.⁴⁴ Additionally, three of the six cases focus solely on civil liability or damages.⁴⁵

However, *Trump v. United States* was the first case in which the Supreme Court reviewed whether a president has absolute immunity from criminal prosecution for actions taken in an official capacity.⁴⁶ Of the six cases, *United States v. Nixon*, *Nixon v. Fitzgerald*, and *Clinton v. Jones* were the most influential in the recent *Trump* decision.⁴⁷ However, to adequately critique and analyze the *Trump* opinion, we must examine all six cases to understand the historical context the Court had to work with.

United States v. Burr was the first case decided concerning executive privilege in 1807.⁴⁸ Burr was criminally prosecuted for treason allegations, based on an incriminating letter the president had received implicating Burr.⁴⁹ The Court ultimately ruled that the president is not subject to special rules and must produce documents or testify like any other citizen, unless the information is deemed highly confidential.⁵⁰ Although this ruling appears broad, subsequent cases will clarify the scope of what constitutes relevant information that a president may withhold for discovery purposes.

United States v. Nixon expanded upon *Burr* by clarifying the scope of confidential matters.⁵¹ President Nixon opposed a criminal subpoena on the grounds of executive privilege and confidentiality of the executive

⁴² Blackstone, *supra* note 39, at 203.

⁴³ *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807); *United States v. Nixon*, 418 U.S. 683, 703 (1974); *Fitzgerald*, 457 U.S. at 760; *Clinton v. Jones*, 520 U.S. 681, 694 (1997); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 388 (2004); *Trump v. Vance*, 591 U.S. 786, 803 (2020).

⁴⁴ *Nixon*, 418 U.S. at 703; *Fitzgerald*, 457 U.S. at 760; *Clinton*, 520 U.S. at 705–06; *Vance*, 591 U.S. at 803.

⁴⁵ *Fitzgerald*, 457 U.S. at 733; *Clinton*, 520 U.S. at 685; *Cheney*, 542 U.S. at 374.

⁴⁶ *Trump v. United States*, 603 U.S. 593, 602 (2024).

⁴⁷ *Id.* at 611, 612, 615.

⁴⁸ *Burr*, 25 F. Cas. at 34.

⁴⁹ *Id.* at 32–33.

⁵⁰ *Id.* at 36–37.

⁵¹ *United States v. Nixon* 418 U.S. 683, 713–14 (1974).

office.⁵² However, the court rejected his claim, ruling that “general” confidentiality does not outweigh the judicial need for relevant evidence for criminal cases.⁵³ For information to be withheld under executive privilege, it must pertain to military, diplomatic, or sensitive national-security matters.⁵⁴

The Court held that the president does not have “absolute, unqualified privilege” from judicial processes.⁵⁵ It further emphasized that the separation of powers among the branches was never intended to operate in “absolute independence.”⁵⁶ Consequently, Nixon’s generalized claim of public interest in asserting executive privilege failed.⁵⁷ Following the Court’s decision, Nixon resigned, and his successor, President Ford, pardoned Nixon for criminal actions committed in his official presidential capacity while in office.⁵⁸ This outcome underscores the widely understood principle that a president may be held criminally liable for actions taken in office, even if those actions are deemed official.⁵⁹

Nixon v. Fitzgerald marked a shift from immunity based on function to immunity tied to the office itself.⁶⁰ In this case, Nixon was sued for civil damages related to an alleged unlawful termination.⁶¹ The majority concluded that constitutional principles necessitated granting the president absolute immunity from civil damages for acts performed within his official capacity.⁶² The Court reasoned that absolute immunity was essential to prevent lawsuits from detracting from the president’s ability to fulfill his duties.⁶³ The majority asserted that this immunity did not place the president above the law but shielded him from private remedies.⁶⁴ However, the dissenters strongly opposed this rationale, arguing that granting immunity based on the office, rather than function, was a dangerous step toward monarchical rule and effectively placed the president above the

⁵² *Id.* at 696–97.

⁵³ *Id.* at 712–13.

⁵⁴ *Id.* at 706.

⁵⁵ *Id.* at 707.

⁵⁶ *Id.*

⁵⁷ *Id.* at 706.

⁵⁸ Brooke Clement, *The Pardon*, NAT’L ARCHIVES OF GERALD R. FORD (Sept. 6, 2024), <https://ford.blogs.archives.gov/2024/09/06/the-pardon/>.

⁵⁹ See Saikrishna Prakash, *Prosecuting and Punishing Our Presidents*, 100 TEX. L. REV. 55, 60–61 (2024) (arguing that the Constitution does not implicitly give the office of the President absolute criminal immunity).

⁶⁰ *Nixon v. Fitzgerald*, 457 U.S. 731, 770 (1982) (White, J., dissenting).

⁶¹ *Id.* at 733–34.

⁶² *Id.* at 749.

⁶³ *Id.* at 751.

⁶⁴ *Id.* at 758.

law.⁶⁵ In light of *Trump v. United States*, the claim that immunity does not elevate the president above the law has been called into question.⁶⁶

Clinton v. Jones was a pivotal case heavily relied on by the *Trump* majority.⁶⁷ Initially, the district court in *Clinton* denied the motion to dismiss on immunity grounds but stayed the proceedings until the end of President Bill Clinton's term.⁶⁸ However, the appellate court overturned the decision to stay the proceedings, and the Supreme Court affirmed the appellate court's ruling.⁶⁹ The Court held that the president can be sued and tried during his presidency for actions unrelated to official duties.⁷⁰ Specifically, the Constitution does not grant the executive office immunity from civil litigation for conduct predating the presidency.⁷¹

Cheney v. United States District Court is less relevant than other cases because it primarily addresses executive privilege and mandamus requirements.⁷² However, the case remains significant due to its extensive discussion of separation of powers principles.⁷³ The opinion emphasized the judiciary's responsibility to shield the executive branch from frivolous claims and to avoid unnecessary interference with the president's duties.⁷⁴ In this civil case, the Court held that the government does not need to assert executive privilege first to prevent undue interference.⁷⁵ If necessary, a higher court may issue a writ of mandamus to safeguard the executive branch's constitutional functions.⁷⁶

The dissenting opinion in *Trump v. Vance* foreshadowed the Court's reasoning in *Trump v. United States*.⁷⁷ In *Vance*, the Court held that a sitting president is not immune from a state-issued subpoena in a criminal case, emphasizing that this issue had previously been addressed at the federal level.⁷⁸ The Court unilaterally rejected Trump's argument that Article

⁶⁵ *Id.* at 766.

