# "Institutional Settlement" in a Provisional Constitutional Order

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Dean Trevor Morrison and his co-author, Professor Sam Issacharoff, have long been at the forefront of a vision of the separation of powers more attuned to the institutional practices of the political branches. They bring together their path-breaking work and important insights to present a forceful critique of the Textualist Constitution as a description of the separation of powers that exists.[1]

I share this critical assessment of the Textualist Constitution. But I want to press a bit on the question of what the unwritten aspects of our constitutional structure establish. Rather than a fixed legal order constructed by conventions, I want to suggest that this unwrittenness points to the *provisionality* of the constitutional order itself—that is, to its essentially unsettled character.[2]

This perspective raises three problems or puzzles that a Constitution-by-Convention poses for public law: a duality at the crux of the presidential office; the unsettled nature of the separation of powers itself; and the role of courts in

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1. *See* Samuel Issacharoff & Trevor Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020).

2. This argument builds on my discussion of the nature of structural norms in a provisional constitutional order in Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018). *See, e.g.*, *id.* at 2190–91 ("Structural norms are . . . inherently provisional; they simultaneously settle constitutional duty for a time and orient contestation over what acceptable behavior should be."); *id.* at 2270 (noting that structural norms "reveal a provisional aspect of [the] constitutional design itself"); *see also* Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1213–14 (2020).

an unstable constitutional order. In particular, I will argue that our unwritten Constitution provides a challenge not just to Textualism but to the very idea of the separation of powers as a legalistic concept that courts can and should robustly enforce. At the same time, our unsettled presidency raises crucial questions about how courts *should* respond when litigation implicates presidential norms—or norm breaches—that pertain not just to the legitimacy of executive action, but to the legitimacy of the courts as well. To develop this commentary, I will focus on each of the three problems in turn.

## I.
## THE UNSETTLED PRESIDENCY

Let me start with the presidency. The "conventionalist" presidency is a bundle of institutional practices, or a set of settled institutional commitments. But what is the relationship between this institutional composite and the individual who is president? The question points to what I have elsewhere called the "two bodies" problem.[3]

Here's the central puzzle: the constitutional presidency is *both* a bundle of institutional bargains—created through iterative practice across parties and administrations—*and* a particular individual, wielding enormous power over the lives of others, the moral fabric of national administration, and the deliberative quality of domestic and foreign policy.[4]

I worry that if we don't focus on this duality, we miss what's really at stake in a case like *Trump v. Hawaii*.[5] Chief Justice John Roberts's opinion for the Court celebrates what he suggests is the resiliency of our institutional settlements—an understanding consonant with a Constitution-by-Convention framework. For the majority, any anti-Muslim animus on the part of the sitting president is nearly irrelevant to the Court's consideration of a policy issued by the impersonal and composite institution of the presidency.[6] Perhaps surprisingly for Justices otherwise committed to a strongly "unitary" vision of the executive,[7]

3. *See generally* Renan, *The President's Two Bodies*, *supra* note 2.

4. *See id*. at 1123.

5. 138 S. Ct. 2392 (2018). I initially offered this interpretation of *Trump v. Hawaii* in a blog post, Daphna Renan, *When the President is at War with the Presidency: Implications for Presidential Authority from* Trump v. Hawaii, JUST SEC. (July 20, 2018), https://www.justsecurity.org/59592/president-war-presidency-implications-presidential-authority-trump-v-hawaii [https://perma.cc/RW77-XARG], and I have since extended and elaborated the argument in Renan, *The President's Two Bodies*, *supra* note 2. The discussion that follows draws on and incorporates these prior works.

6. *See Hawaii*, 138 S. Ct. at 2418 ("[W]e must consider not only the statements of a particular President, but also the authority of the Presidency itself.").

7. *See* Renan, *The President's Two Bodies*, *supra* note 2, at 1198–1200; *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (holding two levels of for-cause removal protection unconstitutional). Professor Richard Pildes has emphasized the starkly unitary turn of *Free Enterprise Fund*. See Richard H. Pildes, Free Enterprise Fund, *Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB.

accountability neither starts nor stops with the incumbent himself. Rather, a system of longstanding conventions is capable, on its own, of producing legitimate presidential authority irrespective of the animus-driven goals of any particular occupant.[8]

