

ESSAY

PERFECTING OUR SUBMISSION?
MANN AND TRUMP, RUFFIN AND ROBERTS

by
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Presidential power is vast, both under law and in practice. Who holds presidents accountable, and by what means? Courts wrestle with these intertwined questions of power and accountability. The majority opinion in the 2024 presidential immunity case, Trump v. United States, is eerily resonant, rhetorically, with a notorious judgment enhancing one person’s power over others by shielding that power utterly from criminal-law accountability. That judgment, from 1829, is Judge Thomas Ruffin’s infamous slavery-law opinion for the North Carolina Supreme Court in State v. Mann. I juxtapose the two opinions, which share jarringly similar claims about the nature of power, rule, and accountability under law.

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The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice.

Judge Thomas Ruffin, *State v. Mann*¹

INTRODUCTION

Presidential power is vast, both under law and in practice. Who holds presidents accountable, and by what means? Much turns on the answers we provide, as well as on the justifications we establish for those answers. We are, at present, in uncharted territory, having just learned—to my surprise—that “when the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them. And he is at least presumptively immune from prosecution for his other official actions.”² One hopes that those who are deeply learned on executive power, criminal law, political theory, constitutional history, and more, will help us scout and chart this new terrain of the unbridled presidency in traditional, doctrinal terms.

My aim here is different, and decidedly more literary, exploring the rhetoric in *Trump v. United States* and thus its implicit ethic.³ My focus is on the justifications the Court provides for unleashing the presidency from criminal law. The Court’s justifications don’t persuade me to cast aside the bedrock principle that no one is wholly beyond accountability to others under law any more than the justifications persuaded the dissenters,⁴ but that’s by the by; again, the doctrinal, legalist analysis is for another time. Persuasive or not, the majority’s account turns on the core claim that presidential power, simply by its very nature, wholly eclipses any resort to criminal law, forever.⁵ The majority opinion in *Trump*, on this score, strikes me as eerily resonant with a notorious judgment enhancing one person’s power over others by shielding that power utterly from criminal law. That judgment, now nearly two

¹ *State v. Mann*, 13 N.C. (2 Dev.) 263, 267 (1829).

² *Trump v. United States*, 144 S. Ct. 2312, 2344 (2024) (internal cross-reference omitted).

³ See James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 690 (1985) (“The lawyer’s speech is thus always implicitly argumentative not only about the result—how should the case be decided?—and about the language—in what terms should it be defined and talked about?—but also about the rhetorical community of which one is at that moment a part. The lawyer is always establishing in performance a response to the questions, ‘What kind of community should we, who are talking the language of the law, establish with each other, with our clients, and with the rest of the world? What kind of conversation should the law constitute, should constitute the law?’”).

⁴ See *Trump*, 144 S. Ct. at 2355 (Sotomayor, J., dissenting); *id.* at 2372 (Jackson, J., dissenting); see also *Nixon v. Fitzgerald*, 457 U.S. 731, 764–65 (1982) (White, J., dissenting from conferral of civil immunity for official presidential acts).

⁵ See *Trump*, 144 S. Ct. at 2347.

centuries old, is Judge Thomas Ruffin's infamous opinion for the North Carolina Supreme Court in *State v. Mann*, "perhaps the best known of all the cases relating to slavery and criminal law."⁶ According to Ruffin, to bridle a master's power over an enslaved person's body would be, simply, to end that power: "The *power* of the master must be *absolute*, to render the *submission* of the slave *perfect*. . . . This discipline *belongs to* the *state* of slavery. They cannot be disunited . . ."⁷ Mann's criminal conviction for shooting Lydia, an enslaved woman in his hire who had run off from his punishment, could not stand. A master's power, much like a king's, cannot countenance criminal accountability. Nor, we are now told, can a president's official acts. A kind of absolute monarchism stalks both judgments.

My plan for juxtaposing these two judgments is direct. First, I explore *Mann*'s inherent master-power justification for a master's immunity from criminal liability for battering a slave. Next, I explore *Trump*'s inherent president-power justification for a president's immunity from criminal liability for official acts. They share jarringly similar claims about the metaphysics of power, rule, and accountability, claims they both express in a sweeping, maximalist style. A conclusion follows.

I. MANN AND RUFFIN

The facts related in *Mann* are sparse.⁸ John Mann had hired Lydia from her owner, Elizabeth Jones, for a year. At some point, "the slave had committed some small offence," we know not what, "for which [Mann] undertook to chastise her." Lydia "ran off," and when Mann "called upon her to stop, [and she] refused, he shot at and wounded her." The jury convicted Mann "for an assault and battery," having been instructed by the trial judge "that if they believed the punishment inflicted by [Mann] was cruel and unwarrantable, and disproportionate to the offence committed by [Lydia]," Mann was guilty as charged. This is the conviction the North Carolina Supreme Court overturned.⁹

Judge Ruffin, who wrote the judgment, had been on the court "for little more than a month."¹⁰ "Ruffin's opinion" in the case "has both attracted and repulsed commentators for over a century," grimly proving him to be "the most eloquent

⁶ RANDALL KENNEDY, RACE, CRIME, AND THE LAW 33 (1997). Professor Tushnet, in his early analysis of the case, described it as "one of the cases regarded by contemporary scholars as particularly revealing of the core of Southern slave law." MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY 1810–1860, at 54 (1981) [hereinafter TUSHNET, LAW OF SLAVERY]. See generally *Mann*, 13 N.C. (2 Dev.) 263.

⁷ *Mann*, 13 N.C. (2 Dev.) at 266 (emphases added).

⁸ What follows is drawn from *Mann*, 13 N.C. (2 Dev.) at 263. For a great deal more factual detail discussing archival materials from the case, see the indispensable Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. REV. 701, 701 (2009).

⁹ *Mann*, 13 N.C. (2 Dev.) at 263, 268.

¹⁰ Greene, *supra* note 8, at 729 n.140.

spokesman for a doctrine of stern necessity.”¹¹ There is a wealth of detailed scholarship about the case, the opinion, and its broader slave-law context,¹² scholarship which I heartily commend. My goal here, again, is critical rather than doctrinal—to assess the opinion as a justification for silencing criminal law as a way to shield power from accountability under law.

First, then, a brief word about Judge Ruffin’s reputation as a skillful judge. He arrived at the state supreme court as an already prominent legal figure. When the legislature sent him to the court, rejecting the governor’s preferred choice, “Ruffin was a well-known lawyer who had also been a judge of the state’s Superior Court,” as well as a member of the North Carolina House.¹³ A century later, his decades of judicial work earned high plaudits: In a 1936 lecture, Harvard Law School Dean Roscoe Pound named Ruffin among “the ten judges who must be ranked first in American judicial history,”¹⁴ with John Marshall, James Kent, Joseph Story, Oliver Wendell Holmes, and Benjamin Cardozo¹⁵—all jurists who are still thought

¹¹ ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 77 & n.* (1975).

