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After Trump

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Recommended Citation

Jacob Eisler, *After Trump*, 10 *Global Constitutionalism* 1 (2021),
Available at: <https://ir.law.fsu.edu/articles/777>

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Editorial

After Trump

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As *Global Constitutionalism* enters its 10th year in print, the issues that inspired the founding of the journal have only become more salient. There is little that illustrates this point better than the legacy of Donald Trump.

In our 2018 Editorial,¹ we highlighted a paradox within global constitutionalism. Even while then-President Trump was publicly undermining foundational norms of constitutionalism through his ‘breaching experiment’, these attacks were simultaneously fortifying such constitutional norms. Conspicuous attacks reinforce the importance of shared civic norms that underpin constitutional democracy. Citizens and leaders responded to Trump’s attacks by stiffening their resolve to protect and entrench the values of democracy. Where the public assaults upon such norms are extraordinarily blatant (as Trump’s assaults were), it may lead to especially robust counter-mobilisation. While the Trump presidency illustrates the ease with which a public office holder can violate liberal democratic norms, the backlash against Trumpism also demonstrates how robust the commitment is to norms of global constitutionalism.

The closing days of Trump’s presidency vividly illustrated this pattern. Following his defeat in the 3 November 2020 election, Trump and his followers orchestrated a broad and baseless disinformation campaign alleging electoral fraud, and asserted that Trump had illicitly been deprived of a second term. This culminated in a ‘Save America/Stop the Steal’ rally, at which Trump welcomed his supporters to Washington DC on 6 January 2021. This protest against the election results took place despite the absence of evidence of widespread or orchestrated fraud. In the face of more than 60 legal challenges and intense pressure from Trump, no public authority,

¹ J Havercroft, A Wiener, M Kumm and J Dunoff, ‘Editorial: Donald Trump as Global Constitutional Breaching Experiment’ (2020) 7(1) *Global Constitutionalism* 1–13, doi: [10.1017/S2045381718000035](https://doi.org/10.1017/S2045381718000035). See also our initial response to Trumpism: M Kumm, J Havercroft, J Dunoff and A Wiener, ‘Editorial: The End of “the West” and the Future of Global Constitutionalism’ 6(1) *Global Constitutionalism* 1–11, doi: [10.1017/S2045381717000077](https://doi.org/10.1017/S2045381717000077).

election official or court found any evidence of fraud beyond occasional human error. The US Congress was due to meet on 6 January to confirm the election of President-Elect Joe Biden by ceremonially opening and counting the votes of the members of the Electoral College from each state, in a session convened by Vice President Mike Pence. Trump spoke to the rally in his usual terms, encouraging his supporters with phrases such as ‘We will never give up’ and ‘You’ll never take back our country with weakness’, and called the media ‘the enemy of the people’. After the rally, thousands of marchers converged on the Capitol, where some of them succeeded in breaking into the building, overwhelming what appeared to be a woefully inadequate police and security presence. This brought about the suspension of the sitting of Congress. Parts of the building were occupied for several hours, there were a number of armed confrontations between Capitol police and the occupiers, and at least five people died as a consequence of the events, including a police officer who succumbed to his injuries.

The episode delivered a shock to the American establishment, even if it had long-simmering roots in far-right rhetoric and action.² It showed the practical vulnerability of a central institution in a country long imagined to be the leading example of democratic spirit and stability. The optics of certain incidents such as the flying of the Confederate Flag inside the Capitol in front of a portrait of Charles Sumner of Massachusetts, an abolitionist senator, were profoundly embarrassing. The intentions of Trump himself have remained obscure and came to be tested in an impeachment trial before the US Senate. He certainly took no immediate steps to quell the violence.³ However, it is unclear whether the storming of the Capitol can be described as a coup attempt led by Trump,⁴ or Trump either did not realise how his incendiary speech would affect rioters or was wilfully blind to its effects. Regardless of Trump’s intentions, the event paralleled several previous attempts to occupy state legislative buildings that had occurred during Trump’s presidency. Underlying all of these events is a populist anti-constitutional sentiment: these occupations were meant to highlight that the legislature, as an elite, is cut off from ‘the people’. The conduct of those involved in the attempted occupation of the Capitol suggests uncritical

² V Banarjee, ‘The Attack on the Capitol: Why It’s Not a Surprise’, *Just Security*, 8 January 2021, available at <<https://www.justsecurity.org/74103/the-attack-on-the-capitol-why-its-not-a-surprise/>>.

³ In a video posted to his now suspended twitter account, Trump falsely claimed that he quickly called out the National Guard.

⁴ C Besaw and M Frank, ‘Was It a Coup? No, but Siege on US Capitol was the Election Violence of a Fragile Democracy’, *The Conversation*, 7 January 2021, available at <<https://theconversation.com/was-it-a-coup-no-but-siege-on-us-capitol-was-the-election-violence-of-a-fragile-democracy-152803>>.

imbibing of the most divisive populist rhetoric that Trump and his circle had advanced.

