#Resistance, with Candor

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Sanford Levinson & Mark A. Graber, *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in a Broken Constitutional Order*, **Chap. L. Rev.** (forthcoming), available at SSRN.

Are we all still "Legal Realists now?" So it is often assumed. But there are reasons to wonder. Today, it seems, many legal scholars are *private* Legal Realists only. Their public writing—whether scholarship, public commentary, or legal advocacy—shows few traces of Realism. They are writing to persuade judges or the general public. That counsels against admitting their arguments are malleable and have as much to do with external factors as the "internal" practice of law. To persuade this audience without causing resistance or cynicism, they cannot put all their cards on the table. Is that concealment Legal Realism, or something else—perhaps bad faith?

This question is especially relevant in the Age of Trump. Many legal scholars today are engaged in what Twitter calls #Resistance to the Trump presidency. They see an urgent need to convince judges to counter Trump's actions. That includes a willingness to urge judges to stretch or reshape existing law. Any Legal Realist understands that this kind of stretching is possible, if not inevitable. They know that judges work with plastic materials and that the springs of their decisions are both "external" and "internal" to the law. Given the perceived urgency of "resistance" to the administration, will scholar-advocates openly acknowledge all this, at the risk of scaring off judges or alienating the public? Or will they keep such thoughts to themselves, insisting publicly that they only seek loyal interpretation and enforcement of "the law?"

One can illustrate these questions by contrasting the excellent article I discuss here—Sanford Levinson and Mark Graber's *The Constitutional Powers of Anti-Publian Presidents: Constitutional Interpretation in a Broken Constitutional Order*—with a recent New York Times op-ed about legal and judicial resistance to Trump. There, Dahlia Lithwick and Stephen I. Vladeck criticize those who have suggested that judges are "shirking their institutional roles as neutral magistrates and 'joining the resistance'" in some rulings against the administration. Such arguments, they charge, are questionable because, among other things, these opinions are "often rooted in sound doctrinal principles." By charging that these rulings are "biased or unprincipled," these critics are entering "dangerous new ground" and engaging in "a direct attack on the independence and integrity of the entire judicial branch."

What would a Legal Realist make of such arguments? A historically informed Legal Realist would recall that Realism reached its height in the early years of FDR's administration, when judicial rulings against New Deal legislation were publicly accused of being "biased or unprincipled," and members of the administration itself, including then-Attorney General Robert Jackson, described the federal bench as "claim[ing] for [itself] the right to nullify" the law, warning that legalistic efforts to hamper the people's will risked the rise of "dictatorship." She might reflect that calling judges "partisan hacks in robes" sounds less like "dangerous new ground" and more like a familiar echo of very recent writings . The Realist would reason that if lawyers describe themselves as an active "#resistance," they must surely want judges to *agree* with their arguments and act accordingly. She would chuckle at the confident assertion that decisions blocking the administration are "rooted in sound doctrinal principles," or the remarkably non-Realist description of judges as "neutral magistrates." She would note with amusement such hedges as "*often* rooted in sound doctrinal principles."

My point is not to disagree entirely with that op-ed. Whether they fairly describe those they criticize or not, they're right that simplistic wholesale attacks on judicial rulings risk overstatement. (Of course, simplistic wholesale *defenses* of the federal judiciary also risk overstatement.) But confident references to judges as "neutral magistrates," and invocations

of shibboleths like "impartiality" and "the rule of law," makes it easy to wonder whether we are "all" genuine Legal Realists any more—or whether an increasing number of legal scholars either reject Realism or conceal it behind a façade of non-Realist rhetoric. Ironically, one reason for doing so is itself Realist: Legalist rhetoric aids judges who deliberately use malleable legal materials in a "creative" fashion to counter Trump, and helps convince the public that those judges are merely applying "sound doctrinal principles." It seems strange to argue for a legal "#Resistance" to the Trump administration, one that includes judicial review, without thinking that anyone *wants* judges to move the law in the direction of the resistance, even if that involves quiet "extensions" or rejections of current "doctrinal principles." Reading pieces like this, one may long for straightforward, openly Realist advocacy of forceful judicial resistance.

With commendable candor, Levinson and Graber make just such an argument. Interestingly, their argument is Realist in its description of how law *operates* and its rejection of the idea of law as autonomous and generally applicable. But the article's vision of the Constitution contains ideas we do not generally associate with the Realists. Rather, it is virtue-centered. It argues that our Constitution demands not just a "government of laws and not of men," but one administered by *virtuous* men and women. For this reason, judges and other legal actors should apply more skeptical legal standards to the present administration. Their argument is valuable not only for whatever short-term strategic purposes it may serve, but for its broader vision and the many difficult questions this vision raises.

