

Toward a Workable Government

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I. INTRODUCTION

I am honored to respond to Ohio State’s invitation to comment on Peter Shane’s contribution to the field of separation of powers law on the occasion of his retirement.¹ Because his new book, *Democracy’s Chief Executive*, captures and extends the central themes of his prior work, I will analyze it to shed light on his career more generally. I begin with the final words of the book, in the Acknowledgements, where he thanks others for their “career-long impact” on him, naming Jerry Mashaw, Peter Strauss—and me.² In my case, the impact has been fully reciprocal, as Peter surely knows. The question I want to address is: what is the *content* of that mutual impact? To answer, I must begin over forty years ago.

II. EXECUTIVE BRANCH LAWYERS

In the fall of 1979, Peter Shane and I began working together in the Department of Justice’s Office of Legal Counsel (OLC). Our collaboration continues today. Lawyers for any government institution soon absorb the culture and mores of their workplace; we were no exception. Peter’s reaction to his time there is captured in his Acknowledgements, where he laments that three of our former OLC colleagues have died all too early. Peter acutely remarks that Larry Hammond, Tom Sargentich, and Larry Simms “capture[d] their idealism in the form of constitutional analysis.”³ We could say the same for many other men and women of the Office in those days (and since).

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¹ He did the same for me five years ago. See Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231, 1231–33 (2016).

² PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* (forthcoming May 2022) (manuscript at 299).

³ *Id.* (manuscript at 230).

Idealism in a government lawyer is a fraught concept. For the President's outside counsel in OLC, it can mean alignment with the political goals of the administration, which produces a desire to find or invent a legal rationale to support whatever someone in the White House wants to do. Some of OLC's worst days have resulted from that kind of idealism, which is contrary to the professional responsibility of government lawyers.⁴ Instead, the lawyers' idealism must advance the rule of law. This means that they must keep a professional distance from the desires of their clients, a role captured as "sympathetic detachment" by former Attorney General and Justice Robert Jackson.⁵ Good OLC opinions try to find an adequate legal basis for a proposed executive action and search for less risky alternatives that might be available, but are prepared to say "no" if necessary.⁶ All lawyers know that saying no to clients is unpleasant at best and may threaten personal career aspirations. But in this context, idealism means a willingness to stand on principle when necessary. In our time at OLC, Peter and I were schooled in the ideal by the people he mentions and many others. We still expect to see it honored by those who serve in government.

III. SCHOLARS

By 1981, Peter and I were both law professors, enjoying collegial interaction with other specialists around the nation. We were freed of our preceding obligations to respond to a client's wishes, but we knew that the culture of OLC was within us, which meant that we were friendlier to executive power than were some, but not all, of our contemporaries.

Then as now, separation of powers scholars could be divided into three rough groupings. Toward one extreme were the presidentialists, who tended to support broad and undefined "inherent" executive powers. This group would eventually morph into the unitary executive and originalist analysis theorists. At the other pole stood the congressionalists, who emphasized the need for statutory authorization for such presidential actions as executive orders and use of military force.⁷ As Congress collapsed into general dysfunction toward the

⁴ OLC opinions in the administrations of George W. Bush and Donald J. Trump have exhibited this characteristic. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 67–68, 78–79, 83, 252 (2009); SHANE, *supra* note 2 (manuscript at 16, 178, 215–18).

⁵ BRUFF, *supra* note 4, at 70.

⁶ See WALTER E. DELLINGER ET AL., *PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL* (2004), reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. REV.* 1559, 1603–11 (2007).

⁷ Jed Handelsman Shugerman, *The Imaginary Unitary Executive*, *LAWFARE* (July 6, 2020), <https://www.lawfareblog.com/imaginary-unitary-executive> [<https://perma.cc/6LJS-HXMZ>]. The prolific and thoughtful work of Louis Fisher exemplifies this stance. See generally LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (6th ed. 2014); LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* (2014).

end of the twentieth century, this group found its influence waning and faced the unhappy task of calling for congressional action that was unlikely to occur.⁸ In the middle stood the institutionalists, who wanted to maximize collaborative action between the two political branches and who therefore stressed shared, nonexclusive constitutional power to the extent possible.⁹ Peter and I soon found ourselves among this middle group, where we learned much from the likes of professors Mashaw and Strauss.¹⁰ Of course we did not all think alike—Peter and I were more supportive of executive power than were some of our group, no doubt reflecting our particular experience.

