

# Political Norms, Constitutional Conventions, and President Donald Trump

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*My big worry is not simply that formal institutions have been eroded, but that the informal norms that underpin them are even more important and even more fragile. Norms of transparency, conflict of interest, civil discourse, respect for the opposition and freedom of the press, and equal treatment of citizens are all consistently undermined, and without these the formal institutions become brittle.*<sup>1</sup>

In the wake of the 2016 elections, I was driving near my home in Durham, North Carolina, with my eldest daughter, Sydney. She was only twelve years of age at the time, but she is an old soul. We were listening to an *NPR* story about Donald Trump, the content of which I cannot recall—there have been so many. When it was over, Sydney sighed, turned to me, and said, “You know, Dad. We didn’t break the glass ceiling, but we sure seem to be breaking a lot of other things.”

This Essay is about the other things that President Donald Trump has been breaking. I will argue that what is most troubling about the conduct of President Trump during and since the 2016 U.S. presidential campaign is not any potential violations of the U.S. Constitution or federal law. There likely have been some such violations, and there may be more.<sup>2</sup> But what is most troubling about

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1. Stanford Political Scientist Anna Grzymala-Busse, *quoted in* Thomas B. Edsall, *Democracy Can Plant the Seeds of Its Own Destruction*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/democracy-populism-trump.html> [<https://perma.cc/4SGX-ZP8M>].

2. As discussed in this Essay, President Trump’s executive orders on immigration and refugees are legally vulnerable. Moreover, multiple pending lawsuits allege that President Trump is violating the Constitution’s Foreign Emoluments Clause at Article I, Section 9, Clause 8. *See, e.g.*, Citizens for Responsibility & Ethics in Washington v. Trump, No. 1:17-cv-00458, 2017 WL 6524851 (S.D.N.Y. Dec. 21, 2017); Jeffrey Toobin, *Behind the Democrats’ Emoluments Lawsuit Against Trump*, NEW YORKER (June 20, 2017), <http://www.newyorker.com/news/daily-comment/behind-the-democrats-emoluments-lawsuit-against-trump> [<https://perma.cc/Y7J5-ZK67>]; Norman L. Eisen, Richard Painter, & Laurence H. Tribe, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* (Dec. 16, 2016) (manuscript on file with author). In addition, the President appears to be under investigation for obstruction of justice. *See, e.g.*, Michael D. Shear, Charlie Savage & Maggie Haberman, *Trump Attacks Rosenstein in Latest Rebuke of Justice Department*, N.Y. TIMES

President Trump is his disregard of political norms that had previously constrained presidential candidates and Presidents, and his flouting of nonlegal but obligatory “constitutional conventions” that had previously guided and disciplined occupants of the White House. These norms and conventions, although not “in” the Constitution, play a pivotal role in sustaining the Constitution.

Part I discusses political norms and constitutional conventions, including how they are alike, how they are different (notwithstanding the tendency of the President’s critics to use the terms interchangeably), and why they matter in the United States notwithstanding the existence of a written constitution. Part II substantiates my claim that President Trump has consistently disrespected numerous political norms and constitutional conventions. I will be more than suggestive in corroborating my claims, but I will not be able to be comprehensive: it would require a longer writing project than a brief Essay to document all of the troubling ways in which President Trump has behaved since becoming a candidate for President, and the constraints of the publication process do not permit weekly updates.<sup>3</sup> For example, Peter Baker of the *New York Times*, in an article taking stock of President Trump’s first 100 days in office, wrote the following:

As Washington pauses to evaluate the opening phase of the Trump presidency, the one thing everyone seems to agree on is that, for better or worse, the capital has headed deep into uncharted territory. On almost every one of these first 100 days, Mr. Trump has done or said something that caused presidential historians and seasoned professionals inside the Beltway to use the phrase “never before.”<sup>4</sup>

This Essay is offered in the spirit of encouraging Americans to insist “never again.”

Before proceeding, an observation is warranted about what is at stake. The phenomenon of increasing disrespect for political norms and constitutional conventions, which President Trump’s conduct embodies but does not exhaust, relates to a larger set of questions of great significance: How are we Americans to understand our current political predicament? What is happening to us? Both

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(June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/trump-investigation-comey-russia.html> [<https://perma.cc/6FN2-A8KU>] (“Acknowledging for the first time publicly that he is under investigation, Mr. Trump appeared to accuse Rod J. Rosenstein, the deputy attorney general, of leading what the president called a ‘witch hunt.’”); *id.* (“‘I am being investigated for firing the FBI Director by the man who told me to fire the FBI Director!’ Mr. Trump wrote [on Twitter], apparently referring to a memo Mr. Rosenstein wrote in May that was critical of [James B.] Comey’s leadership at the F.B.I.”).

3. Since this Essay was initially drafted, for example, the President mocked a foreign leader and threatened nuclear war over Twitter. *See, e.g.*, Editorial, *The Republican’s Guide to Presidential Etiquette*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/interactive/2017/10/08/opinion/editorials/repUBLICAN-etiquette-guide.html> [<https://perma.cc/J6S9-GDXB>]. More interesting and significant than the charge of hypocrisy leveled against Republican politicians by this editorial is the factually accurate compilation of conduct engaged in by President Trump.

4. Peter Baker, *How Trump Has Reshaped the Presidency, and How It’s Changed Him, Too*, N.Y. TIMES (Apr. 29, 2017), <https://www.nytimes.com/2017/04/29/us/politics/trump-presidency-100-days.html> [<https://perma.cc/JS7G-9JGU>].

culturally and conceptually, we increasingly find ourselves possessing and acting on a view of politics that verges on animus toward, and deep distrust of, the political opposition. On that understanding, politics is a realm in which elected officials are entitled to indulge their ideological appetites and exercise their wills to the full extent that legality permits—they are free to take maximum political advantage in every situation. Too often we imagine our polity as being populated by people who are so fundamentally alien from us—so essentially “other”—that we are more charitably disposed toward a hostile foreign power than toward members of the other political party, who cannot be permitted to win the next election or make the next Supreme Court appointment because so much is perceived to be at stake.<sup>5</sup> Increasing disregard of political norms and constitutional conventions by candidates and elected officials is one indication that we have lost our way, and figuring out how to encourage greater respect for them may help us find our way back. But first we need to more fully understand what political norms and constitutional conventions are and why they matter.<sup>6</sup>

### I. POLITICAL NORMS AND CONSTITUTIONAL CONVENTIONS

Norms can be invoked descriptively or prescriptively. The Oxford English Dictionary defines the term “norm” descriptively as a “standard or pattern of social behaviour that is accepted in or expected of a group.”<sup>7</sup> Such social norms may be good or bad from a moral perspective. By contrast, when I use the term “political norms,” I mean to invoke prescriptive phenomena—specifically, norms of political morality. Political norms can be thought of as principles of right action that bind

5. See, e.g., Frank Bruni, *I’m O.K.—You’re Pure Evil*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/opinion/sunday/im-ok-youre-pure-evil.html> [<https://perma.cc/T4VG-F56F>] (“If not physically then civically, we’re in a dangerous place when it comes to how we view, treat and talk about people we disagree with. Ugly partisanship may not be new, but some of its expressions and accelerants are.”); Charles J. Sykes, *The Danger of Ignoring Alex Jones*, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/opinion/sunday/the-danger-of-ignoring-alex-jones.html> [<https://perma.cc/8GYJ-UXJQ>] (“It has almost become a cliché that we are a polarized country, but the reality runs deeper. We now have a politics deeply infused with paranoia and distrust not only of our institutions but also of one another. We do not simply disagree; we are at war. We do not merely differ with our opponents on matters of principle or policy; political paranoids believe that we are fighting in a twilight struggle for civilization.”).

6. Cf. Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1769 (2017) (“Conflict channeled through the role understandings of constitutional culture is crucial in directing the growth and sustaining the authority of our constitutional law. . . . For conflict to serve these ends, however, it must be constrained. Whether we ground these constraints in text, structure, or the unwritten Constitution, or call these constraints law, gloss, norms, or conventions, the vitality of these role constraints is key to the strength and to the character of a constitutional democracy.”).

7. *Norm*, OXFORD ENGLISH DICTIONARY (3d ed. 2003), <http://www.oed.com/view/Entry/128266> [<https://perma.cc/V4W6-4UFG>]. There is a vast academic literature on social norms. For a discussion and citations to that literature in several disciplines, see *Social Norms*, STAN. ENCYCLOPEDIA OF PHIL., <https://plato.stanford.edu/entries/social-norms> [<https://perma.cc/WPC9-RZR2>].

elected officials and serve to guide and control their conduct in office. Political norms prescribe standards of behavior that all politicians should agree on and then comply with anyway—that is, regardless of whether other politicians comply with them. (I therefore mean to exclude immoral norms even though participants in the practice view them as morally obligatory.) An example of a political norm is the norm that politicians ordinarily should not lie about matters of public interest. Among other things, this norm is grounded in the widespread belief that it is wrong for elected officials to mislead their constituents and the general public about matters that may concern them, at least without serious justification for doing so.<sup>8</sup> Instrumentally, politicians who frequently lie undermine representative democracy. Expressively, they impose dignitary harms.<sup>9</sup>

Political norms can usefully be contrasted with the game theoretic equilibria that are studied by many political scientists and economists.<sup>10</sup> Such equilibria emerge as solutions to problems of strategic interaction, in which outcomes are jointly determined by the actions of all the parties to the interaction. It follows that the result of the action of each party depends on the actions of all other parties, and the best choice of action for each party depends on what it expects all the others to do.<sup>11</sup>

One category of problems of strategic interaction are coordination problems—that is, problems in which the parties to the interaction have at least some common interests but multiple solutions are possible.<sup>12</sup> An example of a game of pure coordination is deciding which side of the street drivers should drive on. It does not much matter which side is chosen as long as all drivers choose the same side. Another example is deciding who should call back whom when a phone call is dropped.

On a game theoretic account of political behavior, politicians may restrain their conduct in certain ways, but they do not do so out of a sense of obligation. Rather, they do so in order to avoid criticism and other undesirable consequences in light of what others have come to expect. As Richard Fallon writes, “once solutions to coordination problems have emerged, adherence to those solutions

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8. See, e.g., Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 598 (2010) (“It is wrong to deceive people—and thereby diminish their apprehension of the governmental institutions under which they live—in the absence of very good reason for doing so.”).

9. See *id.* (distinguishing material and expressive harms caused by deception).

10. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1115 (2008) (“Equilibria are not norms, and I doubt that law could exist in the absence of anyone having a normative commitment to obeying it.”).

11. There is a vast game theoretic literature in economics and political science. For a seminal contribution, see THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* (1960). For some representative citations and legal applications, see Fallon, *supra* note 10, at 1113–15 nn.23–27. Standard teaching texts include DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (1991); ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* (1992); and MARTIN J. OSBORNE, *AN INTRODUCTION TO GAME THEORY* (2003).