⁶⁶ *Trump v. United States*, 603 U.S. 593, 657 (2024) (Sotomayor, J., dissenting).

⁶⁷ *See generally Trump*, 603 U.S. 593.

⁶⁸ *Clinton v. Jones*, 520 U.S. 681, 687 (1997).

⁶⁹ *Id.* at 687–88, 691.

⁷⁰ *Id.* at 694, 706.

⁷¹ *Id.* at 692, 694.

⁷² *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 372–73 (2004).

⁷³ *Id.* at 381.

⁷⁴ *Id.* at 382.

⁷⁵ *Id.* at 391.

⁷⁶ *Id.*

⁷⁷ *Trump v. Vance*, 591 U.S. 786, 825–32 (2020) (Alito, J., dissenting).

⁷⁸ *Id.* at 806–07 (majority opinion).

II and the Supremacy Clause granted the president immunity from a state criminal subpoena or imposed a heightened standard of need.⁷⁹

The *Vance* Court reasoned that no president in U.S. history had successfully claimed executive immunity to evade a criminal subpoena.⁸⁰ Furthermore, two centuries of precedent demonstrated that presidents could comply with subpoenas without disrupting their essential duties.⁸¹ The Court concluded that as long as a subpoena is properly tailored, it should not impede the president’s ability to perform official functions.⁸²

Notably, the Constitution does not expressly vest immunity in the executive office.⁸³ However, in *Trump v. United States*, the majority relied heavily on the separation of powers principle—a concept not explicitly stated in the Constitution, though it is interwoven throughout Articles I, II, and III.⁸⁴ This principle ensures that the government’s three branches function independently while maintaining checks and balances on one another. Similarly, while the rule of law—the idea that no one is above the law—is not explicitly mentioned in the Constitution, it is deeply embedded in its structure and principles.⁸⁵ The Constitution delineates laws and limits on power, including provisions for specific immunities, impeachment, and presidential liability under the law.⁸⁶

The principle that “no one is above the law” is a cornerstone of America’s founding ideals, reflected in the creation of an executive branch designed to avoid the unchecked authority of a king. However, in *Trump v. United States*, the majority appeared to prioritize the separation of powers principle over the foundational ideal of the rule of law.⁸⁷ While separation of powers is essential for the efficient functioning of government, the Court’s decision effectively granted broad immunity to the president under the guise of this principle. By doing so, the Court risked reinstating the kind of unchecked, king-like authority that the Framers sought to prevent.

⁷⁹ *Id.* at 809.

⁸⁰ *Id.* at 810.

⁸¹ *Id.* at 802.

⁸² *Id.*

⁸³ *Trump v. United States*, 603 U.S. 593, 637 (2024).

⁸⁴ *Id.* at 637–38, 642.

⁸⁵ See Maryam Ahmad, *President’s Page: Advancing the Rule of Law Now*, 35 CBA REC., May–June 2021, at 6, 6.

⁸⁶ *Trump*, 603 U.S. at 609, 630, 632–34.

⁸⁷ *Id.* at 614.

III. ANALYZING THE HISTORICAL AND CONSTITUTIONAL FOUNDATIONS OF THE MAJORITY

Trump v. United States is the first case in our Nation’s history where a former president is being criminally prosecuted for the actions he took during his presidential term.⁸⁸ Donald Trump was indicted for actions he allegedly took in the final days of his presidency after learning of his loss in the November 2020 election to President-elect Joe Biden.⁸⁹ Trump was indicted for “conspir[ing] to overturn [the election] by spreading knowingly false claims of election fraud to obstruct the collecting, counting and certifying of the election results.”⁹⁰

In response to the indictment, Trump moved for dismissal of the case, arguing that he was entitled to absolute immunity from criminal prosecution for actions performed in connection with the official duties and responsibilities of the executive office.⁹¹ The district court denied Trump’s motion, holding that former Presidents do not possess criminal immunity for actions undertaken while in office or afterwards and declined to determine whether the indicted actions qualified as official acts.⁹²

The D.C. Circuit Court affirmed the district court’s decision, and Trump subsequently appealed to the Supreme Court.⁹³ The Supreme Court granted certiorari to address whether the Constitution provides a basis for granting a president immunity from criminal prosecution for actions that may be deemed “official acts”.⁹⁴

In a narrow 6-3 decision, the Court established a three-tier framework to evaluate presidential liability.⁹⁵ First, any “core constitutional function” of the executive branch grants the president absolute immunity.⁹⁶ Second, actions not classified as core constitutional functions but directly related to them are presumptively immune.⁹⁷ Third, actions committed by the president that are not “official acts” are not immune.⁹⁸

⁸⁸ *Id.* at 605.

⁸⁹ *Id.* at 602.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 605.

⁹⁵ *Id.* at 593.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 615.

The Court declined to delineate specific criteria distinguishing official acts from nonofficial acts, “reasoning” that an exhaustive list would be impractical.⁹⁹ Relying heavily on separation of powers principles, the Court concluded that the unique nature of presidential power requires affording a former president a degree of immunity from criminal prosecution for actions undertaken in an official capacity during their tenure in office.¹⁰⁰

The Court’s reasoning will be analyzed in the following paragraphs, organized by the opinions authored by each majority justice. The Supreme Court vacated the judgment of the D.C. Circuit Court and remanded the case with instructions to apply the newly established framework.¹⁰¹ The lower court was directed to determine whether any of Trump’s alleged actions fell outside the scope of his official duties and, therefore, were not covered by immunity.¹⁰² Notably, the indictment and the Court’s opinion included references to Trump’s alleged involvement in the January 6th attack on the Capitol in Washington, D.C.¹⁰³

Trump discusses public policy principles and the broader interest of the American public, yet neglects to address the profound public interest in Former President Trump’s role in the Capitol attack.¹⁰⁴ The entire nation was interested in the facts of the insurrection and demanded accountability.¹⁰⁵ To date, over 1,488 individuals have been arrested and charged across nearly all fifty states for offenses related to January 6th.¹⁰⁶ The attack caused approximately \$2.7 million in damages, left around 150 police officers injured, and resulted in the deaths of four members of the crowd, as well as five officers in the following days and weeks.¹⁰⁷ Senate Minority Leader Mitch McConnell publicly stated that Trump provoked the crowd

⁹⁹ *Id.* at 641.

