

# THE STATUS OF UNWRITTEN CONSTITUTIONAL CONVENTIONS IN THE UNITED STATES

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*There has been a long historical difficulty in determining what ideas and documents have “constitutional status” within any given political system. This Article examines one feature of unwritten constitutions, the idea of constitutional conventions, by comparing the U.S. and British systems. Unwritten constitutional conventions have long been understood to be integral to the operation of Westminster parliamentary systems. The British legal scholar A.V. Dicey emphasized that “constitutional morality” supplemented legal rules in regulating the exercise of political power and limiting the discretion of government officials. U.S. fundamental law was thought to provide clarity and commitment in a way that was both distinct from and deeper than anything that might be found in the Westminster parliamentary system. The presence of a written constitution and judicially enforceable constitutional rules has sometimes been thought to render constitutional conventions superfluous. Such arguments, however, were misguided. British constitutionalism included more entrenched commitments than such a sharp distinction might suggest and U.S. constitutionalism relied more on unwritten practices than the text might imply. These unwritten constitutional conventions have been common over the course of U.S. history and have played an important role in defining the effective constitution of the polity. Constitutional law, however, always threatens to displace constitutional morality. Unwritten conventions are often regarded as in tension with the supremacy of the written text and the primacy of constitutional interpretation.*

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## I. INTRODUCTION

In the 1980s, the Princeton political scientist Walter Murphy and his colleagues contended that the question of “What is the Constitution” should be front and center in constitutional scholarship.<sup>1</sup> Influenced by the growing debate over “unenumerated” and “unwritten” constitutional rights, these scholars argued that the first task of the interpreter is to identify what is to be interpreted.<sup>2</sup> The formal constitutional text may have “significant gaps,” which could in turn be filled by reference to other sources that might have “constitutional status.”<sup>3</sup> The difficulty comes in identifying what ideas and documents might have that sort of “constitutional status” such that they can be deployed by authoritative interpreters and used to empower or limit government officials.

But supplying sources for legal interpreters is only part of the task that constitutions perform. Building on his comparative study of constitutional systems, Murphy came to emphasize another facet of the question of “What is the constitution.” Drawing on Aristotle, Murphy insisted that a constitution necessarily includes “the state’s most basic ordering.”<sup>4</sup> Constitutional documents are routinely subject to additions and subtractions, and are bound to “gather barnacles” over time.<sup>5</sup> The constitutional text is likely to be a starting point for constituting a working political system, but the text is unlikely to comprehensively order the polity.

Scholars have long observed the importance of the unwritten constitution in the United States, though they have not always followed up on that observation. At the beginning of the twentieth century, the great constitutional historian Francis Thorpe denied that U.S. constitutional history was exceptional. Americans had long prided themselves on their distinctive tradition of written constitutions, but Thorpe contended that constitutional history in the United States “has the same meaning as applied to other countries.”<sup>6</sup> A proper constitutional history provides “a narrative of the apprehension and application of [the principles of government] by the American people.”<sup>7</sup> Admittedly, the “unwritten constitution is a term but dimly understood in America,” where custom and precedent can be readily overturned by policymakers and written constitutions are so prominent.<sup>8</sup>

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1. See WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 16 (2d ed. 1995).

2. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 706 (1975).

3. MURPHY ET AL., *supra* note 1, at 11–12, 383.

4. Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 *LA. L. REV.* 91, 113 (1991).

5. *Id.* at 115–16.

6. Francis N. Thorpe, *What Is a Constitutional History of the United States?*, 19 *ANNALS AM. ACAD. POL. & SOC. SCIENCE* 95, 95 (1902).

7. *Id.*

8. *Id.* at 96.

How can the scope of constitutional history be cabined? Thorpe suggested that it should necessarily be “more than the history of a document.”<sup>9</sup> It would mainly consist of “a history of the origin, formation, adoption and exposition of the document.”<sup>10</sup> Constitutional history is made up of the prolonged “discussions and expositions,” by both official and unofficial expositors, of the principles that regulate political life.<sup>11</sup> Like many constitutional and political scholars of the period, Thorpe was insistent that “government is an organism, and, like an organism, it develops.”<sup>12</sup> The development of constitutional “ideas and ideals” and the efforts to apply them occur across the political landscape and challenge the ability of the historian to adequately contain them.<sup>13</sup> Andrew McLaughlin, the early twentieth century Pulitzer Prize-winning constitutional historian, contended,

The most significant and conclusive constitutional decision was not rendered by a court of law but delivered at the famous meeting of General Grant and General Lee at Appomattox. This is only an illustration of the fact that, not judicial pronouncements, but great controversies, discussed and rediscussed by statesmen and the common people, are, or may be, the crucial matters.<sup>14</sup>

Thorpe was a bit more circumspect, but admitted that “war is a kind of armed politics” and “both military and political affairs” were within the scope of constitutional history to the extent that they illustrated and fed into the fundamental features of the political system.<sup>15</sup>

Akhil Amar’s previous book provided a “biography” of the Constitution.<sup>16</sup> That book is organized around the structure of the text of the U.S. Constitution, and the content focuses heavily on the text, its origins, and its purposes. The book has many virtues, but one of its awkward features is the gap between that text and the effective constitution of the contemporary government.<sup>17</sup> As Edward Corwin observed in the preface to his popular, early twentieth-century introduction to the Constitution, “the real Constitution of the United States has come to be something very different from the document” adopted in 1787.<sup>18</sup> Other scholars of the era took a similar view. On the eve of the Great Depression, the political scientist William Bennett Munro highlighted the importance of the “unwritten constitution.”<sup>19</sup> This was formed from the “federal and state enactments, judicial decisions, usages, doctrines, precedents, official

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9. *Id.* at 99.

10. *Id.*

11. *Id.*

12. *Id.* at 101.

13. *Id.*

14. ANDREW C. MCLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES*, at vii–viii (1935).

15. Thorpe, *supra* note 6, at 97.

16. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

17. See Keith E. Whittington, *Clothed with the Legitimate Authority of the People*, 91 VA. L. REV. 2023, 2023–26 (2005).

18. EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TO-DAY* (2d ed. 1921).

19. WILLIAM BENNETT MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* 1 (1930).

opinions, and points of view which have profoundly altered the implications of the original instrument.”<sup>20</sup> So great was the gap between the written and unwritten constitutions, that the former could not even provide a “silhouette of the American political system.”<sup>21</sup> The “living organism” of the political system regularly adapted itself to the changing environment, and the formal terms and processes of the written Constitution were soon left behind.<sup>22</sup>

In *America’s Unwritten Constitution*, Amar gives greater attention to constitutional developments across time.<sup>23</sup> As a result, he too attempts to reconcile the relatively fixed constitutional text with ongoing constitutional practice. The written Constitution “operates on a higher legal plane” than everyday political actions.<sup>24</sup> The written document trumps the decisions of government officials; it is not trumped by them. The unwritten constitution must demonstrate a certain “fidelity” to the written Constitution.<sup>25</sup> But the constraint is most felt when the written Constitution speaks with a “clear . . . command.”<sup>26</sup> In other circumstances, the unwritten constitution informs our practice and our very understanding of what the written Constitution entails.