Yet there is also an individual at the heart of the presidency. He has agency and he has will. And his power to effectuate policy, for good and ill, is a defining feature of the American constitutional experience. Embracing this individualized conception, Justice Sonia Sotomayor advances a wholly personal view of the office. Any presidential proclamation, for Justice Sotomayor in dissent, is irredeemably contaminated by this particular individual's impermissible animus.[9]

These two opinions respectively suggest what a full-fledged embrace and a wholesale rejection of the Constitution-by-Convention might look like. What makes Justices Stephen Breyer and Elena Kagan's intervention so significant is its attempt to bridge that gap. Their separate opinion, though sparse, points to the possibility of an intermediate position between the conventionalist presidency and the individualistic incumbent. The institutions of the presidency *can* operate as a constraint on the anti-constitutional impulses of the sitting president, they argue. But the question is, *has it here*?[10] This is a question that courts can and must resolve. And, as Justices Breyer and Kagan suggest, the implementation of the Trump proclamation's "elaborate system of exemptions and waivers," by other actors of a composite presidency, provides relevant evidence.[11]

The constitutional presidency is not exclusively a bundle of conventions. Nor is it a person wholly detached from any institutional restraints. Instead, there is *both* an individual and a system of institutional practices at the crux of Article II. The challenge, for public law, is to give conceptual and doctrinal meaning to their interconnection. In our current constitutional moment—of an incumbent who makes avowedly animus-based decisions and then turns to the institutions

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POL'Y (SPECIAL ISSUE) 1, 1–2 (2010), a jurisprudential turn furthered this term in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) ("The entire 'executive Power' belongs to the President alone.").

8. *See, e.g.*, *Hawaii*, 138 S. Ct. at 2423 ("The entry suspension is an act that is well within executive authority and could have been taken by any other President . . . .").

9. *Id.* at 2442 (Sotomayor, J., dissenting) ("The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims . . . ."). Justice Sotomayor recently revisited these themes in her partial concurrence in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., concurring in part and dissenting in part) ("Taken together, the words of the President help to create the strong perception that the rescission decision was contaminated by impermissible discriminatory animus." (internal quotations omitted)).

10. *See Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting) ("If [the Proclamation] . . . was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment . . . . If, however, its sole *ratio decidendi* was one of national security, then it would be unlikely to violate either the statute or the Constitution.").

11. *Id.* at 2429–30 ("[I]f the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a 'Muslim ban,' rather than a 'security-based' ban, becomes much stronger.").

of the presidency to clean things up for the courts—this relationship between the presidency as a system of institutional norms or conventions and the president as a particular individual must be addressed.

Chief Justice Roberts's focus on the institution makes good sense absent indicia of an un-institutional decision. The majority opinion shows, however, the danger of imagining the constitutional presidency as a system of conventions all the way down. Absent from Chief Justice Roberts's framework is any consideration of when the incumbent might exercise un-institutional power or why this could matter to our public law understandings of the presidency.

This legal and conceptual gap is what Justices Breyer and Kagan seem to be getting at. Their dissent can be read to suggest something of a burden-shifting model under which evidence of the incumbent's impermissible animus alters the burden of proof, the discovery and evidence available to those challenging the presidency, or some combination of the two. In this way, it recognizes the possibility of an un-institutional decision, one rooted in the incumbent's personal animus.[12]

As the two-bodies problem reveals, the institutional presidency—whether understood in terms of conventions, norms, or settled institutional practice—is a crucial aspect of the constitutional structure. But it tells only part of the story. A theory of American constitutionalism has to grapple with the individualized president as well—or how to make sense of the president's inescapable duality.

## II.
## THE SEPARATION OF POWERS AS AN INHERENTLY UNSETTLED SYSTEM

If the two-bodies problem illuminates an instability in the constitutional office of the President, a further problem concerns the nature of the separation of powers itself. A Constitution-by-Convention appears to regard the institutional relationships between the political branches as having settled over time, resulting in a fixed allocation of power that the courts, in turn, can and should work to enforce. My concern is that, so understood, the Constitution-by-Convention can provide a theoretical justification for the emergent structural formalism of the Roberts Court,[13] which could rigidify inter-branch practice instead of allowing it to evolve.

In recent cases, the Court has embraced the view that the structure of the administrative state was, in effect, "settled" circa 1935, such that structural innovations—in presidential control over agency policymaking, for example—contravene what is now a fixed conventionalist structure. On these terms, a Constitution-by-Convention provides support for the Court's rejection of two

12. *See* Renan, *The President's Two Bodies*, *supra* note 2, at 1197–1200.

