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Michael Stokes Paulsen

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THE CONSTITUTION OF NECESSITY

*Michael Stokes Paulsen**

No axiom is more clearly established in law, or in reason, than that whenever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.

The Federalist No. 44¹

Before he enter on the execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. Constitution, Article II²

INTRODUCTION

My proposition is a simple but dramatic one: The Constitution itself embraces an overriding principle of constitutional and national self-preservation that operates as a meta-rule of construction for the document's specific provisions and that may even, in cases of extraordinary necessity, trump specific constitutional requirements. The Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one, where an alternative construction is fairly possible. The Constitution should be construed to avoid constitutional implosion; it should not lightly be given a disabling, self-destructive interpretation. And where such an alternative saving construction is *not* possible, the necessity of preserving the Con-

* Briggs & Morgan Professor of Law, University of Minnesota Law School; Visiting Professor of Law, University of St. Thomas School of Law. My thanks to the extraordinary faculty of the University of St. Thomas School of Law for their invaluable comments (and criticisms) at a faculty workshop, to the participants at the *Notre Dame Law Review* symposium of which this Article is a part, and to Robert Delahunty, John Nagle, and Saikrishna Prakash for their detailed comments (dare I say attacks?!) on draft manuscripts. None of these persons should be blamed for the ideas expressed here; Abraham Lincoln should.

1 THE FEDERALIST NO. 44, at 253 (James Madison) (Clinton Rossiter ed., 1961).

2 U.S. CONST. art. II, § 1, cl. 8.

stitution and the constitutional order as a whole requires that priority be given to the preservation of the nation whose Constitution it is, for the sake of preserving constitutional government over the long haul, even at the expense of specific constitutional provisions.

Moreover, the Constitution appears to vest the primary (but nonexclusive) duty for making these sorts of constitutional judgments—judgments about constitutional interpretation, constitutional priority, and constitutional necessity—in the President of the United States, whose special sworn duty the Constitution makes it to “preserve, protect and defend the Constitution of the United States.”³ In short, the Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it and judging the degree of necessity in the press of circumstances.

This is a valuable and a dangerous arrangement. It is valuable in the sense that it is almost inconceivable for matters to be any other way. There simply *must* be power in the national government to preserve the constitutional order; it is inconceivable that the Framers would have neglected such considerations. And they did not. First, Congress possesses legislative power to pass laws “necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁴ If national preservation is necessary to the carrying into execution of other powers vested by the Constitution, Congress has power to legislate measures plainly adapted to national preservation.⁵

Second, and even more strikingly, the Presidential Oath Clause creates a presidential *duty* to preserve the constitutional order of the United States. That duty serves as a gloss on the meaning of the “executive power” vested in the President, an allusion to the exercise of a power assumed to exist. It is, I submit, almost inconceivable that the President’s overarching duty to “preserve, protect and defend the Constitution of the United States” not have priority over, or serve as a template for understanding, specific provisions of the constitutional document. The alternative is near-absurdity: that the parts should be construed, and given effect, even at the expense of preservation of the

3 *Id.* art. II, § 1, cl. 8.

4 *Id.* art. I, § 8, cl. 18.

5 *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

Constitution as a whole, with the logical consequence that adherence to the Constitution might require destruction of the Constitution.

I have said that this is a valuable and a dangerous arrangement. The danger is obvious. It is a dangerous arrangement in the sense that it is capable of being misused and has been misused at various times in our nation's history. It probably will be misused again. (Some argue that it is being misused today.) But the capacity of a constitutional power to be abused does not disprove the existence of such a power. It proves only what has just been said—that such a power is capable of misuse. This is not terribly shocking. *All* constitutional power is capable of being abused or misused. My thesis posits a sharp choice. Either a constitutional law of necessity exists or it does not. If it exists, it is inherently susceptible of misuse and abuse; if it does not, the Constitution is a suicide pact. Either horn of the dilemma is bad. But it is the latter proposition that should be regarded as truly shocking.

The existence of a constitutional power of necessity, flowing from the Presidential Oath Clause (and supported by Congress's legislative powers), does not mean that the President's power is plenary nor that it should not go unchecked. Both the judiciary, through the power of constitutional interpretation it possesses in deciding cases arising under the Constitution, and the Congress, through the power of constitutional interpretation it possesses in exercising its legislative powers and the check of impeachment, have a duty of independent constitutional review over the judgment of necessity. Abdication of such a duty, whether by refusal to act or by excessive deference to executive judgments, renders less valuable and more dangerous the President's power to act to preserve, protect, and defend the constitutional order in the name of necessity. While the courts, and Congress, should recognize the correctness of a doctrine of constitutional necessity, and while they should recognize the fact that the Constitution vests the primary power and duty with regard to such issues in the President, that does not mean they should go along with whatever the President says. A constitutional power of necessity necessitates checks on its exercise. Complete congressional and judicial acquiescence or abdication has a name. That name is *Korematsu*.⁶

Despite the obvious dangers of embracing a doctrine of constitutional necessity, I maintain that such a doctrine is *right* in principle. It is supported by the text of the Constitution, by the structure and deep

6 *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (enforcing a U.S. military order confining American citizens of Japanese descent to concentration camps).

logic of permanent constitutional government, and by background general legal principles of necessity against which the Constitution was drafted and of which specific passages of the Constitution reflect acceptance, and understanding. It is also, somewhat ironically, consistent with myriad judicially developed doctrines permitting departure from what otherwise would be the baseline constitutional rule, in cases of a "paramount" or "overriding" or "subordinating" or "compelling" state interest. National survival, the protection of innocent life, and the long-run preservation of constitutional government in its essentials, constitute, I submit, the quintessential case of such compelling interests.

In developing this thesis, I will take as my point of departure the constitutional theory and practice of President Abraham Lincoln, the leading constitutional theorist and practitioner of presidential power to preserve, protect and defend the constitutional order by applying principles of constitutional necessity in times of crisis. My thesis is not original—it was Lincoln's. In Part I, I set forth and defend Lincoln's theory of constitutional necessity, which takes as its cornerstone the Presidential Oath Clause of Article II.

In Part II, I set forth and defend, at least as a theoretical matter, three interpretive propositions that flow from a Lincolnesque doctrine of constitutional necessity: first, that the Constitution should be construed to avoid self-destruction; second, that the Constitution's provisions, or at least some of them, do not all apply in exactly the same way in time of war as they do in time of peace; and third, that, when push comes to shove, specific provisions of the document sometimes may need to yield to preservation and defense of the Constitution as a whole—the "Constitution" in the sense of the constitutional regime, more broadly conceived.

Finally, in Part III, I conclude by posing the questions of *standards*, *decisionmakers*, and *dangers*: What standard should one apply to determine the existence of a constitutional necessity? Who is to decide, in the first instance—and who in the last—whether that standard has been satisfied? And do the answers to these questions provide a satisfactory, or at least partial, answer to the obvious objection to the dangers posed by recognition of a constitutional law of necessity?

I. THE CENTRALITY OF THE PRESIDENTIAL OATH CLAUSE

The Presidential Oath Clause, located at the end of the first Section of Article II, provides as follows:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm)

that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”⁷

Lawyers and legal academics are inclined, by training and practice, to look at questions of constitutional interpretation from the perspective of a judge or justice deciding a case. This is in many ways a narrow perspective. Consider for a moment the standpoint of *a President* swearing Article II’s oath—that is, the perspective of the person (and responsible office-holder) actually called upon to take the oath. What is, so to speak, the “interpretive stance” of someone swearing the oath of office as President of the United States? Read it again, and imagine yourself President (and uncorrupted by a law school education). What is the President’s duty with respect to the Constitution?

I submit that two propositions flow from the Presidential Oath Clause, one “procedural” and one more “substantive.” First, the procedural point: the President has an *independent, personal, and nonabdicable* constitutional responsibility of faithful constitutional interpretation and execution. The President swears that *he* (or she) will “preserve, protect and defend” the Constitution. The duty is awesome and personal. On its face, the clause appears to assign to the President a special, *unique* responsibility to the Constitution, certainly not one that is subordinate to the judgment of other actors in the constitutional system. The Presidential Oath Clause seems to suggest that the President (not the courts) is a kind of special guardian—almost a “Lord Protector”—of the Constitution. Put less grandly, the President is charged with a personal duty of constitutional stewardship.

That stewardship necessarily involves the authority and responsibility to interpret the Constitution. How else does one know what it is one is preserving, protecting, and defending? Even more clearly so than with the universal oath requirement Article VI of the Constitution commands for all federal and state officers—an oath “to support this Constitution”⁸—the Presidential Oath Clause cannot be reduced to a general political loyalty requirement.⁹ The President swears he will faithfully execute the office and *preserve, protect, and defend* the Constitution. That suggests, necessarily, interpretive responsibilities, even if it might entail broader responsibilities (as I argue presently).

7 U.S. CONST. art. II, § 1, cl. 8.

8 *Id.* art. VI, cl. 3 (emphasis added).

9 See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 257–62 (1994) (arguing that the Article VI oath requirement entails an obligation of faithful interpretation of the Constitution).

Might not the Presidential Oath Clause even make *the President* the “supreme” interpreter of the Constitution—a role, of course, that the Supreme Court presumptuously has claimed for itself?¹⁰ One must concede that if *any* clause of the Constitution fairly could be construed as vesting a power of constitutional interpretive supremacy—an exclusive or superior right of constitutional interpretation—in any one branch, the Presidential Oath Clause has the best claim to having made such an assignment; and that assignment appears to be to the President, not the judiciary.¹¹ But one need not (and should not¹²) go so far in order to recognize that the President is

10 I have argued elsewhere that this self-serving assertion by the judiciary is not defensible as a matter of interpretation of the Constitution’s text, structure, and original understanding. Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1351–59 (1999); Paulsen, *supra* note 9, at 284–88. It is also inconsistent with the reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2709 (2003) (“The logic of *Marbury* implies not, as it is so widely assumed today, judicial supremacy, but *constitutional* supremacy—the supremacy of the document itself over misapplications of its dictates by any and all subordinate agencies created by it.”); Paulsen, *supra* note 9, at 287 (“[The] supremacy-of-judgments hypothesis also contradicts the established theorem of judicial review by maintaining, contrary to the key step in *Marbury*, that one branch’s view *may* bind another branch.”).