This Article takes up a specific feature of unwritten constitutions, the idea of a constitutional convention. Here I am not concerned with the doctrines and understandings that elaborate the meaning of the inherited constitutional text. My focus is on the practices that supplement the constitutional text. In what sense are these practices “constitutional”? What has “constitutional status,” and what is the significance of occupying that role?

## II. CONSTITUTIONAL CONVENTIONS

Constitutional convention has a common meaning in the American context, of course. The United States is distinctive in its long tradition of using specially designated, popularly elected assemblies to draft constitutional texts to regulate governmental institutions. The idea of constitutional conventions, in the American context, usually refers to a process of constitutional drafting and an instantiation of ideals of popular sovereignty. Conventions are super-legislatures engaging in higher lawmaking.

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20. *Id.*

21. *Id.*

22. *Id.* at 1, 4. Like Jack Balkin, Munro also made use of architectural metaphors to understand the living constitution. Munro, however, thought that “only semblance of the original architecture remains,” as a “rambling edifice” was built up in its place by successive generations. *Id.* at 3–4. Even the loose theory of a constitutional “framework” offered by Balkin suggests more continuity over time. JACK M. BALKIN, *LIVING ORIGINALISM* 31 (2011). The original “skeleton on which much will later be built” always remains and guides future constructions. *Id.*

23. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* (2012).

24. *Id.* at xii.

25. *Id.*

26. *Id.*

The concept of the constitutional convention of interest in this Article derives from British, rather than American, traditions. Constitutional conventions have also been understood as crucial to the operation of Westminster parliamentary systems. Such governments do not have a rich tradition of popularly elected assemblies capable of drafting fundamental law. Their conventions are not bodies of the people empowered to create and limit government. Such conventions do not create government; they guide governmental practice.

The concept of a constitutional convention was popularized by the nineteenth-century British legal scholar A.V. Dicey. Conventions were understood to be key features of Westminster parliamentary systems. With long traditions of unwritten constitutions, England and many of its progeny nonetheless established and maintained limited governments and well-ordered polities. Conventions helped fill the space that might have otherwise been filled by written constitutions.

Dicey took a comparative approach to the study of the British constitution. Like many Americans in the nineteenth century, Dicey highlighted the apparent contrast between the written constitutions of the American tradition and the unwritten constitution of the English tradition.<sup>27</sup> The lack of a written constitution, he observed, complicated the subject of his study. U.S. commentators had the advantage of “a definite legal document,” which could be interpreted in light of standard legal canons for understanding any legislative enactment.<sup>28</sup> The U.S. Constitution, he believed, could be expounded with “ordinary legal methods” in a manner familiar to lawyers.<sup>29</sup> By contrast, English constitutional commentators cannot readily distinguish “laws which are constitutional or fundamental from ordinary enactments.”<sup>30</sup> The very idea of constitutional law is uncertain within the English tradition.<sup>31</sup> Partly as a consequence, English constitutional commentators such as William Blackstone could too easily fall into the “midst of unrealities and fictions.”<sup>32</sup> Formal institutions like monarchies could obscure emergent political realities like the significance of the Cabinet. “Political understandings” were as crucial as “rules of law,” though the former would not be “debated in the law courts.”<sup>33</sup>

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27. A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 4-5 (8th ed. 1915).

28. *Id.* at 5.

29. *Id.*

30. *Id.* at 6.

31. *Id.*

32. *Id.* at 10. American commentators who were contemporaries of Dicey would have likely corrected him and pointed out that paper constitutions could also lead to the confusion of truth and fiction. *See, e.g.*, WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 22 (1908).

33. DICEY, *supra* note 27, at 20.

In identifying the scope of his subject, Dicey was expansive and substantive. Without a written constitution to guide his way, Dicey focused his attention on those rules which did the work of a constitution within the British political system. To wit:

Constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state. . . . The one set of rules are in the strictest sense “laws,” since they are rules which . . . are enforced by the Courts. . . . The other set of rules consist of conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power . . . are not in reality laws at all since they are not enforced by the Courts. This portion of constitutional law may, for the sake of distinction, be termed the “conventions of the constitution,” or constitutional morality.<sup>34</sup>

Constitutional conventions, in Dicey’s reading, may have written components, but they do not have the force of law and are not enforceable by courts.<sup>35</sup> They can also vary over time, subject to change “from generation to generation, almost from year to year.”<sup>36</sup>

Although not enforceable in court, Dicey thought constitutional conventions are best understood as “precepts for the guidance of public men,” the “constitutional morality of the day.”<sup>37</sup> A convention “defines duties or obligations” but does so “morally and politically” not “legally.”<sup>38</sup> Constitutional conventions are diverse, but what unites them is that they provide “rules for determining the mode in which the discretionary powers of the Crown (or of the Ministers as servants of the Crown) ought to be exercised.”<sup>39</sup> Discretionary powers describe those actions “which can be legally taken” by government officials.<sup>40</sup> In the English context, the ultimate purpose of constitutional conventions is to secure the supremacy of Parliament over the monarch and the democratic accountability of the legislature.<sup>41</sup> Political power should be exercised in such a way as to maintain democratic government. To do otherwise is to violate the spirit of the constitution, even if it does not violate any particular rule. The critical enforcement mechanism for preserving these “habits of obedience” is ultimately public opinion.<sup>42</sup> Notably, this pur-

34. *Id.* at 22–23 (internal citations omitted).

35. Dicey was quick to recognize that the United States had constitutional conventions of its own, despite the existence of a written constitution. He pointed to the tradition of the two-term presidency and the reduction of the role of presidential electors. *Id.* at 28–29.

36. *Id.* at 30.

37. *Id.* at 414, 418 (internal citations omitted).

38. GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 17 (1984).

39. DICEY, *supra* note 27, at 418.

40. *Id.* at 419.

41. *Id.* at 424.

42. *Id.* at 439. Dicey admitted that the conventions varied in their clarity and firmness. While some maxims are so clear and so deeply rooted in the national conscience that violating them would be seen as revolutionary, others are “vague,” and there is unlikely to be much agreement on whether “rigid observance” of them is necessary in order to sustain the proper workings of the political system.

positive character of constitutional conventions moves them out of the realm of mere description. The idea of a convention is not simply an analytical device to close the gap between the ideal and the reality of political power and account for how political power is actually organized and structured within a given political system. Conventions serve a normative function within constitutional politics, leading political actors to better realize constitutional ends.

Modern commentators have diverged on how best to conceptualize constitutional conventions. One leading expert, Geoffrey Marshall, distinguishes two theories of how conventions might be taken as obligatory.<sup>43</sup> Relevant political actors might accept a given convention as obligatory. Whether a posited convention has that sort of obligatory force within a given political system would be an empirical matter. Conventions might be understood as a matter of “positive morality.”<sup>44</sup> By contrast, constitutional conventions might be matters of normative theory. An external observer might believe that a given convention should be obligatory, even if political participants do not themselves recognize it.<sup>45</sup> A convention might be asserted and defended not because it is already widely recognized within a political system, but because it would be useful in better effectuating constitutional goals.