12. For a lucid and analytically precise discussion, see Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 172–75 (1982).

on the part of some, maybe many, can be explained by the adverse consequences that a deviation would predictably provoke.”<sup>13</sup>

Political conventions find their conceptual space between political norms on the one hand and game theoretic equilibria on the other. Like political norms and unlike equilibria, political conventions impose obligations—not simply costs for deviation—on politicians.<sup>14</sup> Potentially unlike political norms and like equilibria, political conventions serve the long-term interests of the parties to the conventions and help solve coordination and other problems,<sup>15</sup> and they are followed in significant part because politicians followed them in the past and others do so in the present.<sup>16</sup> Also unlike political norms and like equilibria, political conventions may have elements of rational arbitrariness to them, as illustrated immediately below. They are therefore morally more contingent than political norms. Political conventions exist when social facts regarding the past practices and beliefs of elected officials give rise to obligations.<sup>17</sup> They are derived, at least in part, from the historical practices of governmental institutions.

A likely historical example of a political convention, and one that was likely characterized by some rational arbitrariness, was the prohibition, prior to adoption of the 22nd Amendment in 1951, against Presidents serving more than two terms. Norms of political morality did not appear to firmly fix the appropriate number of terms at two rather than at one or three, but George Washington stepped down after two, and it was generally thought thereafter that it would be improper to deviate from his example. A number of Presidents considered running for a third term, however, and President Franklin Delano Roosevelt (FDR) ran successfully for a third and then a fourth term. Ratification

13. Fallon, *supra* note 10, at 1115.

14. See, e.g., A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 422 (London, MacMillan & Co. 10th ed. 1960) (conceiving of constitutional conventions, a special category of political conventions discussed below, as specifying how discretionary governmental power “ought to be exercised”); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 (explaining that constitutional conventions may be understood “as maxims, beliefs, and principles that guide officials in how they exercise political discretion”).

15. David Lewis famously took the view that conventions are coordination devices that people follow largely out of self-interest. See DAVID LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969). Political conventions are importantly different from “Lewis conventions” in that political conventions generate obligations of compliance.

16. See, e.g., Ronald Dworkin, *Hart’s Posthumous Reply*, 130 HARV. L. REV. 2096, 2100–01 (2017) (stating that to have accepted a rule “as convention” is to have accepted the rule “because others so accepted it”).

17. Exactly how social facts give rise to obligations, and whether normative (or value) facts are also needed for such obligations to arise, is a difficult question that divides positivists and antipositivists. For discussions, see generally Postema, *supra* note 12; Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004); Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014); Nicos Stavropoulos, *The Debate That Never Was*, 130 HARV. L. REV. 2082 (2017). For one exploration of the circumstances in which constitutional conventions give rise to obligations, see Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 CAMBRIDGE L.J. 149, 168–75 (2005); see also *infra* note 48 (discussing Jaconelli’s argument).

of the 22nd Amendment, which legally limited Presidents to two terms, likely signified that FDR had contravened the convention (or, perhaps, had availed himself of an emergency exception to it), not that it had never existed.<sup>18</sup>

The political convention against Presidents serving more than two terms was likely an example of a special kind of convention: a constitutional convention. Unlike conventions generally, constitutional conventions advance a purpose of the Constitution, such as limiting presidential power in order to prevent dictatorship.<sup>19</sup> To act contrary to a constitutional convention, as Keith Whittington observes, “is to violate the spirit of the constitution, even if it does not violate any particular rule.”<sup>20</sup> British commentator Albert Venn Dicey, writing during the late nineteenth century, likewise viewed constitutional conventions as related to constitutional purpose. Under Dicey’s account, violating a constitutional convention is considered a breach of “constitutional morality.”<sup>21</sup> Put differently, to violate a constitutional convention is to engage in behavior that is *anticonstitutional*, as opposed to *unconstitutional*.

When American audiences are told about the importance of “constitutional conventions” in the United States, people often think that the reference is either to the 1787 gathering of the Framers of the U.S. Constitution in Philadelphia or to one textually specified mechanism of proposing or ratifying constitutional amendments.<sup>22</sup> These are two meanings of the term, and they are the dominant ones in the United States. They are not the only meanings of the term in America, however, nor are they the primary meaning in Commonwealth legal systems. In such systems, rather, constitutional conventions are as described above: they are principles of proper governmental behavior that are derived, at least in part, from

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18. For a discussion, see Jaconelli, *supra* note 17, at 167–68; see also Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 33 (1999) (suggesting that the constitutional convention could be read as subject to an exception in circumstances of emergency, so that FDR could be understood as having acted within the terms of the convention).

19. Difficult conceptual questions concern the extent to which the preconditions for the existence of a constitutional convention are empirical or normative. My understanding is that the political actors in past instances need to have understood themselves as having been acting, at least in part, out of a sense of obligation, but they do not need to have thought that in doing so they were vindicating a purpose of the Constitution. That is a separate normative requirement that the analyst must assess in determining whether a constitutional convention is at stake. Such a view appears compatible with the classic formulation of Sir Ivor Jennings, who identified three questions that must be answered when seeking to establish the existence of a constitutional convention: “[F]irst, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?” W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (5th ed. 1959). For criticism of the focus of Jennings and other scholars on precedents, see Andrew D. Heard, *Recognizing the Variety Among Constitutional Conventions*, 22 CANADIAN J. POL. SCI. 63, 71 (1989) (“Precedents are not some independent source from which conventional rules are created. A rule is only created by the existence of a general consensus in the political community.”).

20. Whittington, *supra* note 14, at 1852.

21. DICEY, *supra* note 14, at 346.

22. See U.S. CONST. art. V.

the historical practices of governmental institutions and that advance a purpose of the constitution.<sup>23</sup>

British (and, more broadly, Commonwealth) legal and political theorists, not American scholars, coined the term “constitutional conventions.”<sup>24</sup> And it may be tempting to assume that a basic difference between the constitutional regimes in England and the United States is that constitutional conventions play a prominent role only there and not here. Unlike England, the United States has a written, mostly judicially enforced Constitution, which causes many American lawyers, judges, citizens, and legal scholars to assume that there are only two categories of potential interest: the *constitutional*, which is conceived of as *limiting* governmental action, and the *political*, which is conceived of as *licensing* government officials to indulge their appetites and exercise their wills to whatever extent they wish within the bounds of the law.<sup>25</sup>

As illustrated by the historical example of the two-term presidency, however, the constitutional regime in the United States is normatively more complex than that: like England and other Commonwealth countries, the United States has constitutional conventions.<sup>26</sup> For example, under the practice that has grown up around the electoral college method of electing the President, registered voters vote for electors, and then the electors vote for President. Most Americans would be surprised to learn that the Constitution is not generally thought by experts to entitle registered voters to participate in the process *at all* by casting votes for presidential electors. The first section of Article II provides that “[e]ach State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of Electors . . . .”<sup>27</sup> Yet it would be unthinkable today, except perhaps in extraordinary circumstances,

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23. In addition to past practices, other potential sources of constitutional conventions include special agreements and broad constitutional principles. See Heard, *supra* note 19, at 66–67 (writing that, in addition to viewing “precedent” and “special agreement” as potential sources of constitutional conventions, “[w]here an unprecedented situation arises, it is to the basic principles of the constitution that we must turn”).

24. Although most scholars tend to associate the concept of constitutional conventions with Dicey’s work during the late nineteenth century, the idea long predates Dicey. See Janet McLean, *The New Zealand Bill of Rights Act 1990 and Constitutional Propriety*, 11 N.Z. J. PUB. & INT’L L. 19, 22 (2013) (so observing and tracing the idea in the work of Hobbes, Locke, Burke, Austin, Mill, and Hart); O. Hood Phillips, *Constitutional Conventions: Dicey’s Predecessors*, 29 MOD. L. REV. 137 (1966).

25. Herbert Wechsler’s distinction between the principled realm of judicial decision and the unprincipled realm of political decision still resonates among constitutional law scholars. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[W]hether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”).

26. See, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 265–68 (2017) (discussing constitutional conventions on both sides of the Atlantic).

27. U.S. CONST. art. II, § 1 (emphasis added).

for a state legislature to appoint a slate of electors instead of allowing its registered voters to participate.<sup>28</sup>

Another constitutional convention also concerns the Electoral College. The Constitution is not generally thought by experts to prohibit members of the Electoral College from ignoring the popular vote for President in the states that appoint them. Yet the overwhelming majority of electors throughout American history have not felt free to ignore the popular vote and cast their ballots for the candidate they personally prefer.<sup>29</sup> That convention came under pressure in the wake of the November 2016 presidential election, but Americans who sought to persuade electors to prevent the election of Donald Trump did not make much headway.<sup>30</sup>

Other constitutional conventions govern the proper relationship between the political branches and the Supreme Court. The Constitution is not generally thought by experts to prohibit a political party in control of Congress from expanding the size of the U.S. Supreme Court in order to pack it with partisan Justices. Yet any such plan to increase the size of the Court would likely encounter intense bipartisan opposition. That is what happened in 1937, when FDR, a Democrat, tried to pack the Court in response to conservative Supreme Court decisions that were thwarting his New Deal economic recovery plans, which sought to move the country out of the Great Depression. The Democrat-controlled Senate Judiciary Committee vigorously opposed FDR's Court-packing plan on the ground that it was an attack on the constitutional structure—on judicial independence. What is especially interesting about the Senate hearings on the plan is the extent to which it was not clear whether certain witnesses who opposed the plan were invoking constitutional conventions or structural constitutional constraints. Some witnesses tacked back and forth between the two kinds of arguments.<sup>31</sup>

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28. During the contested election of 2000 between George W. Bush and Al Gore, there was serious talk about the Florida Legislature appointing a slate of Bush electors if the recount generated a Gore majority. *See, e.g.,* Jo Becker & Peter Slevin, *Fla. Legislature Could Pick Slate of Electors*, WASH. POST (Nov. 18, 2000), <http://www.washingtonpost.com/wp-srv/onpolitics/elections/electors18.htm> [<https://perma.cc/V4LV-PETE>]. But such talk appeared to reflect a dispute over the process that should be used to discern which candidate registered voters had in fact voted for, not over whether registered voters should be allowed to participate at all.

29. HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 7 (1925) (observing that the United States, like Great Britain, has various “customs, practices, maxims and precepts which are not enforced by the courts, and which thus correspond to the English [constitutional conventions],” and pointing as an example to “the understanding that Presidential Electors shall not cast their votes according to their independent judgment but shall do no more than formally ratify the results of a previous popular vote”).

30. *See, e.g.,* Kyle Cheney, *Democratic Presidential Electors Revolt Against Trump: The Electoral College Could See a Historic Number of “Faithless Electors”*, POLITICO (Nov. 22, 2016, 5:09 AM), <http://www.politico.com/story/2016/11/democrats-electoral-college-faithless-trump-231731> [<https://perma.cc/L7WU-RULM>].