¹² See TUSHNET, *LAW OF SLAVERY*, *supra* note 6, at 54–65 (analyzing the case); MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003) [hereinafter TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH*]; THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 190–93 (Thomas A. Green & Hendrik Hartog eds., 1996); H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 150–58 (2002) [hereinafter POWELL, *A COMMUNITY BUILT ON WORDS*]; Julius Yanuck, *Thomas Ruffin and North Carolina Slave Law*, 21 J. S. HIST. 456, 461–63 (1955); Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 138–41 (1985); Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1120–32 (1998); Sally Hadden, *Judging Slavery: Thomas Ruffin and State v. Mann*, in *LOCAL MATTERS: RACE, CRIME, AND JUSTICE IN THE NINETEENTH-CENTURY SOUTH* 1 (Christopher Waldrep & Donald G. Nieman eds., 2001); Laura F. Edwards, *Enslaved Women and the Law: Paradoxes of Subordination in the Post-Revolutionary Carolinas*, 26 SLAVERY & ABOLITION 305, 305–07, 319–21 (2005); Symposium, *Thomas Ruffin and the Perils of Public Homage*, 87 N.C. L. REV. 669 (2009) (collecting nine articles from a November 2007 symposium on both *Mann* and Ruffin’s legacies).

¹³ Yanuck, *supra* note 12, at 459–60.

¹⁴ ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4 (1938).

¹⁵ *Id.* at 30 n.2. As Pound saw it, Ruffin was one of three state judges who had “long dominated the highest court of an important state, from which many newer states took their legal traditions and upon whose decisions these newer states built their course of decision.” *Id.* at 86. The other two were Lemuel Shaw of Massachusetts and John Gibson of Pennsylvania. See also Walter Clark, *The Supreme Court of North Carolina*, 4 GREEN BAG 457, 474 (1892) (concluding of Ruffin that “[b]y the consensus of the profession he is the greatest judge who has ever sat upon the bench in North Carolina In political opinions he was a follower of Jefferson; but this did not prevent his reverence for Chief Justice Marshall, who was his personal friend, as was also Chancellor Kent.”).

prominent today. We study *Mann* still.

Returning to the judgment, in *Mann* we can see what Professor Cover described as Ruffin's "unusual refusal to clothe an exploitative and brutal relationship with the trappings of anything save power."¹⁶ And it really is all about power. Spanning six pages in the official reports, just shy of 1,650 words, *Mann* crackles with unsparing clarity.¹⁷ Ruffin bookends his analysis by declaring the court's involvement in the matter regrettable. His first sentence in the first paragraph is this: "A Judge cannot but lament, when such cases as the present are brought into judgment."¹⁸ He returns to the lament at the start of the last paragraph: "I repeat, that I would gladly have avoided this ungrateful question."¹⁹ This is no place for law, he tells us, as we begin and as we end a law case.

What *is* the question he laments confronting judicially? "With whatever reluctance therefore it is done, the Court is compelled to express an opinion upon the extent of the dominion of the master over the slave in North-Carolina."²⁰ How expansive is the master's physical dominion over the enslaved body? Of course, as the bench and bar at the time would well know, Ruffin could confront this question personally, as well as legally, at least in theory. "Ruffin owned two plantations and a substantial number of slaves (thirty-two in 1830), but he was not active in their management, leaving the plantations to be run by overseers under his wife's general supervision."²¹ Summing up the court's judicial answer to the legal question of the extent of the master's dominion, Ruffin closes the case with this sweeping, broadly framed principle:

But being brought to it, the Court is compelled to declare, that while slavery exists amongst us in its present state, or until it shall seem fit to the Legislature to interpose express enactments to the contrary, it will be *the imperative duty of the Judges to recognise the full dominion of the owner over the slave*, except where the exercise of it is forbidden by statute. And this we do upon the ground, that *this dominion is essential* to the value of slaves as property, to the security of the master, and the public tranquility, greatly dependent upon their subordination; and in fine, as most effectually securing the general protection and comfort of the slaves themselves.²²

¹⁶ COVER, *supra* note 11, at 78.

¹⁷ See *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829).

¹⁸ *Id.* at 264.

¹⁹ *Id.* at 268.

²⁰ *Id.* at 264.

²¹ TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH*, *supra* note 12, at 90. "Like other overseers, Ruffin's were sometimes brutal." *Id.*

²² *Mann*, 13 N.C. (2 Dev.) at 268 (emphases added). This is not a conventional common law case, proceeding incrementally by carefully tethering legal concepts to key factual details. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 69 (1921) (praising

A criminal court's duty is, in the end, silence. Judicial power *is* present, but only long enough to put the judiciary's hand over its own mouth. Mann's shooting Lydia in the back is immunized from criminal liability because, at the time he did it, he had "full dominion," a fullness that displaces criminal law. This dominion is the very linchpin of enslavement, "essential to" extracting slave labor and securing owner safety and public peace—hence "the imperative duty of the Judges to recognize" it. Black chattel slavery was core to southern economic life, and a master's full dominion was its vital center: "[A] fixed principle of slave law granted masters the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived."²³ *State v. Mann* was not in the end about law, but about the necessary lawlessness at the heart of North Carolina society."²⁴ How does Ruffin justify the conclusion that this "full dominion," by its nature, forecloses criminal-law review?

Before Ruffin works through the opinion's four main steps, he reconfigures the factual context a bit. Mann, after all, is *not* Lydia's owner; he leased her. But at the opening and at the close, the court speaks of masters and owners. Ruffin smooths over this hiring-party wrinkle, casting as the trial court's principal error its decision to reduce a hiring party's dominion relative to that of the true owner.²⁵ "In a criminal proceeding," the court concludes, "the hirer and possessor of a slave, in relation to both rights and duties, is, for the time being, the owner."²⁶ Equating a hirer in possession with a true owner makes sense to Ruffin functionally: Whether the master or a hirer is in "possession and command," it remains the case that "[t]he object is the same—the services of the slave; and the same powers must be confided."²⁷ To extract slave service one must wield master power. This echoes in the concluding paragraph's linkage between full dominion and "the value of slaves as property."²⁸

Justice Holmes' conception of common law reasoning, according to which "judges must and do legislate, but they do so only interstitially; they are confined from molar to molecular motions" (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting))); *PM Group Life Ins. Co. v. W. Growers Assur. Trust*, 953 F.2d 543, 547 (9th Cir. 1992) ("We turn now to fashioning the appropriate rule. While we are free to adopt any rule, the common law decisionmaking process is inherently incremental in nature; the very 'genius of the common law is that it proceeds empirically and gradually, testing the ground at every step.' Here, that approach calls for devising a rule that does not stray too far from the existing regime." (internal citation omitted) (quoting RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 8 (1989))).

²³ *Fede*, *supra* note 12, at 132.

²⁴ POWELL, *A COMMUNITY BUILT ON WORDS*, *supra* note 12, at 154.

²⁵ *Mann*, 13 N.C. (2 Dev.) at 264–65.

²⁶ *Id.* at 265.

²⁷ *Id.*

²⁸ *Id.* at 268.

Having put lessee Mann on an equal footing with owner Jones, at least so far as physical dominion is concerned, Ruffin can put the “general question” in the case like so: “[W]hether the owner is answerable *criminaliter*,^[29] for a battery upon his own slave, or other exercise of authority or force, not forbidden by statute.”³⁰ We know *Mann*’s answer: No.³¹ Ruffin justifies this answer in four steps.

