

THE ROLE OF NORMS IN OUR CONSTITUTIONAL ORDER

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We have given more attention to the issue of norms recently¹—maybe specifically during this administration—than we have previously. But I think it is high time that we pay attention to norms. They are an essential part of how our constitutional system works in general, but they tend to be under-analyzed. We do not pay as much attention to them as we should, nor do we have good tools for thinking about them. Moreover, I do not believe we even have very good tools for identifying them.

So this is a useful moment for us to try to grapple with the fact that the Constitution vests a great deal of discretion in government officials of all sorts,² and that norms are part of the process—part of the sub-constitutional sets of practices and rules—by which we

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1. See, e.g., Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1205 (2019) (noting that the article is part of a symposium “that addresses the pressing need for ‘Reclaiming—and Restoring—Constitutional Norms.’”).

2. For example, the Take Care Clause requires the President to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3, cl. 4. In turn, some of this discretion is exercised by those working under the President. See generally TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW (2014) (surveying the power of the President and “those under his supervision” under the Take Care Clause).

make the constitutional system operate effectively, despite the fact that it entrusts vast discretion to government officials.

The phrase “norms” encompasses a great deal of different kinds of activities that qualify as part of these sub-constitutional sets of practices. We might think of some norms as being purely a matter of informal practice, but we might imagine others that get institutionalized to some degree. For example, we might imagine some rules about professional practice, like the Senate filibuster or how the House committee system works, as being similar to a norm, even though they are in fact entrenched in a set of rules. They are part of the sub-constitutional set of practices that regulate how government officials conduct business within the terms of the Constitution, and we think they serve very important functions and do important work within the constitutional system. Some of them may be built into statutes, and so there is a host of framework statutes that are particularly important to how the government operates more generally. And these rules might serve those similar functions of norms as well.

One of the challenges, though, particularly when we consider informal norms—those that are not built into some kind of regularized sets of rules or practices—is recognizing what they are so that we know when a norm violation has occurred and whether or not we ought to be concerned about it. At the very least, norms are part of a regularized set of behavior, and so an outside observer watching a political system may be able to infer that there is a norm based on how people are behaving.

But identifying a routine practice, by itself, probably is not sufficient to identify a norm. For example, it has become the regular practice of recent Presidents to only nominate people to the U.S. Supreme Court who have some prior judicial experience before that nomination is made, largely people who have gone to Harvard and Yale Law School, and, in many cases, who have gone to Princeton

University as undergraduates.³ It is hard to imagine that practice as being a norm. If a President decided not to follow that regularized practice, but instead chose as a judicial nominee to the Supreme Court someone who had not gone to Harvard Law School but instead went someplace else, or if the nominee had not had prior judicial experience, we might think the President had made a nomination that was more or less wise. However, we would be unlikely to think that the President had abused the public trust or subverted the workings of the political system. We might not necessarily think it is a norm violation but rather a break from routine practice.

So that raises questions about when a routine practice is a norm versus a change in routine behavior such that we worry if government officials deviate from it. Sometimes this is a function of breaking regularized practices, which might signal something about a norm being changed. Other times, though, it is less true.

For example, early in the Trump administration, President Trump was criticized for the fact that he maintained his personal Twitter account,⁴ raising questions of whether there is some kind of norm that the President should not have personal social media accounts they continue to use while in office. President Trump famously, and in all caps, blasted on Twitter that his use of social media is “MODERN DAY PRESIDENTIAL.”⁵ He behaves differently than other Presidents have, and among the modern-day features of his presidency is that he will use a Twitter account in a personal capacity.

3. See *Biographies of the Justices*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> [https://perma.cc/8N3V-WDPH] (summarizing the recent and current Justices' educational and professional backgrounds).

4. See, e.g., Adrienne LaFrance, *Donald Trump is Testing Twitter's Harassment Policy*, THE ATLANTIC (July 2, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-president-of-the-united-states-is-testing-twitters-harassment-policy/532497/> [https://perma.cc/G7H3-43T4].

5. *Id.*

We do not have a long practice that tells us Presidents should not do that kind of thing. And so we are constructing norms on the fly as to whether it is okay to have a personal Twitter account. If it is okay for a President to have a personal Twitter account, how should he use that Twitter account? What kind of behavior on that Twitter account might be acceptable? And those expectations are going to change over time, and it is a challenge to try and determine when we know that the kind of norm has been established and when we do not.