31. For a discussion, see Bradley & Siegel, *supra* note 26, at 269–87. David Pozen has suggested that there is a convention against Court packing. *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34, 69 (2014).



A few liberal legal academics in the United States have recently floated the idea of packing the Court with a liberal Justice as soon as the Democratic Party regains control of the White House and the Senate. Such liberals claim that this is a justifiable way to take back the seat that was “stolen” from the Democratic Party when Senate Republicans took the extraordinary, unprecedented step of refusing to consider President Barack Obama’s nomination of D.C. Circuit Chief Judge Merrick Garland to replace Justice Antonin Scalia.<sup>32</sup> Trump nominee Neil Gorsuch now occupies that pivotal seat. Even if one believes, as I do, that Senate Republicans behaved improperly, any talk of Court packing may be politically unwise,<sup>33</sup> and—more to the point—actually doing it might strike another blow to the health of the constitutional system by exacerbating a destructive race to the normative bottom.<sup>34</sup>

Turning from Court packing to “Court stripping,” the text of the Constitution—specifically, Article III, Section 2—can be read as giving Congress wide authority to strip the Supreme Court of its appellate jurisdiction to hear certain categories of cases. Yet actual instances of Court stripping are extraordinarily rare and any plan to do so would likely meet strong bipartisan objections notwithstanding strong criticisms of particular Supreme Court decisions by conservatives and liberals alike.<sup>35</sup>

Even accounting for anger over the previous election and (in my view) the mistreatment of Chief Judge Garland, the response of most Americans to most

32. See, e.g., Richard L. Hasen, Opinion, *In the Future, John Roberts Could Be the Supreme Court’s Swing Vote*, L.A. TIMES (Apr. 10, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-hasen-roberts-swing-vote-20170410-story.html> [<https://perma.cc/RSN6-VJKB>] (“The only real solution is for Democrats to pray for the current justices’ good health—and then to take back the presidency and the Senate. And once they do, perhaps they’ll play hardball themselves by increasing the number of justices on the court and packing it with liberals.”). At the Indiana symposium mentioned in the star note to this Essay, Mark Tushnet argued in favor of Court packing to take back the allegedly stolen seat. See Mark Tushnet, *Expanding the Judiciary, the Senate Rules, and the Small-c Constitution*, BALKINIZATION (Nov. 25, 2017), <https://balkin.blogspot.com/2017/11/expanding-judiciary-senate-rules-and.html> [<https://perma.cc/FF6W-M4F4>] (“I think—really, I do think this—that Democrats should be thinking about the possibility of expanding the Court’s size to 11 as soon as they get the chance (if they ever do).”)

33. Republicans are much closer than Democrats to having the raw power to pack the Court now, so it is not clear why liberals would want to emphasize to Republicans that there are literally no normative constraints on their doing so. Nor is it clear why liberals would want to estop themselves from being able to claim the normative high ground and assail such a packing scheme in the court of public opinion in the event it were to materialize. And once Democrats or Republicans succeeded in packing the Court, there might be no end of unpacking, packing again, jurisdiction stripping, and perhaps even judicial impeachments on political grounds.

34. Disrespect for constitutional conventions cuts both ways ideologically. It is at best awkward for liberals to decry such disrespect by President Trump and Senate Republicans at the same time that they call for Court packing.

35. For a discussion, including of the possibility that the convention against Court stripping is constitutional in stature (which is the most recently stated view of the Office of Legal Counsel), see Bradley & Siegel, *supra* note 26, at 287–312.

or all of the above scenarios would likely be that “you just can’t do that,” or “that’s just wrong,” even if they would not know exactly why. Their intuitions are most plausibly justified by unwritten constitutional conventions that limit the political discretion of state legislators, presidential electors, Presidents, and members of Congress. These conventions are important because they facilitate democratic self-government, and because they protect judicial independence.

One might question whether constitutional conventions can be said to exist in the United States if they are not necessarily widely recognized as constitutional conventions. It turns out, however, that they can operate in a similarly subtle fashion in Commonwealth legal systems. For example, New Zealand legal scholar Janet McClean has observed that constitutional conventions are typically expressed when—not before—they are challenged:

The fact that emerging practice has not yet been described by the political actors as the operation of constitutional convention is not evidence against the existence of such a convention. Constitutional conventions are, after all, commonly “articulated after the fact”. As they usually operate, constitutional conventions perform a rather neat trick. They are said to represent deeply held and widely shared understandings—and yet such understandings are often only articulated at the moment at which they have been placed in doubt. What really tests the existence of a convention is a crisis.<sup>36</sup>

A good example of the phenomenon McClean describes is the constitutional crisis of 1937 in the United States, discussed above. So it is not true that Commonwealth systems have constitutional conventions and the United States has only a written constitution. The existence of a written constitution in the United States does not necessarily crowd out the existence of unwritten constitutional conventions.

Professor Michael Dorf has expressed the concern, however, that America’s written Constitution makes it difficult to formulate freestanding claims based upon historical practice.<sup>37</sup> “Because of the widespread but mistaken belief that the Constitution alone grounds legal authority,” he contends, “political actors feel the need to search for a constitutional hook for arguments that customary rules should be obeyed.”<sup>38</sup> In Dorf’s view, this search for a textual tie has

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36. McClean, *supra* note 24, at 25. McClean’s observation is a general feature of customary law and norms. If a community is following a practice without deviation, there is no opportunity to know whether, in what way, or to what extent it is understood to be obligatory. It is only when there are breaches that this articulation becomes important. This is true of conventions, constitutional conventions, historical gloss, customary international law, and customary domestic law. It is a general point about customary law and norms and their identification. See, e.g., Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in *CUSTOM’S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 57 (Curtis A. Bradley ed., 2016).

37. See Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 69, 75 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

38. *Id.*

“lamentable consequences” in part because “for some customary rules, there is no readily available hook, and as a consequence, political actors may be tempted to violate them.”<sup>39</sup>

Dorf’s concern has truth to it, but it may be overstated. (Indeed, Dorf himself voices the concern with appropriate circumspection.) As noted, there are examples of constitutional conventions in the United States, both historically and today, and Part III will identify other potential constitutional conventions. Moreover, as evident in the debate over Court packing in 1937, constitutional interpreters in the American tradition can marry conventional claims to legal arguments—specifically, to structural constitutional arguments. Unlike textual arguments, structural arguments do not focus on particular provisions of constitutional text.<sup>40</sup> Instead, structural arguments are thought to underlie the text; they draw inferences from the institutions, and relationships among institutions, that the Constitution creates, emphasizing the purposes or functions of the Constitution as a whole or of some important part.<sup>41</sup>

That said, it does appear true that the written, mostly judicially enforced character of the U.S. Constitution leads to constitutional conventions being under-enforced by elected officials and underappreciated by scholars. That tendency is exacerbated under current conditions of increased political polarization and ill will.<sup>42</sup> For example, political underenforcement of conventions is arguably what we have seen in recent years in the context of the Senate’s handling of judicial nominations. A Democratic Senate ended the filibuster for lower federal court nominees in 2013 after alleging unprecedented Republican obstruction.<sup>43</sup> A Republican Senate did the same for Supreme Court nominees in 2017 in order to overcome a Democratic filibuster of Republican nominee Neil Gorsuch.<sup>44</sup> As discussed above, Senate Republicans so acted after holding Justice Antonin Scalia’s seat open for roughly a year in order to prevent Democratic President

39. *Id.*

40. Bradley & Siegel, *supra* note 26, at 264–65 (making this point); see also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1230 n.77 (2015) (“It is possible, however, that certain customary practices assume constitutional status as claims on the constitutional structure, which are asserted to supplement the text.”).

41. For discussions of structural reasoning in constitutional law, see JACK M. BALKIN, *LIVING ORIGINALISM* 142 (2011); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74–92 (1982).

42. See, e.g., Philip Bump, *Political Polarization Is Getting Worse. Everywhere.*, WASH. POST, (Apr. 9, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/09/polarization-is-getting-worse-in-every-part-of-politics> [https://perma.cc/ASF7-PWMW]; *supra* note 5 (quoting commentators who describe the phenomenon of ill will as distinct from, and in addition to, the phenomenon of polarization).

43. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> [https://perma.cc/7K64-428Z].

44. Matt Flegenheimer, *Senate Republicans Deploy “Nuclear Option” to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> [https://perma.cc/X7RD-PYRD].

Barack Obama from filling the vacancy by appointing Chief Judge Garland.<sup>45</sup> It remains to be seen whether and when it will again be possible to fill a vacancy on the Supreme Court when the same political party does not control both the White House and the Senate.

That is a potentially serious problem because the Supreme Court is not like other courts. Among other things, it plays a unique role in ensuring uniformity on important questions of federal law, and an even number of Justices on a closely divided Court impairs its ability to execute that responsibility. The Court ends up accepting fewer cases, splitting 4-4 on some of the cases it does accept (thereby not establishing a precedent), and deciding some cases very narrowly in order to avoid such splits (thereby offering little guidance).<sup>46</sup> Moreover, judges from other courts cannot sit by designation in order to break ties, nor could visiting judges provide the kind of guidance and stability that the legal, political, and financial systems require.

Such recent experience speaks to an additional reason why constitutional conventions are normatively desirable in the United States. When they are respected, they help the U.S. government function at least tolerably well by keeping partisanship within reasonable bounds. And they keep partisanship within reasonable bounds by discouraging elected officials from pushing their legal powers to their respective maxima.<sup>47</sup> The system cannot function factorially when elected officials do that.<sup>48</sup>

The U.S. Constitution brought into being a robust system of separation of powers and checks and balances. The Framers fashioned such a horizontal constitutional structure without anticipating political parties, let alone the ideological parties in existence today but absent throughout most of the twentieth

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45. Mike DeBonis, *Judge Dashes Merrick Garland's Final, Faint Hope for a Supreme Court Seat*, WASH. POST (Nov. 18, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/11/18/judge-dashes-merrick-garlands-final-faint-hope-for-a-supreme-court-seat> [<https://perma.cc/SN2M-6CCT>].

46. *E.g.*, Neil S. Siegel, *The Harm in the GOP's Pseudo-Principled Supreme Court Stance*, HILL (Apr. 15, 2016), <http://thehill.com/blogs/pundits-blog/the-judiciary/276462-the-harms-in-being-pseudo-principled-about-the-supreme-court> [<https://perma.cc/34DF-E5XE>].

47. A difficult question is when the behavior of some politicians renders a constitutional convention no longer applicable or no longer obligatory. For example, does one political party's political obstructionism in refusing to move judicial appointments along justify or excuse abolition of the filibuster? The question is made more difficult by predictable partisan disagreement over whether an unprecedented amount of obstructionism has occurred.