¹⁰⁰ *Id.* at 638.

¹⁰¹ *Id.* at 642.

¹⁰² *Id.*

¹⁰³ *Id.* at 597.

¹⁰⁴ *Id.* at 674.

¹⁰⁵ Michael Sozan & William Roberts, *Trump and His Allies Must Be Held Accountable for the January 6 Insurrection*, CTR. FOR AM. PROGRESS (Apr. 20, 2023), <https://www.americanprogress.org/article/trump-and-his-allies-must-be-held-accountable-for-the-january-6-insurrection>.

¹⁰⁶ *43 Months Since the Jan. 6 Attack on the Capitol*, U.S. DEP’T OF JUST., <https://www.justice.gov/usao-dc/43-months-jan-6-attack-capitol> [https://web.archive.org/web/20250102034331/https://www.justice.gov/usao-dc/43-months-jan-6-attack-capitol] (Aug. 6, 2024).

¹⁰⁷ *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> (Oct. 13, 2022); *Capitol Attack Federal Agencies Identified Some Threats, but Did not Fully Process and Share Information Prior to January 6, 2021*, U.S. GOV’T ACCOUNTABILITY OFF., <https://www.gao.gov/assets/gao-23-106625.pdf> (July 21, 2023).

to march violently on the Capitol.¹⁰⁸ Given this significant impact, the public had a vested interest in seeking accountability from their former president.¹⁰⁹

i. Main Opinion – Chief Justice Roberts

Chief Justice Roberts relies heavily on *Nixon v. Fitzgerald*, a case addressing civil damages, despite the current case involving a criminal prosecution.¹¹⁰ In *Fitzgerald*, the Court reasoned that private civil suits could invite a flood of litigation, consuming significant time and resources, and thereby imposing a substantial burden on the executive branch.¹¹¹ Chief Justice Roberts extends this reasoning in *Trump* to criminal cases, suggesting that such prosecutions could impose similar burdens.¹¹²

However, *Fitzgerald* also emphasized a critical distinction: judicial action is warranted when it serves broad public interests, such as maintaining the balance of power or advancing the public interest in ongoing criminal prosecutions.¹¹³ The Court explained that these situations differ from private suits for damages, which lack comparable public-serving justifications.¹¹⁴ While *Fitzgerald* did not explicitly contrast civil and criminal cases, its reasoning implies that the public interest in criminal cases warrants a different approach than in private civil suits.¹¹⁵

This nuance complicates Chief Justice Roberts’s reliance on *Fitzgerald* to equate the burdens of criminal and civil cases in *Trump*. Some of the actions for which prosecutors were indicting Former President Trump for, particularly those related to the January 6th attack on the Capitol, arguably align with *Fitzgerald*’s rationale of serving the public interest through criminal prosecution.¹¹⁶ Nevertheless, the Court appears to overlook this

¹⁰⁸ *Minority Leader McConnell Says President Trump "Practically and Morally Responsible" for January 6 Attack on Capitol*, C-SPAN (FEB. 13, 2021), at 01:33, <https://www.c-span.org/clip/us-senate/minority-leader-mcconnell-says-president-trump-practically-and-morally-responsible-for-january-6-attack-on-capitol/4946114>.

¹⁰⁹ *Trump v. United States*, 603 U.S. 593, 674–75 (2024) (Sotomayor, J., dissenting).

¹¹⁰ *Id.* at 611–12 (majority opinion).

¹¹¹ *Nixon v. Fitzgerald*, 457 U.S. 731, 751–53 (1982).

¹¹² *Trump*, 603 U.S. at 613–14.

¹¹³ *Fitzgerald*, 457 U.S. at 754.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Trump*, 603 U.S. at 602–03; *Fitzgerald*, 457 U.S. at 754; see Keith E. Whittington, *Presidential Immunity*, 2023 CATO SUP. CT. REV. 283, 299 (2023–2024) (arguing that “[c]ompared with [the Fitzgerald public interest balancing] approach, the Roberts opinion would seem to up the stakes such that there can be no dangers of intrusion on the executive branch. The Trump

connection. Never before in American history had a group successfully carried out a siege on the Nation’s Capitol, particularly amid allegations implicating a sitting president in the effort.¹¹⁷

The *Trump* opinion places significant emphasis on the Founding Fathers’ intent to establish a “vigorous and energetic” executive branch led by a single individual—an arrangement described in Federalist No. 70 as essential to ensuring the “security of liberty.”¹¹⁸ The majority stresses the importance of approaching the President’s role with the “utmost . . . sensitivity”, emphasizing the need for “fearless[ness]” in executing official duties.¹¹⁹ However, the opinion seems to disregard foundational principles articulated by the Founding Fathers. Notably, a preceding Federalist Paper, which Chief Justice Roberts appears to overlook, extensively outlines the President’s liability to impeachment, removal, and prosecution for crimes committed during office.¹²⁰

Alexander Hamilton clearly distinguished the president of a constitutional democracy from the British king, who was regarded as “sacred and inviolable” and beyond constitutional accountability.¹²¹ The Founding Fathers deliberately designed the presidency to be a limited office, where power is checked, and the individual holding it is held liable for illegal actions.¹²² Therefore, it is improbable to suggest that the Founders envisioned a fearless leader immune from accountability simply by cloaking unlawful conduct as “official acts.”¹²³ What rationale in the president’s pursuit of securing liberty could justify violating criminal law under the cloak of absolute immunity?