First, there is no custom of criminal sanctions for masters in such a scenario. “That he is so liable, has never yet been decided; nor, as far as is known, been hitherto contended. There have been no prosecutions of the sort.”³² An argument from silence—here, the silence of case reports—works only if one would otherwise expect sounds. There is no absence of master violence, as Ruffin himself concedes at the start of the next paragraph: “That there may be particular instances of cruelty and deliberate barbarity, where, in conscience, the law might properly interfere, is most probable.”³³ Given the ubiquitous violence, the lack of prosecutions for it genuinely indicates community acceptance of that violence as a suitable norm for master–slave relations. As Ruffin puts it, “[t]he established habits and uniform practice of the country in this respect, is the best evidence of the portion of power,

²⁹ See 1 JOHN BOUVIER & FRANCIS RAWLE, *BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 732 (Vernon L. Book Co., W. Publ’g Co., 8th ed. 1914) (defining *criminaliter* as “[c]riminally; on criminal process”).

³⁰ *Mann*, 13 N.C. (2 Dev.) at 265.

³¹ Indeed, amid other changes, southern law “preserved the master’s almost unlimited right to kill his slaves with impunity.” *Fede*, *supra* note 12, at 118. Note the “almost”; there was a limit. When the master’s battery killed the slave, *and* the wanton barbarity of his cruelty made clear that his aim was not to “correct,” but to torture even unto death, the criminal law recovered its voice. See *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500, 503–05 (1839) (Ruffin, C.J.) (affirming a murder conviction) (“A master may lawfully punish his slave; and the degree must, in general, be left to his own judgment and humanity, and cannot be judicially questioned. *State v. Mann* [13 N.C. (2 Dev.) at 263]. But the master’s authority is not altogether unlimited. He must not kill. There is, at the least, this restriction upon his power: he must stop short of taking life. . . . [T]he acts imputed to [Hoover] do not belong to a state of civilization. They are barbarities which could only be prompted by a heart in which every humane feeling had long been stifled; and indeed there can scarcely be a savage of the wilderness so ferocious as not to shudder at the recital of them. Such acts cannot be fairly attributed to an intention to correct or to chastise. They cannot, therefore, have allowance, as being the exercise of an authority conferred by the law for the purposes of the correction of the slave, or of keeping the slave in due subjection. . . . Punishment thus immoderate and unreasonable in the measure, the continuance, and the instruments, accompanied by other hard usage and painful privations of food, clothing and rest, loses all character of correction . . . and denotes plainly that the prisoner must have contemplated the fatal termination, which was the natural consequence of such barbarous cruelties.”). The facts of *Hoover* are, by our lights, the stuff of pure nightmare. *Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) at 501, 504. For analyses of *Hoover*, see *Fede*, *supra* note 12, at 122–24; TUSHNET, *LAW OF SLAVERY*, *supra* note 6, at 103–04.

³² *Mann*, 13 N.C. (2 Dev.) at 265.

³³ *Id.* at 266.

deemed by the whole community, requisite to the preservation of the master's dominion.”³⁴ That “portion of power” is, by custom, nearly unlimited.

Second, and here we get to the heart of his reasoning, the criminal-law limits on one person physically “correcting” another that judges enforce in other asymmetric relationships simply don’t apply between master and slave. The Attorney General, *Mann* relates, urged the court to “assimilate[] the relation between a master and a slave, to those existing between parents and children, masters and apprentices, and tutors and scholars.”³⁵ In such contexts, as Professor Powell explains, “the law regulated the relationship and required that the person in authority act reasonably and without unnecessary cruelty.”³⁶ Ruffin rejects the comparison: “There is no likeness between the cases. They are in opposition to each other, and there is an impassable gulf between them.”³⁷ What gulf is it? “The difference is that which exists between freedom and slavery—and a greater cannot be imagined.”³⁸ The nature of slavery itself, and thus of mastery, is at issue. Between free persons, like tutor and pupil, the authority figure’s principal tool is “moral and intellectual instruction.”³⁹ Force is present, but in a decidedly secondary role: “Moderate force is superadded, only to make the others effectual.”⁴⁰ Thus a free father who beats his free daughter with wanton cruelty has thereby exposed himself to criminal liability.

Between master and slave, by contrast, moral instruction has no purchase, no function. “With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make any thing his own, and to toil that another may reap the fruits.”⁴¹ In slavery, the enslaved person is “one who has no will of his own; who surrenders his will in implicit

³⁴ *Id.* at 265.

³⁵ *Id.* at 263–64; *see also id.* at 265 (stating that “arguments drawn from the well established principles, which confer and restrain the authority of the parent over the child, the tutor over the pupil, the master over the apprentice, have been pressed on us.”).

³⁶ H. Jefferson Powell, *The Emergence of the American Constitutional Law Tradition*, JUDICATURE, Spring 2019, at 24, 31 (2019) (discussing this argument in *Mann*). In other words, “under the legal principles governing such relationships the superior is criminally liable for the infliction of disproportionate and unjustifiably harsh punishment.” POWELL, A COMMUNITY BUILT ON WORDS, *supra* note 12, at 151. According to this logic, “[s]lavery does not lie outside the world of law, but like all social relationships recognized by the law, it is subject to legal definition and to limitations on the discretion of the parties involved in the interests of society, including its interest in protecting persons who are vulnerable because they occupy positions of legal inferiority.” *Id.* Ruffin was having none of it.

³⁷ *Mann*, 13 N.C. (2 Dev.) at 265.

³⁸ *Id.*

³⁹ *Id.* at 266.

⁴⁰ *Id.*

⁴¹ *Id.*

obedience to that of another.”⁴² What could secure such surrender, such obedience? Physical force, without escape. We are at the argument’s center now:

Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. *The power of the master must be absolute, to render the submission of the slave perfect.* I most freely confess my sense of the harshness of this proposition, I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. But in the actual condition of things, it must be so. There is no remedy. *This discipline belongs to the state of slavery.* They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But *it is inherent in the relation* of master and slave.⁴³

Absolute power is required to obtain perfect submission. To succeed, this authority must remain outside of judicial control, so that is where Ruffin puts it.

That same free father, constrained by law in his relations with his free daughter, can beat his slave daughter with wanton cruelty; he would not thereby expose himself to criminal liability. Only perfect submission produces what slavery exists to extract—to obtain. The last sentence of this part of Ruffin’s account clinches it: A master’s full dominion is “inherent in” enslavement. It is the very nature of slavery that it cannot countenance criminal liability for a master’s battery on his slave.⁴⁴

Abolitionists, we know, described slave owners as arbitrary tyrants and despots, drawing on the same vocabulary with which colonial writers denounced the British monarchy.⁴⁵ As Ruffin builds out the grim consequences of the master–slave

⁴² *Id.*

⁴³ *Id.* at 266–67 (emphases added).

⁴⁴ In a curious way, the leading common law treatise of Ruffin’s time, William Blackstone’s *Commentaries on the Laws of England*, reaches an antislavery conclusion by a similar route. Civil liberty and chattel slavery cancel one another out: “And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights become *eo instanti* a freeman.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123 (David Lemmings ed., 2016) [hereinafter 1 BLACKSTONE, COMMENTARIES]; see also *id.* at *411 (“I have formerly observed that pure and proper slavery does not, nay cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave.”). Ruffin, of course, knew his Blackstone. See, e.g., *State v. Mills*, 13 N.C. (2 Dev.) 555, 556 (1830) (Ruffin, J.) (“Upon the principal question in this case, whether a Sheriff can award process of the peace, and take security for it by way of recognizance, there seems to be great doubt. Most respectable writers, *Sergeant Hawkins* and *Sir William Blackstone*, express themselves in the affirmative; and yet, in other parts of their works, they lay down positions, from which the contrary is to be inferred.”).