Part of what also complicates thinking about when norms have occurred is that we recognize there are likely to be exceptions to norms over time. So even if we think something has a norm-like quality, we recognize, just like rules, that norms can be violated in various ways. And then the question is when do the violations accumulate such that we in fact think the norm no longer holds and it has broken such that now we can move forward without it, as opposed to simply thinking these are violations of the norms but the norm itself holds going forward.

So, think about the example of faithless electors. The U.S. Constitution sets up a system of an Electoral College that has actual human beings serving as presidential electors who cast ballots a month after the voters themselves cast ballots for the presidency.⁶ All through American history, presidential electors have been pledged electors—when they are selected to hold this office they have pledged themselves to vote for a particular presidential candidate.⁷ But some presidential electors violate that pledge and vote

6. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

7. See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of the Faithless Electors*, 59 ARIZ. L. REV. 903, 906 (2017) (“[E]arly presidential ballots simply listed the names of the presidential electors pledged to vote for that party’s presidential nominee.”).

for someone other than the person that they were pledged to vote for in the first place.⁸ We call these “faithless electors.”⁹

We might think there is a norm for presidential electors, first, to make pledges and, second, to adhere to their pledges over time and actually cast their ballots in favor of the person for whom they were elected to that office to cast their ballots. But we can observe faithless electors all through American history, sometimes more than other times. The 2016 presidential election featured quite a few,¹⁰ as well as a lobbying campaign to create even more.¹¹ Is it still a norm that electors should not be faithless, despite the fact that we have these examples of electors being faithless over time? Does the existence of faithless electors over the course of our political practice indicate that there is no established norm against faithless electors, or does it merely indicate that a norm against faithless electors persists but is sometimes violated?

And so my question as to when we recognize something as being a norm and when we do not, when it is just routine behavior as opposed to some kind of normatively binding behavior, does turn in part on what the internal motivations and understandings are of those engaged in the practice. Do the people who are engaged in this practice recognize it as a kind of norm such that it ought to guide their behavior and constrain their behavior in various kinds of ways? And likewise, is it blameworthy if they violate that kind of practice over time?

For example, I think we would say that most presidential electors believe, as part of their internal practice, that they ought to adhere

8. *See id.* at 904 (describing the push for faithless electors in the 2016 presidential election).

9. *Id.*

10. *See* Kyle Cheney, *Electoral College sees record-breaking defections*, POLITICO (Dec. 19, 2016, 8:52 PM), <https://www.politico.com/story/2016/12/electoral-college-electors-232836> [<https://perma.cc/8P5V-7C63>] (noting seven faithless electors in the 2016 presidential election, the most in United States history).

11. *See, e.g.*, Whittington, *supra* note 7, at 912–15 (discussing efforts to persuade electors to vote against Donald in the 2016 election).

to their pledges. Moreover, we think it is blameworthy if they do not adhere to their pledges and violate their pledges in various ways. But ultimately, those are empirical questions about whether or not that is true, not only true that there is a regular practice but also true that those who engage in the practice believe that there is a norm that creates an independent reason for continuing to adhere to that practice. And it is a challenge to maintain and enforce that sense of norms in these instances in which people might violate them.

So it was suggested earlier in our discussion, for example, that major pieces of social legislation often get bipartisan support. And that has been true through much of American history. Certainly, it is true that through much of the twentieth century major pieces of legislation received bipartisan support.¹² Yet it is hard to think that this is a norm. It is not obvious that any of the players thought internally that they had to have bipartisan support in order to pass legislation, even during the time period in which they routinely did have bipartisan support for doing so.

It is not clear that anyone thought it was blameworthy if you could not get bipartisan support for a particular piece of legislation. But there were institutional features that encouraged legislative entrepreneurs to seek bipartisan majorities in order to advance their policy initiatives. You had to overcome a Senate filibuster. You possibly had to overcome a presidential veto. There was less political polarization so that there was significant overlap in policy preferences among the two parties such that you often would get bipartisanship just based on where people's policy preferences tended to lie.

12. See BIPARTISAN POLICY CENTER, *History of Bipartisanship*, <https://bipartisanpolicy.org/history-of-bipartisanship/> [<https://perma.cc/T6R9-UULZ>] (last visited Nov. 22, 2020) (listing examples of notable legislation in United States history that have received bipartisan support).

