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Law Is Not Enough

Neil S. Siegel

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Law Is Not Enough

NEIL S. SIEGEL*

Thank you, Dean Crago, for that generous introduction.

Please allow me to begin by thanking Professor Joanne Brant and the Ohio Northern University Pettit College of Law for inviting me to deliver this year's Carhart Lecture. I am honored to be here and to contribute to all of the good work that the Fred Carhart Memorial Program in Legal Ethics has been doing since its inception eleven years ago.

I apologize for having had to reschedule this lecture not once but twice. I am truly sorry. The first time was due to a family emergency, and the second time was due to my work in the Senate on the U.S. Supreme Court confirmation process of Justice Brett Kavanaugh. Now that this process is complete, I am free to speak my mind—and to speak for myself alone.

I think it is fair to say that there is a widespread (albeit far from universal) sense among legal academics, political scientists, members of the mainstream news media, political elites, and politically engaged citizens who are not elites that elected officials are crossing lines that should not be crossed and are doing it a lot.[1] What is more, there is a widespread (although, again, not universally held) fear that the repeated crossing of such lines by politicians is endangering the health—and perhaps the future viability—of constitutional

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* David W. Ichel Professor, Duke Law School. For helpful comments, I thank my colleagues Curtis Bradley and H. Jefferson Powell.

1. *See, e.g.*, Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018) ("From the moment Donald Trump was elected President, critics have anguished over a breakdown in constitutional norms. Commentators of all stripes agree that 'Trump's flouting of norms . . . has become a defining feature of his presidency,' perhaps even its 'most consequential aspect.' New watchdog groups and media projects have been established to highlight the importance of unwritten rules and conventions for democratic governance, and to monitor breaches.") (footnotes omitted).

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democracy in the United States.[2] At the same time, Americans who harbor such concerns may find it difficult to explain where the lines are or even that there are lines to begin with. Still, they worry about, for example, all of the lying; the misuse of public office for private gain; the acts of extreme partisanship; the lack of cooperation across party lines to address pressing problems like climate change, immigration, and health care; and the attempts not just to criticize but to *delegitimize* the political opposition, the news media, the courts, and such nonpartisan institutions as the Federal Bureau of Investigation, the national security establishment, and the Congressional Budget Office, whose job it is to leverage their expertise in order to serve the American people.[3]

You may suspect that I am gently—or, perhaps, not so gently—referring to much of the behavior of President Donald J. Trump since he entered political life. There is no doubt that his conduct has raised serious concerns among Americans on both sides of the political aisle, although his behavior has raised greater concerns on one side—unfortunately, in my view. But President Trump may be at least as much symptom as cause of a deeper problem given the steadier, subtler, and longer-term deterioration of self-restraint among members of other political institutions, including state legislatures and the United States Congress.[4] For example, during the Kavanaugh confirmation process, the Chairman of the Senate Judiciary Committee rejected past practice by declining to pursue a bipartisan agreement with the Ranking Member on a document production process that would be run by the nonpartisan National Archives.[5] That was a first. Nor did the Chairman proceed in a bipartisan fashion in responding to allegations that the nominee had engaged in sexual misconduct and was being untruthful about his past behavior.[6]

So what are worried Americans doing in the current situation? When they express concerns, some institution-minded elected officials, legal scholars, and political scientists talk (among other things) about the

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2. *See generally, e.g.*, TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

3. *See generally, e.g.*, Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018).

4. *See generally, e.g.*, Chafetz & Pozen, *supra* note 1 (so arguing).

5. *See, e.g.*, Jordain Carney, *National Archives Distances Itself from Bush Team on Kavanaugh Documents*, THE HILL (Aug. 15, 2018), https://thehill.com/homenews/senate/402061-national-archives-distances-itself-from-bush-team-on-kavanaugh-documents.