The storming of the American legislature with Trump's approval, encouragement or (in the most charitable possible light) inadvertent facilitation shows that the most pessimistic concerns regarding his anti-constitutionalist tendencies are warranted. It was widely agreed, even before his election, that Trump was unprofessional, unpredictable and deeply unsuited to hold the office of President. What was less settled was the extent to which his own manifestly non-democratic impulses and extraordinary egoism would test the practical mid-level institutions, structures and conventions that animate and nourish the constitutional character of the republic.⁵

This became increasingly apparent as Trump first feared and then experienced a resounding defeat in a free, fair and carefully monitored election. Over the latter part of 2020, Trump's actions transitioned from the typical behaviours of a populist ethno-nationalist into conduct more alarmingly reminiscent of fascism. This was first apparent in his claim to some type of special knowledge that he remained, without question and without evidence, the rightful leader of the United States of America – and that such a claim should override any countervailing evidence. Trump's obsession with voter fraud was already a theme at the beginning of his term as President, when he ordered an investigation into an election that he won, as we pointed out in our 2018 editorial. While he continued to cloak his claims to legitimacy in language of fraud and theft, they wore increasingly thin. Even judges appointed by Trump himself in the months preceding the election uniformly dismissed his claims, often with prejudice.⁶ In seeking to craft a political reality that defined him as the sole legitimate leader of the United States, Trump moved from the divisive but marginally democratic appeals of populism towards the cult of personality characteristic of fascism. With an unequivocal defeat at the polls, Trump finally attempted to assert his right to lead based on, in effect, nothing except his own special status.

The ideal of the United States that Trump has advanced with increasing aggressiveness over the course of his career has likewise demonstrated a shift from populism to alarmingly authoritarian tendencies. Trump's 2016

⁵ T Snyder, 'The American Abyss', *New York Times Magazine*, 9 January 2021, available at <<https://www.nytimes.com/2021/01/09/magazine/trump-coup.html>>.

⁶ 'Federal Judge in Wisconsin Deals Trump Another Court Defeat', *New York Times*, 12 December 2020, available at <<https://www.nytimes.com/2020/12/12/us/trump-election-lawsuit-wisconsin.html>>; 'How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election', *The Washington Post*, 12 December 2020, available at <https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html>.

campaign relied on a standard populist playbook: declaring his opponent and the standing regime to be corrupt; asserting a fundamental conflict between elites and the people; presenting himself as an ally of the people; and promising to upend the status quo.⁷ However, Trump's actual agenda did little to achieve these ends; instead, he preferred an array of policies far too redolent of fascistic nationalism. He advanced an 'America first' foreign policy, prioritised a xenophobically narrow conception of American citizenship and, most alarmingly of all, embraced a specific conception of American identity that tolerated ethno-nationalist white supremacy. In doing so, Trump defined America as Trumpism and Americans as those who supported his presidency. This second move, threatening to supplant democratic cosmopolitan constitutionalism with nationalist, cult-of-personality authoritarianism, would have been fatal to American democracy had it gained traction.

The 2020 election – a clear victory for Biden and dramatic rebuke for Trump, especially as an incumbent candidate – showed that Trumpian authoritarianism has not displaced civic norms among the American electorate. Yet Trump's recent and final moves are most strongly and problematically evocative of fascism. After seeking and failing to deploy every formal tool available to tamper with the election results – including directly pressuring state officials and his own direct subordinate, Mike Pence – Trump appealed directly to his most ardent rank and file supporters to resist the results, implying that violence was a legitimate means to this end. It was this move that led to the storming of the Capitol – and it was a logical denouement of the authoritarian turn Trump took during his time in politics. He rejected the peaceful transfer of power and weaponised his factionalised supporters to realise the goal of stopping it.

It is too early to tell whether or not the damage to democracy in the United States caused by these events will be permanent (or whether it will be followed by further insurrections now that Trump has left office), but it is clear that, in the latter part of his presidency, Trump attempted to disregard the principle of the peaceful transfer of power – one of the most basic democratic norms. Civic institutions and popular perceptions have turned against Trump, but this does not change the reality that a leader so hostile to

⁷ For recent analyses of the implications of right-wing populism for global constitutionalism, see A Alterio, 'Reactive vs Structural Approach: A Public Law Response to Populism' (2019) 8 (2) *Global Constitutionalism* 270–96, doi: [10.1017/S2045381719000029](https://doi.org/10.1017/S2045381719000029); C Koch, 'Varieties of Populism and the Challenges to Global Constitutionalism: Dangers, Promises and Implications' (2020) *Global Constitutionalism*, 1–39, doi: [10.1017/S2045381719000455](https://doi.org/10.1017/S2045381719000455). For an early analysis differentiating Trump from fascism, see E McGaughey, 'Fascism-lite in America (or the Social Ideal of Donald Trump)' (2018) 7(2) *British Journal of American Legal Studies* 291–315, doi: [10.2478/bjals-2018-0012](https://doi.org/10.2478/bjals-2018-0012).

the very norms of his own constitutional democracy did actually rule for a period of four years and received the support of some 74 million voters in a general election.