So it becomes an interesting question: if you are now trying to move a piece of legislation through Congress and you cannot get bipartisan support for it, have you somehow violated a norm by continuing to push that legislation forward despite the fact that you do not get support from the other party? If you were a mid-twentieth century legislator who happened to have unified government, a friendly President, and a filibuster-proof partisan majority in the Senate, would you be doing something wrong given the expectations of the time if you moved legislation forward on a purely partisan basis and over the opposition of a unified minority party? Mid-twentieth century legislators rarely found themselves in such a situation, but it is not obvious that they would have thought that they were violating some matter of political duty and doing something disreputable if they were to advance legislation on a purely partisan basis in such circumstances.

Likewise, you had this conversation recently in terms of presidential impeachment, for example. Is it appropriate to move a presidential impeachment forward if you do not have bipartisan support for it?¹³ In what sense is that just misguided because it is not likely to be very successful under those circumstances? And to what degree is that actually blameworthy behavior such that we think we are undermining something important about the constitutional system itself? When Speaker Pelosi suggested that a presidential impeachment should not move forward until there was bipartisan support for such action,¹⁴ was that merely a strategic

13. See, e.g., Alan Dershowitz, *A partisan impeachment vote is exactly what the Framers feared*, THE HILL (Nov. 1, 2019, 10:00 AM), <https://thehill.com/opinion/judiciary/468483-a-partisan-impeachment-vote-is-exactly-what-the-framers-feared> [<https://perma.cc/XKR6-RJ9L>] (arguing that no impeachment should ever move forward without bipartisan support).

14. See Dan Mangan & Kevin Breuninger, *House Speaker Nancy Pelosi says Trump 'unfit' to be president, but 'I'm not for impeachment'*, CNBC (Mar. 12, 2019, 8:03 AM), <https://www.cnbc.com/2019/03/11/house-speaker-nancy-pelosi-says-im-not-for-impeachment-of-trump.html> [<https://perma.cc/9PYM-CSDA>] (quoting Speaker Pelosi as

calculation about the politics of the situation or was that an expression of a norm that suggested that a House majority would be doing something shameful if they voted on an impeachment resolution over the unified opposition of the President's own co-partisans?

Some of those questions are going to turn on how important we think that particular practice is in helping to sustain the larger workings of the democratic political system. Some kinds of practices we can abandon without having lots of negative consequences for how the constitutional system works and certainly not a lot of latent consequences for the limits on government power. But some we should be much more worried about if we wind up losing them and having them break down in various ways.

There is a reason, for example, why we expect the Department of Justice, for the most part, to be relatively independent from presidential intervention. There is a reason why we think it is inappropriate for Congress to interfere with the size of the Supreme Court and to pack the Court by adding additional seats or to pack Congress by adding other states. It is not just the fact that these are longstanding practices and so deviations would be unusual, nor is it just that such deviations might be imprudent political moves that are unlikely to achieve their ultimate objectives.

There is a concern that if we change those practices, what will likely be the consequences for the political system as a whole? And there are at least some norms that, if we start violating them, we should worry there will be bad consequences, not only for people's support of the political system, but also for how well the constitutional system is likely to function and what kind of limits on governmental power are likely to exist.

Let me just briefly put one more issue on the table for us to think about and maybe some questions it raises as well, which is how we go about enforcing norms. We are used to constitutional rules that

stating that "unless there's something so compelling and overwhelming and bipartisan, I don't think we should go down that path, because it divides the country").

we enforce, for example, through judicial review, as well as other mechanisms. Norms are much trickier about how we enforce them and maintain them over time.

So think about the classic example of a norm, which was the tradition of a two-term presidency, in which the idea was that a President should not run for more terms of office than George Washington himself had done.¹⁵ We thought this was an important constraint on the presidency and a way of preventing Presidents from becoming dictatorial leaders.¹⁶ One thing that helped preserve that over time, besides the fact that Presidents often were not very popular by the end of their second term,¹⁷ was the fact that we had lots of gatekeepers in the political parties that could force Presidents to limit themselves to two terms.