Examples of constitutional conventions are abundant. Most notably, Dicey and others have pointed to the formation of parliamentary governments. When the “Ministry [is] placed in a minority by a vote of the Commons,” it has the “right to demand a dissolution of Parliament.”<sup>46</sup> The “House can . . . be deprived of power and of [its] existence” by the Crown in order to prevent the “wishes of the legislature” from being “different from the wishes of the nation.”<sup>47</sup> The “verdict of the political sovereign” ultimately determines whether the Cabinet remains in office.<sup>48</sup> Constitutional conventions identify the conditions under which the incumbent government must surrender power, and in doing so maintain the primacy of democracy. Political practice demonstrates that parliamentary supremacy is tempered; “the nation,” not Parliament, is politically supreme.<sup>49</sup> Similarly, the selection of the Prime Minister is a matter of constitutional practice rather than constitutional text or law. The selection of the Prime Minister is understood to be a matter of royal prerogative. Formally, the Crown could select anyone to occupy the role

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*Id.* at 452. Ivor Jennings suggested that conventions are sustained because the consequences for violating them would be “political difficulties” for those involved. SIR IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 134 (5th ed. 1959).

43. MARSHALL, *supra* note 38, at 11–12.

44. *Id.* at 11.

45. *Id.* at 12.

46. DICEY, *supra* note 27, at 428.

47. *Id.* at 428–29.

48. *Id.* at 429.

49. *Id.* at 431.

and form the government. In practice, “royal discretion” is limited.<sup>50</sup> The Minister must be chosen from among the ranks of the elected members of Parliament, must be able to command a majority of the members of the House of Commons, and must not be a peer of the realm. In sum, the selection of the Prime Minister is no longer a matter of choice for the Crown. The Prime Minister is effectively chosen by the members of the House of Commons (subject to these same limitations) and recognized by the Crown. Likewise, the power of the office of the Prime Minister itself is the subject of adaptable constitutional conventions. The authority to select the members of the Cabinet and supervise their actions is both a function of changing conventions and hemmed in by them.<sup>51</sup> The relative independence of the British Attorney General from political control in the exercise of the responsibilities of launching investigations and prosecutions is among those constraints on Parliament and the Prime Minister.<sup>52</sup>

### III. U.S. CONVENTIONS

Starting with Dicey, various scholars have suggested that constitutional conventions in this British sense also exist in the United States.<sup>53</sup> The presence of a written constitution might be taken to reduce the need for unwritten conventions, but the text may not be exhaustive. Although the formal constitution embodied in the written document drafted in Philadelphia in 1787 may lay down many of the rules and procedures that organize and limit government power in the United States, there are features of the constitutional terrain that are not adequately described in constitutional text. Creative efforts at interpretation might help close the gap between text and practice, but more is likely needed to fully understand the effective constitution.<sup>54</sup>

One way of thinking about U.S. constitutional development is to distinguish between constitutional interpretation and constitutional construction. The traditional focus in U.S. constitutional theory has been on constitutional interpretation and the elaboration of constitutional law. Interpretation seeks to faithfully articulate the rules laid down in the fundamental law, often for the sake of judicial enforcement of those rules. The idea of constitutional construction seeks to identify how constitutional meaning and practices are developed in the interstices of the constitutional text, where discoverable meaning has run out. Political actors are routinely called on “to clarify an understanding of constitutional meaning through the political construction of authoritative norms and

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50. RODNEY BRAZIER, CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT 11 (3d ed. 1999).

51. *Id.* at 76, 96.

52. MARSHALL, *supra* note 38, at 111.

53. *See, e.g.*, DICEY, *supra* note 27, at 162.

54. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–17 (1999).

governing institutions.”<sup>55</sup> The indeterminate text is rendered determinate through the creative action of government officials and commentators, discretion is hemmed in by the generation of “authoritative norms of political behavior.”<sup>56</sup> Constitutional conventions are one mode of construction.

Dicey’s suggestion that conventions help determine how discretionary powers are to be used within a given constitutional system provides a clue as to what role they might play within the United States as well. Part of the purpose of the text of the U.S. Constitution is to assign discretionary power over specified subjects to designated government officials. Such discretion may simply go unchecked by constitutional rules and norms, but it might also be hedged in by evolving expectations on how such power is to be properly used. Constitutional maintenance may well require that political behavior within the constitutional rules be guided by precepts that help preserve the rules.<sup>57</sup> Questions of “constitutional propriety” arise within the boundaries of constitutional law.<sup>58</sup> Mark Tushnet has referred to actions that work within established constitutional doctrine but that are subversive of the existing constitutional order as “constitutional hardball.”<sup>59</sup> Such maneuvers do not challenge the constitutional rules, but rather seek to revise what Tushnet calls “pre-constitutional understandings.”<sup>60</sup> For Tushnet, such understandings “go without saying” and undergird the text of the Constitution itself.<sup>61</sup>

The classic example provided in an older literature on U.S. constitutional conventions, or unwritten constitutional norms, is the tradition of the two-term presidency. Dicey himself pointed to the implicit term limit on presidents as a U.S. example of the type of informal constitutional practice that was central to the British system of government.<sup>62</sup> Borrowing from Thomas Cooley’s understanding of a constitution as a “body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised,”<sup>63</sup> Herbert Horwill called attention to those “maxims” that helped determine how power is “habitually exercised.”<sup>64</sup> For Horwill, the idea that the U.S. and English constitutions are significantly different is an “utter delusion.”<sup>65</sup> The U.S. constitutional system “has all the ingredients of the English,” including a set of constitutional conven-

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55. *Id.* at 7.

56. *Id.* at 8.

57. See Keith E. Whittington, *On the Need for a Theory of Constitutional Ethics*, 9 GOOD SOC’Y 60, 62 (2000).

58. *Id.* at 62–63.

59. See Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004).

60. *Id.* at 523.

61. *Id.* at n.2.

62. DICEY, *supra* note 27, at 27–30.

63. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 21 (2d ed. 1891).

64. HERBERT W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 4 (1925). Cooley himself did not emphasize this dimension of constitutionalism. He was more concerned with the “iron rules” established by written constitutions in the United States. COOLEY, *supra* note 63, at 22.