13. *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) (critiquing separation-of-powers formalism that "presupposes that the Constitution draws sharply defined and judicially enforceable lines among the three distinct branches of government").

layers of for-cause removal protection in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[14]—or, most recently, of the single-director structure of the Consumer Financial Protection Bureau (CFPB) (an independent agency)[15]—as a departure from some imagined inter-branch settlement concerning precisely how much or in what ways Congress can limit presidential control.[16]

I want to challenge this substantive conception of the separation of powers. There is exceedingly little that I think can and should be regarded as fixed in the constitutional allocation of power between the political branches. The design of the state—at the level of the institutional interactions between the executive and Congress—is a story of episodic settlements and recurring contestation. The structure of national government has changed over time to accommodate our changing substantive and political expectations for what the state can and should be able to achieve.[17] Put differently, the separation of powers is not a system of clearly defined entitlements.[18] It is a process of inescapable, ongoing contestation over what those constitutional prerogatives should actually entail.

Institutional contestation and innovation have always been hallmarks of our system of partially differentiated, partially interdependent powers. There is no ideal or essential allocation of power between the political branches. Rather, how much or what types of accommodation, power-sharing, and institutional checking between the executive and Congress are legitimate or desirable is a set of questions that is inherently *un*fixed.[19] I worry that understanding such aspects of our constitutional system as "settled" risks hitting pause on the inter-branch contest—when that political contest might be the whole point.[20] Doing so risks making a normative matter what is better understood as a background, or

14. *See* 561 U.S. 477, 484 (2010).

15. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 ("'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it." (quoting *Free Enterprise Fund*, 561 U.S. at 505)).

16. *Cf. id*. at 2241 (Kagan, J., dissenting in part) (arguing that "novelty is not the test of constitutionality when it comes to structuring agencies," for the Necessary and Proper Clause is "not (as the majority seems to think) a Rinse and Repeat Clause"); *see also* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 18–19 (2017) (describing and critiquing anti-novelty reasoning). *See generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017) (offering a wholesale rejection of the Court's anti-novelty approach).

17. *See Seila Law*, 140 S. Ct. at 2242 (Kagan, J., dissenting in part) ("In deciding what *this* moment demand[s], Congress ha[s] no obligation to make a carbon copy of a design from a bygone era.").

18. *Cf.* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

19. *Cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 309–10 (Quid Pro Books 2013) (1980). *See also* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013); Manning, *supra* note 13.

20. *See* Jeremy Waldron, *Non-Normative Principles* 12, 23 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 19-36, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3400296 [https://perma.cc/GZ2R-59HQ].

"characterizing" principle—important, surely, but not a tool for courts to deploy on its own terms.[21]

There is another sense in which the separation of powers is fundamentally unsettled. The institutional relationships between the branches are ongoing and interactive. They are aggregate processes in terms of historical time and scope. Adjudication takes a particular snapshot of these institutional interactions; it focuses on one specific "transaction."[22] But there is no obvious way to slice up these continuous, complex, and interrelated dealings. This is what Professor Daryl Levinson in another context has called the "framing transactions" problem.[23]

When it comes to the adjudication of presidential authority, for example, many practices of judicial restraint are justified against the backdrop of presidential impeachment.[24] They pivot off of an understanding of the role of courts that assumes—sometimes explicitly, sometimes implicitly—another mechanism of accountability for presidential corruption and other abuses of office. Has the rise of the charismatic presidency and our time of profound political polarization "unsettled" this institutional backdrop? And, if so, should this affect the institutional "settlement" of judicial deference to presidential decision-making? If, on the other hand, courts continue to defer to the executive under these conditions, is that an illustration of institutional settlement or a story about the limits of law and legality in the face of deep, structural *un*settlement?

We might also broaden the frame in a different direction**.** The types of institutional arrangements that the political branches develop are deeply intertwined with whether and how often courts intervene in the structure of those arrangements—and this is interconnected with how often, and under what conditions, courts permit litigants to challenge these arrangements in court.

Consider again the constitutional challenge to the single-director structure of the CFPB, just decided by the Supreme Court this term.[25] There are many reasons that litigation such as this is gaining steam. But one of the main reasons is that private individuals seeking substantive regulatory outcomes—outcomes

21. *See* Waldron, *supra* note 20, at 21–22, 26 (developing the concept of "characterizing" principles as a matter of analytic jurisprudence and arguing that, as applied to the separation of powers, the concept might suggest "a problem in according normative authority for future decisions to [such] an abstract principle . . . when all we have of it in the Constitution is a ragged and compromised version that reflects the outcome of a large number of particular political bargains"); *see also* Manning, *supra* note 13.