For paradigmatic examples of these three ways of thinking, one need go no further than the landmark steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*.¹¹ President Truman's ill-advised assertion of essentially unlimited constitutional executive power as the basis for his seizure of the steel mills to stop a wartime strike stands as an extreme example of presidentialist theory.¹² It produced a hostile reaction at the Supreme Court.¹³ Justice Hugo Black's oversimplified opinion striking down the seizure on grounds that presidents are not lawmakers exemplifies an unrestrained congressionalist view.¹⁴ In between stands Justice Jackson's magisterial institutionalist concurrence, which displays sensitivity to the needs and limitations of both branches and fits the controversy into world conditions as they existed.¹⁵ Jackson emphasized the framers' intention that the separated and checked powers of the branches would combine to create "a workable government."¹⁶ That remains the interpreter's goal today.

Nowadays, it is widely recognized that presidents have too little power in some ways and too much in others. For domestic matters, most of the time Congress is unable to do much more than confirm judges and fund the government. The exception is the first two years of a presidency that commands majorities in both houses of Congress, as Presidents Obama and Trump both

⁸ See SHANE, *supra* note 2 (manuscript at xii–xiii).

⁹ See PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 46, 49 (2009).

¹⁰ See generally JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Peter Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

¹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–89, 634–55 (1952). See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977); Patricia L. Bellia, *The Story of the Steel Seizure Case*, in PRESIDENTIAL POWER STORIES 233 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹² SHANE, *supra* note 9, at 49.

¹³ *Id.* at 49–50.

¹⁴ *Id.*

¹⁵ *Id.* at 50–51.

¹⁶ *Youngstown*, 343 U.S. at 635.

enjoyed.¹⁷ The rest of the time modern presidents try to extend existing statutory authority by executive orders, at peril of invalidation by courts or cancellation by successors.¹⁸ But in the realm of foreign affairs and national security, presidential initiative is broad and poorly controlled by Congress. Putting the two halves together, we see presidents acting like mayors domestically and emperors abroad.

In *Democracy's Chief Executive (DCE)*, Peter Shane offers his analysis of ways to restore a balanced presidency through constitutional interpretation. His essential argument is that aggressive presidentialism has created some of the existing problems in operating our government and that it threatens to make those problems worse, not better. To make his case, he draws on consistent threads of his prior work and applies them to our imperiled democracy.

IV. THREATS

The framers of our Constitution struggled with a nightmare.¹⁹ They knew that ancient republics had proved vulnerable to the rise of demagogues who attempted to seize all power and rule as tyrants.²⁰ Hence, to forestall tyranny the framers created their unique scheme of separated and checked powers distributed among three branches of government and with the states.²¹ They also installed auxiliary precautions.²² The Electoral College was meant to produce deliberations about presidential candidates in the various states, making it difficult for any local hero to capture the whole.²³ And to prevent foreign influence on American politics they required the President to be a natural-born

¹⁷Ryan Struyk, *This Is What Happens when One Party Controls Everything*, CNN (Sept. 15, 2017), <https://www.cnn.com/2017/09/15/politics/single-party-control-comparison/index.html> [<https://perma.cc/Y7ZM-X3PT>].

¹⁸See Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 461–88 (1979); Shane, *supra* note 1, at 1238–39.

¹⁹Here I allude to Peter Shane's *Madison's Nightmare*. See generally SHANE, *supra* note 9.

²⁰For example, they knew that in Rome, Catiline failed when Cicero saved the Republic, but the Caesars succeeded and created the Empire. James M. Farrell, *New England's Cicero: John Adams and the Rhetoric of Conspiracy*, 104 PROC. MASS. HIST. SOC'Y 55, 56–59 (1992).

²¹John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994 (2011).

²²See generally Vince Eisinger, *Auxiliary Protections: Why the Founders' Bicameral Congress Depended on Senators Elected by State Legislatures*, 31 TOURO L. REV. 231 (2015).