6. *See, e.g.*, Jordain Carney, *Grassley Panel Scraps Kavanaugh Hearing, Warns Committee Will Vote Without Deal*, THE HILL (Sept. 21, 2018), https://thehill.com/homenews/senate/407866-senate-panel-scraps-kavanaugh-hearing-set-for-monday.

importance of such ideas as norms, conventions, traditions, culture, historical governmental practices, political precedent, and role morality.[7] To be sure, those concepts do not all point to precisely the same phenomena—for example, historical practice tends to refer to a long-term accretion of governmental conduct, whereas political precedent can refer to a specific past decision or event.[8] But at this moment in political time, I think it is more important to be a lumper than a splitter—to explain what these ideas have in common, what insight they reflect, and why many Americans reach for them now. I will therefore use one umbrella term to refer to this cluster of related ideas: I will call them *norms*.

The title of my lecture today identifies why I think many Americans reach for norms now. It is because they understand that law is not enough to sustain the American constitutional project. Why is law not enough? Because the vitally important purposes that Americans ascribe to the U.S. Constitution require more than legal fidelity for their vindication. I will therefore refer to these related ideas not only as norms, but as *constitutional* norms. They are constitutional in the sense that they are closely tied to the purposes, or spirit, of the Constitution. They are constitutional in the sense that it would be *anti*constitutional for government officials to violate them—not in the sense that it would be *un*constitutional for officials to violate them.

* * *

Consider, for example, the primary reason that the young United States moved from the Articles of Confederation to the Constitution: to create a more effective, reasonably well-functioning federal government. This purpose is reflected in much of the preratification history.[9] It is also reflected in the long list of legislative powers to act directly over individuals that the Constitution gave to Congress in Article I, Section 8. It is further reflected in

7. *See generally, e.g.*, E. J. DIONNE JR., NORMAN J. ORNSTEIN, & THOMAS E. MANN, ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND THE NOT-YET DEPORTED (2017); THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM (2nd ed. 2016); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEORGETOWN L.J. 109 (2018); LEVITSKY & ZIBLATT, *supra* note 2; Siegel, *supra* note 3; Chafetz & Pozen, *supra* note 1; 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].

8. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEORGETOWN L.J. 255, 263 (2017) (distinguishing historical practice from political precedent).

9. For a recent, detailed account, *see generally* GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION (2017).

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Article II, which created an independent executive, and Article III, which created an independent judiciary, both of which would be empowered to enforce federal law. The national government under the Articles of Confederation lacked these powers and institutions.

A potential obstacle to realizing this purpose, however, is that the Constitution brought into being a robust system of separation of powers and checks and balances. The constitutional text confers upon each branch powers that, if taken to their lawful extreme, would cause the federal government to cease to function. There are good reasons for this arrangement—namely, the inability of the Framers to anticipate all of the possible emergencies that might arise: the "various crises of human affairs," to (not) coin a phrase.[10] This inability to predict the future causes constitution writers to write a constitution that (they hope) can preserve the needed flexibility to deal with any-and-all crises by giving coordinate branches strong offensive and defensive powers. The cost of such an arrangement, however, is the potential for ceaseless obstruction and gridlock in non-crisis situations.

The problem is worse than that. The Framers of 1787 created a robust separation of powers regime without anticipating political parties, let alone the ideological parties in existence today but absent throughout most of the twentieth century. This regime of separation of powers, which is often characterized by the separation of parties in control of different parts of the federal government,[11] creates ample opportunities for one political party, or a part of one party, to thwart potential action by the federal government. Moreover, because the minority party in the Senate is empowered to filibuster most legislation (at least for the time being), the problem of potential paralysis endures in circumstances of unified government.

As a result, troubling questions arise regarding how the federal government is to execute its basic responsibilities of: (1) filling executive and judicial offices; (2) solving problems that the states are not well-situated to

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10. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) ("This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.").

11. *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

address on their own (characteristically, multi-state collective action problems),[12] and (3) safeguarding rights through the passage and updating of civil rights legislation, which several constitutional provisions authorize Congress to do.[13] The separation and interrelation of powers are supposed to cabin and qualify the exercise of the substantial set of powers that the Constitution vests in the federal government. The separation is not supposed to largely negate or neuter those powers.

Commentators who reject this understanding of the limited role of the separation of powers in the constitutional scheme will likely reject much of the analysis that I am offering for your consideration today. Although fully defending the structural vision emphasized here would take this lecture too far afield, I can efficiently deliver two points that support it. One is originalist, and the other is living constitutionalist.