22. *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313–14 (2002).

23. *Id.* at 1314.

24. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) (noting that the Court's holding that the President has "absolute immunity" from civil damages liability for official acts does "not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," because of the possibility of impeachment); *Ex parte* Grossman, 267 U.S. 87, 121 (1925) (suggesting that the appropriate sanction for presidential abuse of the pardon power was not found in the courts but rather through impeachment).

25. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

that don't really have anything to do with the structure of the federal agency—can now sue to challenge the constitutionality of that structure.

Indeed, the Court in recent years has been in the process of expanding separation-of-powers standing to facilitate such litigation by private parties, and lower courts have followed suit.[26] Instead of requiring the President to fire an agency head statutorily protected from removal, something that for practical and political reasons is exceedingly rare,[27] abstract constitutional challenges to the structure of federal agencies are becoming the meat and potatoes of the private defense bar.[28]

A similar point can be made with respect to Congress. The House, through changes in its own rules and practices, has made it much easier for that chamber of Congress to sue the executive. By delegating litigating decisions to a

26. *See id*. at 2196 ("We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority. In the specific context of the President's removal power, we have found it sufficient that the challenger 'sustain[s] injury' from an executive act that allegedly exceeds the official's authority" (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 512 n.12 (2010); Bowsher v. Synar, 478 U.S. 714, 721 (1986)). Even prior to *Seila Law*, lower courts interpreted *Free Enterprise Fund* to expand or at least provide support for broad separation of powers standing. In *Collins v. Mnuchin*, 938 F.3d 553, 554 (5th Cir. 2019) (en banc), for example, the Fifth Circuit concluded that an agency action can provide the basis for a challenge to the agency director's removal protection, regardless of whether the director would have acted differently were he "properly authorized." 938 F.3d at 553–54, 586 (holding that the Federal Housing Finance Agency's structure—a single director with for-cause protection—is unconstitutional), *cert. granted* sub nom. Mnuchin v. Collins, 2020 WL 3865249 (U.S. July 9, 2020) (mem.); *see also, e.g.*, John Doe Co. v. Consumer Fin. Prot. Bureau, 849 F.3d 1129, 1135–36 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (arguing that because the CFPB had "issued binding rules that govern[ed] the [regulated entity's] conduct," the regulated entity had standing to "raise its free-standing constitutional claim" even before an enforcement action commenced, and citing *Free Enterprise Fund* for this proposition).

27. *See, e.g.*, Brief for Court-Appointed Amicus Curiae in Support of Judgment Below at 27, *Seila Law*, 140 S. Ct. 2183 (No. 19-7), 2020 WL 353477, at *27 ("[T]he argument for waiting for a contested removal is at its zenith when, as here, the removal authority remains with the President and the question is how much of a restriction on that authority is too much."); *see also, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (resolving Article II question in the context of a contested removal); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (same). *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274 (2001) ("[T]he President often cannot make effective use of his removal power given the political costs of doing so . . . ."). Removal of officers with for-cause protection is especially uncommon. *See, e.g.*, Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 691–92 (2018); *cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994) (observing that the Supreme Court has not had occasion to elaborate on what "good cause" means in the removal context, presumably because the issue does not tend to arise). Convention- or norm-based constraints provide an additional barrier to actual removals from office in a variety of contexts. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013).

28. *See, e.g.*, Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 486 (2014) (noting "the increased frequency of structural challenges by regulated parties").

"Bipartisan Legal Advisory Group," the House can now sue the executive on the initiative of just three members.[29]

So how do changes to one aspect of inter-branch settlement—the question of who can sue, when—affect other aspects of the inter-branch settlement, such as the scope of authority that the political branches have to design novel agency structures, or the pathways available to one chamber of Congress to push back against the executive?

Rather than illuminate a settled constitutional order, this framing-transactions problem suggests the inherent fragility of a system of constitutional government that depends on interacting institutional commitments across the three branches. When constitutional theory turns to the unwrittenness—the norms or institutional practices—of the separation of powers, what we see is not the settlement of inter-branch relationships but the *provisionality* of the constitutional order itself.[30]

To press a bit further, what we see is a provisional constitutional order that depends on shared commitment to a set of substantive values. So the real danger, realized I think in cases like *Trump v. Hawaii*, is that law can legitimate the immoral conduct of individual actors by assuming an institutional settlement that no longer exists.