²³See G. Alan Tarr, *Five Common Misconceptions About the Electoral College*, ATLANTIC (Nov. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/five-common-misconceptions-about-electoral-college/602596/> [<https://perma.cc/KJ7Q-RM5R>]; Akhil Reed Amar, *The Troubling Reason the Electoral College Exists*, TIME (Oct. 29, 2020), <https://time.com/4558510/electoral-college-history-slavery/> [<https://perma.cc/BN5Y-BWFJ>].

American and forbade foreign nations to give emoluments (gifts) to our executive officers.²⁴

But the framers made a mistake that could allow a demagogue to arise and overcome their carefully balanced constitutional system. They naively thought that political parties would not arise in the new republic, that institutional loyalties and deliberation about the general good would prevail. But parties were flourishing ere the Federalists departed at the turn of the nineteenth century.²⁵ Henceforth the potential existed that a demagogue might replace institutional loyalties with personal ones, neutralizing the multiple checks and consolidating power.

The greatest demagogic threat to our republic so far has been the presidency of Donald Trump, culminating in his encouragement of the insurrectionist riot at the Capitol on January 6, 2021.²⁶ In the first three chapters of *DCE*, Peter Shane recounts the various ways that Trump assailed traditional legal and normative checks on executive power in an effort to consolidate his personal power. Republican members of Congress were forced to show absolute fealty to him or suffer a challenge in the next primary election from one of his loyalists.²⁷ Trump very successfully nominated movement conservatives to the courts, including three new Supreme Court Justices, in hopes they would endorse his actions, however extreme they might be.²⁸ Within the executive, Trump installed a cabinet of plutocratic loyalists who would war on the “deep state” of the civil service, with its devotion to law and traditional norms of behavior.²⁹ The goal was to deregulate the business interests who formed part of the administration’s base.³⁰ To protect himself from investigation, Trump attacked

²⁴ Paul Clement & Neal Katyal, *On the Meaning of “Natural Born Citizen,”* 128 HARV. L. REV. F. 161, 163 (2015); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 644–45 (2017).

²⁵ S.C. Stokes, *Political Parties and Democracy*, 2 ANN. REV. POL. SCI. 243, 244–45 (1999).

²⁶ Andrew Jackson certainly had demagogic qualities (for which Donald Trump admired him) but was willing to obey the law. See ERIC A. POSNER, *THE DEMAGOGUE’S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP* 83–114 (2020). Andrew Johnson made crude attempts to rally the common people but was eventually neutered by his impeachment. See *id.* at 151.

²⁷ Jonathan Martin & Maggie Haberman, *Fear and Loyalty: How Donald Trump Took over the Republican Party*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2019/12/21/us/politics/trump-impeachment-republicans.html> [<https://perma.cc/9Z4T-D8AX>].

²⁸ Anita Kumar, *Trump’s Legacy Is Now the Supreme Court*, POLITICO (Sept. 26, 2020), <https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058> [<https://perma.cc/U29X-WWWU>].

²⁹ Evan Osnos, *Trump vs. the “Deep State,”* NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [<https://perma.cc/RP8P-E9WG>].

³⁰ See, e.g., Catherine Rampell, Opinion, *Trump Is All About Deregulation—Except when It Comes to His Enemies*, WASH. POST (May 28, 2020), https://www.washingtonpost.com/opinions/trump-is-all-about-deregulation--except-when-it-comes-to-his-enemies/2020/05/28/dcfb9638-a116-11ea-b5c9-570a91917d8d_story.html [<https://perma.cc/8HYH-H5GJ>].

the established independence of the Department of Justice from White House control of prosecution, installing the pliant William Barr to superintend the effort to degrade the rule of law. Outside of government, the President attacked his press critics as “enemies of the people” while broadcasting his own distorted view of the facts through right-wing media such as Fox TV and his own constant Twitter blasts.³¹ The demagogue welded his base into a mighty force that would attack his foes at his command, and that ultimately attacked our democracy itself by trying to overturn the election of 2020.³²

By now, the essential story of Trump’s catastrophic presidency has been told many times (and more revelations will come). Peter Shane’s unique contribution to the critique is to show in *DCE* how the theoretical elements of aggressive presidentialism first helped to lay the foundations of the Trump administration and then contributed to its excesses. As Peter recounts, these extreme theories had been sowing dysfunction in our government for years before Donald Trump arose.³³ Ironically, the damage wrought by Trump has made Peter’s case for him by revealing what happens when these theories are put into action.