The *Trump* opinion heavily emphasizes the principles of “separation of powers” and the purported “conclusive and preclusive” constitutional authority of the president—terms conspicuously absent from the text of the U.S. Constitution.¹²⁴ In contrast, *Youngstown Sheet & Tube Co. v. Sawyer* underscores the executive’s inability to act without explicit authorization

opinion lapses silent on any interests that might be balanced against the President’s presumptive immunity”).

¹¹⁷ Audrey Kurth Cronin, *The Capitol Has Been Attacked Before: This Time It Was Different*, AM. UNIV. (Feb. 9, 2021), <https://www.american.edu/sis/centers/security-technology/the-capitol-has-been-attacked-before-this-time-it-was-different.cfm>.

¹¹⁸ *Trump*, 603 U.S. at 610; THE FEDERALIST NO. 70 (Alexander Hamilton).

¹¹⁹ *Trump*, 603 U.S. at 610–11.

¹²⁰ THE FEDERALIST NO. 69 (Alexander Hamilton).

¹²¹ *Id.*

¹²² *United States v. Nixon*, 418 U.S. 683, 684 (1974).

¹²³ THE FEDERALIST NO. 69 (Alexander Hamilton).

¹²⁴ *Trump*, 603 U.S. at 597, 611.

from Congress or a clear directive within the Constitution itself.¹²⁵ Curiously, the *Trump* opinion invokes *Youngstown* while simultaneously advancing a broad interpretation of “conclusive and preclusive” presidential power.¹²⁶ The Court broadly classifies Trump’s meetings and discussions with the Attorney General, White House officials, and Justice Department—allegedly aimed at spreading false claims of voter fraud and pressuring actions to overturn the election results—as shielded by absolute immunity under the guise of official acts.¹²⁷

Notably, the *Trump* Court overlooks a critical caution from *Youngstown* regarding expansive executive authority: “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹²⁸ This omission is striking, as *Trump*’s rationale for absolute immunity ostensibly aims to protect democracy and enables the executive branch to act in the “security of liberty” for the nation.¹²⁹ Yet, by disregarding *Youngstown*’s warning, the Court risks destabilizing the very constitutional balance that absolute immunity is meant to safeguard.

The *Trump* opinion places significant emphasis on the principle of “separation of powers,” framing it as a cornerstone for the ruling on presidential immunity.¹³⁰ The Court even characterizes the U.S. government as a “system of separated powers.”¹³¹ This principle is supported by various arguments, including the assertion that the president “occupies a unique position in the constitutional scheme.”¹³² The *Trump* Court further justifies eliminating the president’s criminal liability for actions within his official duties by claiming that such immunity is essential for securing our liberty.¹³³ This reasoning, however, is deeply unsettling.

While the principle of “separation of powers” is undoubtedly embedded in the Constitution, the majority glaringly neglects its equally critical counterpart: the principle of “checks and balances.” The importance of “checks and balances” is evident in numerous constitutional

¹²⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

¹²⁶ *Trump*, 603 U.S. at 607.

¹²⁷ *Id.* at 597.

¹²⁸ *Youngstown*, 343 U.S. at 638.

¹²⁹ *Trump*, 603 U.S. at 610.

¹³⁰ *Id.* at 614–15.

¹³¹ *Id.* at 636.

¹³² *Id.* at 610 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)).

¹³³ *Id.*

mechanisms.¹³⁴ For instance, Congress can override a presidential veto with a two-thirds majority in both the Senate and the House; the president serves as Commander-in-Chief, yet only Congress holds the power to declare war; and while the president nominates federal judges and Supreme Court Justices, the Senate must confirm those appointments.¹³⁵ Moreover, Congress possesses the authority to impeach and remove the president, judges, or other federal officials.¹³⁶ These mechanisms, among others, demonstrate that “checks and balances” are as integral to the constitutional framework as “separation of powers.”¹³⁷

Given the clear existence of “checks and balances” in the Constitution, it is puzzling why the Supreme Court chose to disregard this fundamental principle.¹³⁸ Why did the Court fail to implement safeguards that would preserve the president’s ability to act as a “fearless” leader while also ensuring accountability for abuses of official powers—particularly when such abuses threaten the very democracy the office is meant to protect?¹³⁹ Both logic and historical context suggest that the Founders did not intend to create an office with unchecked authority.¹⁴⁰ Yet, in its *Trump* ruling, the majority focused exclusively on the principle of “separation of powers,” effectively ignoring the principle of “checks and balances” and the foundational tenet that “no one is above the law.”¹⁴¹

The *Trump* Court ruled that if the President’s conduct neither aligns with actions expressly authorized by Congress nor is explicitly granted by the Constitution but is related to such actions, the president’s immunity is presumptive and rebuttable.¹⁴² This framework, while narrower than absolute immunity, demands a fact-intensive analysis of the president’s actions if the Government successfully rebuts the presumption that the conduct falls within the president’s core constitutional powers.¹⁴³ On its face, this approach appears to strike a balance among critical constitutional principles, rather than disproportionately favoring “separation of powers.” However, the *Trump* Court renders this analysis nearly impossible to

¹³⁴ Steven Calabresi, *The Historical Origins of the Rule of Law in the American Constitution*, 28 HARV. J.L. & PUB. POL’Y 273, 279–80 (2004).

¹³⁵ U.S. CONST. art. I, §§ 7, 8; *id.* at art. II, § 2.

¹³⁶ *Id.* at art. II, § 4.

¹³⁷ See Calabresi, *supra* note 134, at 279–80.

¹³⁸ THE FEDERALIST NO. 47 (James Madison).

¹³⁹ *Chaos, Confusion, & Abuse of Power: Trump’s First Week Back in Office*, THE LEADERSHIP CONF. ON CIV. & HUM. RTS. (Jan. 30, 2025), <https://civilrights.org/blog/chaos-confusion-abuse-of-power-trumps-first-week-back-in-office/>.

¹⁴⁰ THE FEDERALIST NO. 47 (James Madison).

¹⁴¹ See *Trump v. United States*, 603 U.S. 601, 611 (2024).

¹⁴² *Id.* at 614–15.