11 Lincoln’s Attorney General, Edward Bates, in an opinion defending the lawfulness of Lincoln’s unilateral suspension of the privilege of the writ of habeas corpus, believed that the Presidential Oath Clause, being unique to the President, implied precisely such a unique role as constitutional “guardian”:

All the other officers of the Government are required to swear only “to *support* this Constitution;” while the President must swear to “*preserve, protect, and defend*” it, which implies the power to perform what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to “take care that the laws be faithfully executed.” And this injunction, embracing as it does all the laws—Constitution, treaties, statutes—is addressed to the President alone, and not to any other department or officer of the Government. And this constitutes him, in a peculiar manner, and above all other officers, the guardian of the Constitution—its *preserver, protector, and defender*.

Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 82 (1861).

12 The correct view, I believe, is that no branch or actor under the Constitution rightfully possesses interpretive supremacy over any other branch or actor. Paulsen, *supra* note 9, at 228–40. The Presidential Oath Clause does not say that the President’s interpretive power is supreme; it merely confers, by necessary implication, interpretive power as an incident of the President’s unique duty to “preserve, protect and defend” the Constitution. In similar fashion, the Constitution confers, by necessary implication, interpretive power on the judiciary as an incident of its duty to de-

charged with *a* power and duty of faithful constitutional interpretation, and that this duty is unique, personal, and solemn.¹³

The second proposition that flows from the Presidential Oath Clause is not as immediately evident, but it is extremely important and is the substantive cornerstone of the doctrine of constitutional necessity: *the President's duty to preserve, protect and defend the Constitution of the United States logically entails a presidential duty to preserve, protect, and defend the nation whose Constitution it is*. The first duty of the President of the United States is to preserve, protect, and defend the Constitution of the United States by preserving, protecting, and defending *the United States*, by every indispensable means within his power. The constitutional law of necessity flows from the duty created by the Presidential Oath Clause. And the existence of such a constitutional duty of the President very strongly implies the existence of legitimate constitutional power on the part of the President to carry out that duty.¹⁴

cide cases or controversies arising under the Constitution. But the latter implied power even *less* plausibly implies interpretive supremacy than does the former.

13 The Presidential Oath is not merely an empty formality. The founding generation took oaths extremely seriously, as involving not just human honor and obligation but as also entailing extra-temporal consequences—like eternal damnation in the fires of hell—for their intentional violation. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1466–67 (1990) (reviewing exceptions made for those with religious objections to oath requirements and showing that oaths were the “principle means of ensuring honest testimony and solemnizing obligations” and were seen as “indispensable to civil society”); Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457, 1486–90 (1997) (reviewing AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* (1997)) (arguing that the Fifth Amendment privilege against self-incrimination only makes policy sense on the understanding, foreign to moderns, that being compelled to testify against oneself might induce a guilty, morally weak person to commit perjury under oath and thereby incur eternal damnation); Paulsen, *supra* note 9, at 257 (noting that *Marbury's* focus on the Oath Clause in support of judicial review is not surprising given the profound significance oaths had at the time of the Founding).

14 *See, e.g.*, *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 310 (1972).

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means.

Id.; *see also* Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y. Gen. at 82 (stating that the duty to “preserve, protect and defend” the Constitution “implies the power to perform what he is required in so solemn a manner to undertake”).

Is the Presidential Oath Clause itself a *grant of power*? Not in form. I believe the better answer is that the oath imposes a duty with respect to the exercise of powers

President Abraham Lincoln advanced this view several times. As usual, Lincoln's argument is persuasive.¹⁵ Consider two extended passages from Lincoln's most important constitutional writings. The first is from Lincoln's July 4, 1861 Message to Congress not long after the outbreak of the Civil War, in which Lincoln explains his actions between the attack on Fort Sumter and the convening of Congress in special session, including Lincoln's suspension of the privilege of the writ of habeas corpus by military order as Commander in Chief. Chief Justice Roger Taney had issued a writ of habeas corpus ordering production of an individual in military custody, and had declared Lincoln's suspension of the writ unconstitutional, directing Lincoln to comply with his order. Lincoln had not done so. Lincoln's refusal to obey compulsory judicial process raises interesting issues in its own

assumed already to be present in the President by virtue of his having been assigned "[t]he executive Power" of the United States. It would have made little sense for the Framers to have imposed on the President a constitutional duty that he did not have the constitutional power to fulfill. The Presidential Oath Clause is properly understood as an allusion or reference to the *power* to preserve, protect, and defend the nation and its constitutional order that inheres in the traditional understanding of the "executive Power" of a nation. The "executive Power" has generally been understood to include, and would have been understood by the founding generation to include, a power to protect the nation's existence and defend it against attacks. The precise contours of such a power, however, are unclear and legitimately disputed. For excellent general discussions, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32-38 (1993) (suggesting that the President does have a limited power to act in an emergency, and that the courts should not interfere unless there is no actual emergency or Congress has not subsequently ratified the action after a reasonable amount of time); and Saikrishna Prakash & Michael D. Ramsey, *The President's Power Over Foreign Affairs*, 111 YALE L.J. 231, 233-36, 285 (2001) (making the constitutional, textual argument that the President has a residual foreign affairs power limited by the nature of the executive power and by the textual grants of specific foreign affairs powers to Congress, and that the President retains a power to repel attacks under his residual foreign affairs powers).

Commenting on the presentation of this paper at the *Notre Dame Law Review* symposium, Professor Prakash correctly observed that, in terms of constitutional *power* to carry out a constitutional law of necessity, it is "[t]he executive Power" Vesting Clause of Article II, Section 1 that does the real work. I do not disagree. My proposition here is that the Presidential Oath Clause supplies the duty and is the source of the set of principles for a constitutional doctrine of necessity that governs how and when "[t]he executive Power" may be applied, legitimately, in extraordinary situations.

15 In other writing, I have taken the position that Abraham Lincoln is the single most important interpreter of the Constitution in our nation's history. Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. (forthcoming 2004) (manuscript at 700-04, 702 n.24) (on file with the Notre Dame Law Review) (reviewing DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003)). Some of the arguments I make here are also set forth (in less detail) in a part of that Review.

right—issues I have addressed at length elsewhere.¹⁶ What is relevant here, to the doctrine of constitutional necessity, is Lincoln's defense of his actions on the merits:

[T]he attention of the country has been called to the proposition that one who is sworn to "take care that the laws be faithfully executed," should not himself violate them. Of course some consideration was given to the questions of power, and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should, to very limited extent, be violated? To state the question more directly, are all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?¹⁷

Lincoln believed that his sworn duty ("*would not the official oath be broken . . . ?*") to execute the laws and preserve the Constitution required him to do what was necessary to prevent the government from being overthrown, even if it meant "disregarding" a "single law," because the alternative was the failure to execute all the laws, but that one. I will have more to say about the implications of the July 4 Message below, concerning the interpretive principles that follow from a constitutional doctrine of necessity.¹⁸ Here, it is sufficient to

16 See Paulsen, *supra* note 9, at 276–84 (arguing in favor of the executive's power to refuse to enforce judgments and employing the decision in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), as a paradigm for evaluating this proposition); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Interpretation*, 15 CARDOZO L. REV. 81 *passim* (1993) (using the *Merryman* case to frame the dilemma between complete judicial supremacy and complete presidential interpretive autonomy).

17 President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–65, at 246, 252–53 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS].

18 The Message is a strong statement of the principle of priority: that preservation of the whole sometimes requires sacrifice of a part. But as we shall see, Lincoln goes on to take a milder stance sufficient to address the particular situation at issue: that the principle of necessity can operate as a rule of construction—a substantive "push" in a certain direction—in cases where the text is ambiguous. See *infra* text accompanying notes 25–32.

note that, for Lincoln, all of this comes from the presidential oath.¹⁹

Lincoln says much the same thing in a notable letter to Senator Albert Hodges in 1864, recalling and putting in writing (evidently at Hodges's request) a White House conversation between the two, with others present, some short time before. The letter is an explanation of the broader constitutional rationale for Lincoln's policy on slavery and emancipation. The explanation, once again, rests on Lincoln's oath to preserve, protect and defend the Constitution, and in Lincoln's conception of constitutional necessity flowing from that oath. The passage merits quotation at length:

I am naturally anti-slavery. If slavery is not wrong, nothing is wrong. . . . And yet I have never understood that the Presidency conferred upon me an unrestricted right to act officially upon this judgment and feeling. *It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States.* I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. I understood, too, that in ordinary civil administration this oath even forbade me to practically indulge my primary abstract judgment on the moral question of slavery. . . . *I did understand however, that my oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that constitution was the organic law.* Was it possible to lose the nation, and yet preserve the constitution? By general law life and limb must be protected; yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. *I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the constitution, if, to save slavery, or any minor*

19 Lincoln also invoked the structure and logic of the Constitution as standing for a presumption of *permanence* to the Constitution, stating that "in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. . . . It is safe to assert that no government proper, ever had a provision in its organic law for its own termination." President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *SPEECHES AND WRITINGS*, *supra* note 17, at 217. Lincoln went on to argue that the Constitution required him to protect the Union from destruction: "I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. . . . I trust this [will be regarded as] the declared purpose of the Union that it *will* constitutionally defend, and maintain itself." *Id.* at 218. Lincoln's logic applies with equal force when the threat to the Constitution is a foreign nation, and not internal rebellion.

*matter, I should permit the wreck of government, country, and Constitution all together.*²⁰

Lincoln's letter to Hodges is an excellent distillation of the theory of constitutional necessity. Its origin is the Presidential Oath Clause: "It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the Constitution of the United States." Its content is the duty to preserve the nation "of which th[e] constitution was the organic law." Its somewhat startling but flawlessly logical implication is that "measures, otherwise unconstitutional, might become lawful," by being necessary to preserve the nation, and thus its Constitution. And its application extends to the justification of the use of "every indispensable means" within the executive power necessary to attain the paramount constitutional objective.

II. THREE INTERPRETIVE PROPOSITIONS

I submit that three interpretive propositions about the Constitution follow—properly follow—from the general proposition that the law of necessity is an operative principle of the Constitution. They are, in ascending order of difficulty: *first*, the proposition that the Constitution should be construed, where possible, to avoid constitutionally self-destructive results (a "construe-to-avoid-constitutional-difficulty" canon of construction); *second*, the proposition that some of the Constitution's provisions apply differently in times of war and crisis than they do in ordinary times; and *third*, the proposition that, when push comes to shove, specific provisions of the document may need to yield to the need to preserve the operation of the Constitution as a whole (what I call the "rule of constitutional priority"). I will consider each in turn.²¹

20 Letter from Abraham Lincoln, President of the United States, to Albert G. Hodges, U.S. Senator (April 4, 1864), in *SPEECHES AND WRITINGS*, *supra* note 17, at 585 (emphasis added).