There is a good reason why the nature of constitutional executive powers has been debated throughout our history: it *is* debatable, not cast in cement at the founding. Many fine constitutional histories exist.³⁴ They generally sound broad themes that are quite inconsistent with recently popular extreme theories of executive power. Historians note that the list of explicit presidential powers in Article II is quite sparse and paints no clear picture of how the office will operate.³⁵ The reason for this vagueness is that the framers were building an executive branch that they had never seen in operation, not adjusting an ongoing enterprise.³⁶ They must have expected it to adapt to problems and conditions it encountered in operation; any good government does so. Madison was explicit about this.³⁷ To the extent that individual framers or individual citizens outside the Convention had clear expectations, these often clashed.³⁸ But there was

³¹ SHANE, *supra* note 2 (manuscript at 20).

³² See Lisa Mascaró, Eric Tucker, Mary Clare Jalonick & Andrew Taylor, *Pro-Trump Mob Storms US Capitol in Bid to Overturn Election*, ASSOCIATED PRESS (Jan. 6, 2021), <https://apnews.com/article/congress-confirm-joe-biden-78104aea082995bbd7412a6e6cd13818> (on file with the *Ohio State Law Journal*).

³³ See SHANE *supra* note 2 (manuscript at 154–56); see also *id.* (manuscript at 3–5).

³⁴ For a collection of them, see PETER M. SHANE, HAROLD H. BRUFF & NEIL J. KINKOPF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 3–4 (4th ed. 2018).

³⁵ E.g., Andrew Rudalevige, *The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 *PRESIDENTIAL STUD. Q.* 506, 507–08 (2006).

³⁶ Garrett Epps, *The Founders’ Great Mistake*, ATLANTIC (2009), <https://www.theatlantic.com/magazine/archive/2009/01/the-founders-great-mistake/307210/> [<https://perma.cc/8WLC-BJQ6>].

³⁷ See THE FEDERALIST NO. 37 (James Madison).

³⁸ Thus, the emergence of the antifederalists and their debate with the federalists during ratification. See generally Charles J. Cooper, *“Independent of Heaven Itself”: Differing*

certainly a consensus that the Constitution was not creating anything resembling a monarchy—thus, the vigorous debate about whether a president should be eligible for reelection.³⁹

Once the new federal government was launched, immediate departures occurred from the apparent meaning of constitutional text. Examples include Washington's discovery that the Senate could not effectively advise on pending treaties but could only give or deny consent to them and Jefferson's discovery that the executive would need to infringe on theoretically exclusive congressional war powers as he defended our commerce from the Barbary Pirates.⁴⁰ As decades and then centuries of national experience unfolded under the Republic, Presidents regularly took actions not supported by any clear constitutional text or original understanding and sought political ratification from congressional and popular support rather than propose constitutional amendments.⁴¹ The Louisiana Purchase is the most spectacular example. In short, we have a living, adaptive Constitution, and have had one since the earliest administrations.

In Chapter Four of *DCE*, Peter Shane ably dispels the “mirage” of originalism. In Chapter Two, he had shown that another canon of extreme presidentialism, the unitary executive theory, is quite inconsistent with original practice in its insistence that the President must control all federal prosecution. Peter explains that the common thread linking the various canons and explaining their content and inconsistencies is the political agenda of movement conservatism since the onset of the Age of Reagan around 1981. In the preceding era from the New Deal through World War II and much of the Cold War, Democrats had embraced strong executive powers—and wide congressional powers as well—as they rebuilt both the domestic and external spheres of American life.⁴² It was after this era that Republicans realized that a strong President could shrink the federal government by controlling the bureaucracy and that originalist visions of limited congressional power could both disable regulation and cabin entitlements.⁴³

More was going on here than the periodic swing of party dominance in American politics.⁴⁴ A powerful and well-funded libertarian movement arose to

Federalist and Anti-Federalist Perspectives on the Centralizing Tendency of the Federal Judiciary, 16 HARV. J.L. & PUB. POL'Y 119 (1993).