¹⁴³ *Id.*

conduct effectively by prohibiting any inquiry into the president's motives, arguing that such an inquiry would "seriously cripple" the executive function.¹⁴⁴

Additionally, the *Trump* Court addressed the president's tweets and public address during the January 6th attack on the Capitol, suggesting that these communications are "likely" immune from liability.¹⁴⁵ The Court justified this by asserting that the president's "extraordinary power to speak to his fellow citizens" derives from his core constitutional powers.¹⁴⁶ Although the Court remanded the case to the district court to determine whether the president's conduct in these communications was official, it raises a deeply concerning question: If a president can make baseless claims of voter fraud and incite violence by declaring, "We won this election, and we won it by a landslide...We will stop the steal...If you don't fight like hell you're not going to have a country anymore...We are going to the Capitol," then what conduct could ever be deemed unofficial and subject the President to criminal liability?¹⁴⁷

ii. Concurring – Justice Thomas

Justice Thomas concurred with Chief Justice Roberts but wrote separately to present an additional constitutional argument questioning the legality of appointing Special Counsel Jack Smith.¹⁴⁸ Justice Thomas contended that the Attorney General's creation of the office might violate the Appointments Clause of the Constitution, as no statute explicitly establishes the position, potentially stripping the Special Counsel of standing to prosecute the former President.¹⁴⁹ However, this analysis will focus solely on Justice Thomas's claims regarding presidential immunity.

Justice Thomas declared: "Few things would threaten our constitutional order more than criminally prosecuting a former President for his official acts. Fortunately, the Constitution does not permit us to chart such a dangerous course."¹⁵⁰ This striking declaration relies on a broad interpretation of the Constitution, selectively elevating principles like "separation of

¹⁴⁴ *Id.* at 618.

¹⁴⁵ *Id.* at 628–29.

¹⁴⁶ *Id.*

¹⁴⁷ Brian Naylor, *Read Trump's Jan. 6 Speech, a Key Part of Impeachment Trial*, NAT'L PUB. RADIO (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

¹⁴⁸ *Trump*, 603 U.S. at 643 (Thomas, J., concurring).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

powers” while ignoring others, such as the “rule of law” and the fundamental system of “checks and balances” designed to protect against abuses of power.¹⁵¹

Justice Thomas’s position amplifies certain constitutional principles to endorse an exceedingly broad conception of executive authority, asserting that the President is “‘deemed an energetic executive essential to . . . the security of liberty,’ and our ‘system of separated powers’ accordingly insulates the President from prosecution for his official acts.”¹⁵² Yet, this reasoning gives little attention to the equally fundamental principle that cautions against granting unchecked power to a single individual.¹⁵³ By asserting that the President *must* be immune from liability for official acts, Thomas’s opinion becomes conclusory, offering little to no concrete evidence to support his claims and failing to propose safeguards against the misuse of such expansive immunity.¹⁵⁴ This omission creates a dangerous precedent, leaving the nation vulnerable to a President who could invoke “official acts” to justify actions that harm, intimidate, or serve personal interests at the expense of the public good.¹⁵⁵

This opinion asserts that subjecting a President’s official acts to criminal liability would “hamstring the vigorous Executive that our Constitution envisions.”¹⁵⁶ Justice Thomas bolsters this claim by invoking Justice Scalia’s dissent in *Morrison v. Olson* to assert that “[w]hile the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.”¹⁵⁷ However, it is notable that the majority in *Morrison* upheld a law permitting the judicial branch to appoint an independent counsel and limiting the Attorney General’s removal authority, concluding these provisions did not violate separation of powers principles.¹⁵⁸ Relying on Scalia’s dissent in *Morrison*—particularly in a context far removed from the case’s central holding—is a significant stretch. Nevertheless, Justice Thomas employs *Morrison*’s holding to reinforce the *Trump* majority’s premise that separation of powers supersedes other constitutional principles, effectively shielding the Executive Branch from

¹⁵¹ See Ahmad, *supra* note 85, at 6; Calabresi, *supra* note at 134, at 279–80.

¹⁵² *Trump*, 603 U.S. at 643 (Thomas, J., concurring).

¹⁵³ See Maddox, *supra* note 21, at 354–57 (discussing fundamental principle distinguishing limited office of president from a king).

¹⁵⁴ See *Trump*, 603 U.S. at 650 (Thomas, J., concurring); *United States v. Nixon*, 418 U.S. 683, 707–08 (1974) (explaining mere assertion of privilege may not be sufficient in light of other principles).

¹⁵⁵ *Trump*, 603 U.S. at 684–86 (Sotomayor, J., dissenting).

¹⁵⁶ *Id.* at 643 (Thomas, J., concurring).

¹⁵⁷ *Id.* (quoting *Morrison v. Olson*, 487 U.S. 654, 710–11 (1988) (Scalia, J., dissenting)).

¹⁵⁸ *Morrison*, 487 U.S. at 696–97 (majority opinion).

essential checks designed to prevent authoritarian overreach.¹⁵⁹ This reasoning is not supported by the Constitution or the Framers' intent.¹⁶⁰

Chief Justice Roberts' opinion and Justice Thomas's concurrence repeatedly claim that the president is not above the law.¹⁶¹ Yet Justice Thomas goes further and declares that "the President's immunity from prosecution for his official acts is the law."¹⁶² This statement reveals a troubling contradiction: under the Court's interpretation, the president is effectively above the law so long as his actions are classified as official.¹⁶³ Such expansive construction is inconsistent with the Founders' intent to establish a government free from monarchical absolutes, where no one, not even the President, stands above the rule of law.¹⁶⁴ The majority's reasoning signals a dangerous shift toward consolidating unchecked executive power, jeopardizing the democratic principles the Constitution was designed to protect.¹⁶⁵

The *Trump* majority relies heavily on *Nixon v. Fitzgerald* to justify granting the president absolute immunity from criminal prosecution for certain acts.¹⁶⁶ As stated previously, *Fitzgerald* addressed civil damages, not criminal liability.¹⁶⁷ Moreover, the *Fitzgerald* Court emphasized that the president is not entirely above the law, citing mechanisms such as scrutiny from Congress and the press, constituent accountability, and impeachment.¹⁶⁸ Additional factors, including the president's desire to win reelection and maintain the prestige of the office, were also noted.¹⁶⁹ Yet these mechanisms are insufficient safeguards—they serve more as incentives for managing optics and public perception than as meaningful tools of accountability.¹⁷⁰

The *Fitzgerald* dissent sounded the alarm regarding this dangerous shift. It criticized the majority's departure from a functionality-based approach to absolute official immunity, stating:

¹⁵⁹ See *Trump*, 603 U.S. at 650 (Thomas, J., concurring).