21 Professor Prakash, commenting on the presentation of this Article at the symposium session, challenges this ordering of the discussion: Why, he asks, should we even look at the first two propositions, if the third one is correct? Why not just cut to the chase, if, in the end, we are going to find that a principle of constitutional necessity justifies departing from specific constitutional provisions in the event that neither of the first two propositions justifies the proposed emergency measure?

The question is a valid one, but there are valid answers. First, though I will argue for the correctness of each of these three propositions, I recognize that some readers will not be persuaded by the third one—the most dangerous and controversial of the three propositions. I would like to leave open the possibility that those readers might still embrace the correctness of the first two propositions, or even just the first one. People might agree on the validity of a principle, without agreeing with (or being willing to accept) the validity of all of its implications, especially the most drastic ones.

A. *Necessity as a Rule of Construction*

First and foremost, the “Constitution of Necessity” properly operates as a *meta-rule of construction* governing how specific provisions of the document are to be understood and applied. Specifically, the Constitution should be construed, where possible, to avoid constitutionally suicidal, self-destructive results. Obviously, constitutional suicide is a result to be avoided; interpretations tending toward such an outcome thus should be regarded as strongly disfavored. The need to preserve the Constitution—and accordingly, as Lincoln points out, the need to preserve the nation whose Constitution it is—operates as a rule of construction for other constitutional principles. It follows that specific provisions of the Constitution ought not be read in such a manner as to defeat the fundamental purposes and goals of the Constitution, or risk the destruction of the nation, if any other interpretation is legitimately possible. Constitutional provisions should not be construed in a needlessly security-destructive or life-threatening way, if an alternative “saving” construction is fairly possible.

Such a principle should not be thought extraordinarily controversial. It is of a piece with familiar canons of statutory construction that hold that statutes ought not lightly be construed in such a manner as to conflict with the Constitution, if an alternative construction is available.²² A somewhat more questionable variation has it that statutes should similarly be construed to avoid constitutional *difficulty*, or constitutional *doubts*, well short of a showing that the avoided construction actually would present a constitutional *infirmary*.²³ The principle I urge here is that constitutional provisions, as well as statutory ones, should be construed to avoid “constitutional infirmity” or very

For those, I prefer half a loaf to none at all. Second, precisely for these reasons, it is prudent for interpreters considering these propositions to consider the least controversial ones first, to see if they are sufficient to dispose of the matter. If not, then and only then is the more difficult question presented. (Lincoln was a classic practitioner of this approach, well before it became a commonplace of modern judicial practice. Indeed, as we shall see, while Lincoln would commonly articulate a sweeping theoretical justification of constitutional necessity, he would often apply a narrower, less controversial principle as a sufficient alternative ground.)

22 See William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 833 n.5 (2001) (citing numerous Supreme Court cases in which the avoidance canon has been invoked or urged to be applied).

23 *Id.* at 840–42 (outlining the change in the avoidance canon from interpreting statutes to avoid unconstitutional results to interpreting statutes to avoid addressing constitutional questions); John Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495, 1496 (1997) (“The most noticeable difference between the two rules is that the unconstitutionality canon requires a court to decide the constitutional question while the doubts canon allows a court to avoid any such decision.”).

serious constitutional difficulty as well—where the constitutionally problematic interpretation to be avoided is one that would strongly tend to undermine the existence of the nation and thus the operation of the Constitution in its entirety. The premise is that an interpretation of a provision that led to (in Lincoln's words) "the wreck of government, country, and Constitution all together"²⁴ would be, in a sense, a construction tending toward *unconstitutionality*, and is to be avoided on such account.

The point is important enough to be worth careful note, at the risk of repetition. This is *not* a rule of bending the Constitution to avoid untoward *outcomes*. The theory is, like Lincoln's, that permitting a nation-destroying outcome is permitting a Constitution-destroying outcome, and that to allow such an outcome would violate the President's sworn duty to preserve the Constitution. So understood, it seems equally, if not more, compelling than the various construe-to-avoid canons in the area of statutory interpretation.

Consider an excellent historical example of application of this rule-of-construction principle—Lincoln's defense of the propriety of his suspension of the privilege of the writ of habeas corpus, as against Chief Justice Taney's order purporting to invalidate it. As noted above, Lincoln defended his conduct in his July 4, 1861 Message to Congress.²⁵ The underlying constitutional question was a separation of powers issue: whether the Constitution permitted the President to suspend the privilege of the writ, or whether this was a power committed to the Congress. Both Taney's order, in the case of *Ex parte Merryman*,²⁶ and Lincoln's July 4 Message, address the question on the merits.

Article I, Section 9, Clause 2 of the Constitution is the provision in question. Like many of the Constitution's empowerments and limitations, it is written somewhat awkwardly, in passive voice: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁷ The clause does not specify who may exercise the power to suspend. Chief Justice Taney offered good arguments, perhaps even persuasive ones, for believing the power to be a congressional one, at least considered as an abstract proposition. First, the clause is located in Article I, which concerns Congress's powers. Section 9 is a set of limitations, or prohibitions, on the exercise of those powers. It fol-

24 Letter from Abraham Lincoln, *supra* note 20, at 585.

25 See *supra* note 17 and accompanying text.

26 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

27 U.S. CONST. art. I, § 9, cl. 2.

lows, Taney believed, that even though the power to suspend the privilege of the writ of habeas corpus is not a specifically enumerated power of Article I, Section 8, that the reference in Section 9 to the conditions under which the writ may be suspended means that the power of suspending is an implied power of the Congress (perhaps arising from the Necessary and Proper Clause).²⁸ Second, Taney highlights the history of the Great Writ of habeas corpus as a limitation on the prerogatives and power of the King—a check on the executive power—and the implausibility, therefore, of vesting a power to suspend such limitation in the executive.²⁹

These are good arguments. Under usual circumstances, Taney's position might even be thought to be convincing. But Lincoln had some convincing counterarguments, which he advanced in the July 4, 1861 Message. He began with the more memorable line about the imperative of national survival, his oath, and necessity, set forth at great length above: "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? . . . [W]ould not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"³⁰

That was the more sweeping argument: necessity establishes a priority for preserving the whole, even at the expense of a part (the third interpretive principle, which I discuss presently). But in the very next breath—the next sentence—Lincoln backs off to a construe-to-avoid argument:

But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "The privilege of the writ of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public

28 See *Merryman*, 17 F. Cas. at 148:

The power of legislation granted by this latter clause [i.e., the Necessary and Proper Clause] is, by its words, carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles, essential to the liberty of the citizen . . . by denying to congress, in express terms, any power of legislation over them.

29 See *id.* at 151:

If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

30 President Abraham Lincoln, *supra* note 17, at 253.

safety may require it," is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety *does* require it. . . . Now it is insisted that Congress, and not the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion.³¹

This is a necessity-as-canon-of-constitutional-construction argument—a “construe-to-avoid” argument. Sure, Taney’s position makes a good deal of sense as a matter of constitutional structure, logic, and history. As an abstract interpretive position, it might even have a claim to be the “better” answer. But the words do not quite *say* that Congress, and not the President, has the writ-suspension power. As Lincoln points out, the provision is not written that way; its purpose was obviously to address emergency and danger, and the logic of Taney’s position, followed to its logical conclusion, would be that the President would have no power to suspend the writ even if Congress *could not* meet to address the situation, with the consequence that the government would fall and with it the rest of the Constitution. This cannot be right, Lincoln said.

Perhaps without such a “push” from the principle of necessity, the interpretive question of whether the President may exercise the writ-suspension power might come out the other way.³² But under the actual circumstances of the case, Lincoln’s position is compelling and sensible, and ends up having more persuasive force than Taney’s otherwise persuasive arguments from context, structure, history, and precedent. The need to preserve the nation operates as a meta-rule of constitutional construction that legitimately can lead to a different interpretive outcome than one otherwise would reach.

Might such a rule of construction be relevant to some of today’s issues? Without pretending to offer a comprehensive discussion, I hazard some tentative observations, with respect to a few important issues.

31 *Id.*

32 The issue is a classic separation of powers question, where the distribution of power between the legislative and executive branch is unclear or its application is uncertain—a *Youngstown* “Category II” situation. See generally Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215 (2002) (discussing *Youngstown’s* paradigms and applying them to the post-9/11 war on terrorism).

First, consider the perennial issue of the Constitution's division of war powers. Congress possesses the power "to declare War," raise and support armies, regulate the military, and make laws "necessary and proper" for carrying into execution those powers and the President's.³³ The President is "Commander in Chief"³⁴ of the military and, further, possesses whatever remains of the traditional "executive Power"³⁵ after the Declare War Clause and other exceptions that Article I makes in favor of Congress. This residual executive power includes a vague power to "repel sudden attacks."³⁶ Consider, then, contemplated military force in situations of debatable emergency: Imagine a nation, believed to be armed with nuclear weapons or rapidly acquiring such capability, and also believed willing to use such weapons against the United States. Imagine that such a nation is either developing or in the process of developing the capability of delivering such weapons, or that it may well be inclined to convey such weapons to persons possessing such capability. Suppose that the President believes a preemptive attack by U.S. armed forces would be able to dismantle the potentially grave threat to the United States. Suppose the President believes the dangers of inaction are potentially catastrophic to the survival of the nation or millions of its people. Suppose also (what I believe to be true) that the better understanding of the Constitution's allocation of war powers is that Congress, not the President, has the power to decide to take the nation to war by initiating offensive military hostilities against a foreign sovereign power. Suppose that requesting congressional authorization would vitiate the opportunity to take the military preemptive action in question. Finally, suppose also that the scope of the assumed power of the President to "repel sudden attacks" (as a residual war power inherent in the vesting in the President of the "executive Power") does not obviously extend to the case of possible but not imminent attacks, and that the power unclearly, if at all, authorizes a doctrine of unilateral presidential power to employ military force in a preemptive fashion.

33 U.S. CONST. art. I, § 8.

34 *Id.* art. I, § 2, cl. 1.