First, as I have already noted, the Framers of 1787 gathered in Philadelphia to substantially enhance federal power, not to restrict it.[14] One often encounters heated rhetoric about a federal leviathan, and it is no doubt true that the federal government today exercises powers that even the most nationalist of our nation's Founders would not have anticipated. But it bears emphasizing that the perceived problem in the 1780s was that the national government under the Articles of Confederation was way too weak, not that it was so strong that a complex institutional architecture was needed to restrain it.

Second, and arguably more importantly, most Americans living today look to the federal government to actually exercise its powers in a variety of ways, not to be consistently hamstrung in its ability to do so. There comes a point at which the "checks and balances" theory of the horizontal constitutional structure malfunctions; rather than acting to discourage ill-considered or excessive federal action, all the checking and balancing produce hopeless gridlock and obstructionism.

12. For work developing and applying the theory of collective action federalism, *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) [hereinafter Cooter & Siegel, *Collective Action Federalism*]; Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS., 29 (2012) (no. 3); Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937 (2013) [hereinafter Siegel, *Collective Action Federalism and Its Discontents*].

13. The structural logic of the federal government's role in protecting civil rights is distinct from the logic of collective action. *See* Siegel, *Collective Action Federalism and Its Discontents*, *supra* note 12, at 1948 ("[T]he 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.") (footnotes omitted).

14. *See, e.g.*, Cooter & Siegel, *Collective Action Federalism*, *supra* note 12, at 117, 121–24.

One obvious response is to invoke the vertical constitutional structure—that is, federalism. On this view, it is a good thing (or at least not a bad thing) if the federal government is incapable of taking effective action; the states can often act effectively, and federal inaction leaves the states more room to maneuver. This position, however, neglects the basic insight of *collective action federalism*, which I have developed elsewhere.[15]

There are many problems in today's modern, integrated economy and society whose nature and scope disrespect state borders, so that the states actually need the federal government to be able to step in. Examples include military defense, anti-terrorism efforts, interstate markets, interstate infrastructure, and environmental protection.[16] Where collective action by states is required in order for substantial progress to be made, having a strong, effective federal government promotes rather than undermines state autonomy. Accordingly, if one examines the entire American constitutional structure—not just the horizontal separation and interrelation of powers at the federal level, but also the vertical separation of powers between the federal government and the states—the sounder conclusion is that all Americans, as well as state governments themselves, are better served as a general matter by a federal government that can act, and act effectively. The recent government shutdown, the longest in our nation's history, underscored the extent to which modern Americans rely upon the effective exercise of federal power.

There is another reason why the separation of powers and parties may at first glance seem like only a feature and never a bug. Creating an effective federal government is not the only purpose of the Constitution. It is also important to ensure that due regard will be given to the interests and commitments of members of the political party out of power. This is necessary to achieve another purpose of the Constitution: realizing the American conception of democracy as *collective* self-governance. In such a heterogeneous, and now polarized, national political community, how can Americans whose party loses the most recent election or two avoid alienation from the federal government? Reconciling democracy and diversity requires not only members of the majority party, but also members of the minority party, to regard themselves as self-governing in some real sense.[17] One way to try to reconcile the purposes of sustaining both effective federal governance and collective self-governance is to impose institutional means

15. For work on the theory of collective action federalism, *see supra* note 12.
16. *See generally, e.g.*, Cooter & Siegel, *supra* note 12 (discussing those examples).
17. For a discussion, see Siegel, *supra* note 7, at 127-37.

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of forcing consensus, and requiring multiple branches and parties to approve governmental actions can serve this function. For example, the filibuster as to appointments or legislation will promote bipartisanship when both the majority and the minority party participate in the political process with restraint. This means that the majority party avoids giving the minority party reason to filibuster bills routinely and the minority party uses the filibuster sparingly.