48. Much more scholarly work needs to be done to develop this point. For one effort, see generally Neil S. Siegel, *Sustaining Collective Self-Governance and Collective Action: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEORGETOWN L.J. (forthcoming 2018). For relevant thinking, see Jaconelli, *supra* note 17, at 169–71 (identifying the source of an obligatory basis for constitutional conventions as their mode of emergence, and adopting a Humean analysis according to which “the party that is in power at the moment respects the constraints that are imposed on it by constitutional conventions in the expectation that the opposition parties, when they attain office, will likewise respect the same constraints”).

century. This regime of separation of powers, which is often characterized by the separation of parties in control of different parts of the government,<sup>49</sup> creates ample opportunity to thwart potential action by the federal government. As a result, troubling questions arise regarding how the federal government is to execute its basic responsibilities of filling executive and judicial offices, solving problems that the states are not well-situated to address on their own,<sup>50</sup> and safeguarding rights through the passage and updating of civil rights legislation (which several constitutional provisions authorize Congress to do).<sup>51</sup>

To be sure, a number of heated political disagreements in America today are in part precisely about how much action the federal government should be taking. It also seems true, however, that Americans of most ideological stripes want the federal government to be able to act effectively, even if they disagree about the spheres or direction in which such effective action should take place.<sup>52</sup> (Demands for a robust federal response to the latest natural disaster, whether in red states or blue states, bring this point home.) And the federal government cannot function effectively if Presidents or political parties in control of Congress push to the legal limits their powers to, for example, veto legislation, nominate aggressive partisans, decline to nominate people to fill key positions, filibuster executive or judicial branch nominees or legislation, and deny confirmation hearings or votes (or not consider nominees at all).<sup>53</sup> It is thus shortsighted to view constitutional conventions as protecting members of only one political party and not the other.<sup>54</sup>

49. For the seminal contribution, see generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

50. Such problems are characteristically multistate collective action problems. See generally Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (articulating the structural theory of collective action federalism); cf. Jane Mansbridge, *On the Importance of Getting Things Done*, 45 PS: POL. SCI. & POL. 1, 5 (2012) (“In a more heavily interdependent world, a democracy needs more collective power to solve the growing number of collective action problems.”).

51. The structural logic of the federal government’s role in protecting civil rights is distinct from the logic of collective action. See Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1948 (2013) (noting that the enforcement clauses of the Civil War Amendments “give Congress authority to regulate the internal policy choices of state governments concerning certain subject matters regardless of collective action problems facing the states”).

52. See generally Neil S. Siegel, *None of the Laws But One*, 62 DRAKE L. REV. 1055 (2014) (arguing that the two political parties disagree less over the constitutional scope of federal power than over the political objectives that robust federal power will be used to accomplish, and providing numerous examples of congressional Republicans favoring the assertive exercise of federal power).

53. Consensus-forcing devices like the filibuster are consistent with the need for the federal government to function effectively (and serve other valuable purposes, see *infra* note 123 and accompanying text) when members of both political parties are willing to negotiate in good faith over nominations and bills.

54. That said, policing violations of political norms and constitutional conventions can be in tension with pursuing a legislative agenda in the short run, which may help explain

Constitutional conventions, when they are honored, help vindicate basic purposes of the constitutional system—purposes that law alone cannot accomplish. Such conventions are not *in* the written Constitution, but they are deeply connected *to* the Constitution. Violating constitutional conventions does not simply constitute bad policy. Disregarding them, at least absent sufficient reason to conclude that they have become outdated or that the stakes are too high to respect them,<sup>55</sup> amounts to a deviation from norms of good institutional citizenship that help sustain the constitutional system.

## II. PRESIDENT TRUMP'S VIOLATIONS OF POLITICAL NORMS AND CONSTITUTIONAL CONVENTIONS

Even as judged by the lower standards of polarized times, President Trump stands alone. No one else in recent memory has approached the degree of his disregard of political norms and constitutional conventions. Some of what follows risks seeming blunt, but the objective of this Part and the next one is to be objective, not neutral. Donald Trump entered political life by relentlessly pushing “birtherism,” the arguably racist lie that Barack Obama, the nation’s first African-American President, was not a natural-born American citizen and so was constitutionally barred from serving as President.<sup>56</sup> President Trump is no ordinary politician.

An objection worth anticipating at the outset is that the criticism to follow is opportunistic. Like the rhetoric of judicial activism, which often masks substantive objections to judicial decisions in process objections,<sup>57</sup> current talk by liberals of norm violations by President Trump may seem less genuine and procedural in nature, and more partisan and substantive. With respect to what is motivating liberals, the answer is likely that it is a mixed bag of motivations. It is worth noting, however, that it is not just liberals who have expressed serious concerns about the President’s conduct, including (among many other things) his seeming inability to resist further inflaming public sentiment over the outrages perpetrated by white

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why congressional Republicans were generally more critical of President Trump’s behavior before the election than they have been since.

55. The great classics of political morality tend to emphasize the high stakes of politics in contrast to ordinary private moral life. See NICCOLÒ MACHIAVELLI, *THE PRINCE* (Tim Parks trans., 2009) (1532); MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77–128 (Hans H. Gerth & C. Wright Mills trans. & eds., 1946) (1919); Thomas Nagel, *Ruthlessness in Public Life*, in PUBLIC AND PRIVATE MORALITY 75–91 (Stuart Hampshire ed., 1978); Michael Walzer, *The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973). Although there is truth to the conviction that sometimes the stakes are so high in politics that even venerable norms and conventions must give way, this view can easily be overstated or misused to rationalize troubling behavior by politicians. Moreover, the constitutional system cannot survive claims of continuous, across the board, emergency with respect to almost every issue.

56. Michael Barbaro, *Donald Trump Clung to “Birther” Lie for Years, and Still Isn’t Apologetic*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> [https://perma.cc/B52F-H3XB].

57. See generally Siegel, *supra* note 8 (making this point).

supremacists in Charlottesville, Virginia.<sup>58</sup> Moreover, even if certain objections are opportunistic, it does not mean that the problem to which they refer is not real.<sup>59</sup>

### A. Political Norms

What follows is a partial list of political norms that Trump has violated. Notwithstanding norms of respect for human dignity that in the United States were purchased at the cost of enormous human suffering and are still being paid for, Candidate Trump indulged in racism, misogyny, Islamophobia, and mockery of the disabled in ways that are extraordinary in contemporary American politics.<sup>60</sup> Hate groups, hate crimes, and other hate-filled speech and actions against racial, ethnic, and religious minorities—including in public schools—have risen since he declared his candidacy for President. American Latinos, Muslims, Jews, and members of the LGBTQ community have been among the targets.<sup>61</sup> Also targeted

58. Conservative critics of President Trump's conduct include David Brooks, Ross Douthat, Erik Erikson, Michael Gerson, and William Kristol. They also include Republican members of Congress. See, e.g., Miranda Green, *GOP Members of Congress Criticize Trump's Comments: "We Should Never Hesitate To Call Out Hate"*, CNN (Aug. 16, 2017), <http://www.cnn.com/2017/08/15/politics/congress-reaction-trump-comments-paul-ryan/index.html> [<https://perma.cc/4GM7-HRSD>] ("Members of Congress in President Donald Trump's own party were among those lawmakers quick to criticize comments the President made in a news conference that laid blame[] on both sides of protesters at a rally in Charlottesville, Virginia, that turned violent over the weekend."). Senators John McCain, Bob Corker, and Jeff Flake are especially noteworthy for their criticism of President Trump's behavior, as is former President George W. Bush. See Peter Baker, *Without Saying "Trump," Bush and Obama Deliver Implicit Rebukes*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/politics/george-bush-trump.html> [<https://perma.cc/4RNQ-HYKY>]; Manu Raju, *Corker: Trump Criticism Had Been "Building for Some Time,"* CNN (Oct. 16, 2017), <http://www.cnn.com/2017/10/16/politics/bob-corker-trump/index.html> [<https://perma.cc/XEP9-DSLS>]; Sheryl Gay Stolberg, *Jeff Flake, a Fierce Trump Critic, Will Not Seek Re-election for Senate*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/jeff-flake-arizona.html> [<https://perma.cc/XEP9-DSLS>]; *McCain Condemns "Half-Baked Spurious Nationalism" in Speech*, ASSOCIATED PRESS (Oct. 17, 2017), <https://apnews.com/021cf4d4bef645f9a30114de813f6e97/McCain-condemns-half-baked,-spurious-nationalism'-in-speech> [<https://perma.cc/PZG9-7CL9>].

59. If the question is whether we can be confident that liberal politicians, commentators, and scholars really believe in political norms and constitutional conventions just because they are invoking them against President Trump, the answer is perhaps not—that may be an example of cheap talk. But if they were willing to do something more costly, the commitment would be more credible.

60. See, e.g., David Perry, Opinion, *Trump's Not Just Racist and Sexist. He's Ableist*, L.A. TIMES (Oct. 17, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-perry-trump-ableism-20161017-snap-story.html> [<https://perma.cc/35NE-VRJ2>]; An Open Letter from Constitutional Law Scholars to President-Elect Donald Trump, (Dec. 8, 2016), <http://aclaw.org/sites/default/files/pdf/ACS%20Open%20Letter%20to%20President-Elect.pdf> [<https://perma.cc/GPH8-GEY3>] [hereinafter "Letter from Constitutional Law Scholars"].

61. See, e.g., Alexis Okeowo, *Hate on the Rise after Trump's Election*, NEW YORKER (Nov. 17, 2016), <http://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [<https://perma.cc/E2XC-DMPS>]; Mark Potok, *Anti-Muslim Hate Crimes Surged Last*

have been Americans of all races and religions who have opposed expressions of hate, including in Charlottesville.<sup>62</sup>

Notwithstanding norms of respect for freedom of speech and freedom of the press, Candidate Trump displayed uncommon hostility toward the news media. He denied access to his campaign events to media outlets that he perceived as antagonistic, threatened to sue journalists, and called for changes to the nation's libel laws that would hinder the ability of the media to report on matters of public importance.<sup>63</sup>

As President, Trump has persisted with his attempts to *delegitimize*—not simply to strongly criticize—mainstream members of the fourth branch of government.<sup>64</sup> In addition to regularly describing the news media as composed of “dishonest people” who spread “fake news,”<sup>65</sup> he also indicated that he would blame the media in addition to the courts in the event of a terrorist attack on the asserted ground that the media had been underreporting terrorist attacks.<sup>66</sup> He offered no evidence to substantiate this accusation and there appears to be none, which is unsurprising because the media lacks any incentive to underreport attacks. He also called the news media “the enemy of the . . . people,” a phrase that Soviet leader Nikita

*Year, Fueled by Hateful Campaign*, S. POVERTY L. CTR. (Nov. 14, 2016), <https://www.splcenter.org/hatewatch/2016/11/14/anti-muslim-hate-crimes-surged-last-year-fueled-hateful-campaign> [<https://perma.cc/X6ZJ-XDZE>]; *Hate Groups Increase for Second Consecutive Year as Trump Electrifies Radical Right*, S. POVERTY L. CTR. (Feb. 15, 2017), <https://www.splcenter.org/news/2017/02/15/hate-groups-increase-second-consecutive-year-trump-electrifies-radical-right> [<https://perma.cc/UF6B-WUPE>].