65. HORWILL, *supra* note 64, at 9.

tions.<sup>66</sup> Horwill observes that the prohibition on third presidential terms was widely recognized by scholars of U.S. politics in the early twentieth century.<sup>67</sup> Even so, he acknowledges that the robustness of the principle may be doubted. Lord Bryce reported that this U.S. tradition had “recently lost nearly all of its influence,” even though this hedge against overly self-interested presidents had been formalized in other presidential systems.<sup>68</sup> James Bradley Thayer presciently suggested that were a president who is “good enough” ever enter the political scene, then the people would gladly take to “re-electing him repeatedly.”<sup>69</sup>

Horwill’s own analysis of the limit on presidential service is illuminating. With the example of Theodore Roosevelt’s 1912 presidential campaign firmly in mind, Horwill finds mixed support for the idea of a constitutional convention against third terms. On the one hand, popular presidents over the course of U.S. history had in fact generated discussion of third terms.<sup>70</sup> On the other hand, individuals who might have been tempted to push these traditional boundaries have often encountered resistance.<sup>71</sup> The fact that no president had been elected to a third term, Horwill noted, was not dispositive in evaluating whether there was a norm against it. The American people had yet to elect Roman Catholics, “men of color,” or corporate lawyers to the White House as well, but there was little reason to believe that there was an implicit disqualification on potential candidates of such descriptions.<sup>72</sup> Horwill seemed to believe that incumbent presidents running for a third term would face a positive “handicap” that was different in kind and significance than the kind of handicap that might face other candidates who might run against popular sentiments and prejudices.<sup>73</sup> The historical examples suggested that such incumbent presidents might encounter explicit opposition grounded in the tradition against three terms of office. Andrew Jackson seemed committed to the principle of rotation in office for presidents, the House of Representatives resolved that a third term for President U.S. Grant would be “unwise” and “unpatriotic,” and the national convention of the Democratic Party turned away from nominating President Grover Cleveland with the warning that third presidential terms were against the “unwritten law of [the] republic.”<sup>74</sup> But Horwill also thought the historical experience suggested that this particular “unwritten law” did not rest on firm foundations. Theodore Roosevelt might have been shot by a would-be assassin who rationalized his actions as necessary to defend the ban on third terms, but he also received a large number of votes from citizens who seemed unconcerned about his status as a former

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66. *Id.*

67. *Id.* at 88–89 (citing J. A. Woodburn, A. B. Hart, and G. Bradford).

68. JAMES BRYCE, *MODERN DEMOCRACIES* 469 n.2 (1921).

69. JAMES BRADLEY THAYER, *LEGAL ESSAYS* 204–05 (1908).

70. HORWILL, *supra* note 64, at 88–100.

71. *Id.*

72. *Id.* at 96.

73. *Id.* at 99.

74. *Id.* at 91, 93.

two-term president.<sup>75</sup> Seekers of power were unlikely to be firmly deterred by this tradition, and presidents and their supporters had already sought to reinterpret the custom so as to discount midterm accessions to the Oval Office and interrupted terms. Horwill anticipated that the “question will be definitely settled” by the adoption of a formal constitutional amendment.<sup>76</sup>

The presidency has been the locus for other putative conventions as well. The diminution of presidential electors is one traditional example. Although the text of the Constitution delegates to the legislatures of the states the manner of choosing the electors, within a few decades of the founding the states had vested the people with the power to elect the electors. At the time that Horwill was trying to assess the features of the unwritten constitution, the entire body of the Electoral College had been popularly elected for only a few decades.<sup>77</sup> Nonetheless, that presidential electors would be selected by popular vote was, by the early twentieth century, “taken as a matter of course” and a legislator would “risk his political life” if he were to suggest that a state legislature make use of its constitutional discretion to select presidential electors by some other means.<sup>78</sup> Similarly, presidential electors were no longer expected to exercise discretion when casting their ballots in December. Like many writers in the Progressive period, Horwill accepted that the constitutional design of the founders was intended to be antidemocratic and that the formal system of presidential selection contributed to that framework.<sup>79</sup> The contemporary political scientist, James Woodburn, asserted that any presidential elector who chose to exercise independent judgment in casting a ballot would be regarded as a “traitor to his party,” would “not find it comfortable to return home,” and could be expected to be “ostracized and despised and would be visited with the social condemnation and contempt due to one who had been guilty of an infamous betrayal of a public trust.”<sup>80</sup> Any candidate who found himself elected to the presidency on the basis of such an action by a presidential elector “would probably not

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75. *Id.* at 93, 95, 97.

76. *Id.* at 100. The House of Representatives proposed the Twenty-Second Amendment in 1947 with a goal of gaining a “positive expression” from the people on the subject of the “well-defined custom which has risen in the past.” H.R. REP. NO. 17, at 2 (1947).

77. HORWILL, *supra* note 64, at 34. Colorado was the last state to not choose electors by popular vote, in 1876. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957 679 (1960).

78. HORWILL, *supra* note 64, at 34–35. When the Florida legislature took up the question of whether they should, or could, directly designate a slate of presidential electors during the contested 2000 election, commentators seemed more likely to blame the constitutional text, as interpreted by the Supreme Court in *McPherson v. Blacker*, than point to a firm tradition limiting legislative discretion. 146 U.S. 1 (1892). See, e.g., Mary Ellen Klas, *Questions, Answers on Controversial Special Session*, PALM BEACH POST, Dec. 8, 2000, at 21A; *Heads-Up for Voters*, PALM BEACH POST, Dec. 6, 2000, at 20A.

79. HORWILL, *supra* note 64, at 26–28.

80. JAMES ALBERT WOODBURN, *THE AMERICAN REPUBLIC AND ITS GOVERNMENT* 122 (2d ed. 1916).

accept the office.”<sup>81</sup> Former President Benjamin Harrison went so far as to suggest that a faithless elector “might be the subject of a lynching.”<sup>82</sup> The problem of the faithless elector has been a persistent one over time, though was unknown during the long period from Reconstruction to the New Deal. No elector has ever cast an independent ballot in a pivotal situation of the type that most concerned commentators like Woodburn, but it is not clear that they have suffered the sort of public scorn that he expected would help discipline the electors and help preserve the convention against independent judgment. Presidential elector Roger MacBride, for example, broke from the Republican Party in 1972 and cast his ballot for the Libertarian ticket rather than Nixon-Agnew.<sup>83</sup> He was rewarded with a spot at the head of the Libertarian Party presidential ticket in 1976.<sup>84</sup>

Other practices in U.S. political history may also be appropriately characterized as constitutional conventions. In some cases, conventions have formed to resolve apparent indeterminacies in constitutional meaning, settling potential disputes and allowing governance to proceed. As Alexander Hamilton might have said, practice helps “liquidate and fix” the meaning of the constitutional text.<sup>85</sup> “Usage” may clarify the operative constitution, in the face of constitutional uncertainty or even in the face of contrary alternative understandings of constitutional meaning.<sup>86</sup> Conventions fill in the gaps of constitutional meaning so that the appropriate practice in ordinary cases is clearer. In other cases, conventions narrow the apparent discretion in the exercise of political power that might otherwise fall to government officials, elaborating supplemental rules that limit political options. In doing so, conventions shift authority from one set of actors in the political system, empowering some at the expense of others. By delimiting the sphere of choice for some government officials, conventions implicitly or explicitly enlarge the range of options for other political actors.<sup>87</sup>

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81. *Id.* Woodburn was convinced that state legislators were reaching a similar point prior to the adoption of the Seventeenth Amendment, merely ratifying the popular vote when selecting the U.S. senator. Their discretionary authority to choose the members of the U.S. Senate was gradually being replaced by an entrenched norm of mechanically sending the candidate favored by the voters. *Id.* at 216–17.