⁴⁵ See Nicholas Serafin, *Redefining the Badges of Slavery*, 56 U. RICH. L. REV. 1291, 1319–22 (2022) (detailing the similarities in language); John Witte, Jr. & Justin J. Latterell, *Between Martin Luther and Martin Luther King: James Pennington’s Struggle for “Sacred Human Rights” Against*

relationship, establishing a master's immunity from criminal law, the aptness of the abolitionists' likening of master to tyrant comes fully, shockingly into view. "The master-slave relationship was of necessity a bloody tyranny, different only in scope from the most brutal of Old World dictatorships."⁴⁶ The well-informed legal reader in Ruffin's time might well have thought, in this connection, of the explicit contrast the framers of our national constitution had drawn between the British monarch's immunity from criminal process and the U.S. president's exposure to it.⁴⁷ And perhaps, as well, of Tom Paine's insistence that, in spite of "the Royal Brute of Britain. . . in America THE LAW IS KING."⁴⁸

Two steps remain, in *Mann*, to complete the justification. Criminal law

Slavery, 31 YALE J.L. & HUMAN. 253, 272–73, 280–83, 281 n.123 (2020) (detailing the similarities in language). In this, the abolitionists could follow the example of slave owner Thomas Jefferson, who likened masters to tyrants: "The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other. . . . The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose to the worst of his passions, and thus nursed, educated, and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities." THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 236–37 (2d Am. ed. 1794).

⁴⁶ POWELL, A COMMUNITY BUILT ON WORDS, *supra* note 12, at 155; *see also id.* ("Ruffin's opinions display no great sympathy for slaves or for African Americans. But at the same time Ruffin was unwilling to pretend that the customs necessary to the maintenance of slavery could be assimilated to the ordered social world of republican freedom and the rule of law.").

⁴⁷ For the conventional formulation of the British view of the monarch's immunity, see 1 BLACKSTONE, COMMENTARIES, *supra* note 44, at *244; ("In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution."); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *32–33 (Ruth Paley ed., 2016) (grounding the king's "incapacity of committing crimes" in "the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law; which will not suppose him capable of committing a folly, much less a crime."). Hamilton, two decades after Blackstone, contrasts a U.S. president, who "would afterwards be liable to prosecution and punishment in the ordinary course of law," with the quite different British monarch: "The person of the king of Great Britain is sacred and inviolable; there is no constitutional tribunal to which he is amenable; no punishment to which he can be subjected without involving the crisis of a national revolution." THE FEDERALIST NO. 69, at 348 (Alexander Hamilton) (Ian Shapiro ed., 2009). Chancellor Kent, three more decades on, appraises the U.S. presidency, with its exposure to impeachment and removal, as an "office" that is "render[ed] . . . equally safe and useful, by combining in the structure of its powers a due proportion of energy and responsibility." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 289 (6th ed. 1848). That "responsibility," Kent notes, is "requisite, to preserve inviolate the liberties of the people." *Id.*

⁴⁸ THOMAS PAINE, *Common Sense*, in THOMAS PAINE: COLLECTED WRITINGS 5, 34 (Eric Foner ed., 1995) (capital lettering in original); *see also id.* ("For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other.").

provides no security, in this context, against a master's descent into wanton cruelty. The chaos that such cruelty can unleash needs reckoning by some extralegal means.

Third, a criminal-law court's general legal reasoning, if set loose on the reasonableness of a master's punishment of his slave, would produce a greater chaos. As Ruffin warns, "seeking to redress an acknowledged evil," it would do so "by means still more wicked and appalling than even that evil."⁴⁹ How can we know that? Because any resort to law makes a judge the master's rival. That rivalry would unravel the master's power, perhaps by tempting a slave to disobedience. He brackets his account of the chaos with explicit renunciations of *judicial* power:

The truth is, that we are forbidden to enter upon a train of general reasoning on the subject. We cannot allow the right of the master to be brought into discussion in the Courts of Justice. . . . The Court therefore disclaims the power of changing the relation in which these parts of our people stand to each other."⁵⁰

The master's power is mirrored by judicial impotence. To even begin to judge by law, to let a prosecutor expose a master's choices to judicial assessment, is to make dominion unspool:

The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God. The danger would be great indeed, if the tribunals of justice should be called on to graduate the punishment appropriate to every temper, and every dereliction of menial duty. No man can anticipate the many and aggravated provocations of the master, which the slave would be constantly stimulated by his own passions, or the instigation of others to give; or the consequent wrath of the master, prompting him to bloody vengeance, upon the turbulent traitor—a vengeance generally practised with impunity, by reason of its privacy.⁵¹

Chaos indeed. Judging independently, applying legal reasoning, does not stem wanton cruelty, it prompts it. The judiciary must back up the master's dominion the only way it can, with silence. A master's restraint must come from somewhere else.⁵²

Fourth, and last, common-law judicial intrusion is as unnecessary as it would be destabilizing. Ruffin reassures us that "there is daily less and less occasion for the

⁴⁹ State v. Mann, 13 N.C. (2 Dev.) 263, 268 (1829).

⁵⁰ *Id.* at 267.

⁵¹ *Id.*

⁵² Cf. POWELL, A COMMUNITY BUILT ON WORDS, *supra* note 12, at 152 ("The heart of Ruffin's answer was that slavery and the rule of law are fundamentally irreconcilable, that slavery requires for its maintenance and economic value a relationship between master and slave that cannot be shaped in any meaningful way by legal principles.").

interposition of the Courts.”⁵³ Other forces, he explains, restrain masters from abusing their full dominion. He lists four:⁵⁴ (a) The legislature has declared some limits, without needing to engage in common-law reasoning;⁵⁵ (b) Owner self-interest will curb destructive punishment;⁵⁶ (c) Family feeling between master and slave—what he describes as “the benevolences towards each other, seated in the hearts of those who have been born and bred together”⁵⁷—prevents abuse; (d) Desire for the good opinion of friends and neighbors likewise stems abuse, to prevent “the frowns and deep execrations of the community upon the barbarian, who is guilty of excessive and brutal cruelty to his unprotected slave.”⁵⁸ Taken together, Ruffin concludes, these “have produced a mildness of treatment, and attention to the comforts of the unfortunate class of slaves, greatly mitigating the rigors of servitude, and ameliorating the condition of the slaves.”⁵⁹ This play of extrajudicial forces is, at any rate, preferable to setting up judges as rival authorities to slaves’ masters. Ruffin remonstrates, as he draws to a close, against “any rash expositions of abstract truths, by a Judiciary tainted with a false and fanatical philanthropy.”⁶⁰

The holding in *Mann*—no criminal liability for a hiring party’s battery on a slave in his possession—is utterly typical. “[T]he appellate case reports of the southern common law states contain no case in which a master was successfully prosecuted for excessive slave punishment.”⁶¹ Ruffin’s justification, though, stands out, as antebellum abolitionists recognized in publicizing the opinion as graphic evidence of slavery’s depravity.⁶² The core of it is his claim that the nature of master power forecloses judicial power. In the end, “it [is] the imperative duty of the Judges to recognise the full dominion of the owner over the slave.”⁶³ Ruffin’s theory is quite

⁵³ *Mann*, 13 N.C. (2 Dev.) at 267.