³⁹ See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 267 (2009).

⁴⁰ See Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 631–36 (2004); Graham T. Allison, *Making War: The President and Congress*, 40 LAW & CONTEMP. PROBS., Summer 1976, at 86, 86.

⁴¹ See generally HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* (2015).

⁴² See Eric Posner, *Long Live the Imperial Presidency?*, PROJECT SYNDICATE (May 12, 2021), <https://www.project-syndicate.org/commentary/us-imperial-presidency-forged-in-national-crises-by-eric-posner-2021-05> [<https://perma.cc/AS94-9B4U>].

⁴³ SHANE, *supra* note 2 (manuscript at 104–05).

⁴⁴ See JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* 13 (2020).

challenge Keynesian economics, claiming that government intervention in the economy is almost always harmful.⁴⁵ Business leaders could now portray self-interest as virtue, attacking the heart of the New Deal with this attractive new weapon.

The libertarian movement was reinforced by a troubling development in broader American society: a disintegration of many forms of traditional community engagement that had long supported collective action.⁴⁶ Active government was put on the defensive and remains so today. Traditional arguments for government programs that are based either on the creation of public goods that private enterprise cannot supply or on market failures that need redress have lost traction.⁴⁷

The optimal power of the federal government has been a core issue in American politics ever since Hamilton and Jefferson fought over the issue in the early days of the Washington administration when the Bank of the United States was proposed.⁴⁸ It will remain so for the foreseeable future. The boundary between ordinary politics and constitutional law has always been cloudy in our government, and always will be. This is healthy insofar as it brings the Constitution into view when Americans talk politics.⁴⁹ Political arguments often grade seamlessly into constitutional claims. For example, what should equality mean? This tendency, known to all constitutional lawyers, presents an issue that is near the heart of Peter's project in *DCE*. Advocates can dress up their political preferences in constitutional garb and claim that the Constitution ends the debate in their favor. This is the sin that Peter lays at the feet of the aggressive presidentialists. He succeeds admirably in proving his case.

Proponents of aggressive presidentialism must ignore strong evidence that their theories are vastly overbroad. First, prominent constitutional text grants Congress clear powers to control the executive branch, including the presidency. The Senate's power to advise and consent to executive nominations has always prevented Presidents from appointing anyone they prefer to subordinate offices.⁵⁰ The Necessary and Proper Clause's authorization to Congress to define the powers of the other two branches has given Congress a central role

⁴⁵ See BINYAMIN APPELBAUM, *THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY* 12–14 (2019); see also ZACHARY D. CARTER, *THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES* 453–83 (2020) (describing the evolution of economic policies in the United States in the second half of the twentieth century).

⁴⁶ The classic analysis is from ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000). See also ROBERT D. PUTNAM & SHAYLYN ROMNEY GARRETT, *THE UPSWING: HOW AMERICA CAME TOGETHER A CENTURY AGO AND HOW WE CAN DO IT AGAIN* 11–12 (2020) (ebook).

⁴⁷ See generally APPELBAUM, *supra* note 45 (noting the negative social effects of the movement toward free-market economic theories and deregulation).

⁴⁸ See BRUFF, *supra* note 41, at 38–40.

⁴⁹ See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE*, at xviii–xx (1986).

⁵⁰ U.S. CONST. art. II, § 2.

in creating agencies, organizing them and defining their powers.⁵¹ The Opinions Clause assumes that subordinate officers will have statutory duties that Presidents may oversee but not assume directly.⁵² Taken together, these provisions do not paint an executive branch that will be subject to plenary presidential control.

Our early constitutional history also negates presidentialist theory. As the federal government was fleshed out during the first decades of the Republic, Presidents and Congresses worked cooperatively to grant, limit, or deny particular executive powers. Issues regarding supervision and removal of officers were not sharply defined, as *DCE* recounts. Even so aggressive a President as Andrew Jackson did not think he could simply assume powers vested in a subordinate by statute, as the controversy over removal of the Bank of the United States deposits confirms.⁵³ Federal prosecution was decentralized, not concentrated in the White House. The most extreme claims of modern presidentialists lack precedent drawn from early examples.