82. BENJAMIN HARRISON, *THIS COUNTRY OF OURS* 77 (1897).

83. *THE ENCYCLOPEDIA OF LIBERTARIANISM* 310 (Ronald Hamowy ed., 2008).

84. *Id.*

85. ALEXANDER HAMILTON ET AL., *THE FEDERALIST PAPERS* 237 (Michael A. Genovese ed., 2009).

86. In the early republic, the idea of usage often referred to the development of the common law, and commentators emphasized that even despotic governments were constrained by “some custom or ancient usage . . . that is by the people held more sacred than the authority or person of the prince;—and which, he cannot with impunity, and dares not violate.” NATHANIEL CHIPMAN, *PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS* 144 (1833).

87. The idea of “usage” often highlights this empowering feature of established constitutional practice. John Jameson asserted, for example, that long-established usage had established that regularly constituted legislatures could call state constitutional conventions, even if they were not explicitly authorized to do so by the constitutional text. JOHN ALEXANDER JAMESON, *THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING* 366 (1867). Legislatures could “take the initiative.” *Id.* Even the classic British example of the Queen being constrained in the selec-

At the very outset of the politics under the U.S. Constitution, President George Washington liquidated the meaning of the “advice and consent” clause relative to treaties.<sup>88</sup> The requirement of Senate advice and consent was not immediately clear. Historical practice prior to the adoption of the Constitution at least suggested a close involvement of senators with treaty negotiations and government appointments.<sup>89</sup> Executive councils were the precursors to the Senate, and those small bodies of advisors worked closely with governors to make executive decisions.<sup>90</sup> In revolutionary-era state constitutions, these assemblies of worthies could expect to serve as collective executives. The U.S. Senate was structured differently, and the President of the United States had more power, but the first senators might well have expected that their “advice” would be sought often. Washington seemed to agree initially. Like governors before him, the president went to the Senate to seek its collective advice.<sup>91</sup> The experiment did not go well. The president left the Senate in frustration and vowed not to return.<sup>92</sup> The Advice and Consent Clause was transformed into the ratification clause. The authority of senators to expect presidents to confer with them over matters of state was reduced, and presidents were freed from treating the senators as if they were Cabinet advisors. A constitutional provision that was briefly and persuasively read one way was given a different and enduring practical content through political construction.

The late nineteenth-century practice of senatorial courtesy bent senatorial advice and consent in a different direction. Fueled by the need to provide federal patronage to state political machines, senators insisted that they do more than ratify the choices of the president to fill local federal offices.<sup>93</sup> Senators expected to be consulted before any nominations were made and to have their preferred choices to fill those offices adopted.<sup>94</sup> Presidents complained that they had been reduced to the role of a mere filing clerk, transcribing and forwarding the selections of home-state senators for the mass of federal offices subject to senatorial advice and consent.<sup>95</sup> By convention, the discretionary role of the president to nominate most executive branch officers was sharply limited. This fundamental political act of the presidency was reduced to a ministerial one.

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tion of the Prime Minister implicitly empowered a different set of political actors (the members of Parliament) to make the choice. BRAZIER, *supra* note 50, at 11–12.

88. AMAR, *supra* note 16, at 193.

89. *Id.* at 189–92.

90. *Id.* at 190.

91. Keith E. Whittington, *The Separation of Powers at the Founding*, in THE SEPARATION OF POWERS: DOCUMENTS AND COMMENTARY 1, 12 (Katy J. Harriger & William Owen Roberts eds., 2003).

92. *Id.*

93. AMAR, *supra* note 16, at 192–95.

94. JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 79–86 (1953).

95. *Id.* at 86.

## IV. DO CONVENTIONS REGULATE?

Constitutions serve a variety of functions within a political system.<sup>96</sup> Perhaps most fundamentally, they constitute the organs of government. They organize and structure politics and government, identifying actors who are authorized to exercise political power, specifying how they are to be selected, clarifying how they relate to one another, and defining what powers they possess. In some cases, a written constitution may describe institutions that predate the constitution itself. In other cases, the constitution may create new institutions of government. This Aristotelian feature of constitutions may be commonplace, but it is not trivial.<sup>97</sup> How political institutions are structured matters, and formal constitutions that do not describe how political power is actually organized and exercised are flawed. The extent to which constitutions successfully constitute the forms of government cannot be taken for granted, and the challenge of ordering politics by means of a written text should not be underestimated.

Constitutional conventions may contribute to the effort of constituting government. Conventions, understood as maxims, beliefs, and principles that guide officials in how they exercise political discretion, may not be likely to do the first-order work of generating governmental agencies. At least in the American context, they are largely parasitic on preexisting institutions, whether created directly by the Constitution's text or by other means.<sup>98</sup> Even so, they may well help define how those institutions operate. The formal Constitution may create the office of presidential elector and invest it with potentially significant power, but constitutional conventions have grown up to structure how that power is exercised—and in the process have hollowed out the office. Constitutional conventions help define whether and how the Senate filibuster can be used and recess appointments made and judicial powers and personnel reorganized. Conventions may flesh out how government officials interact with one another, but conventions are rarely sufficient to create the offices themselves.

Constitutions also empower and constrain government officials. In constituting governmental agencies, a constitution delegates authority and provides resources for achieving public ends. Constitutions may re-

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96. See 1 HOWARD GILLMAN ET AL., *AMERICAN CONSTITUTIONALISM* 7–10 (2013); Keith E. Whittington, *Constitutionalism*, in *OXFORD HANDBOOK OF LAW AND POLITICS* 281 (Keith E. Whittington et al eds., 2008).

97. Cf. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 *AM. POL. SCI. REV.* 853, 859–60 (1962) (defining constitutionalism as exclusively concerned with legal limits on government power).

98. Here I would distinguish constitutional conventions from the full range of constitutional constructions. Constitutional constructions supplement the fixed boundaries of the formal constitution and help fill in the subject matter that constitutions provide for a political system. Institutions that elaborate constitutional features and serve constitutional functions are readily encompassed by the concept of constitutional construction. See WHITTINGTON, *supra* note 54, at 9–15. Principles that provide guidance on how those institutions should be operated are a subset of construction that is addressed by constitutional conventions. *Id.*

arrange public power, shifting authority among governmental institutions and transferring power from private to public actors. Conversely, constitutions also limit political power. In giving authority to government officials, constitutions also delimit how far that authority extends. In entrusting power and responsibility to public officers, constitutions also specify the rights available to private individuals. Conventions work within these elements of constitutional systems to further specify how government officials should use the power that has been made available to them. The rights and duties of office are matters not only of law but also of custom.<sup>99</sup> By limiting the discretion of political actors, constitutional conventions impose constraints that supplement legal rules.