The difficulty, as I have emphasized, is that the political branches are also charged with accomplishing various tasks associated with governance, from appointing officials to enacting legislation. And the separation of powers and parties can result in Congress accomplishing little when the parties lack moderation, which has arguably been the case at the federal level too often in recent years. For example, whatever one's preferred solution to the problem of more than eleven million undocumented people living, to a significant extent, in the shadows in the United States, the federal government should also be addressing the issue through new legislation, not just through unilateral action by the president (whether Obama or Trump).

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 is worth repeating, however, that Americans of most ideological stripes want the federal government to be able to act effectively, even if they sometimes disagree about the spheres or directions in which such effective action should take place.[18] (Demands for a robust federal response to the latest natural disaster continuously bring this point home.) The federal government cannot function effectively, however, if presidents and the majority and minority parties in Congress lack forbearance—that is, if they push to the legal limits their powers to, for example, nominate aggressive partisans, decline to nominate people to fill key positions, repeatedly make use of the filibuster, and deny confirmation hearings or votes (or not consider nominees at all).

Consider, for example, the Senate's handling of judicial nominations in recent years. To put the point gently, the Senate has increasingly become dysfunctional. More often than not, Senators are unable to cooperate across party lines in order to execute the basic responsibilities of the federal government in the constitutional scheme. For example, a Democratic Senate ended the filibuster for lower federal court nominees in 2013 after alleging

18. *See generally, e.g.*, Neil S. Siegel, *None of the Law but One*, 62 DRAKE L. REV. 1055 (2014) (collecting numerous examples of ways in which today's congressional Republicans, like congressional Democrats, possess and seek to leverage a broad view of the constitutional scope of federal power).

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unprecedented Republican obstruction.[19] A Republican Senate did the same for Supreme Court nominees in 2017 in order to overcome a Democratic filibuster of Republican nominee Neil Gorsuch.[20] Senate Republicans so acted after holding Justice Antonin Scalia's seat open for roughly a year in order to prevent Democratic President Barack Obama from filling the vacancy by appointing Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit.[21] Most recently, as I noted at the outset, Senate Republicans cast aside the previous practice of reaching bipartisan agreement on a document production process that is run by the nonpartisan National Archives, and then responded unilaterally to allegations that the nominee had engaged in sexual misconduct decades earlier.[22] It remains to be seen whether 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.

Because the Supreme Court is not like other courts, it is a problem if we are nearing (or have arrived at) the point at which Supreme Court vacancies will go unfilled unless the same political party controls both the White House and the Senate. The Supreme Court 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 this responsibility. The Court ends up granting fewer cases, splitting 4-4 on some of the cases it does agree to hear (thereby not establishing a precedent), and deciding some cases very narrowly (thereby offering little guidance) in order to avoid such splits.[23] 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 system often requires.

This example illustrates the importance of constitutional norms—of normative constraints on elected officials over and above strictly legal limits that oblige them to participate in the political process with some self-restraint, and so to refrain from pushing their legal powers to their respective maxima.

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19. *See* 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.

20. *See* 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?_r=0.

21. *See* 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/?utm_term=.b518d565f272.

22. *See supra* notes 5-6 and accompanying text.

23. For a discussion, *see* Neil S. Siegel, *The Harm in the GOP's Pseudo-Principled Supreme Court Stance*, THE HILL (Apr. 15, 2016), http://thehill.com/blogs/pundits-blog/the-judiciary/276462-the-harms-in-being-pseudo-principled-about-the-supreme-court.

In the past, it was norms that both preserved the filibuster with respect to judicial nominations and limited its use. As the English Whig and Liberal politician, (and future prime minister) Lord Jon Russell wrote to Poulett Thomson in 1839 while the latter was Governor General of Canada, "[e]very political constitution in which different bodies share the supreme power is only enabled to exist by the forbearance of those among whom this power is distributed. . . . Each must exercise a wise moderation."[24]

Representatives disserve everyone, including Americans who voted for them, when they undermine the proper functioning of the constitutional system. Relevant in this regard is the political science literature suggesting that today's elected officials are disserving their constituents (including the people who voted for them) by pursuing policies that are more extreme than what their constituents would want.[25]

A key role of constitutional norms is to keep partisanship within reasonable bounds so that the federal government can function more effectively and with greater stability—so that there is more bipartisan action by the federal government, as opposed to opposition-forced inaction or narrowly partisan action (often accompanied by a disreputable process) in order to overcome the opposition.[26] Constitutional norms, while not *in* the Constitution, are properly called constitutional because they are deeply connected *to* the Constitution. And they are deeply connected to the Constitution because, to repeat the basic takeaway of my lecture, law alone is not enough to sustain the American constitutional project.