⁵⁴ *Id.* at 267–68.

⁵⁵ *Id.* at 267.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 267–68.

⁵⁹ *Id.* at 268. It is possible, of course, that things could have been even worse. But “mildness”?

⁶⁰ *Id.*

⁶¹ *Fede*, *supra* note 12, at 133.

⁶² Harriet Beecher Stowe, for example, not only wrote about Ruffin’s reasoning in *Mann* in detail, she constructed her second novel about slavery, *Dred*, around a fictional case modeled directly on Mann’s attack on Lydia and Ruffin’s opinion overturning Mann’s conviction. See Alfred L. Brophy, *Thomas Ruffin: Of Moral Philosophy and Monuments*, 87 N.C. L. REV. 799, 802–05 (2009) (describing Stowe’s use of *Mann*); see also *id.* at 807–09 (describing other abolitionists’ use of *Mann*). Local newspapers reprinted Ruffin’s opinion for their readers shortly after it issued, praising both “the forcible views of the case taken by the Judge, and the beauty and fitness in which they are clothed.” *Id.* at 802 n.14 (quoting those newspapers).

⁶³ *Mann*, 13 N.C. (2 Dev.) at 268.

similar to Blackstone's account of the sweep of the king's prerogative powers, as well as his related immunity from criminal law.⁶⁴ And Ruffin fortifies the duty to back the master's dominion by depicting judicial scrutiny as dangerous. What is the grammar of this fear? To judge a master's physical domination of his slave by criminal-law metrics is to upend the master-slave relationship, and so the judicial forum closes itself off. A master need not fear criminal liability in this context. Whatever the enslaved person's fear of the master's absolute power may be, it does not appear to matter; what matters are the master's benefits from perfect submission.

II. *TRUMP* AND ROBERTS

Does presidential power foreclose criminal-law power? For example, does presidential power preclude a federal indictment against a former president for violating a federal criminal statute, if the acts alleged to be criminal were his official acts? The Supreme Court has said that it does.⁶⁵ What justifies such a conclusion? Chief Justice Roberts wrote the majority opinion for the *Trump* court.⁶⁶ In it, I hear faint echoes of *Mann*'s monarchical metaphysics; and to hear even faint ones is unsettling. To be clear, I do *not* mean to say, or suggest, that *Mann* was on the minds of any justice or clerk as the case was argued and decided. I feel confident it was not. Certainly no filing in *Trump* cited *Mann*. And why would anyone have cited it? It is a relic of a bygone era. By happenstance, however, on June 30 I encountered a discussion of *Mann*,⁶⁷ a case I had learned about previously (though I cannot recall where or why). The Court issued *Trump* on July 1.⁶⁸ I read *Mann* again. And here we are.

Admittedly, *Mann* is a common-law case. Even if it weren't at so great a remove of law and time, its common-law cast would make it less helpful to analyzing a question of federal criminal law. For there are no federal common-law crimes.⁶⁹ That much the Supreme Court made clear more than two centuries ago, in *United States v. Hudson*.⁷⁰ Federal criminal prohibitions are thus found in statutes. For example,

⁶⁴ See *supra* note 47 and accompanying text.

⁶⁵ *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024).

⁶⁶ *Id.* at 2312.

⁶⁷ See H. JEFFERSON POWELL, *THE FOUNDATIONS OF AMERICAN LAW: A COMPANION TO THE 1L YEAR* 55–57 (2024) [hereinafter POWELL, *THE FOUNDATIONS OF AMERICAN LAW*] (discussing *Mann*'s holding and Ruffin's reasoning).

⁶⁸ *Trump*, 144 S. Ct. at 2312.

⁶⁹ "Federal crimes are defined by Congress, not the courts" *United States v. Lanier*, 520 U.S. 259, 259, 267 n.6 (1997) (reviewing Lanier's "convict[ion] under 18 U.S.C. § 242 of criminally violating the constitutional rights of five women by assaulting them sexually while [Lanier] served as a state judge.").

⁷⁰ *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (rejecting a federal prosecution for common-law seditious libel).

using its power under Section 2 of the Thirteenth Amendment,⁷¹ in 2009 Congress criminalized “willfully caus[ing] bodily injury to any person . . . because of the [person’s] race [or] color.”⁷² In other words, John Mann’s attack on Lydia would now be a federal crime.

The question in *Trump* is also a constitutional one, and Roberts frames it that way from the outset: “We consider the scope of a President’s immunity from criminal prosecution.”⁷³ This constitutional context makes the conventional manner of justification distinct from *Mann*’s common-law context, in which, then as now, a court applies precedents and their animating principles; there is no authoritative text to apply.⁷⁴ In *Trump*, there *is* an applicable authoritative text—the U.S. Constitution—that should shape any justification, whether one accepts or rejects a claim of presidential immunity. At least three textual components, in particular, seem highly relevant before we delve into the reasoning. First, and most generally, the text establishes and allocates power to each of three government branches.⁷⁵

⁷¹ “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2. Section 1 abolishes slavery: “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” *Id.* § 1.

⁷² Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2838–39 (2009) (codified at 18 U.S.C. § 249(a)(1)). Multiple courts have rejected constitutional challenges to § 249(a)(1) as beyond Congress’s Thirteenth Amendment enforcement power. See Sarah L. Harrington, Annotation, *Validity, Construction, and Application of Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, Div. E., 123 Stat 2835*, 77 A.L.R. Fed. 2d 103 § 4 (2013 & cumulative supp.) (collecting cases). One of the key congressional findings enacted to support § 249 agrees, in its way, with Ruffin’s view that physical violence is central to enslavement:

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

34 U.S.C. § 30501(7).

⁷³ *Trump*, 144 S. Ct. at 2324. This tracks the Court’s formulation of the question the case presented: “Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.” *Trump v. United States*, 144 S. Ct. 1027 (2024) (mem.) (granting review).

⁷⁴ See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 1 (1988) (explaining this distinction).

⁷⁵ First, the legislature: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” U.S. CONST. art. I, § 1. Second, the executive: “The executive Power shall be vested in a President of the United States of America.” *Id.* art. II, § 1. Third, the judiciary: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time

Second, for the legislative branch, the text expressly immunizes some legislators' conduct from judicial accountability.⁷⁶ Third, and most pointedly in the *Trump* context, it expressly exposes to criminal process those officials who have been impeached and convicted by Congress: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted *shall nevertheless be liable and subject to* Indictment, Trial, Judgment and Punishment, *according to Law.*"⁷⁷ An informed reader knows the Court must make something of these authoritative provisions along the way.

Two more contrasts, interrelated, to keep in mind when juxtaposing *Trump* and *Mann*. The former, more recent opinion is *much* longer. There are five separate opinions in *Trump*, almost as many as there are individual pages in *Mann*—six.⁷⁸ Altogether the *Trump* slip opinions, issued on the Court website on July 1, 2024, span 111 typeset pages (excluding the Syllabus that the Reporter of Decisions prepared).⁷⁹ The majority opinion alone spans just over 42 pages.⁸⁰ Additionally, and relatedly, the *Trump* majority addresses, toward its conclusion, the dissenters' opinions.⁸¹ *Mann* contains no dissent, written or noted. Concurrences and dissents, raising issues that a majority may want to address, make for longer majority opinions, on average.⁸² Whatever the average, the *Trump* majority is long, covering substantial analytical ground. My discussion of it is thus necessarily more selective, rather than, as with *Mann*, paragraph by paragraph for the whole of it.