At least in their willingness to put their cards on the table—to argue that this administration requires a different (but not, they argue, unprecedented) approach by judges, that political reality is relevant to this approach, and that this is not simply a matter of "neutral magistrates" applying existing law—Levinson and Graber's article is both openly Realist and praiseworthy for its honesty and forthrightness. It is what scholarship of quality and integrity should always do—even in the time of #Resistance. Such scholarship not only suggests an immediate fix to a current problem, but is unafraid to raise interesting, productive, and sometimes troubling questions about the implications of that proposal. The very fact that Levinson and Gruber's article raises these questions, or enables them to be raised by others, is reason enough for praise.

Their argument can be summarized easily enough: Trump is very, very bad. This summation is not mockery but fair description. President Trump "lacks every constitutional qualification for office save that he was elected." His "gross unfitness for office" is widely acknowledged. Everything in his presidency to date proves this. I take this premise as true for purposes of the jot. (Given that plenty of solid evidence supports it, however, it's unfortunate that they sometimes rely on questionable sources or speculation.)

Trump's awfulness matters for more than consequentialist reasons, they argue. Although our legal culture speaks in terms of "laws, not men," the Constitution is not "indifferent to the character of the office-holder." Rather, "The Constitution presupposes at least some version of what we call 'Publian presidents,' presidents with the character and capacity necessary to exercise the vast powers conferred by Article II." As *The Federalist Papers* and other sources suggest, the founding generation was deeply concerned with the character of office-holders in republican government. They sought "to guarantee, as far as is humanly possible, the selection of persons with exceptional capacities and virtuous character." They envisioned an "intimate…connection between the character of an official and official powers."

General arguments of this sort have been popular at least since Douglass Adair's famous essay on fame and the founding fathers. The result of such a worldview, then as now, is not neat, but it *is* important, especially for its focus on ideas—such as duty, honor, virtue, and character—that have faded in public usage and even been described as obsolete. Renewed interest in these ideas in recent (and pre-Trump) years has birthed a number of approaches taken to constitutional thought, such as arguments for an aretaic turn in constitutional law, a fiduciary vision of office-holding, renewed attention to constitutional oaths, and a focus on judicial duty. These authors have varied politics and draw varied conclusions. But they share the belief that in our constitutional ethos, character matters. It is interesting, if unsurprising, that such arguments have recently drawn new advocates.

Virtue-centered arguments rarely produce clear judicially enforceable standards. But Levinson and Graber argue that they should, for officials (including judges) responding to the Trump administration. Constitutional interpretation must

"respond[ ] to breakdowns in underlying assumptions" about the proper functioning of our system of government. That includes responses to an "anti-Publian president" such as Donald Trump. "Texts are routinely interpreted differently when crucial background conditions fail." Such departures from standard practice may demand clear reasons and evidence, given the strong presumption "in most interpretive practices that background conditions are functioning smoothly." But departures *are* possible, and legitimate.

Drawing creatively on various cases, Levinson and Graber argue that this is true in constitutional law as well. One example they deploy is *Brown v. Board of Education* and its progeny, which they describe not as a simple, if celebrated, application of ordinary law but as an extraordinary response to a breakdown: a "judicial commitment to eradicate frauds on the Constitution." Similarly, the First Amendment decision in *New York Times v. Sullivan* was "motivated by commitments to racial equality as much as commitments to the First Amendment," and as having involved the use of creative improvisation to "alter[ ] rules of normal practice to account for constitutional breakdowns in the Jim Crow South."

These examples vary greatly from separation of powers law. But Levinson and Graber use them to draw a broad lesson: "Constitutional decision-makers faced with constitutional failures, American history teaches, jettison rules of constitutional practice and constitutional interpretation rooted in assumptions that constitutional institutions are functioning normally." With respect to the Trump regime, "judges and other governing officials" should be "wary" when interpreting the actions of the administration and the justifications offered for them. They should eschew rational basis review and view all such actions skeptically, with something like a presumption of *un*constitutionality. Under an anti-Publian president, "courts should adopt the presumption that the efforts to implement that [president's] platform violate the Constitution until the program is redesigned in ways that eliminate unconstitutional features 'root and branch.'" Courts and other officials, "explicitly or implicitly, [should] engage in motive analysis, up the standard of scrutiny, and interpret statutes as not delegating power when adjudicating Trump Administration efforts to exercise Article II powers."