62. See, e.g., Charlie Savage, *A Hate Crime? How the Charlottesville Car Attack May Become a Federal Case*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/politics/charlottesville-sessions-justice-department.html> [<https://perma.cc/5A57-D8TD>] (“State law enforcement officials have primary jurisdiction to prosecute James Alex Fields Jr., 20, whom they have charged with second-degree murder in an attack that killed Heather D. Heyer, 32, of Charlottesville and injured at least 19 other people. But the [Justice] department’s announcement raises the question of whether Mr. Sessions could also seek to make it a federal case.”).

63. Letter from Constitutional Law Scholars, *supra* note 60, at 1.

64. See, e.g., Jaclyn Reiss, *Trump Again Publicly Tells CNN’s Acosta: “You’re Fake News,”* BOS. GLOBE (Aug. 14, 2017), <https://www.bostonglobe.com/news/politics/2017/08/14/trump-tells-again-publicly-tells-cnn-acosta-you-fake-news/OJhbGg43bwCiaUbaAhloBJ/story.html> [<https://perma.cc/Q38H-3TTB?type=image>].

65. See, e.g., Baker, *supra* note 4 (quoting President Trump).

66. See, e.g., Scott Shane, *Is News of Terror Attacks Underplayed? Experts Say No*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/terrorist-attack-media-coverage-trump.html> [<https://perma.cc/5GT8-TW4T>] (“‘Pre-emptive blame,’ said [Martha] Crenshaw, the Stanford terrorism researcher. ‘Nothing’s happened. But if something does happen, he can blame the judiciary and the news media.’”); see also Max Fisher & Kitty Bennett, *Our Articles on the Attacks Trump Says the Media Didn’t Cover*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/us/politics/the-white-house-list-of-terror-attacks-underreported-by-media.html> [<https://perma.cc/57A6-EW3G>] (stating that President Trump claims the media is not sufficiently reporting terrorist attacks and providing links to media sources that reported on the White House’s list of terrorist attacks from September 2014 to December 2016).



Khrushchev deemed too toxic to use given how Joseph Stalin before him had used it to annihilate his critics.<sup>67</sup>

Notwithstanding norms against permitting or encouraging foreign meddling in U.S. elections, a number of close associates of Candidate Trump appear to have had contacts with either Russian officials or Russians with close ties to the Russian government.<sup>68</sup> Among others, these Trump associates include his son, his son-in-law, his former campaign chairman, his attorney general, and his former National Security Advisor, Michael Flynn, who was forced to resign and is under investigation.<sup>69</sup> The extent of Mr. Trump's knowledge or involvement also appears to be under investigation, as discussed further in Part II.B.

Notwithstanding norms of respect for judicial independence, Candidate Trump declared that a federal judge presiding over civil litigation to which he was a party should recuse himself because he has "an absolute conflict" on account of his "Mexican heritage" and Mr. Trump's promise to "build a wall," even though the case had nothing to do with either the judge's heritage or Mr. Trump's immigration proposals.<sup>70</sup> Consistent with the Judicial Code of Conduct, the judge did not reply to Mr. Trump's attack, which Republican House Speaker Paul Ryan condemned as "racist."<sup>71</sup>

As President, Trump has continued to try to undermine public confidence in the federal judiciary by disparaging the federal courts and particular federal judges in ways that are unprecedented in modern times.<sup>72</sup> For example, the President publicly asserted that because of a "ridiculous" federal district court decision by a "so-called judge" stopping enforcement of his initial executive order on immigration and refugees, "many very bad and dangerous people may be pouring into our country," and

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67. Baker, *supra* note 4 (quoting President Trump).

68. See, e.g., Zachary Cohen, *Kushner Under Fire for Role in Meeting After Trump Jr. Email Release*, CNN, (July 12, 2017), <http://www.cnn.com/2017/07/12/politics/kushner-trump-jr-russia-email-chain/index.html> [<https://perma.cc/7ZSW-JLU2>].

69. See, e.g., Tom LoBianco & Phil Mattingly, *Flynn Providing Documents to Senate, First Batch by June 6*, CNN, (May 30, 2017), <http://www.cnn.com/2017/05/30/politics/michael-flynn-documents-senate/index.html> [<https://perma.cc/BTK3-DXE8>] ("Flynn and three other former Trump campaign operatives—former campaign chairman Paul Manafort, former adviser Roger Stone and former foreign policy adviser Carter Page—have been the central focus of congressional investigators for months now. But House and Senate investigators have also expanded their sights to more recent Trump aides, including personal lawyer Michael Cohen and former on-air surrogate Boris Epshteyn.").

70. Letter from Constitutional Law Scholars, *supra* note 60, at 2.

71. *Id.*

72. See, e.g., Peter Baker, *Trump Clashes Early with Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), <https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html> [<https://perma.cc/SV5X-KQNL>] (quoting the opinion of Jack Goldsmith, head of the Justice Department's Office of Legal Counsel under President George W. Bush, that "Trump's serial attacks on judges and the judiciary take us into new territory"); Julie Hirschfeld Davis, *Supreme Court Nominee Calls Trump's Attacks on Judiciary "Demoralizing"*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html> [<https://perma.cc/6JQF-7TVT>] (quoting the opinion of former George W. Bush judicial appointee Michael W. McConnell that "Mr. Trump is shredding longstanding norms of etiquette and interbranch comity").

that the decision “opens up our country to potential terrorists and others that do not have our best interests at heart.”<sup>73</sup> He also asserted that if the government did not win the case, “we can never have the security and safety to which we are entitled.”<sup>74</sup> He then deemed “disgraceful” the appellate hearing before a panel of three judges of the U.S. Court of Appeals for the Ninth Circuit.<sup>75</sup> He condemned the panel even though it was composed of Republican and Democratic appointees alike who, in asking difficult questions of both sides, were each models of professionalism and competence.<sup>76</sup> The panel was subsequently unanimous in rejecting the administration’s position in the appeal.<sup>77</sup>

The President’s public antagonism and ad hominem attacks are causing many commentators to opine that he is preemptively engaging in blame shifting in the event of an attack.<sup>78</sup> More disturbingly, a few commentators have expressed the concern that the President may be trying to establish a narrative that he can use after an attack in order to rally a fearful public into accepting his disregard of judicial authority, which would set off a constitutional crisis.<sup>79</sup> To be clear, we are not anywhere near a crisis at this time, but one is now thinkable in a way that it has

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73. The President’s tweets that are quoted in the text are collected and analyzed by Jack Goldsmith, *Does Donald Trump Want to Lose the EO Battle in Court? Or Is Donald McGahn Simply Ineffectual (or Worse)?*, LAWFARE (Feb. 6, 2017, 8:22 AM), <https://lawfareblog.com/does-trump-want-lose-eo-battle-court-or-donald-mcgahn-simply-ineffectual-or-worse> [<https://perma.cc/4FLE-DAZK>].

74. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 8, 2017, 4:03 AM), <https://twitter.com/realdonaldtrump/status/829299566344359936> [<https://perma.cc/5F2N-XZ7Q>].

75. Davis, *supra* note 72 (quoting President Trump’s characterization of the hearing before the Ninth Circuit panel as “disgraceful”).

76. Audio of the oral argument before the Ninth Circuit panel, which took place on February 7, 2017, is available online. Oral Argument, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000010885](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885) [<https://perma.cc/H66P-NXU3>].

77. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam) (order denying emergency motion for stay pending appeal). For a suggestion that President Trump’s attacks on federal judges may cause them to find greater strength in numbers than they would otherwise be likely to achieve, see Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1243–46 (2017); *id.* at 1245 (“If that happens, there will be a certain irony in it: by unjustifiably deriding the federal courts as political, the President will have succeeded in encouraging them to act politically, at least to some extent, in order to safeguard their own public legitimacy.”).

78. See, e.g., Philip Rucker, “If Something Happens”: Trump Points His Finger in Case of a Terrorist Attack, WASH. POST (Feb. 6, 2017), [https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882\\_story.html](https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html) [<https://perma.cc/TH3Q-QYGP>] (“President Trump appears to be laying the groundwork to preemptively shift blame for any future terrorist attack on U.S. soil from his administration to the federal judiciary, as well as to the media.”).

79. Paul Krugman, *When the Fire Comes*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/opinion/when-the-fire-comes.html> [<https://perma.cc/29R7-NPRY>]; Curtis Bradley & Neil S. Siegel, *Judicial and Media Independence After the Next Attack*, LAWFARE (Feb. 9, 2017, 5:41 PM), <https://www.lawfareblog.com/judicial-and-media-independence-after-next-attack> [<https://perma.cc/4F9B-AALM>].

not been for a long time in the United States. Although the courts are currently asserting their authority, they will inevitably become more vulnerable after an attack, especially a significant one.<sup>80</sup>

President Trump's attacks on judges have not subsided over time, no matter how damaging his attacks are to his own stated litigation positions and legal filings. For example, while the legal challenge to his second executive order on immigration and refugees was pending before the Supreme Court, President Trump unleashed a barrage of tweets that, among other things, described the revised order as "politically correct" and "watered down," and as amounting to a "travel ban" after all.<sup>81</sup> These descriptions reinforced the already strong impression that the President had intended to discriminate against foreign nationals on the basis of their (Muslim) religion.<sup>82</sup> He also tweeted that "the courts are slow and political!"<sup>83</sup>

Notwithstanding norms of respect for, and respectful disagreement with, the professional judgments of the American intelligence community, President-elect Trump likened the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, and the Director of National Intelligence to "Nazi Germany"—to the regime of Adolf Hitler—for unanimously concluding that Russian officials directed the hacking of Democratic Party targets during the presidential campaign and had contacts with members of the Trump campaign.<sup>84</sup>

Moreover, unlike every prior President of either party over the course of at least half a century, President Trump has refused to disjoin public service from private interest and so has implicitly attacked the basic distinction between government impartiality (that is, "honest government") and government corruption. President Trump represents a merger of public office and private gain. For him, private gain has been converted into public office, and so far he has shown no opposition to, and apparent enthusiasm for, using public office to reinforce private gain for himself, his family, and others who are extraordinarily wealthy. This is evident in many contexts. A nonexhaustive list includes: (1) his refusals to divest from his business interests;<sup>85</sup> (2) his continued implicit cultivation of these interests through

80. Bradley & Siegel, *supra* note 79 (making this point).

81. Adam Liptak & Peter Baker, *Trump Promotes Original "Travel Ban," Eroding His Legal Case*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/2017/06/05/us/politics/trump-travel-ban.html> [<https://perma.cc/E3GD-EJC3>].