35 *Id.* art. II, § 1, cl. 1.

36 This is a drastically compressed discussion. For more detail, see Paulsen, *supra* note 32, at 239 (arguing that the executive has constitutional power to repel sudden attacks and imminent threats even in a *Youngstown* "Category III" situation, where such action conflicts with congressional commands); Prakash & Ramsey, *supra* note 14, at 285 (reviewing the debate at the Convention over the war power, which resulted in the congressional power to "declare" war rather than "make" war, and concluding that the Framers desired to preserve the power of the President to repel attacks, as an aspect of the residual executive power).

May the President constitutionally take preemptive military action against the potential foreign aggressor? By hypothesis, the better answer, considered *apart* from the constitutional law of necessity (brought into play by the President's duty to preserve, protect, and defend the Constitution by protecting and defending the nation) is *no*. As an abstract proposition of constitutional interpretation, the better legal answer may be that Congress must authorize the use of offensive military force against an enemy power that commences hostilities of a type fairly characterized as "war," and that this (probably) does not fall within the scope of the President's executive power to repel attacks on the nation without awaiting congressional authorization.

But can this really be right? Under the assumed hypothetical scenario, the President constitutionally must refrain from action he deems essential to prevent a grave danger to the lives of millions of Americans. In real world situations like this, of various kinds, the executive branch's legal position, typically, is simply to assert a more expansive view of the scope of the President's inherent military authority as Commander in Chief than I have posited in the hypothetical. That is, the executive branch tends to push the envelope of inherent executive military power, claiming that it legitimately falls within the scope of the President's war powers. Academic theorists, confronted with such situations (both as a matter of theory or as a matter of historical practice), but unable to square such executive branch assertions with Congress's power under the Declare War Clause, will sometimes repair to nontextual doctrines of "inherent" or "emergency" power, to describe (and, perhaps, defend) such actions (again, either in theory or in practice).³⁷

My position is that, assuming legitimate interpretive ambiguity about the scope of presidential versus congressional constitutional war powers as applied to the circumstances of the hypothetical situation described above (or other analogous situations), the President's duty

37 In future work, I hope to take a more comprehensive look at the way the executive branch has defended various assertions of unilateral military power, and the various ways that scholars have sought to rationalize such assertions of power (in whole or in part) on alternative grounds. For an excellent general survey of war powers claims by the President throughout history, see LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (surveying presidential use of war powers from 1789 until President Clinton's military interventions in Haiti and Bosnia). For an excellent general survey of academic theories of "inherent" or "emergency" presidential powers (and the introduction of a new one of his own—*unconstitutional but permissible* exercises of emergency power), see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011 (2003).

to “preserve, protect and defend” and his evaluation of the necessity of unilateral action, properly supplies a *constitutional* rule permitting the President to *lawfully* resolve the ambiguity in favor of what he in good faith feels is the most nation-protective reading of the powers in question, under the circumstances. (If there is no legitimate interpretive ambiguity as to the division of war powers in this situation—if one assumes it is clear that the President may not act absent direct congressional authorization—one must repair to my third interpretive principle. I will reconsider this hypothetical below, in that context.³⁸)

This does not mean (as the executive branch might typically assert) that the President may unilaterally initiate war as a matter of interpretation of the allocation of the Commander in Chief power and the Declare War Clause power.³⁹ Nor does it mean that the President possesses *extra-constitutional*, “inherent,” or “emergency” powers that talismanically devolve on him, notwithstanding the absence of any textual constitutional grant of such powers. It means that the Presidential Oath Clause entails a command of presidential duty, and a corresponding view of the “executive Power,” that supplies a rule of construction for resolving the interpretive ambiguity.

Another set of situations, very much at issue as of the time of this writing, and likely to have been addressed in Supreme Court decisions by the time this Article is published, presents similar issues of interpretive ambiguity, where the constitutional law of necessity might legitimately be thought relevant. Do non-U.S. nationals, engaged in armed combat against the United States, who are captured by the U.S. military (or its allies) abroad in a theater of active combat and held outside the United States by the military, possess the right to challenge in U.S. courts the lawfulness of their military detentions, during time of war? May U.S. *citizens*, who have taken up arms against the

38 See *infra* Part II.C.

39 The leading academic defenders of such an approach are John Yoo and Robert Delahunty, both of whom have served in important positions in the Office of Legal Counsel of the U.S. Department of Justice. See, e.g., Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor and Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 488 (2002) (“[T]he Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the nation in its foreign relations, to use military force abroad, especially in response to grave national emergencies created by sudden, unforeseen attacks on the . . . United States.”); John C. Yoo, *War and The Constitutional Text*, 69 U. CHI. L. REV. 1639, 1654 (2002) (“[T]he Framers would have understood the President's powers as commander-in-chief and chief executive as vesting him with the authority to initiate and conduct hostilities. . . . [T]he power to declare war would not have been understood by the Framers as a significant restriction on the President's powers in war.”).

United States, as unlawful combatants of a foreign power or enemy—in common parlance, war criminals—be held in custody by military authorities, during time of war, or must they be transferred to civilian authorities for criminal charges or else released?

I do not purport to offer a detailed analysis of the questions here, other than to note that the cases present fairly contestable issues of constitutional interpretation.⁴⁰ In such situations, as between competing interpretations, each of which is arguably within the range of meaning and application of an uncertain provision, should not the prospect of grave risk or danger to the nation resulting from one of the alternatives, if satisfactorily established, counsel in favor of the construction less likely to produce destruction? Should not this principle apply even when the alternative construction might, absent the danger, be on balance the preferable one? This is not to suggest that Congress and the judiciary should defer completely to executive or military judgments about what actions are essential to national security. That is the path of *Korematsu*. Rather, the point is simply that for *any* actor attempting to interpret and apply the Constitution faithfully, the idea that provisions of the Constitution should be construed, where possible, to avoid grave harm to the nation, is a useful and a valid principle for choosing between plausible readings of ambiguous constitutional commands.

A final example of such a situation in which the construe-to-avoid canon may be applicable is the question of the lawfulness of the use of military tribunals to administer the war authority of the United States with respect to violations of the law of war by unlawful enemy combatants/war criminals. The essential question is whether and how the provisions of Article III, the Fifth Amendment, and the Sixth Amendment apply to such proceedings. Again, the issues strike me as not entirely free from doubt. The text of the constitutional provisions at issue would seem, albeit not clearly, to exclude the use of such tribunals and procedures to dispense justice. On the other hand, probably the better understanding of the nature of such tribunals and procedures is that they are applications of the *war* power to specialized cir-

40 See *Padilla v. Rumsfeld*, 352 F.3d 695, 698–99 (2d Cir. 2003) (holding that the detention of a U.S. citizen captured within the United States and held without a trial as an enemy combatant is unconstitutional absent congressional approval), *cert. granted*, 124 S. Ct. 1353 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1139–45 (D.C. Cir. 2003) (holding that the privilege of litigation does not extend to aliens in military custody outside of the United States), *cert. granted*, 124 S. Ct. 534 (2003); *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003) (upholding the detention of a U.S. citizen captured in Afghanistan and held without a trial as an enemy combatant), *cert. granted*, 124 S. Ct. 981 (2004).

cumstances, not really part of the *criminal justice* power to which the provisions in question appear directed. Historical practice, background principles of law against which the Constitution was framed, and reasonably clear judicial precedent all support the latter position.⁴¹

Even though, in this particular example, the legitimacy of military tribunals might appear the better interpretation of the Constitution even in the abstract, the principle that the Constitution's provisions should be construed to avoid tendencies toward self-destruction tends to make a doubtful answer less so. The constitutional law of necessity and self-preservation dictates that the first responsibility of the President in time of war, when the survival or safety of the nation is at stake, is to *win that war*. Where the application of force can fairly be characterized as an application of the *war* power rather than the application of a civilian justice-dispensing model, and given that history, practice, and judicial precedent all support such a characterization of the use of military tribunals, the fact that such proceedings arise out of *war*, as an incident of war, suggests that doubts about the correct application of the Constitution be resolved in favor of finding that such tribunals are constitutional as a necessary ingredient of the war power.

B. *Necessity, War, and Peace*

The last example leads me to the next interpretive principle that flows from the Constitution of Necessity: the Constitution's provisions sometimes *apply differently* in times of war, invasion, rebellion, or other comparable crisis or emergency, than they do in times of peace. The use of military commissions to "try" violations of the laws of war by unlawful enemy combatants is precisely such a case. The fact of war makes all the difference in the world. In times of peace, the criminal justice system may be the exclusive method for using state force to restrain liberty or impose punishment. But in times of war, concerning crimes of war committed by enemy combatants, that is no longer the case. The Constitution *applies*, in all its provisions, in time of war

41 See *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (holding that German saboteurs captured within the United States can be tried in military commissions). *Quirin* is both the key precedent and also contains much of the relevant historical evidence of background understandings and long practice. See also *In re Yamashita*, 327 U.S. 1, 8-9 (1946) (citing *Quirin* in upholding the power of the federal government to execute a Japanese general found guilty by a military tribunal, and denying judicial power to review the decisions of such military tribunals). See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998) (exploring the curtailment of civil liberties during wartime and the judicial response).

and in time of peace. But a good number of the Constitution's provisions *apply differently* to such different situations. The Constitution of Necessity, apart from supplying a constitutional rule of construction for other constitutional provisions in cases of uncertain application, means that some provisions simply apply quite differently where the preservation and defense of the nation is at stake.

Consider once again the words of President Lincoln, this time in an 1863 public letter defending military arrests, detentions, and punishments.⁴² One need not agree with how Lincoln applied this principle in all situations, including the one that provoked the letter (in which his application seems very likely wrong⁴³), in order to recognize that the principle itself may be a sound one:

If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion or invasion, the public safety does *not* require them; in other words, that *the Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security.* The Constitution itself makes the distinction; and I can no more be persuaded that the Government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown not to be good food for a well one.⁴⁴

Lincoln may be being just a bit too slick here, in one respect: the provision of the Constitution that "makes the distinction" between times of rebellion or invasion and other times concerns the power to suspend the privilege of the writ of habeas corpus—Article I, Section 9. It feels like a lawyer's trick to extrapolate from a specific power to suspend a specific right to a general power to suspend rights generally. Indeed, one could very plausibly argue just the reverse, on an *expressio unius* type of logic: that the mention of a specific suspension-

42 Letter from Abraham Lincoln, President of the United States, to Erastus Corning and Others (June 12, 1863), in *SPEECHES AND WRITINGS*, *supra* note 17, at 454.