Similar stories could be told about the role of constitutional norms in sustaining other purposes of the Constitution. Those purposes include, as I have already mentioned, realizing the American conception of democracy as *collective* self-governance, which (to reiterate) can be in tension with the purpose of sustaining an effective federal government because collective self-governance requires members of the minority party to retain some influence over governmental decision making.[27] These purposes also include combatting the misuse of public office for private gain (otherwise known as

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24. Letter of Lord John Russell to Poulett Thomson (October 14, 1839), *available at* http://www.constitution.org/sech/sech_133.txt. This quote appears in WOODROW WILSON, CONGRESSIONAL GOVERNMENT 165 (1885). I thank Peter Shane for these references. *See also* Edmund Burke, *An Appeal from the New to the Old Whigs*, *in* 4 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 208 (1889) ("[I]n the British constitution, there is a perpetual treaty and compromise going on.").

25. *See, e.g.*, Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2011) (finding, *inter alia*, that "state policy is far more polarized than public preferences").

26. Siegel, *supra* note 3, at 188.

27. For a discussion, *see* Siegel, *supra* note 7, at 127-37.

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corruption),[28] preventing the politicization of federal criminal law enforcement,[29] and protecting a significant measure of judicial independence.[30]

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American constitutional law scholars appreciate the idea that law is not enough to restrain government officials when those officials are federal judges. Scholars understand that law narrowly conceived does not suffice to render the fact of judicial discretion compatible with the limited place of judges in the constitutional scheme. And so constitutional law scholars push ideas like the counter-majoritarian difficulty, judicial restraint, reason giving, the virtue of consistency in judicial decision making, the "modalities" of constitutional interpretation, the perception and reality of judicial impartiality, and the importance of judicial statesmanship—of taking some account of the conditions of the public legitimacy of the decisions that judges render.[31] Different scholars disagree—both at a particular time and over time—about how judges should fulfill their institutional role.[32] But they continue to push constraining ideas upon judges that sound more in norms than law. For example, constitutional law scholars do not assert that it would be illegal, akin to taking a bribe, for a judge to consider policy consequences in adjudicating a constitutional case. They instead insist that it is contrary to judicial role for judges to decide cases just in light of their policy preferences.

When the conversation turns to elected officials, however, constitutional law scholars typically embrace the distinction that Herbert Wechsler articulated in his famous "neutral principles" article—between law as a system of "hard" limits on the exercise of political discretion and politics as a realm of unlimited discretion.[33] When politicians push their powers to the

28. For a discussion, *see generally* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014).

29. For a discussion, *see* Siegel, *supra* note 3, at 198-200.

30. For a discussion, *see generally* Bradley & Siegel, *supra* note 8.

31. For a discussion and citations to the literature, *see* Siegel, *supra* note 7, at 119-20 & n.43.

32. *See* Craig Green, *What Does Richard Posner Know About How Judges Think?*, 98 CAL. L. REV. 625, 661 (2010) (reviewing RICHARD POSNER, HOW JUDGES THINK (2008)) ("Conversations about judicial role do not yield an image of cultural consensus, much less of unanimity. Our variegated legal community is populated by judges, lawyers, and commentators who differ widely over how judges do and should act.").

33. *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.").

legal limit in order to secure partisan advantage, constitutional law scholars-qua-scholars tend to just shrug and mutter that the Constitution has nothing to do with the matter.

I suggest to you that this view is incorrect. Constitutional norms occupy the normative territory at the border between law and politics as typically conceived. They help accomplish key constitutional purposes, even if they are not strictly legal in status. To be sure, constitutional norms can become outdated and change over time, as law and politics themselves change over time. And sometimes the stakes of politics are so high that politicians are justified in disregarding particular norms.[34] But the system cannot survive claims of continuous, across the board, emergency with respect to almost every issue. If certain norms have long been viewed as playing vital roles, then politicians should have good, public-regarding reasons for disregarding them. The fact that norms are in the way is not such a reason; norms are supposed to be in the way.