¹⁶⁰ *Id.* at 660–61 (Sotomayor, J., dissenting).

¹⁶¹ *Id.* at 642 (majority opinion); *id.* at 650 (Thomas, J., concurring).

¹⁶² *Id.* at 650 (Thomas, J., concurring) (emphasis omitted).

¹⁶³ See *id.*

¹⁶⁴ See Calabresi, *supra* note 134, at 279–80.

¹⁶⁵ Ahmad, *supra* note 85, at 6; Calabresi, *supra* note at 134, at 279.

¹⁶⁶ See *Trump*, 603 U.S. 593.

¹⁶⁷ *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982).

¹⁶⁸ *Id.* at 757–58.

¹⁶⁹ *Id.*

¹⁷⁰ See Douglas B. McKechnie, *Defaming the President*, 49 MITCHELL HAMLINE L. REV. 535, 563 (2023).

It cannot be seriously argued that the President must be placed beyond the law and beyond judicial enforcement of constitutional restraints upon executive officers in order to implement the principle of separation of powers.

Focusing on the actual arguments the majority offers for its holding of absolute immunity for the President, one finds surprisingly little.¹⁷¹

This critique remains pertinent when applied to the reasoning of *Trump*, particularly given their heavy reliance on *Fitzgerald* to substantiate their ruling.¹⁷²

The *Fitzgerald* dissenters asserted that the ruling constituted a policy choice devoid of any legal support, characterizing it as “without substantial support and that in all events is ambiguous in its reach...”¹⁷³ They rejected the implied belief that the principle of “separation of powers” could sustain absolute immunity for a president.¹⁷⁴ As the dissenters presciently warned, the ruling ultimately abandoned a foundational principle of democracy by placing the president above the law.¹⁷⁵ It is, as they declared, a “reversion to the old notion that the king can do no wrong.”¹⁷⁶ *Trump* mirrored the flaws of *Fitzgerald* and sacrificed the cornerstone principle of accountability in favor of an overly broad and dangerous interpretation of executive immunity, paving the way for an unchecked presidency that imperils the very democracy it purports to protect.

iii. Concurring – Justice Barrett

Justice Barrett’s concurring opinion more accurately reflects constitutional principles than Chief Justice Roberts’ broader interpretation. Justice Barrett contends that the President’s core constitutional acts are protected by absolute immunity.¹⁷⁷ However, for official acts outside of core, she advocates for a two-step analysis to determine whether presidential immunity applies.¹⁷⁸ First, the court must assess whether the President’s official act falls within the scope of liability under relevant criminal statutes.¹⁷⁹ If

¹⁷¹ *Fitzgerald*, 457 U.S. at 794 (White, J., dissenting).

¹⁷² *Trump v. United States*, 603 U.S. 593, 617–18 (2024).

¹⁷³ *Fitzgerald*, 457 U.S. at 769 (White, J., dissenting).

¹⁷⁴ *Id.* at 782 (quoting *United States v. Nixon*, 418 U.S. 683, 706 (1974)).

¹⁷⁵ *Id.* at 797–98 (Blackmun, J., dissenting).

¹⁷⁶ *Id.* at 766 (White, J., dissenting).

¹⁷⁷ *Trump*, 603 U.S. at 650–51 (Barrett, J., concurring in part).

¹⁷⁸ *Id.* at 653–54.

¹⁷⁹ *Id.*

so, the court must then determine whether prosecuting the President under the statute would threaten the executive branch's function.¹⁸⁰ If no such threat exists, prosecution may proceed.¹⁸¹

Justice Barrett's approach explicitly provides for an interlocutory appeal to ensure fairness and accuracy.¹⁸² Admittedly, determining whether a prosecution jeopardizes the executive branch's function may present challenges. However, this narrower interpretation of "separation of powers" stands in contrast to Chief Justice Roberts' expansive view, offering a more balanced framework.¹⁸³ This approach preserves the principles of the rule of law and checks and balances by allowing a factual analysis of the President's actions.¹⁸⁴ Justice Barrett succinctly encapsulates her perspective:

The Constitution does not insulate Presidents from criminal liability for official acts. But any statute regulating the exercise of executive power is subject to a constitutional challenge. A criminal statute is no exception. Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.¹⁸⁵

This reasoning stands in stark contrast to the majority opinion, which bluntly ignores competing constitutional principles in its sweeping invocation of the "separation of powers."¹⁸⁶

Justice Barrett's opinion effectively balances the principles of separation of powers, rule of law, and the system of checks and balances. By prioritizing a balanced and cautious approach, she upholds the integrity of our constitutional framework, ensuring accountability without undermining the functionality of the executive branch.¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 655.

¹⁸³ Compare *id.* at 656, with *id.* at 637–39 (majority opinion).

¹⁸⁴ *Id.* at 651 (Barrett, J., concurring in part).

¹⁸⁵ *Id.* at 656–57 (internal citation omitted).

¹⁸⁶ *Id.* at 639–40 (majority opinion).

¹⁸⁷ *Id.* at 651–52 (Barrett, J., concurring).