43 The occasion for this public statement was a limited defense of the propriety of his general's having arrested and tried Clement Vallandigham, an Ohio Congressman who was engaged in antiwar agitation asserted to have a deleterious effect on the military. I find Lincoln's justification in the specific case unpersuasive, and the actions of his administration in violation of the First Amendment, but Lincoln's case is more plausible than academics tend to portray it. See Paulsen, *supra* note 15 (manuscript at 700–03, 702 n.24) (on file with Notre Dame Law Review).

44 Letter from Abraham Lincoln, *supra* note 42, at 460 (second emphasis added).

of-customary-rights power impliedly demonstrates the absence of a more general rights-suspension power in the national government. (This is one of the points Professor Prakash makes in critique of my general thesis, and I concede that it is a good one.)

In the end, though, it is true neither that the existence of the Writ Suspension Clause establishes a general principle of necessity nor that the negative implications of the Writ Suspension Clause tend to disprove the general principle. The idea of a constitutional law of necessity flows not from the Writ Suspension Clause, but from the presidential duty to preserve, protect, and defend the Constitution and the logical proposition that such a duty implies a duty (and power) of the President to take action indispensably necessary to preserve the nation whose Constitution it is. The specifics of the writ-suspension power neither prove nor disprove the general proposition.

But Lincoln is also making a narrower point. And it seems an obvious one: that at least *some* of the Constitution's provisions obviously do not apply *in precisely the same way* in time of war, national emergency, or grave peril, as they do in time of peace and security. One such example is, obviously, the Writ Suspension Clause—a power triggered by the existence of a condition of rebellion or invasion where public safety is deemed by the relevant decisionmaker(s) to require temporary suspension of customary civil liberties. Another famous example Lincoln might have invoked for this general proposition is his Emancipation Proclamation. Lincoln consistently disclaimed having had any power to free the slaves by executive order, throughout the nation, as a matter of ordinary executive power in time of peace. As explained in his letter to Senator Hodges, set forth at length above,⁴⁵ the Emancipation Proclamation was a military measure, triggered by the existence of military necessity in the fight to save the nation. Nor was it the case that the power came into being immediately upon the start of the rebellion, in Lincoln's view. It only became a proper war measure when it became indispensably necessary. In addition, one might legitimately ask whether the President was required to enforce the Fugitive Slave Clause—the constitutional requirement that slaves escaping to free states be “delivered up on Claim”⁴⁶ of the slaveowner—during the Civil War, as to claims made by slaveholders residing in rebel states. Here, apparently, is an example of a constitutional requirement that might legitimately be dispensed with, under the special circumstances that existed at the time.

45 See *supra* note 20 and accompanying text.

46 U.S. CONST. art. IV, § 2, cl. 3.

In each such case, national government powers exist or do not exist depending on the circumstances of national necessity. Plainly, then, it is true that not all constitutional provisions apply in the same way in time of war or crisis as they do in time of peace and stability. Would that it were not so: it is somewhat disheartening to think that individual rights might legitimately need to contract during times of war; it is discouraging to wonder whether such a situation could degrade into a permanent status; it is scary to contemplate a willful national government employing such a distinction unjustifiably, for insidious purposes. But it is a somewhat sad reality of our Constitution. The qualifier “somewhat” is appropriate, though. For the flipside of sadness that individual rights contract is relief that the Constitution wisely bends to give the government power to take actions necessary to preserve the nation and the Constitution.

Are there other specific provisions of such a nature? Again without attempting to be comprehensive, there seem to me to be several. Typically, they are constitutional provisions that provide a *standard* rather than a bright-line *rule* with respect to the scope of individual rights. For example, what constitutes a “reasonable” search and seizure within the meaning of the Fourth Amendment surely depends on the circumstances.⁴⁷ One of those circumstances is national security. A search that might otherwise be unreasonable might become reasonable in an emergency. (Even the Supreme Court’s convoluted Fourth Amendment jurisprudence embodies “exigent circumstances” exceptions to usual requirements.) A danger of a nuclear bomb being detonated tends to make a necessary search seem reasonable, at least to most reasonable (i.e., non-law professor) minds. If terrorists can wreak havoc by hijacking airplanes with small weapons, it is reasonable to strictly screen *all* passengers, probable cause or not. And whatever the propriety of racial or other profiling in police work generally, if information about an impending or suspected upcoming act of war or terrorism against the United States or its citizens correlates with the believed attackers’ race or gender, it becomes commensurately more reasonable to “profile” based on such characteristics.

Similarly, what process is “due” before the government takes certain actions with respect to detention or incarceration of individuals, and what punishments are “cruel and unusual” under the circumstances, are questions of application of general *standards*, not bright-line rules. As such, how they apply in different or unusual circumstances—or, to be more specific, in circumstances involving grave na-

47 I have defended this proposition in other work, considered apart from concerns of national security. See Paulsen, *supra* note 13, at 1460–62, 1472–76.

tional danger—depends to a significant degree on those circumstances.

This is not to say that *all* constitutional provisions in favor of individual liberties are of such a nature. They are not. Many establish hard rules, not soft standards. Nor is it to say that all provisions of the Constitution are subject to one great big balancing test, as Professor Prakash devilishly chided me—knowing how much it would irritate me—at the symposium presentation of these ideas. It is simply to say that, where the Constitution sets a standard, and where that standard's application is arguably circumstance-dependent, *how* that standard applies certainly must take into account the constitutional law of necessity. Indeed, such provisions seem to have built into them the flexibility to accommodate such circumstances.

At a workshop in which an earlier version of this Article was presented, some questions raised the increasingly well worn hypothetical of the propriety of torturing a suspect if necessary to obtain information about the whereabouts of a nuclear bomb about to destroy New York City. To me this is a relatively easy question. Torture is a horrible thing; there is great danger in explicitly sanctioning it; there are slippery-slope tendencies, once authorized in principle, to apply such tactics where not necessary; it may produce unreliable information. *But in principle*, if it were known that by torturing the guilty one could reliably obtain information necessary to save millions of innocents, I believe such action is morally justified. More than that, I believe it would be *constitutional*. It would not violate the Fourth Amendment. The reasonableness of the intrusion is a function of the circumstances, and the magnitude of the imminent danger can justify what otherwise might be an unreasonable seizure of the person. At the very least, surely the urgent necessity of averting a cataclysmic occurrence is a legitimate consideration in the constitutional calculus.

For some, this medicine is too strong. But as Lincoln put it in his 1863 letter to Corning, the fact that medicine might be poor food for a well man does not mean it is not good medicine for a sick one.

Nor am I able to appreciate the danger apprehended by the meeting that the American people will, by means of military arrests during the Rebellion, lose the right of Public Discussion, the Liberty of Speech and the Press, the Law of Evidence, Trial by Jury, and Habeas Corpus, throughout the indefinite peaceful future, which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics during tempo-

rary illness as to persist in feeding upon them during the remainder of his healthful life.⁴⁸

As noted above, I disagree with Lincoln's application of these principles in the specific context before him, involving the freedom of speech of an antiwar agitator. But even that disagreement suggests a further observation. With respect to a great many constitutional provisions, including those seemingly cast in absolute terms—hard rules, not standards—the *courts* have found implied exceptions in favor of necessity, in the form of sufficiently “compelling” interests to justify what otherwise would be departures from the baseline constitutional rule. Put bluntly, the courts have turned many seemingly bright-line rules into amorphous balancing tests, and balanced away constitutional rights against perceived policy imperatives. To whatever extent one accepts such decisions as being consistent with the Constitution (and I am more skeptical than most in this area), they too are examples where specific provisions of the Constitution apply differently in different circumstances. If freedom of speech can be balanced against ostensibly “compelling” interests in regulation of campaign expression;⁴⁹ if the free exercise of religion can be balanced against “compelling” interests in administrative convenience;⁵⁰ if the equal protection of the laws permits racial profiling, classification, and differential treatment upon a showing of a “compelling” interest in racial diversity in state law school classroom discussions,⁵¹ it would seem to follow a fortiori that compelling interests in national self-preservation, national security, and protection of innocent civilians from military or terrorist attack by foreign enemies likewise could justify restrictions of constitutional freedoms and protections.

I tend to think that the better understanding of such “compelling interest” exceptions to constitutional provisions is *not* that such provi-

48 Letter from Abraham Lincoln, *supra* note 42, at 460–61.

49 See *McConnell v. Fed. Election Comm'n*, 124 S. Ct. 619, 659–66 (2003) (holding that the limitations on political parties' power to spend, raise, solicit, or direct campaign funds is not an impermissible infringement upon the parties' free speech because the government's interest in preventing apparent and actual corruption constitutes a “sufficiently important” interest to allow for limitations on such campaign related activities).

50 For a collection of dubious assertions of “compelling government interest” in the area of free exercise of religion, see Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 263–83 (1995).

51 See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2346–47 (2003) (holding that, while the Fourteenth Amendment's purpose was to do away with government imposed discrimination based on race, the use of race in admissions decisions is acceptable if the policy is to be of a limited duration, because of the compelling state interest in “obtaining the educational benefits that flow from a diverse student body”).

sions, on their own terms, contemplate balancing tests. That is, they are not provisions of the sort that can fairly be described as properly depending, in their application, on the circumstances. Rather, I think that such “compelling interest” tests can only be justified in theory (if at all) on some variant or another of the proposition that principles of constitutional necessity—interests of a sufficient order of importance that they can be thought of as explicitly or impliedly of constitutional stature—*trump* what otherwise would be the constitutional rule. They are, in short, illustrations of my third interpretive principle, to which I now turn.

C. *Necessity as a Rule of Constitutional Priority*

The third interpretive principle is, quite rightly, the most controversial. The rule of necessity is not only a rule of construction with respect to ambiguous provisions; it is not only a rule of different application of certain provisions in time of war or crisis as opposed to peace and repose. More than these, the rule of necessity is, when push comes to shove, a *rule of constitutional priority*. The first duty of the President of the United States is to preserve, protect, and defend the nation, through every indispensable means. That duty is both a precondition to and an essential aspect of the duty to preserve, protect, and defend the Constitution. The duty is superior to the duty to enforce any particular provision, where doing so would be in conflict with such a broader conception of constitutional duty.