Presidentialist theory also collides with general norms that have gone unquestioned since the founding. The summary removal or instruction of adjudicators can infringe due process. White House control of investigation or prosecution of senior executive officers including the President threatens the traditional common law principle that no one may judge their own cause. Broad executive immunity from oversight subpoenas or broad claims of testimonial privilege for White House staff foster an unaccountable presidency.

Overall, the most aggressive claims of presidential power combine sheer novelty with an obdurate resistance to the legitimate claims of the other two branches and the people to control and monitor their President. The result of accepting all these claims would be a kind of presidency by plebiscite, under which anyone elected could govern with little restraint or oversight (except for funding limitations) until the next election occurred. An alternative vision to better ensure a workable government is needed, and *DCE* provides one.

V. REMEDIES

In Chapter 5 of *DCE*, Peter Shane calls for the explicit pursuit of traditional democratic values in constitutional interpretation. The values are equality, engagement, and deliberation, and for most of American history they have been on the upswing in our government.⁵⁴ All of them promote governance by a majority of citizens, not rule by a minority of plutocrats or populists. No wonder that the Trump administration stood as their antithesis in its effort to cement rule by his political base, which has always been composed of a minority of voters.

⁵¹ *Id.* art. I, § 8.

⁵² *Id.* art II, § 2.

⁵³ BRUFF, *supra* note 41, at 99–104.

⁵⁴ For a fine exploration of such values in our early history, see generally AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760–1840* (2021).

Instead of saying that he represented all citizens, he explicitly focused on the interests of his supporters and tried to harm his opponents. Instead of engaging Americans with one another in search of democratic policy compromises, he constantly sought to divide us along emotional fault lines. And instead of fostering deliberation about his administration's policies, he conducted a secretive and closed shop to an unprecedented degree.

To undermine democratic values, Donald Trump used constitutional arguments to foreclose debate on grounds that the Constitution, properly understood, already provided conclusive answers in favor of his positions. A flawed and absolutist originalism underlay much of this. Thus, he claimed that unitary executive theory gave him complete control of the executive branch, so that he could direct and remove officers at will without having to provide justification and without encountering effective statutory limits.⁵⁵ Arguments for plenary discretion under all assigned powers, such as law enforcement, supposedly allowed him to direct federal prosecution at will.⁵⁶ Resistance to congressional oversight of any kind depended on overbroad assertions of testimonial privileges. Claims of constitutional hegemony in the national security realm distorted and extended already overbroad arguments that the executive branch had been using in prior administrations.

In Chapter Six of *DCE*, Peter provides a vision of the presidency that incorporates explicit democratic values in search of a balanced and workable government instead of the antidemocratic and unbalanced executive that Donald Trump tried to create. As Peter explains, he wants to promote a fair and open legal debate over presidential powers, not a closed set of doctrines that pretend to enjoy sole legitimacy.

Because Peter's stated values favor majoritarian politics and institutional complexity, he can be accused of simply advocating the partisan agenda of modern progressives, who share these preferences. The answer is that these are core traditional values that do not serve any particular party but rather advance the majority that exists at any given time while empowering the opposition in appropriate ways. The political party cycles that have long existed in the United States have generally displayed these values, which lie at the heart of the health of our democracy. That is why a politically neutral constitutional argument can openly endorse them instead of hiding behind a veil that shields other purposes such as empowering a demagogue.

Sadly, realizing Peter's vision of a presidency in a balanced system will entail a lot of work because our government has fallen into such dysfunction. It will not be enough to redress the particular excesses of the Trump presidency, essential as that project is. The underlying doctrinal excesses that opened the door for the demagogue require correction as well, as *DCE* emphasizes throughout. Alas, all three federal branches need some reforms, as follows.

⁵⁵ See SHANE, *supra* note 2 (manuscript at 32–34, 105).

⁵⁶ *Id.* (manuscript at 16–17, 32).