Roberts summarizes the Court's conclusion, and its animating theory, just after reviewing the procedural history. He introduces the summary by framing the stakes: "This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed."⁸³ This translates, for Roberts, to a question about "the scope of Presidential power under

to time ordain and establish." *Id.* art. III, § 1.

⁷⁶ "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." *Id.* art. I, § 6, cl. 1.

⁷⁷ *Id.* art. I, § 3, cl. 7 (emphases added).

⁷⁸ *Trump*, 144 S. Ct. at 2312; *id.* at 2347 (Thomas, J., concurring); *id.* at 2352 (Barrett, J., concurring in part); *id.* at 2355 (Sotomayor, J., dissenting); *id.* at 2372 (Jackson, J., dissenting).

⁷⁹ *Trump v. United States*, No. 23-939, slip op. (U.S. July 1, 2024).

⁸⁰ *Id.*

⁸¹ *Trump*, 144 S. Ct. at 2344–46.

⁸² See Adam Feldman, *An Opinion is Worth at Least 1,000 Words*, EMPIRICAL SCOTUS (Apr. 3, 2018), <https://empiricalscotus.com/2018/04/03/1000-words/> (aggregating data on opinion length over a six-decade period).

⁸³ *Trump*, 144 S. Ct. at 2326.

the Constitution.”⁸⁴ That approach, in turn, differentiates “official acts” from “unofficial acts.” Immunity from criminal law breaks along that line. For the latter, Chief Justice Roberts notes, “[t]he parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office.”⁸⁵ For the former, immunity, described in sweeping, broadly framed terms:

We conclude that under our constitutional structure of separated powers, the *nature* of Presidential power *requires* that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President’s *exercise of his core constitutional powers*, this immunity must be *absolute*. As for his remaining official actions, he is also entitled to immunity.⁸⁶

Immunity from criminal law is inherent to, follows from the creation of, presidential power. It really is all about power—in this case, the “executive Power.”⁸⁷ The constitutional text most central to the majority’s analysis is thus not Article I’s legislator immunity or post-impeachment criminal process provisions. It is, instead, Article II’s Vesting Clause, with which Roberts opens the next paragraph.⁸⁸ This minimal textual ground, as Roberts uses it, leads to a freewheeling, policy-infused approach.

What is it, in the nature of this power, that requires criminal-law immunity for official presidential acts? The Vesting Clause does not characterize the executive power, it allocates it. Roberts describes presidential power in ways that push it

⁸⁴ *Id.*

⁸⁵ *Id.* Toward the majority’s conclusion, Roberts explains that “[l]ike everyone else, the President is subject to prosecution in his unofficial capacity.” *Id.* at 2345–46. This is the sense in which, the Court explains, no one, including a president, is “above the law.” *Id.* at 2345; *see also id.* at 2331 (“The President, charged with enforcing federal criminal laws, is not above them.”). “As for a President’s unofficial acts, there is no immunity.” *Id.* at 2332. Put differently, official presidential acts enjoy immunity, whereas unofficial acts of a person who happened, at the time, to be president, do not. The majority gives no examples of clearly unofficial acts.

⁸⁶ *Id.* at 2327 (emphases added). This is not a conventional, constitutionally minimalist case, proceeding incrementally by carefully tethering legal concepts to key factual details. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in the judgment) (“But that is all I would say, out of adherence to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more.”); *PDK Labs. Inc. v. U.S. Drug Enf’t Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part) (“This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.”). On the matter of judicial minimalism in constitutional adjudication, a good place to begin is Cass Sunstein’s book, CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

⁸⁷ *Trump*, 144 S. Ct. at 2327 (quoting U.S. CONST. art. II, § 1, cl. 1).

⁸⁸ *Id.* (quoting U.S. CONST. art. II, § 1, cl. 1). The Article I provisions are relegated to brief, later passages. *See id.* at 2342, 2344.

toward maximal scope, exerted with great energy and vigor. Criminal law, on this account, is an impermissible intrusion on and distortion of that scope, that vigor. Indeed, were criminal law brought to bear on presidential official acts after a given president's term ended, presidential power itself would unravel, a feared consequence Roberts vividly describes late in the opinion.⁸⁹

What, then, is the "nature" of presidential power? Roberts emphasizes both its enormity and its concentration in one person. He begins with a catalog of Article II powers and duties, "duties . . . of 'unrivaled gravity and breadth.'"⁹⁰ The power "stems" from congressional statutes and constitutional text.⁹¹ Indeed, the power source serves as the principal guidepost for distinguishing official from unofficial acts: "When the President acts pursuant to 'constitutional and statutory authority,' he takes official action to perform the functions of his office."⁹² The difference between foundations, constitutional and statutory, prompts Roberts to distinguish "conclusive and preclusive" presidential power,⁹³ or "exclusive constitutional authority,"⁹⁴ from action taken "in areas where his authority is shared with Congress."⁹⁵ He then graduates the sweep of the new presidential immunity to the type of power. Core power gets absolute immunity:

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President^[96] or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.⁹⁷

⁸⁹ *Id.* at 2346.

⁹⁰ *Id.* at 2327 (quoting *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020)).

⁹¹ *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

⁹² *Id.* at 2333 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982)).

⁹³ *Id.* at 2327 (quoting *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring)). Roberts identifies the following conclusive and preclusive presidential powers: the pardon power, the removal power, the power to recognize foreign governments, *id.* at 2327–28; and the power "to decide which crimes to investigate and prosecute," *id.* at 2334. It is the last of these conclusive powers that grounds the clearest particularized result in the case: "Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials." *Id.* at 2335.

⁹⁴ *Id.* at 2327.

⁹⁵ *Id.* at 2328.

⁹⁶ None of the statutes in the case have this character, so it is unclear to me what Roberts has in mind here. Perhaps, e.g., a statute expressly criminalizing the president selling pardons for personal gain?

⁹⁷ *Trump*, 144 S. Ct. at 2328.

Power grounded in statutes and shared with Congress, by contrast, does *not* receive absolute immunity automatically.⁹⁸ But it *does* warrant presumptive immunity: “[T]he separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President’s acts within the outer perimeter of his official responsibility.”⁹⁹

Why? What is it about presidential power’s “nature” that forces out of bounds holding presidential action to account under criminal law? To explain it, Roberts “look[s] primarily to the Framers’ design of the Presidency within the separation of powers,”¹⁰⁰ as well as executive-power precedents, chief among them the case establishing *civil* immunity from damages claims for presidential official action, *Nixon v. Fitzgerald*.¹⁰¹

When he looks to the design of the presidency, what does Roberts see? Both strength and fragility, intertwined. In the two paragraphs that are most central to justifying this immunity from criminal law, Roberts describes both features in tandem. For reading ease, shorn of quotations and citations, they are thus:

The President occupies a unique position in the constitutional scheme as the only person who alone composes a branch of government. The Framers sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many. They deemed an energetic executive essential to the protection of the community against foreign attacks, the steady administration of the laws, the protection of property, and the security of liberty. The purpose of a vigorous and energetic Executive, they thought, was to ensure good government, for a feeble executive implies a feeble execution of the government.