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If one fully appreciates the role that constitutional norms play in sustaining the constitutional system, one may have mixed feelings when commentators advise politicians on "their side" to defy such norms in response to norm violations by the "other side." On one hand, this approach will likely continue fueling a race to the normative bottom. For example, Professors Mark Tushnet, Michael Klarman, and a few others have been urging Democrats to seriously consider adding two or more seats to the Supreme Court when they again control both the Presidency and the Senate, whether to counteract the asserted illegitimacy of President Trump's election,[35] or to take back the seat that Republicans allegedly "stole" from

34. The great classics of political role 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); Michael Walzer, *The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973); Thomas Nagel, *Ruthlessness in Public Life*, *in* PUBLIC AND PRIVATE MORALITY 75–91 (Stuart Hampshire ed., 1978). While this view can easily be overstated or misused to rationalize troubling behavior by politicians, there is no doubt truth to the conviction that sometimes the stakes are so high in politics that even venerable norms must give way.

35. *See* Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court ("A president who lost the popular election by 2.9 million votes—and whose victory was rendered possible only by an FBI director's misguided intervention, Russian meddling in the election (which, *at a minimum*, the victorious candidate's campaign team attempted to involve itself with), and the candidate's own personal involvement in a felonious scheme to pay hush money to an adult film actress days before the election to cover up an extramarital affair—ought not to be making Supreme Court appointments that will continue

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them when they refused to consider Chief Judge Garland and ultimately appointed Justice Gorsuch.[36] (Note that adding and filling one seat would merely neutralize the influence of Justice Gorsuch; adding and filling two seats would be required to simulate the impact of having confirmed Chief Judge Garland as an initial matter.) Such suggestions may trouble even some Americans who were deeply troubled by the circumstances of Trump's election and the Republicans' refusal to consider Chief Judge Garland, although calls for Court-packing may increase in the years ahead given the divisiveness of the Kavanaugh confirmation process, and given that the Court over at least the next decade is likely to be substantially more conservative than a majority of the national population.

On the other hand, one need not have studied much game theory to understand that Professors Tushnet and Klarman make an important point: unilateral disarmament is not a wise option if one is interested in protecting one's interests and values, as well as ensuring norm compliance over the longer term. In my view, unilateral disarmament is just being a sucker without in any event changing the nature of the race being played. I therefore do not believe that the way to sustain constitutional norms is to comply with them no matter what the political opposition does—to always model ideal institutional behavior.

What, then, should a constitutionally conscientious politician or scholar do if she realizes the nature of the race being played and does not want to be a sucker (or advise others to be suckers), but would also like to promote a different sort of race—a race to the top? This is an extraordinarily difficult question to answer, and I do not pretend to have solutions. I will, however, offer five modest suggestions.

First, as I just suggested, I would advise against unilateral disarmament. The two political parties should follow a tit-for-tat strategy where the issue matters (such as in the area of judicial appointments), but they should also make clear why they are doing so and why a different course would be preferable for all involved. For example, if the Democrats had won control of the Senate in 2016, they might have announced that they would confirm only Merrick Garland or someone ideologically similar as a first appointment.

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to affect the country for the next thirty-plus years. Democrats must seize the earliest opportunity to offset those appointments with some of their own.").

36. *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 ("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).").

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If so, I would hope that they would also have come to the decision with some regret and with a public expression of hope for a different path in the future.

I do not expect the other party to be satisfied by such a posture. The other party is likely to believe that the interaction started earlier—that the other side "started it." In the case of judicial nominations, for example, Republicans are likely to cite the Democratic Senate's rejection of Judge Robert Bork for the Supreme Court in 1987 or the Democrats' termination of the filibuster as to lower federal court nominees in 2013. There are responses to these claims, but in this lecture I do not wish to adjudicate the disagreement between the parties about "who started it" any more than I like adjudicating such disputes between my daughters; indeed, I fear the country is so polarized that any such attempt would itself seem partisan.[37] Rather, my point is that there may be an important difference between a politician who exults in partisan combat and one who regrets participating in a race to the bottom. There may be no hope for a different future if we are dealing only with partisan warriors; there may be some reason for cautious optimism if we are dealing with a critical mass of reluctant combatants.