82. "In calling the revised order 'politically correct,' Mr. Trump suggested that his goal throughout had been to exclude travelers based on religion. And in calling the revised order 'watered down,' he made it harder for his lawyers to argue that it was a clean break from the earlier one, which had mentioned religion." *Id.*

83. *Id.*

84. See, e.g., John Wagner, *Trump's Comparison of U.S. Intelligence Community to Nazi Germany Rebuked by Anti-Defamation League*, WASH. POST (Jan. 11, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/01/11/trumps-comparison-of-u-s-intelligence-community-to-nazi-germany-rebuked-by-anti-defamation-league> [<https://perma.cc/W8SH-UEWK>].

85. See, e.g., Dan Alexander, Chase Peterson-Withorn, & Jennifer Wang, *Trump Refuses to Divest Assets, Passes Control to Sons*, FORBES (Jan. 11, 2017), <https://www.forbes.com/sites/chasewithorn/2017/01/11/donald-trump-will-hand-over-business/> [<https://perma.cc>

regular visits to his properties around the United States;<sup>86</sup> (3) his populating the White House with family members;<sup>87</sup> (4) his populating his cabinet with an unprecedented number of billionaires;<sup>88</sup> (5) his frequent use of, and the large amount of public money spent to secure, his Florida golf club at Mar-a-Lago;<sup>89</sup> (6) the potential link between his aforementioned refusal to release his tax returns and the tax cuts that he pursued (and recently secured) for the wealthy;<sup>90</sup> and (7) the number and nature of ethics waivers he has awarded to key staffers in his administration.<sup>91</sup>

Perhaps most troublingly, President Trump utters falsehoods regularly, including statements whose falsity is immediately demonstrable.<sup>92</sup> Almost all politicians spin the truth to some extent, but at least it is the truth they are spinning. And politicians do utter false statements on occasion, but President Trump's frequency is so different in degree as to be different in kind. For example, he has made demonstrably false claims about: (1) various government statistics, including

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86. See, e.g., Karen Yourish & Troy Griggs, *Tracking the President's Visits to Trump Properties*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/interactive/2017/04/05/us/politics/tracking-trumps-visits-to-his-branded-properties.html> [https://perma.cc/R3GR-8VPX] (“Ethics experts say Donald J. Trump’s visits to properties owned, managed or branded by the Trump Organization amount to free publicity for the company and blur the line between his family business and presidential duties.”).

87. See, e.g., *The Trump Family's Prominent Roles in the White House*, CBS NEWS (May 1, 2017), <http://www.cbsnews.com/videos/the-trump-family-s-prominent-roles-in-the-white-house> [https://perma.cc/L67M-MM6U].

88. See, e.g., *Donald Trump's \$14 Billion Cabinet*, CBS MONEY WATCH, <http://www.cbsnews.com/pictures/donald-trumps-14-billion-cabinet> [https://perma.cc/FR8T-SASJ] (“President-elect Donald Trump rode the winds of a populist movement into Washington, D.C., promising to root out money from politics. Yet when picking his Cabinet members, Mr. Trump is surrounding himself with a historic level of wealth that’s at least 50 times greater than the Cabinet that George W. Bush led.”).

89. See, e.g., *Trump's Mar-a-Lago Trips Cost Taxpayers About \$10 Million So Far*, CBS NEWS (Feb. 21, 2017), <http://www.cbsnews.com/news/president-trump-mar-a-lago-trips-cost-taxpayers-millions> [https://perma.cc/SH9Q-PRUH] (“Budget watchdogs are criticizing the cost of President Trump’s visits to Mar-a-Lago, his private club in Palm Beach, Florida. Mr. Trump has been at his so-called ‘Winter White House’ the past three weekends. That’s 11 of his first 33 days in office. The travel has an estimated price tag of \$10 million.”).

90. See, e.g., Alan Rappeport, *Trump's Unreleased Taxes Threaten Yet Another Campaign Promise*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/17/us/politics/tax-code-overhaul-trump.html> [https://perma.cc/TD32-VU4F] (“President Trump’s promise to enact a sweeping overhaul of the tax code is in serious jeopardy nearly 100 days into his tenure, and his refusal to release his own tax returns is emerging as a central hurdle to another faltering campaign promise.”).

91. See, e.g., Josh Gerstein, *Trump White House Grants Waivers of Ethics Rules*, POLITICO (May 31, 2017), <http://www.politico.com/story/2017/05/31/trump-white-house-waivers-ethics-239011> [https://perma.cc/RZ7Z-FN7Q].

92. See David Leonhardt & Stuart A. Thompson, *Opinion, Trump's Lies*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html> [https://perma.cc/XJJ5-CM77] (cataloguing “nearly every outright lie [President Trump] has told publicly since taking the oath of office”).

those concerning criminality and employment;<sup>93</sup> (2) the size of the crowd at his inauguration (it was far smaller than he alleged);<sup>94</sup> (3) the magnitude of his Electoral College victory (it was below average by historic standards);<sup>95</sup> (4) voter fraud that he repeatedly claimed cost him the popular vote in the election (there is no evidence for his assertion that more than three million people voted illegally for Hillary Clinton);<sup>96</sup> and (5) wire tapping of his communications that he repeatedly alleged had been ordered by President Obama (there is no evidence for his claim, which would be a major scandal if true).<sup>97</sup> And these examples just skim the surface of the President's falsehoods.<sup>98</sup>

President Trump's repeated and persistent denials of truth and defenses of falsehood are beyond any plausible pale in American politics. A person who launched his political career on birtherism still counts "Obama wiretapped me" as an "opinion" worth defending and even becoming defensive about when others point out to him the absence of any evidence.<sup>99</sup> A number of prominent Republicans have condemned President Trump for spreading falsehoods in the service of his own imagined self-interest.<sup>100</sup> In all likelihood, no American living today has witnessed

93. See, e.g., Christopher Ingraham, *Trump Says Sanctuary Cities Are Hotbeds of Crime. Data Say the Opposite.*, CHI. TRIB. (Jan. 27, 2017), <http://www.chicagotribune.com/news/nationworld/ct-trump-sanctuary-city-crime-data-20170127-story.html> [<https://perma.cc/9Y97-FRET?type=image>]; Bourree Lam, *After a Good Jobs Report, Trump Now Believes Economic Data*, ATLANTIC (Mar. 10, 2017), <https://www.theatlantic.com/business/archive/2017/03/trump-spicer-jobs-report/519273> [<https://perma.cc/DV3J-CL8T>].

94. See, e.g., Tara Palmeri, *Trump Fumes Over Inaugural Crowd Size*, POLITICO (Jan. 22, 2017), <http://www.politico.com/story/2017/01/donald-trump-protesters-inauguration-233986> [<https://perma.cc/TVW2-DVNP>].

95. See, e.g., Jugal K. Patel & Wilson Andrews, *Trump's Electoral College Victory Ranks 46th in 58 Elections*, N.Y. TIMES (Dec. 18, 2016), <https://www.nytimes.com/interactive/2016/12/18/us/elections/donald-trump-electoral-college-popular-vote.html> [<https://perma.cc/2A6Q-VZ6X>] ("President Donald J. Trump has claimed he won the electoral vote in a 'landslide,' but he ranks below most presidents in the electoral vote and popular vote margins.").

96. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664> [<https://perma.cc/R8UG-E6XG>] ("In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.").

97. See Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 4, 2017, 3:35 AM), <https://twitter.com/realdonaldtrump/status/837989835818287106> [<https://perma.cc/6QHY-TNK8>] ("Terrible! Just found out that Obama had my 'wires tapped' in Trump Tower just before the victory. Nothing found. This is McCarthyism!").

98. See David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES, June 23, 2017, <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html> [<https://perma.cc/S3VX-KZJV>] (cataloguing "nearly every outright lie [President Trump] has told publicly since taking the oath of office").

99. See Jeremy Diamond, *Trump on Obama Wiretapping Claim: It Has "Been Proven Very Strongly"*, CNN (May 1, 2017), <http://www.cnn.com/2017/05/01/politics/trump-obama-wiretapping> [<https://perma.cc/W9EH-33YH>].

100. See, e.g., Allan Smith, *Republicans Are Dismayed by Trump's False Insistence that Millions Voted Illegally*, BUS. INSIDER (Jan. 24, 2017), <http://www.businessinsider.com/republicans-trump-voter-fraud-2017-1> [<https://perma.cc/5GV8-8YEK>]; Kelsey Snell, *McCain to Trump: Retract Wiretapping Claim or Prove It*, WASH. POST (Mar. 12, 2017),

a public official so willing and eager to attack the very existence or relevance of truth itself as a category of political life.<sup>101</sup>

American constitutional government will be in danger if enough institutions acquiesce in President Trump's apparent belief that he is entitled to his own facts. Imagine the lack of political accountability and unchecked power that would give him.<sup>102</sup> Yet it is also a serious problem that Americans have little reason to believe almost anything he says. Public trust in the President is essential in the event of a national crisis regarding which only the President possesses full information and to which only the President can respond effectively. As University of Chicago Law Professor Eric Posner wrote in criticizing Mr. Trump, "[t]he president's authority rests on trust and discretion, not on triumph of the will."<sup>103</sup>

### B. Constitutional Conventions

President Trump has disregarded more political norms than constitutional conventions. Nonetheless, several instances of his troubling behavior potentially qualify as breaches, or attempted breaches, of constitutional conventions. Because the relevant practices likely began in social fact before any potential obligation attached, they seem like potential candidates for constitutional conventions, as opposed to violations of norms that every presidential candidate or president ought to have observed from the beginning and should observe regardless of whether others do so.

This Part can only be suggestive, however, because it will not be able to do the hard work of establishing the existence and scope of each constitutional convention, as well as the level of generality at which the convention should be described. Nor will it be able to examine whether relevant circumstances have changed to the point that the convention should no longer be respected; like many phenomena in law and politics, conventions can rise and fall.<sup>104</sup> These are all important questions, and American legal scholars are increasingly asking and

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<https://www.washingtonpost.com/news/powerpost/wp/2017/03/12/mccain-to-trump-retract-wiretapping-claim-or-prove-it> [https://perma.cc/67PH-7RAR].

101. See, e.g., Roger Cohen, Opinion, *Trump 2020 Is No Joke*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/opinion/donald-trump-2020-roger-cohen.html> [https://perma.cc/UX75-E6UA] (arguing that, of the many concerning things about President Trump, "the frivolous blurring of truth and untruth, fact and falsehood, is the most grave," because "[l]iberty depends on facts" and "disoriented people are more inclined to accept a despot as sole font of truth").

102. See Aziz Huq & Tom Ginsburg, *How To Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 153 (2018) ("Democracy requires a shared epistemic foundation. Where the state exercises either direct or indirect veto power over the voices aired in the public sphere or the factual material therein available, antidemocratic actors and coalitions face lower barriers to the consolidation of authority.").