IV. IMPLIED PRESIDENTIAL IMMUNITY CHALLENGES

i. Ambiguous Constitutional Foundation and Separation of Powers

Looking to the text of the Constitution, presidential immunity is not explicitly provided.¹⁸⁸ By contrast, the Constitution expressly grants immunity to Congress in the Speech and Debate Clause when acting within their legislative functions.¹⁸⁹ Additionally, the Necessary and Proper Clause grants Congress implied powers.¹⁹⁰ The Framers understood how to provide immunity when deemed necessary, and had they intended to extend such immunity to the President, they likely would have done so explicitly.¹⁹¹ However, the *Trump* Court justified implied absolute immunity for the President's core constitutional acts based solely on the policy-driven principle of separation of powers.¹⁹²

Not only did the *Trump* majority fail to derive presidential immunity from the constitutional text, but in extending it from broader constitutional principles, they effectively "cherry-picked" the Founders' ideologies.¹⁹³ This selective approach amplified principles that aligned with their reasoning while ignoring others that would undermine their holding.¹⁹⁴ The majority's dismissal of fundamental principles—checks and balances and the maxim that "no one is above the law, not even a king"—raises serious concerns, as these principles are at least as fundamental to our democracy as the separation of powers.¹⁹⁵ Historians and constitutional scholars will likely grapple with this choice for generations to come.

ii. Core Constitutional vs. Official vs. Non-Official Acts

¹⁸⁸ *Id.* at 638 (majority opinion).

¹⁸⁹ U.S. CONST. art. I, § 6.

¹⁹⁰ U.S. CONST. art. I, § 8, cl. 18.

¹⁹¹ See 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, 384-85 (Max Farrand, ed., Yale University Press 1911) (1787); see generally U.S. CONST. art. I, § 8, cl. 18 (providing Congress with implied powers).

¹⁹² *Trump*, 603 U.S. at 606.

¹⁹³ *Id.* at 659 (Sotomayor, J., dissenting).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 662.

The *Trump* Court ruled that absolute immunity extends to all core constitutional official acts while granting presumptive immunity to other official acts falling outside of the core.¹⁹⁶ However, the dissenters criticized the majority for offering “no meaningful guidance about how to apply” this framework.¹⁹⁷ Notably, the majority declined to define the boundaries of “core constitutional” acts, dismissing the task as overly burdensome and too exhausting.¹⁹⁸

This lack of clarity leaves lower courts without a workable standard. As the dissent aptly observes, “the majority does not—and likely cannot—supply any useful or administrable definition of the scope of that ‘core.’”¹⁹⁹ Neither Article II nor any other constitutional provision offers any sort of definition of what constitutes “core” powers.²⁰⁰ By expounding absolute immunity from a single constitutional principle, the Court has created a doctrine without providing the necessary guidance for consistent judicial application, thereby inviting uncertainty in future rulings.²⁰¹

iii. Accountability vs. Functionality

The majority’s reasoning for a broad presidential immunity rests on the “necessity” of preserving the president’s discretion to prevent disruptions to the executive function, grounded in the Founders’ vision of an “energetic” executive dedicated to “securing liberty.”²⁰² While this rationale may present a compelling case for presidential immunity in general, it collapses without safeguards that ensure accountability. Accordingly, the king claimed absolute authority and immunity, rendering his conduct beyond the reach of law; likewise, under *Trump*, a president invoking the guise of an “official act” now risks being placed above accountability.²⁰³ This outcome starkly contradicts the Founders’ vision for our democracy and reflects the majority’s narrow interpretation of a singular constitutional principle while disregarding the broader constitutional framework.²⁰⁴

¹⁹⁶ *Id.* at 606 (majority opinion).

¹⁹⁷ *Id.* at 698 (Jackson, J., dissenting).

¹⁹⁸ *Id.* at 641 (majority opinion).

¹⁹⁹ *Id.* at 698 (Jackson, J., dissenting).

²⁰⁰ U.S. CONST. art. II.

²⁰¹ *Trump*, 603 U.S. at 642.

²⁰² *Id.* at 610.

²⁰³ PAINE, *supra* note 24, at 75; *Trump*, 603 U.S. at 659 (Sotomayor, J., dissenting).

²⁰⁴ *Trump*, 603 U.S. at 659 (Sotomayor, J., dissenting).

Furthermore, the Court fails to justify its shift from functional to office-based immunity.²⁰⁵ Historically, immunity was contingent on whether the individual’s actions aligned with their official function, thereby limiting protection to acts directly tied to their role.²⁰⁶ Functional immunity offers a narrower, more principled approach, ensuring that actions falling outside the scope of the function remain unshielded.²⁰⁷ By contrast, the majority’s reasoning grants immunity based solely on the office of the President—a sweeping departure from precedent with weak constitutional support.²⁰⁸

iv. Inconsistent Supreme Court Rulings

Although the Court relied heavily on *Nixon v. United States* to support its claim that the executive branch holds “exclusive authority and absolute discretion,” the implications are troubling.²⁰⁹ The *Trump* majority used this reasoning to portray presidential power as both “conclusive and preclusive”.²¹⁰ Yet, it is fascinating—and concerning—that *Nixon* would likely produce a completely different result if reconsidered in light of the *Trump* ruling.²¹¹ In this way, the *Trump* Court implicitly overturns one of its key precedents.²¹² *Nixon* firmly established the judiciary’s role in checking executive power, even when a President acts within their official capacity.²¹³ Yet, under the *Trump* majority’s reasoning, this balance erodes.²¹⁴

Had the *Trump* ruling been applied to *Nixon*, the judiciary would have been unable to examine former President Nixon’s motives or actions, and thereby unable to discover his involvement in illegal wiretapping of the Democratic National Committee’s headquarters.²¹⁵ Because the meetings in question related to Nixon’s executive function of conferring with staff, his actions might now be deemed absolutely immune—or, at minimum, presumptively immune.²¹⁶ This refusal to scrutinize presidential conduct under the guise of avoiding interference with executive function would

²⁰⁵ See *Trump*, 603 U.S. 593.

²⁰⁶ *Nixon v. Fitzgerald*, 457 U.S. 731, 765–67 (1982) (White, J., dissenting).

²⁰⁷ *Id.* at 785.

²⁰⁸ *Trump*, 603 U.S. at 690 (Jackson, J., dissenting).

²⁰⁹ *Id.* at 612–13, 620 (majority opinion).

²¹⁰ *Id.* at 620 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952)).