In order to accomplish such tasks, constitutional conventions have to be regulative. Understanding how constitutions constrain has been a significant concern in the recent literature. Many scholars have emphasized the ways in which constitutions help coordinate expectations about political behavior.<sup>100</sup> On this account, constitutions must be self-enforcing, that is, political actors must agree to abide by them and find it in their continuing interest to sustain constitutional agreements. If adhering to constitutional limits were no longer in the interest of political actors, then those limits would soon be abandoned. Even legalized enforcement mechanisms like judicial review ultimately depend on this same dynamic. Courts enforce constitutional terms and other government officials defer to judicial judgments only to the extent that such a system of judicial enforcement is politically useful.<sup>101</sup>

To this extent, constitutional conventions and constitutional law are similarly situated. Conventions must be self-enforcing to be effective, but constitutional law is no different. Conventions thrive to the extent that they successfully order the expectations of political actors and allow them to better organize their political lives and pursue their primary political goals.<sup>102</sup> It is this system of mutual expectations that make conventions binding. Individual political actors are not free to disregard a given constitutional rule or norm whenever it becomes inconvenient. A larger web of social and political relations depends on sustaining the rule, even in circumstances in which a given political actor would be made better off in the short term by deviating from it. Constitutional commitments en-

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99. On the importance of rights of office to the constitutional system, see Karen Orren, Essay, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 *STUD. AM. POL. DEV.* 60 (1994).

100. RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 90–114 (1999); Peter C. Ordeshook, *Constitutional Stability*, 3 *CONST. POL. ECON.* 137 (1992); Barry R. Weingast, *The Constitutional Dilemma of Economic Liberty*, 19 *J. ECON. PERSP.* 89 (2005).

101. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 14–15 (1996); Sonia Mittal & Barry R. Weingast, *Constitutional Stability and the Deferential Court*, 13 *U. PA. J. CONST. L.* 337, 341–44 (2010).

102. To this extent, Diceyan constitutional conventions share features of social conventions generally. As Andrei Marmor shows, “[t]he reasons for following a rule that is conventional are tied to the fact that others (in the relevant population) follow it too.” ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* 1 (2009). We have “compliant-dependent reasons” for following conventions. *Id.* at 11.

ture because they provide long-term benefits that override short-term costs. They collapse when the cost-benefit calculation changes and political actors are willing to pay the short-term costs associated with uncertainty and instability in order to try to shift the system to a new equilibrium. The higher the transaction costs of defection, the stickier the constitutional rule is likely to be. As Peter Ordeshook concluded,

[T]o perform its coordination function, a constitution must establish a set of stable and self-generating expectations about peoples' actions that overcomes alternative expectations. . . . Insofar as a constitution's stability is concerned, it is evident that if it is effective—if it coordinates action—then it must be an equilibrium in the sense that no individual within the society has an incentive and the ability to defect to some other strategy.<sup>103</sup>

This begins to suggest, however, reasons why formal constitutional rules might be better situated than informal constitutional conventions. Constitutions serve as coordination devices because they structure expectations. The nature of the coordination problem is such that establishing settled expectations is more valuable than uncertainty. But there is no unique solution to coordination problems. Coordination can be established by a variety of means, including direct communication and negotiation or spontaneous convergence on focal points. Constitutional rules attract attention and settle expectations. We know when and under what circumstances presidents will leave office, and as a consequence, we can organize around those expectations. There are certainly other ways of organizing political life, but having settled on this solution, it functions better for all concerned than being uncertain about the timing and circumstances of presidential transitions. One can only play the game after the rules for the game are fixed in place. Discarding the rules endangers the game itself. Textual provisions publicly ratified and widely disseminated, combined with high-profile reminders of their content by judges, provide a ready basis on which to form expectations about political behavior.

Informal customs understood and sustained by political insiders may be less robust. Modification or violation of constitutional conventions may be less obvious than revision of formal constitutional rules. Ignorance or misunderstanding of the convention may be more widespread, and alternative focal points for coordinating political behavior may not be at such a competitive disadvantage. Prominence is a key component of a successful coordination device. If coordinating around *A* is much easier than coordinating around *B* (in part because *A* is more

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103. Ordeshook, *supra* note 100, at 149–150; *see also* HARDIN, *supra* note 100, at 98, (“If a constitution is to be stable, it must be self-enforcing, it must be a coordination, because the nation cannot go to a supranational agency to enforce its citizens’ contractual agreement with each other or with their government. . . . A constitution that has the form of a contract immediately faces this problem of how to motivate compliance without enforcement.”). *Id.* at 111 (“A constitution does not commit in the way a contract does. Rather it merely raises the cost of trying to do things some other way through its creation of a coordination convention.”).

familiar to all the relevant participants), then *A* is likely to emerge as the stable equilibrium. To the extent that alternative arrangements are easily imagined and well within the conceptual grasp of the interested parties, then the transaction costs of shifting to a new governing arrangement are relatively low. Constitutional practices endure and regulate political behavior to the extent that they are expected to endure. They cease to be efficacious when they are no longer likely to describe actual behavior.<sup>104</sup>

Sanctioning mechanisms are useful to help sustain conventions and make them regulative. The social theorist Russell Hardin has suggested that “[c]oordination theory is primarily a theory of workability, not of normativity or obligation.”<sup>105</sup> Contractual bargains require normative justifications and external sanctions to coerce participants to sacrifice their own immediate interests, whereas coordinating devices generate incentives for voluntary compliance.<sup>106</sup> Nonetheless, conventions often set and maintain mutual expectations of compliance. The alignment of the incentives of political actors with the maintenance of the convention is crucial, of course, such that all parties “believe that they are better off under the pact” than going through the effort of renegotiating or embarking on less cooperative political projects.<sup>107</sup> Mechanisms of “monitoring and the dissemination of information” help publicize the content of conventions and the possibility of violations.<sup>108</sup> The willingness of other participants in the convention to sanction violations reinforces the initial commitment and maintains the expectation of widespread compliance. President Harrison’s rumination on the possibility that faithless presidential electors might be lynched by their unhappy constituents at least points to the more general phenomenon of communal sanction of violators of social conventions.<sup>109</sup> Constitutional conventions are backed by threats of ostracism, censure, reprisal, and the breakdown of cooperation, all of which reinforce the reasonableness of the expectation that the convention will adequately describe the future political behavior of others and thus should provide a guide to one’s own behavior. But from an internal perspective, constitutional conventions will be regarded as normative. They provide not only a description of how political actors are likely to behave given the arrangement of incentives but also a rule for how they ought to behave. Given the continuing compliance of others, the simple existence of the convention provides a *prima facie* reason for

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104. The risk for formal constitutional rules is that they will become obsolete. To the extent that practical needs of a changing society increasingly diverge from the terms of the written constitution, the pressure to defect from its terms will increase. The ability to adjust or revise the content or application of the formal rule so that the gap between established commitments and current preferences does not become too wide is crucial to the ultimate survival of the constitution as a whole.