As Lincoln put it—correctly—“*a life is never wisely given to save a limb.*”⁵²

If this principle is right, it implies a meta-rule of constitutional interpretation: that preserving the Constitution as a whole—preserving the United States of America and “We the People” who ordained and established the Constitution—must, in the event of conflict, take precedence over strict adherence to specific parts of that Constitution. The parts must be understood as subordinate to, and contingent on, the preservation of the whole. It is true that the Constitution contains no true “severability clause.” Thus, any time that a specific provision is violated, the Constitution is violated and we no longer have, for so long as the violation persists, quite the same “Constitution” we had absent the violation. The Constitution is a whole. But it surely cannot be that *as between the choice of two impairments of the constitutional system, one of which destroys more of the system, or all of it, and one of which destroys less, that no action may be taken which tends to destroy, even tempo-*

52 Letter from Abraham Lincoln, *supra* note 20, at 585 (emphasis added).

rarily, less of the Constitution, if doing so is (correctly) judged indispensably necessary to avoid destroying more of it. Even for one who aspires to be a constitutional purist (as I do), and follow the logic of the Constitution where it leads, it is hard to say that the Constitution is properly interpreted to require such a self-destructive course. Our constitutional life is never wisely given to save a constitutional limb.

Hear Lincoln again on this point:

[M]y oath to preserve the constitution to the best of my ability, imposed upon me the duty of preserving, *by every indispensable means*, that government—that nation—of which that constitution was the organic law. . . . I felt that *measures, otherwise unconstitutional, might become lawful, by becoming indispensable* to the preservation of the constitution, through the preservation of the nation.⁵³

Lincoln's logic is flawless here, though the result may be counter-intuitive. His rule is one of constitutional duty creating sensible constitutional priorities, with the result that measures that might otherwise be thought unconstitutional in fact become constitutionally justified on the basis of a superior principle. Note well: This is *not* a doctrine of *extra-constitutional* emergency powers, or a power to *suspend* the Constitution. Rather, it is a rule *of* the Constitution. It is a rule of logical priority of not sacrificing the whole of the Constitution to a part.

In a sense, this principle can be seen as nothing more than an internal rule of construction of the Constitution, similar in a way to the rule offered earlier that specific provisions should be construed to avoid constitutional implosion or tendencies to self-destruct. Here, the rule of construction is an interpretive rule for reconciling conflicting (by hypothesis) constitutional provisions. *Where one concludes that two constitutional provisions unavoidably conflict, apply the more fundamental, foundational provision rather than the less important one, precisely to the extent of the conflict.* If one accepts the principle that the Presidential Oath Clause's "preserve, protect and defend" injunction is an allusion to, or itself the statement of, a principle of constitutional self-preservation, to be carried out by the President pursuant to the executive power of the nation, then one needs a rule for deciding what to do when *that* constitutional provision conflicts with another one.

My thesis is that the "preserve, protect and defend" command must take priority over practically any other constitutional rule set forth in the document.⁵⁴ This is not an unusual canon in the least.

53 *Id.* (emphasis added).

54 As discussed below, there are some *checks* against abuse by the President of his constitutional power to preserve, protect, and defend the Constitution (by protecting

Nor is it in the least improper to identify such a canon as implicit in the nature of the Constitution as a unified written text—a “Code” as it were, not terribly different from other legal codes or systems. The Framers of the Constitution recognized (and we continue to recognize today) canons of legal interpretation to be applied when two statutes within a single code or system of laws conflict. In *The Federalist* No. 78, Alexander Hamilton, in the course of his explanation of the simple logic of what we call “judicial review,” first notes this rule for “determining between two contradictory laws”:

It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other and neither of them containing any repealing clause or expression. . . . So far as they can, by fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other.⁵⁵

Hamilton continues, noting that “[t]he rule which has obtained in the courts” in such cases “is that the last in order of time shall be preferred to the first” but that this is “a mere rule of construction, not derived from any positive law but from the nature and reason of the thing” that the courts have adopted as “consonant to truth and propriety” as a way of deciding as between “interfering acts of an *equal* authority.”⁵⁶ Hamilton then goes on, more famously but of less relevance here, to describe the rule that “the nature and reason of the thing” indicates that between interfering acts of a superior authority (constitutions) and an inferior authority (such as statutes) “the prior

the nation and its people) that are themselves so fundamental to preserving, protecting, and defending the Constitution against internal abuse by a willful, corrupt, usurping President, acting (wrongly) in the name of protecting the nation, that they must be deemed to weigh against the legitimacy of a purported assertion by the President of the principle of constitutional priority. See *infra* Part III.B. The checks I have in mind are those created by the existence of periodic elections, the existence of the other branches of the national government, and the ultimate availability of the check of impeachment—the precise checks noted by Alexander Hamilton at the close of *The Federalist* No. 77’s multi-paper discussion of the Presidency as the core “requisites to safety” of the public against a President who would abuse his constitutional powers. See THE FEDERALIST NO. 77, *supra* note 1, at 431–32 (Alexander Hamilton). These checks mark the limit of legitimate presidential power to act in the name of necessity. It is hard to imagine any situation where presidential action eviscerating checks on presidential power possessed by the other branches of national government could be justified as indispensably necessary to save the Constitution. See *infra* note 77.

55 THE FEDERALIST NO. 78, *supra* note 1, at 436 (Alexander Hamilton).

56 *Id.*

act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority.”⁵⁷

The situation I have posited is “interfering acts of an *equal* authority” *within the Constitution* itself. Like Hamilton, I maintain that the first step (my first interpretive principle) is to seek to reconcile the two to each other, insofar as practicable. Thus, specific provisions should be construed to avoid conflict with the broader principle of overall national and constitutional survival, wherever they are fairly susceptible of such a “saving” construction. But where this is “impracticable, it becomes a matter of necessity” (an interesting choice of words) “to give effect to one in exclusion of the other.”⁵⁸

Lincoln’s insight with respect to conflicts between constitutional principles is the same as Hamilton’s for statutory conflicts: to determine which to give effect, one needs a second order rule “consonant to truth and propriety” that accords with “the nature and reason of the thing.”⁵⁹ Lincoln’s principle was simple and straightforward: the part must yield to the whole; the less fundamental provision must yield to the essential provision.⁶⁰

One can see further support for such an approach in *The Federalist* No. 40. James Madison defended the propriety of the Constitutional Convention’s seeming enlargement of its charge by proposing a completely new constitution, on the ground that the Convention had a choice between two competing mandates—to frame “a *national government*, adequate to the *exigencies of government and of the Union*”; and to propose “*alterations and provisions in the Articles of Confederation*” effecting such changes.⁶¹ Madison defended the Convention’s proposed scrapping of the Articles as being necessary in order for the Convention to adhere to the more important mandate. Madison offered the following general statement of interpretive priorities:

There are two rules of construction, dictated by plain reason as well as founded on legal axioms. The one is that every part of the expression ought, if possible, to be allowed some meaning, and be made to conspire to some common end. The other is that where the several parts cannot be made to coincide, the less important

57 *Id.*

58 *Id.*

59 *Id.*

60 For a systematic presentation of Lincoln’s views in this regard, and its extension to other areas (including the propriety of secession and the impropriety of judicial supremacy), see generally Paulsen, *supra* note 15.

61 THE FEDERALIST NO. 40, *supra* note 1, at 216 (James Madison).

should give way to the more important part; the means should be sacrificed to the end, rather than the end to the means.⁶²

Lincoln's interpretive principle of constitutional priority can thus be seen as standing in an interpretive tradition with roots in the framing generation and employing the same logic that Madison used in explaining the propriety of the Constitutional Convention's proposal and that Hamilton used in the course of explaining why judicial review was consonant with well accepted interpretive rules for reconciling, or subordinating, conflicting legal commands.⁶³ So viewed, the third interpretive rule indicated by the Constitution of Necessity is not quite as radical as it may at first appear.

Indeed, as noted, this view is not so different from myriad "compelling state interest" tests developed by the courts, whereby specific constitutional provisions are overcome—trumped—by exceptions to the stated rule implied out of a sense of necessity. Unfortunately, however, what the courts hold sufficient to constitute such a "compelling interest" often falls well short of what one might think to be true *necessity*, in the sense of an urgent need to protect the nation or its people from devastating events rending the nation—the scope of the "necessity" principle that I defend here.⁶⁴ In short, the argument offered here is that the President of the United States may do, by virtue of his oath and the duties and powers it implies, what the Supreme Court of the United States does all the time. Surely, if the idea of recognizing "compelling" interests sufficient to trump what otherwise

62 *Id.*

63 Thomas Jefferson invoked similar reasoning in justifying, years later, the propriety of the Louisiana Purchase. Jefferson's view, consistent with his narrow construction of federal powers generally, was that the Purchase was strictly speaking unconstitutional, but justified by circumstances, and that his duty as President required him to take such action, whether constitutional or not. There are some flaws in Jefferson's approach—in particular, he seems quite wrong in believing that the Constitution did not permit acquisition of new territory—but his "necessity" argument is intriguing, and provides indirect support for Lincoln's more rigorous formulation in terms of the obligation created by, and power implied by, the Presidential Oath Clause. Jefferson wrote:

A strict observance of the written law is doubtless *one* of the high duties of a good citizen, but it is not the *highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.

Letter from Thomas Jefferson, President of the United States, to John B. Colvin (Sept. 20, 1810), in *BASIC WRITINGS OF THOMAS JEFFERSON* 682 (Philip S. Foner ed., 1944).

64 See *infra* Part III.A.

would be the baseline constitutional rule is a legitimate constitutional principle, that principle is fully generalizable to all constitutional interpreters—including, of course, the President of the United States. If the courts may interpret constitutional provisions as containing implied exceptions attributable to necessity, the President may do the same. (Indeed, on the view that the courts' pronouncements have special authoritative weight, the President *should* apply a similar approach in carrying out his own duties of faithful law execution.)

If anything, the principle I defend here is better, because narrower (in addition to being more textually defensible). True constitutional necessity is the standard, not watered-down "compelling" governmental interests in whatever the government thinks important at the moment. Only those actions dictated by (in Lincoln's words) "indispensable necessity"—those actions indispensably necessary to fulfill the President's obligation to preserve, protect, and defend the nation whose Constitution it is—should satisfy the standard. (I will have more to say about this standard, and who is to apply it, presently.)