The constitutional stature of Congress, historically the “first branch,” deserves rehabilitation. As Peter explains, Congress has a claim at least equal to that of the presidency as an institution that represents all of the people. Although no single member has a national constituency, Congress as a collectivity embodies a vast and complex set of political influences that always involve both parties in an evolving power relationship. Any President’s base is likely narrower than the dominant politics of either house of Congress, even without the naked partisan skew of Trump’s attempt to aid regions that supported him and to harm the others. In any event, Congress is constitutionally entitled to its full role in government.

To play its full role in the modern era, Congress needs to be able to legislate free of distorted and limiting constitutional doctrines that appear to be advancing in the Supreme Court at the behest of the recent libertarian movement. The restricted “horse and buggy” view of congressional power to regulate interstate commerce that appeared in the Obamacare litigation should be repudiated in favor of the broad judicial support for modern regulation of the economy that preceded it.⁵⁷ And recent attempts by some Justices to revive the long-dormant nondelegation doctrine are pernicious—if accepted, they could dismantle much modern health and safety regulation and disable Congress from pursuing new initiatives.⁵⁸ In short, the courts should commit to their usual practice of judicial restraint in reviewing the constitutionality of legislation, abjuring aggressively conservative interventions.

The much-battered agencies of the “administrative state” also need and deserve some rehabilitation. The Trump administration’s mindless war on the bureaucracy has left it in tatters—shorn of essential personnel, underfunded to the point of ineffectiveness, and bereft of vital morale. As scholars like Jerry Mashaw have long emphasized, the agencies are legitimate institutions of a functioning democracy.⁵⁹ They promote democratic values by opening many functions to a broad range of influences. Final regulations must respond to public comment in detail.⁶⁰ Major agency actions must incorporate rational fact and policy analysis, not raw political preference.⁶¹ No one can argue that the agencies are perfect, but overall they aid the democratic enterprise in essential ways.

In matters of national security, including both foreign policy and use of military force, modern Congresses have failed to control the executive

⁵⁷ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 623 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

⁵⁸ See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

⁵⁹ See generally MASHAW, *supra* note 10.

⁶⁰ TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2–3, 3 n.16 (2017), <https://sgp.fas.org/crs/misc/R41546.pdf> [<https://perma.cc/XQK6-YCPX>].

⁶¹ See *id.* at 12.

successfully. Here aggressive presidentialism has tried to convert the executive's institutional advantages into constitutional entitlement, as Peter explains in Chapter 6.⁶² To evade the hurdle of the two-thirds Senate supermajority that the Constitution requires for treaty ratification, modern Presidents have relied heavily on sole executive agreements to make deals with foreign nations. This practice will likely continue unabated unless Congress reins it in.

It is in the realm of war powers where the framers' original expectations have been most obviously ignored by both political branches. Because it was understood at the founding that Presidents might have to repel sudden attacks on America by force before asking Congress to declare war, there has always been an opening for presidential adventuring in the guise of national defense. The essential move is to claim that an attack on Americans or on our national interests abroad is the same constitutionally as an attack on the homeland. Jefferson toyed with this argument; many of his successors have enthusiastically embraced it.

Congress tolerated many instances of this manipulation until executive unilateralism in conducting the Vietnam War finally spurred it to try to reclaim its authority by enacting the War Powers Resolution (WPR) of 1973. The WPR has received bad reviews ever since, but as Peter points out in Chapter 6, it has produced some democratic gains. The existence of the WPR's deadline for unauthorized use of the armed forces in hostilities has led to repeated bargaining and negotiation between the branches in the shadow of the law, with congressional action at least a remote possibility.⁶³ Still, the fact that the most recent authorizations to use force date from 2001 and 2002 reveals the atrophied state of the congressional war power. Amending the WPR to require recorded votes in both houses when the executive files notice of a use of force might bring Congress back toward its vital responsibility to decide on matters of war and peace. Hence, it is not enough to pressure the executive to scale back its overextended constitutional doctrines; Congress must step forward and use its undoubted powers lest it lose them.