105. HARDIN, *supra* note 100, at 87 (emphasis omitted).

106. *Id.* at 87–88.

107. Weingast, *supra* note 100, at 98.

108. *Id.*

109. *See supra* note 82 and accompanying text.

following it.<sup>110</sup> The presence of the convention itself provides a content-independent reason for political action. The “constitutional morality” embodied in the convention replaces the need for evaluating and agreeing with the substantive values expressed in or advanced by the convention.

## V. THE THREAT OF INTERPRETATION AND LAW

Conventions, in the American context, work within the indeterminacies of the constitutional text. They operate where known textual meaning runs out, in what Larry Solum has called the “construction zone.”<sup>111</sup> They are both useful and viable to the extent that the constitutional text does not itself fully specify how political actors ought to behave.

The U.S. constitutional tradition has often been distinguished from the British constitutional tradition because the former is grounded in a single, authoritative text. A written constitution serves as a fundamental law and as a sourcebook for regulating political behavior. We might think that writing down the political rules, specifying the duties and privileges of office, would obviate the need for constitutional conventions. The British constitution needed conventions to specify how the prime minister is to be selected, when elections should occur, and what consequences follow from elections.<sup>112</sup> By contrast, democratic control over the government is instantiated in the U.S. context through text. Written constitutions specify many of the details of how the government should operate and how government officials should behave. The discretion that government officials might otherwise enjoy is limited by law rather than by Dicey’s “constitutional morality.”<sup>113</sup>

Larry Alexander and Frederick Schauer express a common view of law and constitutions. The most important function of law, they contend, “is to settle authoritatively what is to be done.”<sup>114</sup> The goal of law is to reduce uncertainty by discouraging divergence from a known path. To the extent that law is successful, it will “coordinate a multiplicity of substantive views, mutually exclusive interests, and self-defeating individual strategies into the thing we call a state, and into beneficial collective activity.”<sup>115</sup> One risk of parliamentary supremacy is that the reality of substantive disagreement on fundamental questions will overwhelm the need for settlement and coordination.<sup>116</sup> Leaving questions open to political resolution risks leaving questions perpetually unresolved. Dicey

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110. See MARMOR, *supra* note 102, at 10–11.

111. Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 117 (2010).

112. MARSHALL, *supra* note 38, at 45–33.

113. DICEY, *supra* note 27, at 23.

114. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

115. *Id.* at 1374.

116. *Id.* at 1376.

would have responded that conventions help resolve at least some fundamental questions, reducing the degree to which “shifting political fortunes” might destabilize expectations about government behavior.<sup>117</sup> Alexander and Schauer place their bets on written constitutions to perform that role.

Constitutional text and constitutional conventions are to some degree substitute goods. Both attempt to perform the settlement function and coordinate and direct political behavior. The adoption of constitutional text offers an alternative to relying on unwritten conventions identified and sustained by government officials. Written constitutions, in turn, generate efforts at interpretation to clarify and elaborate the meaning of the text. Presumptively, constitutions fail in their settlement function to the extent that they even require interpretation. Language may simply be, “to some extent, indeterminate.”<sup>118</sup> The simple understanding of a text may sometimes be possible without interpretive effort, but more extensive efforts at interpretation may be necessary to resolve apparent uncertainties in meaning.<sup>119</sup> The effort at interpretation ultimately gives rise to competing interpretations, but the interpretative enterprise is aimed at uncovering meaning in the text that is otherwise obscure, reducing the scope of textual indeterminacies. An indeterminate and incomplete text is replaced by a determinate and full interpretation of the text; constitutional law replaces the Constitution.<sup>120</sup>

Of particular interest for the moment is the common interpretive assumption that the text is complete in itself. The Constitution can reasonably be taken to specify the degree of discretionary authority possessed by an officer. The Constitution says which officials are empowered to take what actions, and it specifies what the limits of those powers are. The Constitution identifies offices, enumerates their powers and responsibilities, and specifies rights that delimit those powers.

In arguing against the Jeffersonian strict-constructionist orthodoxy, Chief Justice John Marshall long ago contended:

If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitu-

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117. *Id.*

118. ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* 13 (rev. 2d ed. 2005).

119. *Id.* at 16 (“A crucial observation made by Wittgenstein in his discussion of following rules is that ‘there is a way of grasping a rule which is not interpretation.’ Similarly, there is a way of understanding a sentence or an utterance that does not consist in putting an interpretation on it.”) (quoting Michael Dummett, *A Nice Derangement of Epitaphs: Some Comments on Davidson and Hacking*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 459, 464 (Ernest Lepore ed., 1986)) (citations omitted).

120. As Alexander and Schauer argued, “our argument assumes that Supreme Court decisions provide more clarity than the constitutional text alone. . . . If and only if Supreme Court opinions settle more constitutional issues than they unsettle does our argument [in favor of judicial supremacy] succeed, but as long as this is the case, it is no objection that the Court usually falls short of optimal clarity.” Alexander & Schauer, *supra* note 114, at 1377 n.79.

tion, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded.<sup>121</sup>

Justice Joseph Story further emphasized the point:

[I]n construing a constitution of government, framed by the *people* for their own benefit and protection for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents, but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises.<sup>122</sup>

From this perspective, denying the full scope of official discretion both denies the authority of the people to empower their agents and defeats the purpose of the constitutional text.

A convention seeks to restrict the discretion of government officials, to guide their behavior along narrow channels. But if the text is understood to grant discretion, how can that authority be properly rescinded or restrained by mere government officials? The turn to interpretation, in this case, serves to undermine conventions. A correctly interpreted text makes any convention seem artificial. Rather than serving a comparable function to law, conventions would more likely appear to be in tension with the law. What legal directives have given, the convention purports to take away. Where the text has sought to impose an authoritative settlement, a convention appears to unsettle.

It should come as no surprise that government officials have often sought to exercise their power in full. Stephen Skowronek's analysis of presidential leadership is generalizable. Just as presidents routinely seek "to take charge of the independent powers of [the] office and to exercise them in [their] own right," other government officials do the same.<sup>123</sup> It is no surprise, therefore, that modern presidential electors are understood to have "absolute freedom of choice" by virtue of constitutional grant.<sup>124</sup> "Faithless" electors have been more common in recent decades than they were in the late nineteenth century,<sup>125</sup> and considerations of how electors will vote are more likely to emphasize voter preference than convention.

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121. *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).

122. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 396–97 (1833).

123. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 20 (1993).

124. Stephen Seplow & Clea Benson, *Many Schools of Thought on Electoral College*, PHIL. INQUIRER, Nov. 9, 2000, at A15.

125. 1 GUIDE TO ELECTIONS 819 (6th ed. 2010).