This framing problem has important implications for Dean Morrison's Constitution-by-Convention: it elucidates the judiciary's constitutive role in institutional settlements between the political branches. When courts step in, they are not impartial umpires taking institutional settlements as they find them. They are central players in an interactive institutional process.[31] An important normative question, then, is when *should* courts step in and participate in this type of institutional development?

## III.
## THE ROLE OF COURTS IN A PROVISIONAL CONSTITUTIONAL ORDER

This brings me to a final conceptual and legal question: the role of courts in a provisional constitutional order. To make progress on this question, I think

29. For a terrific paper documenting the emergence of BLAG and analyzing its legal implications, see generally Ben Miller-Gootnick, *How the House Sues*, 2021 U. ILL. L. REV. (forthcoming 2021) (manuscript at 1) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508856 [https://perma.cc/SDM7-LPFU]). For an analogous development with respect to the states, see, for example, Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 363, 364–65 (2018) (analyzing the expansion of state standing and noting that, as a result of this development, "state governments [are] becoming central figures in efforts to advance social change and, at times, rein in federal government power"); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 852 (2016) (noting that "[s]tate suits against the federal government are on the rise" after *Massachusetts v. EPA*, 549 U.S. 497 (2007)).

30. *See* Renan, *Presidential Norms*, *supra* note 2, at 2190–91.

31. *See also id.* at 2242–73.

we need to distinguish among different types of norms or conventions implicated by our constitutional structure.

Some of these institutional practices involve the ongoing contest over power-sharing involving the political branches—what we might think of as "separation-of-powers norms." (Think norms involving the practice of recess appointments or the structure of independent agencies.) My own view is that courts should be quite wary of "juridifying" this type of inter-branch practice, or trying to encrust ongoing institutional contestations in legal arguments and judicial review.[32]

Put another way, rather than illuminate a source for judge-made constitutional law, a Constitution-by-Convention might do just the opposite: it might suggest caution in using courts to rigidly enforce any particular conception of what the "separation of powers" should legally entail. To be clear, my suggestion is not that courts decide separation-of-powers questions without reference to historical practice. I agree with Dean Morrison that historical practice is crucial to an informed understanding of how the government works.[33] Rather, my argument is that we have gone astray in what we imagine the separation of powers to be.

What a Constitution-by-Convention reveals is practice that is inherently provisional, and inextricably tied up with our political disagreements about the substantive role of "the state."[34] Separation-of-powers norms are constitutive of our constitutional morality. But we might misconceive of the project of structural constitutionalism—or overstate the role of courts within it—if we interpret such norms and conventions as the ingredients for judge-made constitutional law. A Court more reluctant to decide separation-of-powers questions, or more Thayerian in how it decides them, might better enable the process of institutional *un*settlement at the heart of our separation of powers.[35]

There is, however, a more limited category of norms that describe conduct by the political branches, but that also pertains to the legitimacy of the courts in

32. *See* Renan, *Presidential Norms*, *supra* note 2, at 2265–66 ("[C]ourts should generally be reluctant to interfere with presidential norms using structural constitutional law . . . .").

33. *See also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412–17 (2012); Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 59–64 (2017).

34. *See generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE (1982).

35. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that courts should find legislation unconstitutional only when the unconstitutionality is "so clear that it is not open to rational question"); *see also, e.g.*, John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 3 (2014) (suggesting a Thayerian approach to separation of powers questions would give Congress "broad latitude to configure the government"); Renan, *Presidential Norms*, *supra* note 2, at 2271–72 (discussing Thayerian considerations in the enforcement of structural constitutional norms). Jesse Choper's book *Judicial Review and the National Political Process* represents perhaps "the classic expression of Thayerianism in connection with federalism and the separation of powers." Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2244, n.48 (2014) (citing CHOPER, *supra* note 19).

resolving the legal disputes that come before them. While these norms—let's call them "rule-of-law" norms—address conduct by the political branches, they also implicate more directly the *role of the judge* in a legitimate or respect-worthy legal system.[36]

One example of such a norm is what I have elsewhere called the "deliberative-presidency" norm, which requires some consultation and consideration of the relevant facts and law in the making of significant presidential policy.[37] Courts in a range of legal contexts seem to assume—sometimes implicitly, sometimes explicitly—that the presidency has undertaken this sort of deliberation prior to deferring to the executive on the specific question at issue.[38] When this type of norm breaks down, it poses a threat to basic rule-of-law understandings about how the government operates. That is, it derivatively threatens the legitimacy or respect-worthiness of the judicial practice of deference.