103. Eric Posner, Opinion, *Judges v. Trump: Be Careful What You Wish For*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/opinion/judges-v-trump-be-careful-what-you-wish-for.html> [https://perma.cc/8SKF-7P5K].

104. A good use of scholarly time would be to think hard about how and why constitutional conventions arise in the first place, how and why they are maintained, and how and why they decline.

attempting to answer them in a variety of settings.<sup>105</sup> But this Essay cannot substantially contribute to this effort, which would require close engagement with historical governmental practices with respect to each area of concern in order to determine when the perception of obligation first arose. And even then, it might be difficult to determine in particular instances whether one is dealing with a political norm or a constitutional convention because they are both related and different phenomena. One could certainly quibble with some of the categorizing attempted in this Part, although, again, the following are at least plausible candidates for constitutional conventions.

First, President Trump fired the FBI Director, James Comey, who had been the federal law enforcement official responsible for investigating potentially criminal behavior by members of the President's inner circle, including the President himself. What is more, President Trump fired Mr. Comey at least in part *because* of that investigation. Initially, the Trump administration's stated reason for Mr. Comey's dismissal was his alleged mishandling of the investigation into Hillary Clinton's use of a private email server as Secretary of State.<sup>106</sup> But President Trump quickly acknowledged what political observers already suspected to be the truth: the Russia investigation influenced his decision to fire Mr. Comey.<sup>107</sup>

Although the FBI director is given a ten-year term by statute in order to facilitate his political independence, the prevailing view is that the President possesses the legal authority to fire him; for example, it happened once before in the case of an FBI director who stood accused of numerous ethical lapses, including financial improprieties.<sup>108</sup> Legality, however, is neither the point of this episode nor of this Essay. It is arguably a constitutional convention in the United States that the President permits the executive officers responsible for federal criminal law enforcement a very broad range of independence and discretion. Structurally, the convention is an important aspect of the executive's maintenance of the rule of law, a task that the Constitution expressly imposes on

105. See generally Bradley & Siegel, *supra* note 26; Dorf, *supra* note 37; Pozen, *supra* note 31, at 29–39, 69; Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 & n.2, 544 (2004); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–94 (2013); Whittington, *supra* note 14.

106. See, e.g., Peter Baker & Michael D. Shear, *Trump Shifts Rationale for Firing Comey, Calling Him a "Showboat,"* N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/us/politics/trump-comey-showboat-fbi.html>

[<https://perma.cc/FYJ4-JAYC>] (“Earlier, the White House had said that Mr. Trump acted only after Attorney General Jeff Sessions and the deputy attorney general, Rod J. Rosenstein, came to him and recommended that Mr. Comey be dismissed because of his handling of last year’s investigation into Hillary Clinton’s email.”).

107. See *id.* (“[F]or the first time, he explicitly referenced the F.B.I.’s investigation into his administration’s ties to Russia in defending Mr. Comey’s firing.”)

108. See, e.g., Philip Bump, *Here’s How Unusual It Is for an FBI Director to be Fired*, WASH. POST (May 9, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/05/09/heres-how-unusual-it-is-for-an-fbi-director-to-be-fired> [<https://perma.cc/95MU-4CWP>] (discussing the firing of FBI Director William Sessions by President Bill Clinton in 1993).

the President by charging him with taking care that the laws are faithfully executed.<sup>109</sup>

This constitutional convention plays an obvious role in protecting the actual and perceived impartiality of the law. Among other people, the convention protects the President's political opponents. One can thus see why members of both political parties would perceive a long-term incentive—and would have since internalized an obligation—not to politicize criminal law enforcement. It protects Americans who are active in public life when their political party is out of power.

It may be less apparent that this constitutional convention protects the President, for at least two reasons. First, he retains the authority to ensure that his subordinates are acting with vigor and without improper influence, including the influence of knowing too much about what the President himself would prefer. This both attracts persons of integrity to the relevant positions and enables them to execute their responsibilities in good conscience. Second, and critically, as long as the President and others observe the convention, he cannot be justly accused of trying to corrupt the system of criminal law. (Perhaps this consideration helps explain why President Obama, a Democrat, nominated Mr. Comey, a Republican known for his independence, for the position.) When the President disrespects the constitutional convention of independent criminal law enforcement, Americans all lose, including the President—unless, perhaps, he has something to hide.

Candidate Trump contravened a second arguable constitutional convention that seeks to prevent the politicization of federal criminal law enforcement. He threatened his political opponent with imprisonment, declaring emphatically during a presidential debate that Hillary Clinton “would be in jail” if he were President.<sup>110</sup> Ari Fleischer, former Press Secretary to President George W. Bush, tweeted in response with some understatement: “Winning candidates don’t threaten to put opponents in jail. Presidents don’t threaten prosecution of individuals. Trump is wrong on this.”<sup>111</sup> Nonetheless, Candidate Trump for the most part exulted in, and encouraged, crowd chants of “lock her up” during his many campaign rallies.<sup>112</sup> After the election, he quickly abandoned the idea of

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109. U.S. CONST. art. II, § 3. In addition to constitutional conventions, constitutional law also plays an important role in constraining the President. In the public debate over whether the President is capable of obstructing justice, it has not been sufficiently appreciated that the Take Care Clause makes it unlawful for the President to act with the intention of obstructing or perverting justice.

110. See, e.g., Rebecca Berg, *Trump Savors “Lock Her Up” Chants at Pa. Rallies*, REALCLEAR POL. (Oct. 11, 2016), [https://www.realclearpolitics.com/articles/2016/10/11/trump\\_savors\\_lock\\_her\\_up\\_chants\\_at\\_pa\\_rallies.html](https://www.realclearpolitics.com/articles/2016/10/11/trump_savors_lock_her_up_chants_at_pa_rallies.html) [<https://perma.cc/HH9G-BKQ4?type=image>] (“Halfway through his remarks to supporters in a high school gym here Monday, Donald Trump paused for a minute to revel in the crowd’s chants. They shouted, “Lock her up.” The Republican nominee clapped along. ‘Very sad,’ Trump said, swiveling back to the microphone to continue speaking. ‘Special prosecutor, here we come.’ At his first rally following a high-stakes town hall debate Sunday, Trump forged ahead on the path he charted on that stage—where he told Hillary Clinton, his Democratic rival, that she ‘would be in jail’ if he were in the White House. If elected, he said, he planned to appoint a special prosecutor to further investigate her use of a private email server while secretary of state”).

111. *Id.* (reproducing Mr. Fleischer’s tweet).

112. See Peter W. Stevenson, *A Brief History of the “Lock Her Up!” Chant by Trump*



prosecuting Clinton, apparently in deference to the very convention he had flouted in order to electrify his base and increase his chances of winning the presidency.<sup>113</sup> More recently, however, he has publicly condemned his own attorney general for not investigating Clinton.<sup>114</sup>

Third, notwithstanding a post-Watergate practice that for forty years had been respected by presidential candidates of both parties, Candidate Trump refused to release his tax returns. The public was thus unable to learn: (1) whether his personal financial connections to Russia helped explain his seemingly inexplicable affinity for Russian leader Vladimir Putin; (2) whether Mr. Trump was as successful a businessperson as he said he was; (3) the extent to which he has paid taxes and made charitable donations; and (4) the extent to which he would benefit personally from his proposal to cut taxes significantly on the wealthiest Americans.<sup>115</sup> Notwithstanding these concerns, the President's refusal to release his tax returns would likely have been justified if there were no preexisting practice of presidential candidates releasing their returns. But given decades of contrary practice, including releases against political interest out of an apparent sense of obligation, there appears to be a strong case to be made that Trump violated a constitutional convention requiring presidents to release their tax returns.

For example, 2012 Republican presidential candidate Mitt Romney predictably was harmed by his release of his tax returns, but he did it anyway. Moreover, he deemed Trump's refusal to follow suit "disqualifying."<sup>116</sup> Romney's Facebook post on the subject illuminates the constitutional purpose served by requiring presidential candidates to release their tax returns:

It is disqualifying for a modern-day presidential nominee to refuse to release tax returns to the voters, especially one who has not been subject to public scrutiny in either military or public service. Tax returns provide the public with its sole confirmation of the veracity of

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*Supporters Against Clinton*, WASH. POST: THE FIX (Nov. 22, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-phant-as-it-looks-like-trump-might-not-even-try> [<https://perma.cc/W8VH-6CL4>].

113. See *id.* ("Former New York mayor Rudolph W. Giuliani sounded a similar note. 'Look, there's a tradition in American politics that after you win an election, you sort of put things behind you,' he told reporters at Trump Tower on Tuesday.")

114. See, e.g., Betsy Klein, *Trump Slams Sessions, Rips DOJ in Twitter Outburst*, CNN (July 25, 2017, 11:24 AM), <http://www.cnn.com/2017/07/25/politics/donald-trump-jeff-sessions-hillary-clinton/index.html> [<https://perma.cc/NZ9C-8LMM>] ("President Donald Trump lashed out at his attorney general and Justice Department in an extraordinary outburst on Twitter Tuesday morning, continuing his public shaming of Jeff Sessions while appearing to prod the nation's top law enforcement official to investigate Hillary Clinton, his 2016 election opponent.")

115. See, e.g., Greg Sargent, Opinion, *This New CNN Scoop Shows the Drip-Drip-Drip of Trump's Russia Scandal Will Continue*, WASH. POST: PLUM LINE (May 30, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/05/30/this-new-cnn-scoop-shows-the-drip-drip-drip-of-trumps-russia-scandal-will-continue> [<https://perma.cc/KY9A-6N7M>].

116. *Romney Calls Decision by Trump Not To Release Tax Returns "Disqualifying,"* FOX NEWS (May 11, 2016), <http://www.foxnews.com/politics/2016/05/11/romney-calls-decision-by-trump-not-to-release-tax-returns-disqualifying.html> [<https://perma.cc/6KJ4-5V85>].

a candidate's representations regarding charities, priorities, wealth, tax conformance, and conflicts of interest. Further, while not a likely circumstance, *the potential for hidden inappropriate associations with foreign entities, criminal organizations, or other unsavory groups is simply too great a risk to ignore for someone who is seeking to become commander-in-chief.*<sup>117</sup>

Perhaps in the future Congress will legally require presidential candidates to release their returns.

A fourth potential constitutional convention concerns compliance with established practices of vetting executive orders within the executive branch. President Trump failed to vet his initial executive order on immigration and refugees, which (among other things) barred admission into the United States from seven predominantly Muslim countries for ninety days and suspended all refugee admissions for 120 days.<sup>118</sup> Contrary to how executive orders are ordinarily crafted—thereby disciplining exercises of presidential power and giving courts institutional reasons to accord at least some deference to national security judgments by the President—the affected departments within the executive branch were not consulted and given any opportunity to voice objections.<sup>119</sup> The order that resulted was poorly drafted and legally vulnerable, and the rollout was egregious in the lack of humanity it exhibited towards the many individuals and families who were taken by surprise while on airplanes, in airports, or abroad.<sup>120</sup> Again, perhaps the normative situation would be different had the practice of vetting orders and enabling the expression of dissent not been firmly established. But given that it was so established, the President at least arguably had an obligation to comply with past practice.