Presidents reasserted their discretion to override senatorial courtesy and nominate their own preferred individuals for executive offices in part on the back of arguments that the Constitution had entrusted the White House, not the Senate, with the power to nominate. When measured against the available text, a convention can appear to be a perversion of the pre-established constitutional rules, not an expression of them. The belief in both the ultimate textual determinacy of the Constitution and the supremacy of textual commitments over alternative guides to political behavior leaves little place for conventions to operate and impose additional restrictions on the exercise of political power.

The text is not the only thing needing interpretation, however. The meaning of conventions themselves is not always self evident. As Alexander and Schauer observe about law, uncertainty and indeterminacy undermine the very function of such coordinating devices.<sup>126</sup> If the relevant actors do not know what is required of them by either the law or a convention, then disagreements will continue to arise and coordination will break down. An authoritative interpreter might help resolve such disagreements and reestablish the clarity of legal commitments. Courts may be able to provide such authoritative interpretations of the law, but conventions lack such an institutionalized mechanism for resolving disagreements over their content.<sup>127</sup>

Conventions are developed and sustained by political actors, but there is no single authoritative repository of conventions or interpreter of them to resolve disagreements over their existence or meaning. One of the virtues of law as a source of coordinating behavior is that it is visible and salient. Those who are governed by it are readily capable of recognizing such texts and orienting their behavior around them. Conventions are rarely reduced to writing and are instead implicit in tradition and practice. But tradition and practice can be notoriously obscure. The problem of indeterminacy in the conventions themselves will lead to the constant need for contestable interpretations of their requirements, which will complicate otherwise clear standards and introduce exceptions and distinctions that will limit the applicability and relevance of the conventions.

The case of the two-term presidency illustrates the point. Both commentators and politicians recognized that George Washington and his contemporaries had established a tradition of presidents not serving more than two terms in office.<sup>128</sup> More than just an observed historical pattern, the departure of even popular presidents after a second term of office was taken to be normatively obligatory, central to the maintenance

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126. Alexander & Schauer, *supra* note 114, at 1376–77.

127. In practice courts may not be as authoritative of interpreters as Alexander and Schauer might prefer. See Keith E. Whittington, *On Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

128. See *supra* notes 62–76 and accompanying text.

of the U.S. constitutional project.<sup>129</sup> The idea of a two-term presidency seems straightforward, and in many constitutional systems the term limit is not left to tradition but is instead written into constitutional text.<sup>130</sup> But ambitious politicians have an incentive to bend the rules, to discover qualifications and loopholes. By the turn of the twentieth century, questions about the meaning (as well as the existence) of the tradition began to emerge. Grover Cleveland was the first president to serve two non-consecutive terms. The traditional issue of whether the president should leave office after eight years on the job was, arguably, less clear in such a situation. Was the traditional prohibition on serving more than two terms in office, or on serving more than two terms in office in succession? History did not provide an obvious answer, since the issue had not previously arisen. At best, the details of what the convention required were implicit in the tradition and perhaps turned on the underlying purposes that motivated the adoption and maintenance of the practice. If someone like President Cleveland could serve a third term, however, then the door might be opened to others as well. Could a president serve two terms, take four years off, and return for a third term? Such a question was not likely to be raised often, given the age of departing presidents and the difficulty of maintaining personal popularity and relevance for twelve years and more. Theodore Roosevelt was one of those exceptions. Youthful in retirement, and well positioned to remake himself and stage a comeback after leaving office, President Roosevelt invited the questions that the Cleveland case had suggested.<sup>131</sup> Roosevelt also added a new wrinkle, since he had acceded to office through the death of his predecessor. Roosevelt had not served a full two terms. Did his first, partial term of office count within the tradition?<sup>132</sup> No other “accidental president” was popular enough in his own right to ever raise the issue. Indeed, Roosevelt was the first to be elected to serve a term as president in his own right. A practice that once seemed clear in its requirements became increasingly murky.<sup>133</sup> Formalization of the convention in consti-

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129. Thomas Jefferson was crucial to transforming George Washington’s example into a binding precedent, arguing that “[i]f some period be not fixed, either by the Constitution or by practice, to the services of the First Magistrate, his office, though nominally elective, will, in fact, be for life; and that will soon degenerate into an inheritance.” 11 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 220 (Albert Ellery Bergh ed., 1907). Self-government required rotation in office for the chief executive. *Id.* at 220–21.

130. Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1835–36 (2011).

131. Roosevelt himself argued that the rationale against seeking a third term of office as president only applied to incumbents, who could leverage the power of their office to seek reelection. THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 388 (1922). A former president “stands precisely in the position of any other private citizen, and has not one particle more power to secure a nomination or election than if he had never held the office at all.” *Id.*

132. Roosevelt had initially concluded that the answer was “yes.” *Id.* at 387–88. After his own election to the presidency, Roosevelt stated simply, “[t]he wise custom which limits the President to two terms regards the substance and not the form, and under no circumstances will I be a candidate for or accept another nomination.” *Id.* at 387. His supporters had suggested that the answer might be “no.” *Id.* at 387–88.

133. As with all things, Roosevelt preferred to apply the convention “practically,” and not as a mere “formula,” so as to avoid “mischievous confusion.” *Id.* at 388–89.

tutional text was eventually necessary to more effectively stabilize and settle the rule.

## VI. CONCLUSION

The written constitutions of the United States were once sharply distinguished from the unwritten constitutions of the British tradition. American fundamental law was thought to provide clarity and commitment in a way that was both distinct from and deeper than anything that might be found in the Westminster parliamentary system. Such arguments were misguided, as various commentators have recognized over time. British constitutionalism included more entrenched commitments than such a sharp distinction might suggest. U.S. constitutionalism relied more heavily on unwritten practices and traditions than the presence of the written text might imply.

But the written and unwritten constitutions sit uneasily together. The written constitution was designed to displace the reliance on potentially unreliable traditions and the shifting fortunes and desires of government officials. Much of what might have been left to convention was put into the form of a fundamental law. The law, in turn, is subject to authoritative interpretation and elaboration by courts. Officials were empowered, given discretion within their realms of authority. Conventions purport to constrain that discretion. How well they can do so in the U.S. context is unclear.

There is little doubt that conventions have emerged and had political significance over the course of the U.S. constitutional experience. Political actors have relied on conventions to settle expectations about how others will behave, and they have felt their constraining effects. But conventions are under constant pressure of erosion. Government officials often have incentives to maintain these traditional commitments (and it is those incentives that encourage the rise of the conventions in the first place), but conventions lack some of the reinforcing factors that help sustain the law. Conventions are likely to be more obscure and to rely more heavily on the continued support of the very political actors who are regulated by them than do the rules embodied in the constitutional text. Conventions occupy a constitutional role in the United States, but they do not possess the higher law features that are so closely associated with U.S. constitutionalism. What makes them “constitutional” is not that they can be deployed by courts to void government action, but that they channel government behavior along narrow tracks. But those tracks are not the same ones laid down in the constitutional text, and simply returning to the text is an always attractive default. Even though it does not, and cannot, perform all the functions as the unwritten constitution, the written constitution always threatens to erase and overwrite the unwritten.