Second, I would advise both political parties to be mindful of the difference between tit-for-tat and conflict escalation. For example, there is at least a plausible argument that Court-packing proposals like Professor Tushnet's and Professor Klarman's would escalate a conflict and not simply amount to responding in kind, at least to the extent those proposals were aimed at counteracting the Senate's refusal to consider Chief judge Garland.[38] Once Court-packing is on the table (after being off the table since at least 1869 and being rejected in part on normative grounds by Democrats in 1937 when a popular Democratic president proposed it),[39] so is more Court-packing and then Court-unpacking.

One can no doubt question the usefulness of the distinction between tit-for-tat and conflict escalation, given that what one side views as tit-for-tat the other side may be likely to interpret as escalation. Even so, the distinction is defensible in principle and is applied in practice in a variety of settings. Consider, for example, the distinction in foreign policy circles between economic sanctions and military intervention, and the more general

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37. *See* Mark Tushnet, *The Pirate's Code: Constitutional Conventions in the United States*, 45 PEPPERDINE L. Rev. 481, 485-86 (2018) (recording this observation).

38. Responding to President Trump's election may be a different matter. If the evidence ultimately supports the claim that Trump was not legitimately elected (an issue on which I take no view here), there may be no way other than adding seats to the Supreme Court to undo the impact of his appointments, which presumably will last for decades.

39. For a historical analysis of Court-packing in the United States that focuses on President Franklin Delano Roosevelt's failed attempt in 1937, see Bradley & Siegel, *supra* note 8, at 269-87.

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requirement in international law that a nation's responses to a breach of norms by another state be "proportional."[40] Moreover, there may be a difference between how politicians characterize the other side's behavior in public and what they understand to be going on in private.

Third, I would encourage both parties to consider ways of establishing a different race through a series of incremental, confidence-building measures and compromises (a very difficult task given political-base opposition to compromise). Going back to the hypothetical in which the Democrats had regained control of the Senate in 2016, they could have insisted that Chief Judge Garland be confirmed, but they also could have publicly committed to considering in good faith future Trump nominees to fill future vacancies once Garland was confirmed.

Fourth, I would advise members of both parties to try to engage thoughtful, patriotic citizens of the opposing party or ideology in this Constitution-sustaining work. Respect for constitutional norms requires respect for the legitimacy of the political opposition.[41] I realize how naïve this may sound in the current political moment, which has veered into Game of Thrones territory: politicians who are assiduous about respecting norms are likely to get their proverbial heads chopped off. But I do not think it is foolish to hope and expect that constitutional norms will play a greater role at a future time, especially if President Trump is denied re-election at least in part because of his prominence in the anticanon of politicians who respect constitutional norms.

As far as I can discern as I endeavor to be objective (as opposed to neutral), the primary impediment to getting to the point at which politicians respect constitutional norms to a substantially greater extent than they do now may be the somewhat asymmetric nature of current partisanship in the United States: more Republicans view Democrats as fundamentally illegitimate today than the other way around. I say this for a number of reasons, including: (1) the political science literature on polarization, which finds that Republicans have moved further to the right over the past several decades than Democrats have moved to the left;[42] (2) the Republicans' treatment of Chief Judge Garland after Democrats had accepted the basic legitimacy of

40. *See generally* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008) (finding that the principle of proportionality succeeds in limiting conflict escalation between nations because frequent application of the principle has rendered it more determinate).

41. *See* LEVITSKY & ZIBLATT, *supra* note 2, at 8-9, 102-06; *see also* Siegel, *supra* note 7, at 151-52.

42. *See, e.g.*, Mann & Ornstein, *supra* note 7, at 51-58.