Perhaps relatedly, President Trump seemingly takes or abandons public positions on difficult, controversial issues without first consulting experts. Consider, for example, his casual invocation of a one-state solution to the Israeli-Palestinian conflict, an approach that would be at odds with decades of American foreign policy.<sup>121</sup> Similarly, he briefly suggested, apparently without deliberation or consultation, that he might question the “One China policy” to which the United States has adhered since the 1970s. He then had to back down as a condition to talking with the Chinese government.<sup>122</sup> This is not how Presidents of both parties have traditionally felt entitled to behave. (Such conduct may, however, simply be

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117. Mitt Romney, FACEBOOK (May 11, 2016) (emphasis added), <https://www.facebook.com/mittromney/posts/10153487016861121> [<https://perma.cc/9UCL-7DWP>].

118. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

119. See, e.g., Michael D. Shear & Ron Nixon, *How Trump's Rush To Enact an Immigration Ban Unleashed Global Chaos*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/politics/donald-trump-rush-immigration-order-chaos.html> [<https://perma.cc/U2J9-8WWC>].

120. See *id.*

121. See, e.g., Ian Fisher, *Palestinians Dismayed as U.S. Appears To Back Off Two-State Solution*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/world/middleeast/trump-israel-two-state-solution.html> [<https://perma.cc/P6GF-B8A6>].

122. See, e.g., Jane Perlez, *Trump, Changing Course on Taiwan, Gives China an Upper Hand*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/world/asia/trump-one-china-taiwan.html> [<https://perma.cc/P2RR-WXJD>].

unwise or in violation of a political convention, as opposed to a constitutional convention.)

To end on a more positive note, President Trump has advocated the abandonment of a fifth arguable constitutional convention—the Senate’s filibuster rule as to legislation—but so far he has not succeeded. It is hard to see how norms of political morality simply required such a rule from the beginning and regardless of whether the opposition party respects it. But the rule is firmly established, having been respected for a long time by both political parties when they have been in control of the Senate. Moreover, the filibuster serves the arguable constitutional purpose of facilitating some meaningful measure of self-governance by electoral losers.<sup>123</sup> And although political self-interest of course partially explains why the filibuster has survived, it is at least plausible to think that more than partisan self-interest underlay Senate Majority Leader Mitch McConnell’s firm rejection of President Trump’s suggestion that Senate Republicans do away with it.<sup>124</sup>

#### CONCLUSION

So what, if anything, can be done to enhance respect for political norms and constitutional conventions by elected officials? It is far easier to diagnose the problem than it is to offer promising solutions, because it is far easier to observe that respect for political norms and constitutional conventions is eroding in American politics than it is to identify all of the reasons why. Contributing factors likely include the transformation of the public sphere through old and new media, demographic changes in the country and their implications for the Republican Party, gerrymandering on technological steroids, and the increased clustering of Democrats in urban areas and Republicans in rural areas. But a responsible examination of the issue is beyond the scope of this Essay, which can offer only modest suggestions in closing for managing the corrosive conduct of President Trump and the flouting of norms and conventions more generally.

It is essential that the President be called out for his disregard of political norms and constitutional conventions each and every time he disrespects them. Many individuals and institutions have a role to play. They include, first and foremost, members of Mr. Trump’s own political party,<sup>125</sup> but they also include members of the

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123. See generally Siegel, *supra* note 48 (arguing that a constitutional role morality for elected officials of the federal government, including compliance with constitutional conventions, can help vindicate (among other things) the American ideal of democracy as collective self-governance).

124. See Aaron Blake, *Trump Asks for More Power. Here’s Why the Senate GOP Will Resist.*, WASH. POST: THE FIX (May 30, 2017) <https://www.washingtonpost.com/news/the-fix/wp/2017/05/02/3-reasons-the-gop-wont-nuke-the-filibuster-and-give-trump-more-power> [<https://perma.cc/68M7-Z5NK>].

125. See *supra* note 58 (noting prominent Republican critics of President Trump’s behavior); Josh Gerstein, *Trump’s Tweets Prompt Backlash from GOP Lawyers*, POLITICO (June 5, 2017), <http://www.politico.com/story/2017/06/05/trump-tweets-republican-lawyers-backlash-239148> [<https://perma.cc/XQC4-B8PK>] (“A top Justice Department official under President George W. Bush, Jack Goldsmith, unleashed a 17-entry Tweetstorm arguing that Trump’s ongoing attacks on his own lawyers and his apparent effort to disclaim responsibility

opposition party, the mainstream news media (which must seek to overcome its own partial polarization), the courts in appropriate ways in cases properly before them, the institutions that constitute civil society, legal academics, ordinary citizens, and friends of the United States abroad in the various institutional roles they occupy.

It is also important for all of the above actors and institutions to try to persuade Americans that political norms and constitutional conventions are good for the health of the American constitutional system, and so Democrats and Republicans alike should push for them.<sup>126</sup> In this regard, admissions against political interest can potentially be helpful. Democrats could model such behavior by, for example, opposing faithless electors and future Court packing, and by condemning liberals who advocate (or joke about) violence against the President, his family, his supporters, or any Republican politician.<sup>127</sup> Republicans might consider whether certain matters are so important to the long-term health of the American constitutional system that standing up for them is worth the cost of potentially undermining parts of their current legislative agenda by holding the President to account for his most egregious misconduct.

Looking beyond our shores, it is imperative that President Trump's troubling relationship with political norms and constitutional conventions not migrate abroad. Rather than serving as a model of political behavior for emulation elsewhere, it is at least possible that President Trump is setting a series of "negative precedents" that other countries will reject.<sup>128</sup> The results of the most recent French and English elections may be at least partially explicable in such terms.<sup>129</sup>

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for reissuing his 'watered down' order are further eroding judicial deference for the executive branch."); *id.* ("Given POTUS's instability, it is not just courts that have reason to relax the presumption of regularity for this Prez," wrote Goldsmith, now a professor at Harvard Law School. "We all have reason to do so about everything the Executive branch does that touches, however lightly, the President."").

126. Joseph Fishkin and David Pozen offer a wide variety of evidence to support their argument that Republican politicians are, for a variety of reasons, more likely to engage in behavior that disrespects political norms and constitutional conventions. *See generally* Joseph Fishkin and David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. (forthcoming 2018).

127. Engaging in self-restraint in order to help sustain political norms and constitutional conventions at a time when they are being disregarded by others raises obvious concerns about the risks of unilateral disarmament. This Essay cannot address how best to negotiate this collective action problem; it can merely observe that there is a genuine problem to be negotiated, and that conflict escalation may not be in anyone's long-term interests.

128. *Cf.* Bradley & Siegel, *supra* note 26, at 273 ("Historical practice, like judicial decisions, can sometimes create negative precedent—that is, precedent about what not to repeat rather than what is constitutionally permissible. Just as certain infamous judicial decisions have come to be regarded as 'anticanonical,' intrusions on the separation of powers—including intrusions on judicial authority—might come to stand for what should not be repeated." (footnote omitted)).

129. *See, e.g.,* Peter Baker, *A Global Trump Movement? French Election Signals No*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/world/europe/trump-macron-france.html> [<https://perma.cc/7JGM-X4R9>] ("[I]nstead of being joined by like-minded counterparts across the Atlantic, Mr. Trump finds himself facing a European leadership that has repudiated his fiery brand of politics."); Ceylan Yeginsu, *What Turned the British Election? Maybe the Youth Vote*, N.Y. TIMES (June 9, 2017), <https://www.nytimes.com>

Most importantly, it is critical for Americans to vote their displeasure with President Trump's conduct if he does not change his behavior, as he appears unlikely to do. Indeed, the 2018 midterm elections and the 2020 presidential primaries and general election may be, at least in part, a verdict on whether President Trump will be remembered as having violated certain political norms and constitutional conventions or as having succeeded in terminating them. There is a huge difference between a constitutional regime in which there are norms and conventions based on role that are sometimes or even often violated by elected officials and a regime in which these norms and conventions are simply thought not to exist.<sup>130</sup>

Recent political events can make it difficult for Americans who value political norms and constitutional conventions, as well as the governmental institutions and constitutional system they help sustain, to believe in the concept of just deserts. Good things have recently happened to American politicians who have treated such norms, conventions, and institutions badly. But the jury is still out on how successful President Trump will be in eroding political norms and constitutional conventions; his low approval ratings since taking office may suggest that there is reason for hope.<sup>131</sup> His political base seems to love his behavior; they view him as "shaking things up."<sup>132</sup> Other Americans have become disturbed by that phrase—for them it brings to mind the mixing together of powerful chemicals in order to cause an explosion. All Americans might bear in mind that the President's base alone is not large enough to win another election, even with the rural favoritism that is baked into the Electoral College.<sup>133</sup> Desert sometimes operates within a longer time horizon than a few years. More to the point, so does the hard work and struggle of sustaining a constitutional democracy.

/2017/06/09/world/europe/britain-elections-youth-vote.html [https://perma.cc/B7SU-ALHX] ("The election results were fueled partly by a higher turnout rate among young British voters who had long been angry at the results of the referendum last year to leave the European Union, known as Brexit. That vote, overwhelmingly supported by older Britons, was seen by many younger people as a threat to their jobs, their ability to study abroad and their desire to travel freely across the bloc's borders.").

130. It is premature to conclude that the United States is already at the point at which norms and conventions based on political role are thought not to exist. For example, neither President Trump nor Senate Republicans have pushed Court packing, and, as noted at the end of Part II, Senate Majority Leader Mitch McConnell firmly rejected the President's idea of eliminating the filibuster as to legislation. Moreover, as documented in the footnote that follows, the President's strikingly low approval ratings at the beginning of his term (and since) may have something to do with his disregard of political norms and constitutional conventions.

131. See, e.g., *Gallup Daily: Trump Job Approval*, GALLUP, <http://news.gallup.com/poll/201617/gallup-daily-trump-job-approval.aspx> [https://perma.cc/2K2T-Y7BB] (noting President Trump's approval rating of thirty-six percent on October 18, 2017).

132. See, e.g., Baker, *supra* note 4 ("Where Washington veterans fret about deviations from past norms, Mr. Trump's supporters see a president willing to shake things up. Where Washington cares about decorum and process, they want a president fighting for them against entrenched powers.").

133. See, e.g., Emily Badger, *As American as Apple Pie? The Rural Vote's Disproportionate Slice of Power*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/upshot/as-american-as-apple-pie-the-rural-votes-disproportionate-slice-of-power.html> [https://perma.cc/88WK-KKBZ].