Levinson and Graber believe the benefits of this approach outweigh any costs. And they suggest, far more candidly than some others have, that some lower court rulings against the Trump administration are evidence that this is *already* happening. They thus argue, both, that these courts are *doing* and not shirking their duty, *and* that their decisions are not simply the actions of "neutral magistrates" applying "sound doctrinal principles." In tension with their argument that departures from ordinary legal presumptions have a long historical pedigree, they conclude that "the lack of deference to presidential authority that persons outside of Congress [including judges] have demonstrated in Trump's first year seems unprecedented."

Their willingness to describe these departures *as* departures is refreshing. It's not the kind of thing that someone who wants to persuade courts to resist this "anti-Publian president" will want to say openly. Although some judges might be pleased to be seen as part of the vanguard of the #Resistance, for the most part they either want to believe that they are applying existing law routinely, or would prefer that no one publicly suggest (or reveal) that they are not. To borrow Philip Bobbitt's terms, "We are ruling differently in this case because the President is awful" is not an accepted mode of constitutional argument. To say so publicly would make judges look less judicial, risk the courts' political capital, and draw the critical scrutiny of both the Supreme Court and (some of) the general public.

In being so candid, Levinson and Graber offer ammunition to critics and hostages to fortune. That, of course, is precisely what scholarship of and integrity should do. It is not the job of legal scholars—even in times of emergency—to abandon candor, flatter judges, collude with them in disguising "anti-Publian" departures as routine applications of existing law, or say and write what they do not actually think. It should not require unusual courage for a legal scholar—tenured, secure, and privileged and affluent by any sane standard—to write as Levinson and Graber do here. That their frankness is at all unusual is a credit to them and a question mark about legal and constitutional scholarship more generally.

A candid, forthright, and sweeping argument of this sort, as I noted, inevitably offers hostage to fortune, in the form of

the critical questions that it raises, both explicitly and by implication. Levinson and Graber's analysis and prescription would have dramatic implications for constitutional interpretation. It thus raises substantial questions.

Some of them are self-evident. How do we know when a president is "anti-Publian?" In a polarized era in which each new president or presidential candidate is described as the worst threat to the Republic yet, and in which people come to *believe* such propaganda—that people came to view the milquetoast technocrat Mitt Romney in this way proves this—do citizens or office-holders, judges included, have sufficient character to distinguish "anti-Publian" leaders from those with whom they simply disagree? Some If they are right, why should we think that judges or other officers will have the wisdom and character to know and respect the difference between a Publian and an anti-Publian president? Levinson and Graber acknowledge these questions, as they should. It is in the nature of good scholarship to acknowledge difficult questions and hope they will lead to better conversations.

Another important question, one I have noted here before, is what the precise goal of extraordinary skepticism toward anti-Publian presidents in general, and Trump in particular, should be. Should it be one of total resistance? Or should it be to nudge such a president into a more "Publian" mode—to "normalize" that president—and then return to the standard, deferential approach to routine executive action? Levinson and Graber write that "courts should adopt the presumption that the efforts to implement that [president's] platform violate the Constitution *until* the program is redesigned in ways that eliminate unconstitutional features 'root and branch.'" That suggests they favor the latter goal, although that is unclear.

The authors may think that Trump, being Trump, can never be made into a truly Publian president. They may be right. But as their history of bad presidents suggests, there are *degrees* of Publian and anti-Publian conduct. That is especially true given that the executive branch requires the cooperation of principal Article II officers, ordinary federal bureaucrats, and perhaps Congress to affect people outside the government. I think Trump's "travel ban" executive orders are terrible policy. One or more of their iterations may be unconstitutional, although an ordinary application of precedent leans against that conclusion. But should judges reject *all* iterations of such an order, applying the same anti-Publian presumption of unconstitutionality to each succeeding version? Or, if the courts force the administration to narrow the scope of the order, to offer more plausible justifications for it (by ordinary legal standards), and to engage in inter-agency consultation and other sound practices, does there come a point at which the order should be treated as ordinary (if awful) policy, and subjected to usual standard of review that would apply in the case of ordinary (if awful) actions by a more "Publian" president?