Republican control of the Supreme Court since 1969;[43] (3) the prominent Republican Senators, including Ted Cruz, John McCain, and Richard Burr of my home state, who vowed to hold Justice Scalia's seat open for four years in the event that Hillary Clinton won (as then seemed likely), in contrast to Democratic Senators or candidates who said nothing similar about what they would do if Donald Trump won;[44] and (4) the 49% of Republicans—in contrast to 33% of Democrats—who said in 2010 that they would be "somewhat or very unhappy" if their child married someone of the other political party.[45]

More fundamentally, I say this because there are reasons why the Republican Party may be more vulnerable than the Democratic Party to the temptations of hyper-partisanship. The GOP has become overwhelmingly white and predominantly Christian, and white Christians are a once-dominant majority in the United States whose numbers and cultural status are declining as the country becomes racially and ethnically more diverse as well as more secular.[46] As political scientists Steven Levitsky and Daniel Ziblatt recently observed in their book *How Democracies Die*, a once-dominant group whose status is increasingly in question is likely to view the political opposition as posing an existential threat to its continued existence and so as fundamentally illegitimate.[47] Consistent with this demographic and cultural interpretation of contemporary American politics is the unfortunate reality that the Republican Party today wants to make it harder to vote and the Democratic

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43. *See* Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/ ("Democratic-appointed judges are not to be considered a normal part of the system, fit to exercise adjudicative authority because they too are honorable servants of the Constitution, even if they understand the Constitution differently from the way we understand it. No. They are to be regarded unfit *per se*.").

44. *Id*. ("As 2016 wore on, Republican Senators from McConnell to Cruz to McCain said publicly that if Hillary Clinton won the election, they wouldn't consider any of her nominees to the Supreme Court. If one takes what they said seriously—and I do, because it hangs together well with the rest of the related conduct—they planned to use their blocking power to keep the Supreme Court shorthanded indefinitely rather than let Democratic appointees become a majority, even if a Democrat were to be elected President."); LEVITSKY & ZIBLATT, *supra* note 2, at 166 ("In the run-up to the 2016 election, when it was widely believed that Hillary Clinton would win, several Republican senators, including Ted Cruz, John McCain, and Richard Burr, vowed to block all of Clinton's Supreme Court nominations for the next four years, effectively reducing the Court's size to eight.").

45. *See* LEVITSKY & ZIBLATT, *supra* note 2, at 167-68 (citing this statistic).

46. *See generally, e.g.*, Neil S. Siegel, *The Distinctive Role of Justice Samuel Alito: From a Politics of Restoration to a Politics of Dissent*, 126 YALE L.J. F. 164, 169 (2016) (observing that "the idea that traditionalists will be able to 'restor[e] the culture' may become increasingly implausible even to them," and that "[t]heir politics of *restoration of* the culture will have evolved into a politics of *dissent from* the culture") (quoting the Liberty Counsel website).

47. LEVITSKY & ZIBLATT, *supra* note 2, at 173-75.

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Party wants to make it easier—just as the Republican Party wants to reduce immigration and the Democratic Party wants to increase it.

I hope that the political science literature is wrong about the asymmetric nature of political polarization in the United States, because the problems we face as a nation will be less severe if I am wrong.[48] Even if I am right, however, there are still a good number of members of each main political party who respect members of the other party and who recognize their common humanity and citizenship, even as they disagree with them significantly on various issues. Our future as a successful constitutional democracy may lie with them.

Fifth, and speaking now to legal scholars, political scientists, and students, I would advise producing normative work that imagines a more hopeful future, one in which presidents and members of Congress value constitutional norms to a substantially greater extent than they do today.[49] Our constitutional system depends upon fidelity to such norms. And with apologies to *The Last Jedi*, without hope, I fear we are doomed.

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48. For an argument that Republican politicians are, for various reasons, more likely to engage in behavior that disrespects constitutional norms, see generally Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); *See id*. at 982 ("[T]he appeal of flouting Washington norms is now very strong among Republican voters, and it takes no great public-opinion expertise to see that this appeal was central to the electoral success of President Trump."); *id*. at 940 (surveying evidence suggesting that "Republican partisans are . . . strikingly more likely than Democratic partisans to reject consensual politics in principle").

49. For one attempt, *see generally*, Siegel, *supra* note 7.

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