The Framers accordingly vested the President with supervisory and policy responsibilities of utmost discretion and sensitivity. He must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. There accordingly exists the greatest public interest in providing the President with the maximum ability to deal fearlessly and impartially with the duties of his office. Appreciating the unique risks to the effective functioning of government that arise when the President’s energies

⁹⁸ *Id.*

⁹⁹ *Id.* at 2331. Roberts leaves open the question whether, on a full record in this case, the resulting immunity for official presidential acts “is presumptive or absolute.” *Id.* at 2332.

¹⁰⁰ *Id.* at 2329.

¹⁰¹ *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (Powell, J.) (“[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts.”). Roberts quotes precisely this line. *Trump*, 144 S. Ct. at 2329. One hopes—okay, I hope—Justice White’s lengthy dissent in *Nixon* gets renewed attention. See *Nixon*, 457 U.S. at 764–97 (White, J., dissenting).

are diverted by proceedings that might render him unduly cautious in the discharge of his official duties, we have recognized Presidential immunities and privileges rooted in the constitutional tradition of the separation of powers and supported by our history.¹⁰²

Presidential power is strong when “energetic, vigorous, decisive, and speedy,” when “fearless[],” *not* when “diverted” or “unduly cautious.” Immunity secures the strength by cutting off the fear, diversion, and caution at the pass. That is the lesson of *Nixon*: “In holding that Nixon was immune from that suit, our dominant concern was to avoid diversion of the President’s attention during the decisionmaking process caused by needless worry as to the possibility of damages actions stemming from any particular official decision.”¹⁰³ Immunity trades away judicial process to protect presidential power.

Roberts thus extends the immunity that blocks civil law to block the intrusions of criminal law.¹⁰⁴ Having framed the overriding worry as energy-sapping intrusion and diversion, extending *Nixon* from civil law to criminal law is, perhaps, not a hard trade-off to embrace. Roberts seems right when he says that criminally “prosecuting a President for official conduct” presents a “danger . . . akin to, indeed greater than, what led [the Court] to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the bold and unhesitating action required of an independent Executive.”¹⁰⁵ That the bold action is a federal crime is immaterial. On the other hand, if one’s overriding worry is to make manifest criminal law’s “compelling public interest in fair and effective law enforcement,”¹⁰⁶ to say nothing of the related, more general axiom of “equal justice under law” carved above the Court’s main entrance,¹⁰⁷ securing bolder presidential action by immunizing it from criminal law gets the balance wrong.

Roberts’ twin motifs of constitutional energy and vigor-protecting immunity pervade the rest of his opinion. Our presidential power cannot, by its nature,

¹⁰² *Trump*, 144 S. Ct. at 2329 (cleaned up); *see also id.* at 2345–46 (“Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.”).

¹⁰³ *Id.* at 2329 (cleaned up).

¹⁰⁴ *Id.* at 2331.

¹⁰⁵ *Id.* at 2330–31 (cleaned up).

¹⁰⁶ *Id.* at 2331 (cleaned up).

¹⁰⁷ *See The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Apr. 24, 2025) (depicting and describing the entrance to the U.S. Supreme Court building).

withstand the glare of post-presidential criminal-law accountability. Consider the following (all, again, shorn of quotations and citations to make for smoother reading):

- “The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under a pall of potential prosecution raises unique risks to the effective functioning of government. A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President’s official acts are routinely subjected to scrutiny in criminal prosecutions, the independence of the Executive Branch may be significantly undermined. The Framers’ design of the Presidency did not envision such counterproductive burdens on the vigor and energy of the Executive.”¹⁰⁸
- “At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no dangers of intrusion on the authority and functions of the Executive Branch.”¹⁰⁹
- “Although Presidential immunity is required for *official* actions to ensure that the President’s decisionmaking is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct.”¹¹⁰
- “In dividing official from unofficial conduct, courts may not inquire into the President’s motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, it would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government if in exercising the functions of his office, the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry.”¹¹¹
- “Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him unduly cautious in the discharge of his

¹⁰⁸ *Trump*, 144 S. Ct. at 2331 (cleaned up).

¹⁰⁹ *Id.* at 2331–32 (cleaned up).

¹¹⁰ *Id.* at 2332.

¹¹¹ *Id.* at 2333–34 (cleaned up).

official duties. Vulnerability to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute. The Constitution does not tolerate such impediments to the effective functioning of government.”¹¹²

- “Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.”¹¹³
- “The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President’s conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts.”¹¹⁴

As Roberts tells it, immunity is, and must be, presidential power’s constant companion. Only that constant vigilance against judicial scrutiny gives the presidency its due.

Two final items in the opinion are notable, in mapping the contours of this new immunity doctrine. First, presidential immunity casts a shadow even into criminal proceedings where *unofficial* acts are in question.¹¹⁵ The prosecution had urged that, even if some presidential official acts are immune from criminal process, a properly instructed jury could, and should, still hear relevant evidence about official acts in a permissible criminal case.¹¹⁶ The majority roundly rejects this view, concluding that the “proposal threatens to eviscerate the immunity we have recognized.”¹¹⁷ Eviscerate how? The problem with criminal court review is, for Roberts, no less present in the evidentiary use of official acts. That evidential use “would permit a prosecutor to do indirectly what he cannot do directly—invite the jury to examine acts for which a President is immune from prosecution to

¹¹² *Id.* at 2344 (cleaned up).

¹¹³ *Id.* at 2345–46.

¹¹⁴ *Id.* at 2347.

¹¹⁵ On this point, the majority loses Justice Barrett. See *id.* at 2354–55 (Barrett, J., concurring in part).

¹¹⁶ *Id.* at 2340–41.

¹¹⁷ *Id.* at 2340.

nonetheless prove his liability on any charge.”¹¹⁸ Presidential power cannot countenance that scrutiny in *any* criminal court:

Presidential acts frequently deal with matters likely to arouse the most intense feelings. Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors’ deliberations will be prejudiced by their views of the President’s policies and performance while in office. The prosaic tools on which the Government would have courts rely are an inadequate safe-guard against the peculiar constitutional concerns implicated in the prosecution of a former President.¹¹⁹

A criminal court’s duty, where presidential official acts are concerned, is silence. This immunity, like the very presidential power it shields, is a thing of enormous breadth and weight.

Last, in rebuffing the dissenters’ view that the majority has in a critical sense put the presidency beyond accountability under law,¹²⁰ Roberts remonstrates against a danger he vividly draws. This spectre is even worse than the diminished energy, diverted focus, and undue caution that post-presidential criminal accountability would, by hypothesis, generate. Dismissing what he calls “fear mongering,” Roberts hawks a fear of his own:

The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. For instance, Section 371—which has been charged in this case—is a broadly worded criminal statute that can cover any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our

¹¹⁸ *Id.* at 2340–41.

¹¹⁹ *Id.* at 2341 (cleaned up).