So when some people thought, for example, that it would be a great idea for Ulysses S. Grant to run for a third term,¹⁸ there were party leaders inside the Republican party who pushed back and said that was inappropriate,¹⁹ that you should not have a President run for a third term of office. Once those kinds of gatekeepers break down, though, it is very hard to know how to continue to enforce the norm.

Do you simply rely on the self-restraint of the political leader? Are you relying on the mass public? These questions are often going to be very difficult. In the case of two-term presidencies, of

15. See Harry A. Bailey, Jr., *Presidential Tenure and the Two-Term Tradition*, 2 *PUBLIUS* 95, 95 (1972) (quoting JOSEPH E. KALLENBACH, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 188-90* (1966)).

16. See *id.* at 105 (“One of the expressed reasons for the [Twenty-Second] Amendment is to prevent the possibility of a president securing a third term, which would presumably increase his chances of becoming a dictator.”).

17. See *id.* (noting that a majority of Presidents in the United States have served only one term).

18. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 *MINN. L. REV.* 565, 580-82 (1999) (describing the events surrounding President Grant’s possible third presidential run).

19. See *id.* (noting that in 1875 several state Republican conventions “passed resolutions declaring their opposition to presidential services beyond two terms”).

course, we built it into a constitutional rule instead.²⁰ But we can think about similar questions in terms of, for example, the norm for presidential candidates to release health records and tax returns. Are we just relying on the mass public at this point to enforce that norm by refusing to vote for somebody who will not do it? Relying on the public's vote often seems like an ineffective mechanism to enforce a particularly important norm.

It is an interesting question of what states can do in this kind of context of primarily federal norms. Of course, states, in their own internal operations, have their own sets of norms. And they are struggling over those, as well. One feature of norms is we might think that they are largely not institutionalized, although you can imagine some ways states might try to help institutionalize particular norms through litigation, through statutes, and the like. But you can also think about informal things states can do to try to put pressure on federal officials they think are violating norms in various ways.

You might think of the sanctuary cities movement as being an aspect of that—namely, states deciding to use their own powers to refuse to cooperate with federal government officials who are conducting their policy in a way they think violates traditional expectations about how exactly immigration policy is going to be implemented.²¹ I think about the case of President Andrew Johnson, to go back to a set of presidential norms, for example, where he went on a tour of cities in 1866 leading up to the mid-term elections and used what were traditionally understood to be ceremonial political

20. See U.S. CONST. amend. XXII (“No person shall be elected to the office of the President more than twice . . .”).

21. See generally Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019).

events to make them into partisan political events.²² And one consequence was local government officials stopped showing up for those events.²³

Presidents traditionally could be expected to be on stage with all the local bigwigs. Andrew Johnson increasingly was isolated.²⁴ The local bigwigs would not come and be onstage with him if he was going to use his presidential platform as a partisan device rather than primarily a ceremonial or celebratory device. And we can imagine similar ways in which, in the modern context, state and local officials can push back against federal officials they think are misbehaving by speaking out against them and reinforcing a set of norms about what our expectations are about how political figures behave and by ostracizing political officials they think are behaving in bad ways.

An underlying feature of that question is who is the relevant community to help support norms or to undermine them? If we're changing norms, is it because the people in general want it, or is it something else? And there's certainly a set of norms that are a function of mass public opinion but an awful lot of political norms that matter for how political actors behave are really elite-driven norms that are not necessarily something the mass public has much stake in, knows very much about, or even would be very supportive of if you were to highlight it to them.

So, some of President Trump's unusual rhetorical behavior, for example, we might think of as breaking traditional norms about how exactly Presidents are supposed to criticize judges or criticize other political leaders. Those may have been expectations among a set of political elites but not necessarily something the general public cares very much about or would necessarily be supportive of if

22. This tour is commonly known as President Johnson's "swing around the circle." CHESTER G. HEARN, *THE IMPEACHMENT OF ANDREW JOHNSON* 97 (2000).

23. *See id.* at 102–04.

24. *See id.* at 107.

you push them on it. So I do not think we should necessarily think that the desirable feature of norms is that they all rest on mass majority support. Sometimes we might think norms are a very good idea, even if a majority of the people in fact prefer to operate rather differently. An outsider, populist politician might also be a norm breaker precisely because political norms are often created, enforced and maintained by insider political elites. The political outsider might well have popular support for burning those insider norms down, but we might find that the constitutional system is less functional, less robust, and less attractive once those norms are all torn away.