²¹¹ Evan A. Davis, *‘I am Not a Crook,’ Said Nixon – Under Trump v. US, He Wouldn’t Be*, THE HILL (July 11, 2024, 8:00 AM), <https://thehill.com/opinion/judiciary/4762672-immunity-trump-nixon-watergate>.

²¹² *Id.*

²¹³ *United States v. Nixon*, 418 U.S. 683, 706 (1974).

²¹⁴ See Davis, *supra* note 211.

²¹⁵ See *id.*; see also *Trump*, 603 U.S. at 597–98.

²¹⁶ *Trump*, 603 U.S. at 597–98.

have marked a significant loss for democratic accountability.²¹⁷ Moving forward, the *Trump* ruling promises to shield future presidents from scrutiny and consequences, creating a troubling precedent for unchecked executive power.²¹⁸

Compounding this tension is the Court's simultaneous role in overturning *Roe v. Wade* through *Dobbs v. Jackson Women's Health Organization*, a precedent that stood for nearly fifty years.²¹⁹ Among the justifications for overruling *Roe* was the majority's reliance on originalism: interpreting the Constitution as it was understood at the time of its drafting.²²⁰ The *Dobbs* majority concluded that the right to an abortion is neither explicitly stated in the Constitution nor implicitly protected by any constitutional provision, which is why *Roe* needed to be overturned.²²¹

What is striking, however, is the stark contradiction between the Court's refusal to expound upon the Constitution in *Dobbs* and its willingness to do so in *Trump*.²²² The *Trump* majority expounded presidential immunity from a single constitutional principle, even though such immunity is neither explicitly granted nor implied within the text.²²³ This selective expansion of constitutional interpretation underscores the inconsistency in the Court's approach, raising questions about the integrity and coherence of its jurisprudence.²²⁴

V. CONSEQUENCES AND IMPLICATIONS

Nevertheless, *Trump* now stands as the law of the land in relation to presidential immunity, despite its ambiguous and contradictory foundation.²²⁵ However, this ruling raises profound concerns about its potential consequences for our democracy.²²⁶ Chief Justice Roberts dismisses the dissent as "fear mongering on the basis of extreme hypotheticals," but can it truly be considered fear mongering when such scenarios are now a blatant possibility by virtue of this ruling?²²⁷ Justice Sotomayor, in her

²¹⁷ *Id.* at 618.

²¹⁸ *Id.* at 685 (Sotomayor, J., dissenting).

²¹⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022).

²²⁰ *Id.* at 370–71 (Breyer, J., dissenting); see also Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2013 (2011) (defining "originalism").

²²¹ *Dobbs*, 597 U.S. at 292.

²²² *Id.* at 239; *Trump*, 603 U.S. at 637–38.

²²³ *Trump*, 603 U.S. at 614, 637–38.

²²⁴ *Id.* at 637–38; *Dobbs*, 597 U.S. at 239.

²²⁵ See *Trump*, 603 U.S. at 642.

²²⁶ See *id.* at 685 (Sotomayor, J., dissenting).

²²⁷ *Id.* at 640 (majority opinion).

powerful dissent, paints a stark and realistic picture of the potential abuses enabled by the *Trump* majority’s decision:

Orders the Navy’s Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune...Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority’s message today.²²⁸

Justice Sotomayor’s dissent highlights the disturbing implications of this ruling: a President could now abuse executive power under the guise of “official acts” and remain shielded from criminal liability, effectively placing them above the law.²²⁹

The implications for the military are equally alarming. As commander-in-chief, the president holds unparalleled authority over the armed forces, a position that demands both trust and accountability.²³⁰ Service members are bound by their duty to follow the lawful orders of their superior officers, but also to disobey unlawful ones.²³¹ *Trump* places service members in an untenable position: if the president issues an unlawful order, those who follow it could face liability, while the president remains immune from criminal prosecution by virtue of their official capacity.²³² This dynamic undermines the integrity and trust within the military, as well as the democratic principles that service members risk their lives to defend.²³³

This decision eroded foundational constitutional principles, such as checks and balances and the rule of law.²³⁴ These principles are the foundation of our democracy, woven throughout the Constitution, yet the *Trump* majority has effectively weakened the judiciary’s ability to serve as a check on a President who may exploit their office for malicious or self-

²²⁸ *Id.* at 685 (Sotomayor, J., dissenting).

²²⁹ *Id.*

²³⁰ U.S. CONST. art. II, § 2, cl. 1.

²³¹ Brief for Retired Four-Star Admirals and Generals, and Former Secretaries of the U.S. Army, Navy, and Air Force as Amici Curiae Supporting Respondents at 8, *Trump v. United States*, 603 U.S. 593 (2024) (No. 23-939).

²³² See *id.* at 18; *Trump*, 603 U.S. at 609.

²³³ Brief for Retired Four-Star Admirals and Generals, *supra* note 231, at 9.

²³⁴ *Trump*, 603 U.S. at 657 (Sotomayor, J., dissenting); Ahmad, *supra* note 85, at 6.

serving ends.²³⁵ The Court has left the nation vulnerable to the prospect of a tyrannical president, empowered to wield official acts as a shield against accountability.²³⁶ Should such a figure gain office with the intent to dismantle our democratic institutions, what recourse would remain after irreversible damage is done?

VI. CONCLUSION

Although it is undisputed that the president holds a uniquely significant position in our democracy, *Trump* has effectively granted future presidents the broadest immunity this country has ever known, placing the most powerful office in the United States—and perhaps the world—beyond meaningful accountability. The *Trump* majority’s reasoning rests on a fragile foundation of law that erodes the constitutional principles crafted by the Framers. Checks and balances and the rule of law—not merely the separation of powers—are essential to safeguarding liberty in this nation. At the time this article was written, former President Trump is set to be inaugurated once again. As a nation, we can only hope that history does not repeat itself and that future presidents will resist the temptation to abuse the powers of the executive office. In the meantime, we can take solace in the resilience of our democratic nation, which has endured 248 years and, we hope, will continue to stand the test of time.

²³⁵ *Trump*, 603 U.S. at 676, 685 (Sotomayor, J., dissenting).

²³⁶ *Id.* at 673.