Or, to take another example, consider the norms of investigatory independence, pursuant to which a president does not interfere with specific investigatory decisions by the Justice Department nor use the criminal law enforcement power to advance a private agenda of punishment and self-dealing.[39] These norms are frighteningly under attack today, including in many contexts that do not present a legal controversy.

But what if the president directs the prosecution of his personal political opponent, and the opponent brings a selective-prosecution challenge?[40] As the Supreme Court has explained, "[a] selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive"[41] and, as a result, courts have long afforded great deference to the executive. Implicitly, however, such deference is conditioned on the expectation that the executive branch exercises law enforcement judgment in the public interest — that is, that the executive branch is constrained by the investigatory norms just described. To maintain a posture of judicial deference on the facts here suggested would seem to distort rather than preserve the judicial practice. And it would put a judicial imprimatur on a form of presidential power deeply threatening to a working constitutional democracy.[42]

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36. I initially developed this argument in Renan, *Presidential Norms*, *supra* note 2, at 2191, 2265–73, and some of this work is incorporated in the discussion that follows.

37. *See id.* at 2221–30.

38. I discuss a range of doctrinal examples in *Presidential Norms*. *See, e.g.*, *id.* at 2259–60 (discussing the deliberative-presidency norm in the context of the Fourth and Ninth Circuits' decisions in litigation over President Trump's "entry ban"); *id.* at 2261 (discussing the deliberative-presidency norm in the context of President Trump's proposed transgender service members prohibition).

39. *See id.* at 2207–15, 2267–73.

40. *See id.* at 2268–69.

41. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

42. Litigation over the unusual motion by the Justice Department to dismiss a criminal case against former Trump national security advisor Michael Flynn, after he had twice pleaded guilty,

Failing to observe the absence of the presidential norms in these examples puts courts in the service of arbitrary power, rather than as a constraint on it.[43] When a presidential norm implicitly underwrites the *judicial* practice of deference, then ignoring the presidential breach decides the case on false premises; it alters the substance of the judicial practice as well.[44] With respect to these types of norms, the practices of the presidency and of the courts are fundamentally intertwined. When these sorts of norms or conventions break down, judicial practice appropriately adjusts.[45]

I agree with Dean Morrison that courts cannot solve the problems of constitutional governance.[46] Indeed, the more society depends on courts to check norm-breaching by political actors, the more fragile judicial practice (such as conventions of judicial independence) may become.[47] There comes a point, however, when presidential norm-breaching derivatively challenges the legitimacy of the judicial function as well.[48]

Perhaps this is the central challenge for a conventionalist constitution in uncertain times. As I have argued elsewhere, abnormal practice is not itself unlawful. But it can remove the conditions that courts have implicitly relied upon in developing their own conventions of inter-branch deference.[49] When courts defer to a political judgment that now lacks these minimal characteristics of respect-worthiness, they risk a formalism dangerous to the concept of legality itself.[50]

provides another justiciable context where flagrant violations of longstanding conventions of prosecutorial independence might inform the judicial response. *See In re* Flynn, No. 20-5143, 2020 WL 5104220 (D.C. Cir. Aug. 31, 2020) (en banc) (per curiam); *see also* Brief of Former Federal Prosecutors and High-Ranking Department of Justice Officials as Amici Curiae, at 2–5, No. 20-5143 (D.C. Cir., Aug. 31, 2020) (arguing on behalf of over a thousand federal prosecutors that "[t]he government's motion . . . bears the hallmarks of a brazen attempt to protect an ally of the President" in the context of recurring conduct by "Attorney General Barr in furtherance of President Trump's personal political interests").

43. *See* Renan, *Presidential Norms*, *supra* note 2, at 2265–73.

44. *Id.* at 2263.

45. *Id.* at 2265–68.

46. *Id.* at 2194.

47. *Id.* at 2193.

48. *Id.* at 2269.

49. *Id.* at 2193.

50. *Id.*; *cf.* Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REV. CONST. STUD. 101, 105 (2003) ("Legitimacy (where it exists) descends to specific legal acts from the 'respect-worthiness' . . . [of the] system, or practice, or 'regime' of government.").