VI. DEMOCRACY—AND TIME

Peter Shane's concluding chapter in *DCE* correctly emphasizes that reorienting constitutional doctrine in ways that promote democracy cannot succeed unless a real democracy exists to allow the doctrine to operate. To say the least, restoring our democracy to full health is a heavy lift, and it will not occur quickly. Viewing the sum of the long-term dysfunction in our government that existed before the Trump administration together with the added damage he inflicted (and continues to inflict) invites despair. But for Peter, and for those of

⁶² SHANE, *supra* note 2 (manuscript at 161, 179–80).

⁶³ *See id.* (manuscript at 182–84); Shane, *supra* note 1, at 1256–58.

us who share his overall outlook, it is imperative to press on to salvage the Republic we love so much. Consider us optimists with gritted teeth.

Before the insurrection of January 2021, the last fifty years had seen three crises that threatened the stability of our government—Watergate, Iran/Contra, and the war on terror after 9/11. The nation weathered these three crises, although not without damage to its institutions. The extent to which we will weather a sitting President’s attempt to overturn a legitimate electoral defeat is unknown. But as Ben Franklin famously observed at the close of the Constitutional Convention, whether we keep or lose our Republic is up to us.⁶⁴

In Chapter 7, Peter stresses the effects of widening economic inequality on the health of American society. This challenge has arisen before, as seen in the Gilded Age that followed the Civil War.⁶⁵ The Progressive Era that extended from about 1895 to 1915 addressed and remedied many national problems; calls have arisen for a Second Progressive Era to meet the Second Gilded Age in which we live.⁶⁶ Bring it on. But be aware that it was the work of a generation to produce reform the first time, and it likely will take that long again. The nation’s problems press hard against us—along with economic inequality there is racial injustice, global warming, pandemic, immigration tragedy, and much more, all exacerbated by the governmental dysfunction that makes reform so difficult to achieve. Peter is right to close his book with an appeal to address the societal problems that derange legal interpretation. He has always been passionate about the health of the nation—a patriot, in other words.

VII. BACK TO THE FUTURE

Peter Shane’s life in the academy has always focused on teaching as well as research and writing. This is evident in the existence of the casebook on separation of powers that Peter and I have coauthored since 1988.⁶⁷ The book was his idea and he has always been its guiding force. Now in its fourth edition with another OLC alumnus, Neil Kinkopf, the book has been a joy to work on. Our current editing for the fifth edition provides a frequent reminder of Peter’s constant devotion to presenting complex materials in a way that will aid student and teacher alike. (Our rather substantial reorganizations and alterations from edition to edition should confirm this assertion.) In the editing process, Peter shows little pride of authorship and no tendency toward self-promotion—the

⁶⁴ See Gillian Brockell, ‘A Republic, If You Can Keep It’: Did Ben Franklin Really Say Impeachment Day’s Favorite Quote?, WASH. POST (Dec. 18, 2019), <https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/> [https://perma.cc/7Y8F-42K7].

⁶⁵ Lily Rothman, *How American Inequality in the Gilded Age Compares to Today*, TIME (Feb. 5, 2018), <https://time.com/5122375/american-inequality-gilded-age/> (on file with the *Ohio State Law Journal*); PUTNAM & GARRETT, *supra* note 46, at 19–20.

⁶⁶ See, e.g., PUTNAM & GARRETT, *supra* note 46, at 19–20.

⁶⁷ See generally SHANE, BRUFF & KINKOPF, *supra* note 34.

question is what works. As we review our prior work, we are often unsure about who wrote what. I cannot imagine a more collegial partnership.

I began this essay by emphasizing the impact on Peter (and me) of our many mentors and colleagues in government and the academy. Creating the casebook—the first in its field—and teaching it to our own students has been a way for us to perpetuate that impact as best we can, and to add our own contributions to the best of our ability. The book has always emphasized the issues of professional responsibility and skills development that we encountered at the outset of our careers. Our work (and that of many other scholars and lawyers) thus stands as a bridge between past and future, in a process that animates the law generally. Writing and teaching in this way has given us fulfilling careers that have been enhanced by the mystic chords of memory (in Lincoln's lovely phrase). Peter has had a meaningful and entirely positive influence on the students and professors he has encountered in a long and fruitful career. Well done, my friend.