This question deserves more attention than it has received. It matters greatly—both to law and judges, and to politics—whether the goal of resistance to Trump is *total* resistance, or simply ensuring that his administration is not tyrannical, arbitrary, or chaotic. Levinson and Graber argue that there is an important distinction between "bad" presidents and anti-Publian ones. If our general assumption is that constitutional law and politics make "merely" bad policies a matter for *political* debate, then our choice of goal matters for both healthy politics and the legitimacy of the legal and judicial #Resistance.

Unfortunately, we have already traveled far down the road of viewing all political adversaries as political enemies. Certainly neither Trump himself nor some of the understandable reactions to him have helped us retreat from this path. If this question has received too little attention, it may be because legal academics are subject to the same tendencies. Whatever the reason, a resistance needs a clear goal and stopping point. It should be able to distinguish between fighting ordinary bad policies by ordinary means, and using extraordinary measures to counter extraordinary "breakdowns" in political and constitutional norms. Similarly, an argument for extraordinary legal responses to anti-Publian presidents demands a clear goal for courts. Rendering an anti-Publian president more Publian seems like an appropriate goal, and suggests that when judges succeed in doing so, they should revert to more ordinary forms of judicial review. There is room for disagreement about this. But discussion is essential.

An interesting side note concerns Levinson and Graber's account of *Brown*, *New York Times v. Sullivan*, and other cases. They are hardly the first to argue that race, racism, and the intertwined public-private nature of white supremacy

exerted a "gravitational pull" on the Warren Court's constitutional rulings. If anything, that observation is commonplace for all but the most case-fixated legal doctrinalists. But it does complicate recent descriptions of that era as having instituted a "deep and abiding constitutional settlement[ ]," of a *general* and generally applicable nature, "favoring inclusion, equal opportunity, and equal respect for all," and recent efforts to apply that "settlement" confidently to a broad set of cases not involving race. On this view, anything that might interfere with this "settlement" must be rejected, and can be rejected confidently and easily. From this perspective, cases like the wedding cake case, *Masterpiece Cakeshop*, are "easy."

Perhaps this case *is* easy. Or perhaps, even if "race is different," we can see LGBTQ and other rights as involving the same interdependent public-private collaboration in a set of legal and social evils. At a minimum, however, Levinson and Graber's depiction of the Warren Court as having departed from conventional legal doctrine in order to cure an extraordinary failure of ordinary political norms and institutions raises a number of questions. What was the precise nature and scope of any constitutional "settlement" reached by the Warren Court? Having addressed the extraordinary public-private nature of racism, did the Court mean to create a new generally applicable approach, or did it see itself as addressing a unique historical problem? Is the alleged departure from the presumption that "background conditions are functioning smoothly" strong and clear enough in current cases to justify the same departure from ordinary principles protecting, say, free speech and association? How broadly should we apply "anti-Publian" precedents—some of which, as Levinson and Graber note, were clearly improvised and far from fully reasoned—in cases that are less clearly anti-Publian?

I do not mean to make too much of this side note. Nor am I arguing for a particular result in *Masterpiece Cakeshop*, other than it be taken seriously and not dismissed as the easy application of a clear "settlement." Nevertheless, in treating the Warren Court's race decisions as an example of the Court "altering rules of normal practice to account for constitutional breakdowns" and not as an easy application of "sound doctrinal principles" by "neutral magistrates," Levinson and Graber raise more important questions. If they're right that reactions to anti-Publian measures constitute an extraordinary departure from background legal norms and assumptions, one that is justified by extraordinary and unusually dangerous circumstances, then that argument has power precisely because it does *not* threaten to overwhelm or replace the ordinary legal system. And if they're right that the Warren Court's race jurisprudence *was* extraordinary, because the system it addressed was deeply entrenched, unconventional, and impossible to dislodge, then we should hesitate to apply it too broadly. If, on the other hand, those cases were just a matter of the Warren Court applying ordinary law ordinarily, then the argument in support of the legitimacy of an anti-Publian judicial approach is weakened considerably. These questions demand serious consideration.

These questions are not intended as fatal criticisms of Levinson and Graber's fine article. They offer a bold approach to a bad situation. And they are *candid* as well as bold. They model a willingness to speak in terms that decidedly will not be attractive to judges who want to fly under the radar, or to advocates who simultaneously want to engage in #Resistance and make it look like ordinary law. In arguing for extraordinary legal and judicial responses to the "anti-Publian" Trump regime, they show that a willingness to acknowledge the serious questions such an approach raises. Good for them.

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