¹²⁰ Justice Jackson’s dissent explains concisely how it is that this new immunity puts presidential power above the law: “Under the majority’s immunity regime . . . the President can commit crimes in the course of his job even under circumstances *in which no one thinks he has any excuse*; the law simply does not apply to him. Unlike a defendant who invokes an affirmative defense and relies on a legal determination that there was a good reason for his otherwise unlawful conduct, a former President invoking immunity relies on the premise that he can do whatever he wants, however he wants, so long as he uses his ‘official power’ in doing so. In the former paradigm, the President remains subject to law; in the latter, he is above it.” *Id.* at 2378 (Jackson, J., dissenting) (internal cross-reference omitted).

Government that would result from such a cycle of factional strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.¹²¹

Cycles of faction this destructive are nothing to hazard. If this is where criminal accountability for presidential official action slides, better not to step on the slope.

What is the grammar of this fear? To judge a president's official domination of the executive branch by criminal-law metrics, even after the fact, is to upend the current-president/past-president relationship, and so the judicial forum closes itself off. A serving president need not fear post-presidency criminal liability in this context. Whatever the citizen's fear of the president's power to commit official-act crimes may be, it does not appear to matter; what matters is bold, fearless presidential power. Roberts, a few pages earlier in the opinion, grants that presidential criminality invites impeachment and removal.¹²² Figuring out how it can be that the political tool of impeachment and removal *is* robust enough to deter presidential criminality, but simultaneously is *not* robust enough to deter presidency-cannibalising prosecutions of one's predecessor(s) in office, is an exercise left to the reader.

* * *

Trump focuses on a singular public office, the presidency, and resolves questions about the scope of a power by reference to that power's essential nature. Accountability under criminal law cannot co-exist with presidential power because it would make a criminal court that power's rival, and that power's essence can brook no rival. Roberts does not focus, in granular detail, on functions carried out in particularized ways, to tease out whether immunity is needed on a given occasion to protect a specific function's particular exercise; in other words, he shuns constitutional minimalism in favor of bold pronouncement. A sweeping power is framed in the broadest terms. *Mann* focuses on a singular private office, the slave master, and resolves questions about the scope of a power by reference to that power's essential nature. Accountability under criminal law cannot co-exist with slave-master power because it would make a criminal court that power's rival, and that power's essence can brook no rival. Ruffin does not focus, in granular detail, on functions carried out in particularized ways, to tease out whether immunity is needed on a given occasion to protect a specific function's particular exercise; in other words, he shuns common-law incrementalism in favor of bold pronouncement. A sweeping power is framed in the broadest terms.

In both *Mann* and *Trump*, having framed the question as a matter of a power's essence, rather than as a matter of a power's use on a particular occasion to a specific

¹²¹ *Id.* at 2346 (cleaned up).

¹²² *Id.* at 2342.

end, the court lets vivid fears about a power's unspooling—fears expressly described—push criminal-law accountability into full retreat. The power to act on and rule over others, essentialized around a felt need for energetic, unrivaled imperium, eclipses criminal law. In Ruffin's telling, the fruits of unbridled mastery are the economic and social benefits, for masters, of chattel slavery. In Roberts's telling, the fruits of unbridled presidency are the economic and social benefits of executive vigor. For both, the fears of those who may suffer criminal harm, including grievous physical harm, do not appear to register. If, with Professor Postema, we think that "a robust practice of holding each other accountable under the law is essential for the realization of law's rule,"¹²³ these unbridled powers would seem to eclipse the rule of law itself.¹²⁴

CONCLUSION

Judging is choosing. By my lights, the *Trump* majority chooses poorly, ratcheting up presidential energy at the expense of public accountability. Put that aside. Explaining a choice, justifying a choice with the legal materials at hand in a formal judicial opinion, is a bit of world making, apart from the choice.¹²⁵ When the opinion is from the U.S. Supreme Court, it makes a world we now live in together, whether we like it or not. We owe it to one another to appraise the ethical stance that an opinion's rhetorical moves imply. The faint footfalls from *Mann* that I hear in *Trump* do nothing to make this new world a welcome one.

¹²³ Gerald J. Postema, *Fidelity in Law's Commonwealth*, in *PRIVATE LAW AND THE RULE OF LAW* 17, 20 (Lisa M. Austin & Dennis Klimchuk eds., 2014). As Postema explains, "For the rule of law to flourish in a polity, it is not enough that those in power rule *by* law . . . because the rule of law demands *reflexivity*: those who use law in their exercise of power must likewise be subject to it." *Id.* Fuller made much the same point by describing the downside of reflexivity's absence: "When this bond of reciprocity [between citizen and government] is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules." LON L. FULLER, *THE MORALITY OF LAW* 40 (rev. ed. 1969). And it is well to recall, in this connection, historian E.P. Thompson's conclusion "that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good." E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975).

¹²⁴ *Cf.* POWELL, *THE FOUNDATIONS OF AMERICAN LAW*, *supra* note 67, at 55 ("If law is reason that measures the exercise of power, then slavery as Ruffin portrayed it was anti-law, a system of power that excluded reason.").

¹²⁵ "An opinion may be authoritarian or democratic, generous or mean-spirited, doctrinaire or open to multiple arguments, and so on—indeed, it may exhibit many of the ethical and political qualities that other kinds of conduct can. Action with words is after all a form of action, in relation both to a cultural inheritance and to other people, and it is charged with ethical and political significance." James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995).

Echoes fade. Life continues. I do not know whether it will have proved wise to claim that presidential power simply cannot abide accountability under the criminal law. Given A.V. Dicey's influential observation that the rule of law (in the anglophone tradition, at any rate) embraces the precept that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals,"¹²⁶ I confess I have more than a little doubt there is any wisdom in choosing to shield presidential power from so much as a word of our existing criminal statutes. But of one thing, at least, I am now certain: the present, no less than the past, can be a foreign country, where others do things quite differently indeed.¹²⁷

¹²⁶ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1915); *see also id.* at 198 (concluding that "the 'rule of law' in th[e] sense [of 'equality before the law'] excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs others citizens or from the jurisdiction of the ordinary tribunals"). Justice Story, in an earlier generation, made much the same point about post-impeachment criminal liability in particular, describing it as "indispensable that provision should be made that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence for the purpose of inflicting the common punishment applicable to unofficial offenders," thus "wisely subject[ing] the party to trial in the common criminal tribunals, for the purpose of receiving such punishment as ordinarily belongs to the offence." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 782–83, at 571–72 (Little, Brown & Co., 5th ed. 1891); *id.* § 812, at 591 ("In other respects, the offence is left to be disposed of by the common tribunals of justice, according to the laws of the land, upon an indictment found by a grand jury, and a trial by a jury of peers, before whom the party is to stand for his final deliverance, like his fellow-citizens."); *see also* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 79 (1840) ("As the principal object of the power of impeachment is to punish political crimes, the restriction of the punishment to mere removal and disqualification from office, seem appropriate, and sufficient. . . . Yet persons, who are guilty of public offences, ought not wholly to escape the proper punishment, affixed by law in other cases. And, therefore, they are made amenable, like their fellow-citizens, to the common course of trial and punishment in the courts of law."); Joseph Story, *Congress of the United States of America*, in 3 ENCYCLOPÆDIA AMERICANA 435, 436 (Francis Lieber ed., 1854) ("The judgment extends only to a removal from office and future disqualification for office. But the party is, nevertheless, liable to punishment on indictment, by the common trial and course of law.").

¹²⁷ *See* L.P. HARTLEY, THE GO-BETWEEN 7 (1953) ("The past is a foreign country: they do things differently there.").