All of the examples offered above, for the first two interpretive propositions, could also serve as examples of the third proposition of constitutional priority. Indeed, Professor Prakash, commenting on this Article at the symposium, asked why one should not simply cut to the chase and always invoke this third point, rather than labor through the other two. One simple answer might be that the less dramatic, sweeping constitutional rule should be the first resort, and the more extreme rule resorted to only *in extremis*, when no other principle would do. As should be immediately apparent, the more sweeping rationale is potentially difficult to cabin and, because more sweeping, its abuse would sweep in greater dangers.

A further possible objection to this theory (aside from its evident dangers, which I address in the next Part), is that, if actually applied, it might well mean that the President of the United States had greater executive power than the British King to act, in emergency situations, in violation of usual legal restrictions. Surely (the argument goes) that cannot be a correct construction of "[t]he executive Power" of Article II, as the Framers understood it; a construction cannot be correct if it would result in the President possessing, in any circumstances, powers greater than the British King.⁶⁵

Accepting for the sake of argument the premise concerning the scope of the British King's power to act in an emergency (a point

65 Professor William K. Kelley of the Notre Dame Law School posed this question at the symposium, and I thank him for it.

which I am unprepared to contest without further research), it does not quite follow that the President's powers must always be less. To be sure, the Constitution's Framers withheld from the President, or required him to share with others, certain powers traditionally associated with the British King. But the U.S. Constitution is a written Constitution, and it is not at all impossible that the logical implications of a written power, fairly construed, might permit valid applications that would not have been anticipated by the provision's drafters and that might permit some exercises of power not traditionally recognized as belonging to the British King of the time.

For example, the British King lacked any power to suspend application of the laws—to refuse to execute an enactment of Parliament. Yet if it is true that the President of the United States, by virtue of the Presidential Oath Clause, the “take care” clause, and the structural priority of the written Constitution over legislative enactments contrary to it, may decline to execute a statute on the ground that it is *unconstitutional*, that is a power the British King would not have had.⁶⁶ In form, such action resembles a power to “suspend” the laws. And in substance, where the power of constitutional legal review exists, it has essentially that consequence. But that consequence flows from the logical implications of written constitutionalism and constitutional supremacy over legislative acts. Great Britain did not (and does not) have a written constitution, and the idea of constitutional supremacy over legislative acts is incoherent under the British model.

In similar fashion, the relevant question is whether the Presidential Oath Clause reflects an understanding of executive power, and imposes a duty on the President, that might mean that, under the U.S. constitutional system, the President possesses authority to apply a constitutional law of necessity in situations where the British King would have lacked a corresponding power. It is not sufficient, I believe, to take the King as a baseline and assume that any uses of power “above”

66 See J. Randy Beck, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 422–24 (1999) (book review) (reviewing the history of the abolishment of the King's power to suspend statutes with the passage of the English Bill of Rights and arguing that the King's suspending power is distinguishable from executive review on the ground that executive review only exists for violations of the Constitution, not as a general veto); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 924–27 (1990) (arguing for “presidential review,” under which the President may refuse to enforce laws thought by the President to be unconstitutional, but denying the President the power to refuse to enforce specific judgments of the courts).

that line by the American President are, for that reason alone, unconstitutional.⁶⁷

My contention is not that the "Constitution of Necessity" was specifically intended by the Framers, but that it is a logical consequence of the provisions they wrote and the system that they created—and that this, rather than subjective intentions or expectations, is what counts. To be sure, they could have been more explicit in creating emergency power in the President. Instead, it is left to inference and deduction from what must be conceded to be a somewhat cryptic provision—the President's oath. But the whole issue is whether this inference and deduction is a sound one. Moreover, there may have been good reasons *not* to be explicit, as we shall see.

III. STANDARDS, DECISIONMAKERS, DANGERS, AND CHECKS

The problem with all this, of course, is that it is susceptible to abuse. The fact that a power is dangerous, however, does not prove that it does not exist.⁶⁸ It proves only that it is dangerous. The existence of such danger suggests that the standards for the exercise of the dangerous power be constrained, and that its exercise not go unchecked by others. I conclude, therefore, with a brief—and prelimi-

67 Justice Taney made a similar objection to the President's asserted power to suspend the privilege of the writ of habeas corpus, in his opinion in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Justice Taney wrote:

And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression, they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it.

Id. at 150.

68 Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 84 (1861):

This is a great power in the hands of the chief magistrate; and because it is great, and is capable of being perverted to evil ends, its existence has been doubted and denied. . . . Yes, certainly it is dangerous—all power is dangerous—and for the all-pervading reason that all power is liable to abuse. . . . Still, it is a power necessary to the peace and safety of the country, and undeniably belongs to the Government, and therefore must be exercised by some department or officer thereof.

Id.; cf. *Luther v. Borden*, 48 U.S. (7 How.) 1, 44 (1849):

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual.

nary—discussion of *how* the “Constitution of Necessity” is to be applied, and *who* is to do (and who is to restrain) the applying.

A. *Standards*

President Lincoln had it pretty much right, as to the core standard: “indispensable necessity.”⁶⁹ Lincoln considered it his duty to preserve, “by every indispensable means, that government—that nation—of which the constitution was the organic law.”⁷⁰

Under Lincoln’s standard, what are the interests sufficiently compelling to invoke the constitutional principle of necessity? There is fair room for argument: surely national survival qualifies; surely protection of the nation against devastating military or terrorist attack, potentially crippling our ability to respond and continue to protect the nation against its enemies; probably protection of the nation’s *people*, in circumstances falling well short of a risk of complete destruction of the constitutional order. I would be inclined to press the scope of compelling national interests at least that far, and probably further. But there are limits: surely the President could not properly invoke, as national interests sufficiently compelling to invoke a principle of necessity, some of the things that courts have found to be “compelling” in the myriad areas where such tests have been applied.⁷¹

The standard of “indispensable necessity” also implies a close means-ends fit of measure to compelling objective. The fact that national survival is important does not mean that the government can nationalize the steel mills to avert a labor strike.⁷² Not all measures that might arguably further national security goals are indispensably necessary to those goals. Lincoln viewed habeas suspension, and even emancipation, as measures of last resort, not first.

Such “compelling interest” and “narrowly-tailored” or “least-restrictive means” tests pop up everywhere in constitutional law. If such standards, with their unavoidable imprecision, are acceptable in other areas of constitutional law, it is hard to see why a similar standard—especially one so formulated as to be at the strictest end of the continuum—should not likewise be tolerable in the context of actions taken to preserve, protect, and defend the fundamental survival of the United States and its people.⁷³

69 Letter from Abraham Lincoln, *supra* note 20, at 585–86.

70 *Id.*

71 See *supra* notes 49–51.

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

73 I have not attempted to tie the relevant standard to any particular formulation of the courts in any particular context, but certain truly strict doctrinal formulations

B. *Who is to Judge?*

But who is to judge whether that standard is satisfied? The question of the relevant decisionmaker or decisionmakers is as important as the standard itself, perhaps more so.

My answer is that the President, at least in the first instance—and perhaps even ultimately—must make the call. That is intrinsic in the nature of the power and the raw fact that the Constitution locates it in the President. It is the *President* that swears the oath to “preserve, protect and defend” the Constitution. It is in the nature of executive power, and the office, to bear this responsibility. In the press of circumstances, it is the President who must be the judge of whether exigency requires action, whether such action comports with the fundamental charge to preserve, protect, and defend the Constitution of the United States of America, and the course of action that the situation requires. The Constitution establishes the duty, and “[t]he responsibility must be where the power is.”⁷⁴

strike me as appealing analogies, specifically the standard for suppression of assertedly dangerous advocacy urged by Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 376–78 (1927) (Brandeis, J., concurring):

[T]here must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State.

Id. With respect to the duty to preserve, protect, and defend the nation, there must be a reasonable ground to fear that a serious, imminent evil will result if action is not taken. Brandeis’s free speech formulation goes on to state: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.” *Id.* at 377. Likewise for the constitutional law of necessity: if time and circumstances admit of alternative measures of intercepting the evil—measures *not* generally “otherwise unconstitutional”—those measures, not the doctrine of necessity, are to be employed. *See also* *N.Y. Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) (“[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.”).

⁷⁴ *N.Y. Times Co.*, 403 U.S. at 728 (Stewart, J., concurring). This was Lincoln’s view as well. Lincoln believed that some constitutional officer must make the ultimate judgment of what necessity dictates and that, in time of war, that judgment devolves, finally and unavoidably, on “the man whom, for the time, the people have under the constitution, made the commander-in-chief, of their Army and Navy” President

That does not mean—cannot mean—that the power is an unchecked one. The power is *not exclusive* to the President. And it is worthy of repetition that the power is *not plenary* either. The President of the United States is given the *responsibility* for making the judgment. But that does not mean that he may do whatever he wants, and it does not mean that other constitutional actors should go along with whatever he does. Constitutional responsibility does not imply constitutional unaccountability.

As suggested at the outset of this Article, Congress has a substantial measure of power to direct, control, limit, and check the President in this area. The Necessary and Proper Clause gives Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers *and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*”⁷⁵ If the Constitution implies a rule of necessity, and if the President is, by virtue of the Presidential Oath Clause, the principal interpreter and executor of the constitutional law of necessity, it remains the case that Congress has concurrent power in this area, by virtue of the Necessary and Proper Clause. Congress has power to make laws for carrying into execution the power to preserve the nation. That power is both a power to further the President’s actions and a power to interpret the “Constitution of Necessity” and check presidential actions that abuse it. In theory, I believe Congress could pass a statute providing that “the President is directed to take all necessary action to preserve, protect, and defend the nation and its citizens, in time of emergency or crisis, without awaiting specific congressional authorization.” If the Presidential Oath Clause suggests the existence of a constitutional power of self-preservation, Congress can legislate to implement that power. In theory, Congress equally could pass a statute purporting to define and limit the circumstances in which such a power may be exercised—much as the War Powers Resolution has sought to define and regulate the extent of presidential war powers.⁷⁶ Whether such legislation could effectively constrain presidential action would be (as with the case of the War Powers Resolution) a function of the interaction of the branches, political circumstances, the good faith of the respective political branches, and the perceived imperatives of the situation.

Abraham Lincoln, Reply to the Ohio Democratic Convention (June 29, 1863), in *SPEECHES AND WRITINGS*, *supra* note 17, at 467.

⁷⁵ U.S. CONST. art I, § 8, cl. 18 (emphasis added).

⁷⁶ War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555 (1973). For a discussion of the War Powers Resolution as an act of congressional interpretation, see Paulsen, *supra* note 32, at 242–50.

Moreover, Congress possesses all of its usual high trump powers with which to check the President: control over appropriations, a check on appointments, and ultimately the power to impeach and remove a President it believes to have abused the powers and duties of the office. In the end, these powers will work to check an abusive President, or nothing will. The Framers believed that term of office, congressional powers generally, and the power of impeachment, would serve as the only appropriate, but nonetheless entirely sufficient, checks on the President.⁷⁷

The courts, too, can serve to check the President. The “Constitution of Necessity” is part of the Constitution, and while it does not supply crystalline standards readily susceptible of judicial decision, that does not mean that no proper case could ever come before the judiciary; nor does it mean that the judges should dismiss all such matters as “political questions” or that the judges would be obligated to defer to the President’s judgments in all such matters. That the President’s duty is primary, and his responsibility nonabdicable, does not mean that the judiciary (or Congress) lacks any proper constitutional role and should acquiesce in whatever the President does. That the President is charged with the primary role in making judgments concerning the degree of necessity does not mean that the judiciary may not render decisions finding a particular judgment to be outside the range of legitimate evaluations of necessity.⁷⁸

77 In *The Federalist* No. 77, Alexander Hamilton named the following checks on presidential power:

[T]he election of the President once in four years by persons immediately chosen by the people for that purpose, and his being at all times liable to impeachment, trial, dismissal from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially feared, the Chief Magistrate of the United States, would by that plan, be subjected to the control of a branch of the legislative body. What more can an enlightened and reasonable people want?

THE FEDERALIST NO. 77, *supra* note 1, at 431–32 (Alexander Hamilton). It follows from the checks that the Constitution creates that presidential action in the name of constitutional necessity is least defensible where it impairs or destroys these checks. The Constitution itself, in its fail-safe checks against presidential usurpation, implies that the limits of the doctrine of necessity are marked by the necessity of preserving political checks to its exercise: elections, impeachment, and the existence of independent coordinate branches of the national government. See *supra* note 54.

78 For a good working model of proper judicial review of executive or military judgments, one need look no further than the dissenting opinions in *Korematsu*, especially that of Justice Murphy. Murphy recognized the legitimacy of wartime actions

The Japanese Internment Cases—*Hirabayashi v. United States*⁷⁹ and especially *Korematsu v. United States*⁸⁰—illustrate presidential and military misuse of asserted constitutional power in time of war. But the actions of President Roosevelt were taken with full congressional authorization and endorsement, and were duly ratified by the Supreme Court. The World War II internment of Japanese-Americans was a tragic injustice, but it was one perpetrated by all three branches of the national government. It does not so much demonstrate the dangers of presidential power (though it does tend to demonstrate that as well) as the dangers of too-great judicial deference to the judgments of military officials as to when “necessity” really exists and what “necessity” truly requires.⁸¹

based on necessity and the need to “accord great respect and consideration to the judgments of the military,” *Korematsu v. United States*, 323 U.S. 214, 233–34 (1944) (Murphy, J., dissenting), reviewing such judgments on a deferential standard of “reasonable relation to the removal of the dangers of invasion, sabotage and espionage.” *Id.* at 235 (Murphy, J., dissenting). But that did not preclude serious review of the facts presented to justify the government’s actions. *See id.* at 240–42 (Murphy, J., dissenting).

79 320 U.S. 81, 105 (1943).

80 323 U.S. 214, 219–20 (1944).

81 Candor compels me to acknowledge that the overall theory I advance here—that there exists a constitutional law of necessity, and that the President possesses the duty to take action indispensably necessary to the preservation of the nation—is in some tension with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), a case that I have elsewhere celebrated for its holding “that the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency.” Paulsen, *supra* note 32, at 215. But I believe that *Youngstown* is more an *illustration* than a *refutation* of the existence of a “Constitution of Necessity.” To be sure, the majority opinion of Justice Black rejected President Truman’s assertion of “inherent” or “emergency” power to seize the nation’s steel mills—at least in the particular case at hand—where the power claimed was rather clearly legislative in character. And while Justice Black’s opinion is not free of ambiguity on this point, it can fairly be read as a categorical rejection of the idea of inherent presidential powers. (Justice Jackson’s important and influential concurrence *is* explicit in this regard, and I address that opinion presently.)

The *result* in *Youngstown*, however, seemed to turn largely on (1) the absence of true necessity requiring unilateral presidential action, and (2) the presence of congressional action apparently in opposition to—limiting, checking—Truman’s actions taken in the name of necessity. A careful look at the opinions suggests that *Youngstown* is not inconsistent with a claim of a presidential duty to take action he deems indispensably necessary to preservation of the nation and its constitutional order; it is inconsistent only with any claim that such power is unchecked, unreviewable, and unlimited. In many ways, *Youngstown* is an illustration of the *limits* of a constitutional doctrine of necessity and presidential power to act on such grounds; it is not a repudiation of the possibility of such a doctrine as a general proposition. Interestingly, a majority of the Justices in *Youngstown* appears to have embraced some version of the

“preserve, protect and defend” theory of presidential constitutional power to take measures indispensably necessary to save the nation and the Constitution. That of course was the core of Chief Justice Vinson’s dissent (for three Justices). See *id.* at 681–82 (Vinson, C.J., dissenting) (invoking the Presidential Oath Clause and contending that the Framers did not “create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake”). Justice Clark’s concurrence (in the judgment only, and not the opinion of the court) is singularly explicit in embracing a constitutional law of necessity, quoting Lincoln’s letter to Hodges with approval and concluding that “the Constitution does grant to the President extensive authority in times of grave and imperative national emergency” and that “such a grant may well be necessary to the very existence of the Constitution itself.” *Id.* at 661–62 (Clark, J., concurring in the judgment). What made Clark’s opinion a concurrence rather than a dissent was the view—a view shared with other concurring justices in the majority—that the asserted imperative necessity for presidential legislative action (1) simply did not exist as a matter of fact, given legal alternatives available to the President, and (2) was in opposition to Congress’s legislative grant of certain powers to act in emergencies and specifically to act in the area of threatened labor strikes endangering important national interests, and Congress’s reasonably explicit refusal to grant *other* powers to act, notably the seizure power claimed by President Truman. See *id.* at 660 (Burton, J., concurring) (“The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency.”); *id.* at 602 (Frankfurter, J., concurring) (“Congress has expressed its will to withhold this power . . .”).

The most eloquent judicial rebuttal of a constitutional principle of necessity is contained in Justice Robert Jackson’s celebrated concurring opinion in *Youngstown*. The Framers “knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.” *Id.* at 650 (Jackson, J., concurring). Especially given Congress’s power, and exercise of its power, to enact legislation granting emergency powers, “I am quite unimpressed with the argument that we should affirm possession of them without statute.” *Id.* at 653 (Jackson, J., concurring). “Such power either has no beginning or it has no end.” *Id.* (Jackson, J., concurring). When all is said and done, however, Jackson’s opinion, famous for its “categories” of presidential-congressional interactions, and its recognition of a “zone of twilight” in which powers are unclear and congressional quiescence can invite, or permit, unilateral presidential action, see *id.* at 635–38 (Jackson, J., concurring), ruled against President Truman’s inherent/emergency power argument largely because it was not supported on the facts of the case, and because it was inconsistent with Congress’s assertion of *its* legislative powers in an area where Congress certainly had nothing *less* than concurrent authority with the President. See *id.* at 637–40 (Jackson, J., concurring). As such, even Jackson’s opinion cannot be read as an absolute rejection of—and can even be read as supporting, to a point—presidential power to construe the Constitution, in areas of ambiguity, to avoid potentially nation-destructive results; to apply certain of its provisions differently in times of war and national emergency; and to give priority to preservation of the nation whose Constitution it is rather than any particular constitutional requirement, where such action is *truly* necessary, and where exercise of such power is subject to limits created by Congress’s exercise of its legislative power.

In the end, however, it all turns back on the office of President of the United States. If the duty conferred by the Presidential Oath Clause is truly an independent, personal, and nonabdicable one, not exercised in subordination to others, then the President cannot be bound by the decisions of courts, in the sense that he *must* defer, no matter what. Lincoln defied Chief Justice Taney's order invalidating Lincoln's suspension of habeas corpus.⁸² If a President concludes that the survival of the nation or its people depends on a course of action that is indispensably necessary to avert such a disaster, his duty as President—his duty *to the Constitution*—requires that he not let a judicial decision to the contrary prevent him from performing what his duty requires.

In the end, it really cannot be any other way. The President possesses the power and must exercise final responsibility for its faithful exercise. As Justice Jackson put it in his dissent in *Korematsu*:

If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.⁸³

CONCLUSION

As I said at the outset, these are dangerous principles. They can be misapplied, as all legal principles and powers can. The power contemplated by the Presidential Oath Clause can be misused by evil or willful or mistaken men and women, as all governmental authority can, whether exercised by legislative, executive, or judicial authorities.

But I think that these are *right* principles, even though they can be misapplied. I submit that they are correct as a matter of sound interpretation of the Constitution. I may be wrong in this. But if so, my error lies in thinking that the Constitution is not a suicide pact; or in thinking that its provisions should not readily be construed to make

82 I have defended the position that the President need not adhere to judicial decisions that he concludes, in good faith, are contrary to the Constitution and harmful to the nation. See generally Paulsen, *supra* note 9, at 276–84 (arguing that the Presidential Oath and Take Care Clauses give the President the duty to reach legal conclusions separate from the other branches and are not requirements that the President simply “pledge obeisance to the preferences of the other branches”); Paulsen, *supra* note 16, at 82–83 (arguing that the consensus view, that the judiciary is the supreme interpreter of the Constitution and the President retains the power to make constitutional determinations as to vetoes and pardons, is analytically incoherent).

83 *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

it one; or in thinking that a part should not trump the whole, to the destruction of the whole (or that “a life is n[ot] wisely given to save a limb”); or in thinking that the Presidential Oath Clause has real force, meaning, and content, and that the President has a role in interpreting the Constitution he has sworn to preserve and protect, and that this might entail some judgment as to what is necessary to preserve the nation he has sworn to defend. In short, if I am mistaken in all this, so was President Lincoln.