Trump's explicit rejection of these norms has generated significant tension in foreign relations. The United States has traditionally advanced itself as the global exemplar of liberal constitutionalism, and Trump's egregious assaults upon the country's own constitutional norms while he was still president created tricky dilemmas for leaders of other countries. For example, the challenge thrown up by the invasion of Congress has led government leaders to express their opposition to the insurrectionist actions of the protestors on 6 January 2021 and their support for the norm of the peaceful transfer of power. In the United Kingdom, this generated a dilemma for some politicians who had to engage in a sophisticated finessing of their options, given that several senior members of government had previously expressed their preference for Trump over Biden or praised Trump for his actions while President. Some tried to take this step without necessarily asserting that Trump should be held responsible, at least in part, for what happened.⁸ But it is unsurprising that even politicians who politically supported Trump should want to reassert their democratic credentials, since the peaceful transfer of power is one of the most central democratic principles, even in democracies that are somewhat or substantially degraded.

The dynamics of the pushback against the actions of the insurrectionists and the responsibility of Donald Trump are interesting to observe. Far-right politicians, especially those not in power, have been able to use an expression of concern about the events – especially the violence – in order to burnish their credentials as belonging in the mainstream. Those in power, however – for example, Aleksandar Vučić in Serbia and Viktor Orbán in Hungary – have proved themselves notably less likely to make direct comment on what happened or have used the occasion, as did Recep Tayyip Erdoğan in Turkey or Janez Janša in Slovenia (the latter being the only national leader to 'congratulate' Donald Trump on 'winning' the election at the point in time when he was some way ahead of Joe Biden in terms of votes counted on election night in November) as a means to articulate a convenient (and situationally digressive) equivalence along the lines of 'violence from the right and the left is equally wrong'.⁹ At the same time, such an embarrassing (if short-lived) physical security failure in the Capitol can be

⁸ See, for example, how UK Prime Minister Boris Johnson developed his condemnation of the events under pressure from journalists: 'Capitol Riots: Boris Johnson Condemns Donald Trump for Sparking Events', *BBC News*, 7 January 2021, available at <<https://www.bbc.co.uk/news/uk-politics-55580806>>.

⁹ 'How Europe's Far Right Responded to Pro-Trump Capitol Riots', *Aljazeera*, 7 January 2021, available at <<https://www.aljazeera.com/news/2021/1/7/far-right-capitol-riots>>.

seized on by authoritarian actors to assert hypocrisy and weakness in liberal states. For example, the Chinese government drew attention to the fact that western governments, including that of the United States, did not deliver condemnations when protestors stormed government buildings in Hong Kong.¹⁰ This highlights the distinctly ambiguous role that the United States has played since World War II in relation to the evolution of democratic norms and practices. Its interventionist stance abroad, in the context of its foreign policy activities, has often failed to match the professed claim to be committed to democratic norms at home. It has intervened on many occasions to thwart national democratic choices that it perceives as contrary to its national or regional interests (especially in Latin America and the Caribbean). After the insurrection, ‘democracy-promotion’ through military intervention will look even more hypocritical than it already does.¹¹

Highlighting the complex dimensions of this type of ‘breaching experiment’ reinforces the continued utility of global constitutionalism for studying the contestation of constitutional norms,¹² even if a given event seems confined *within* one country. The invasion of the Capitol is a case in point. The United States has widely been accepted as the world’s leading (if imperfect) representative democracy, and thus its constitutional condition is especially noteworthy. Democracy in the United States has undoubtedly become more fragile in recent years,¹³ and the recent events have already had global repercussions for democratic norms, especially when the analysis is framed within a liberal democratic ideational structure. Biden’s victory adds further nuance, and indicates the continually evolving character of constitutionalism in American and its global implications. One can point, for example to the actual or expected return of the United States to a number of important forums for the development of global norms, such as the Paris Climate Agreement¹⁴ and the Iran Nuclear Deal. At the political

¹⁰ ‘US Capitol Riots: China Seizes on Propaganda Coup as West Calls for Calm’, *The Times*, 7 January 2021 available at <<https://www.thetimes.co.uk/article/china-seizes-on-us-capitol-riots-while-west-calls-for-calm-lplj85rsd>>.

¹¹ A Applebaum, ‘What Trump and His Mob Taught the World About America’, *The Atlantic*, 7 January 2021, available at <<https://www.theatlantic.com/ideas/archive/2021/01/what-trump-and-his-mob-taught-world-about-america/617579>>.

¹² For an approach that frames distinct practices and cases of norm contestation in a global perspective, see A Wiener, *Contestation and Constitution of Norms in Global International Relations* (Cambridge University Press, Cambridge, 2018).

¹³ SF Maerz, A Lührmann, S Hellmeier, S Grahn and SI Lindberg, ‘State of the World 2019: Autocratization Surges – Resistance Grows’ (2020) 27(6) *Democratization* 909–27, doi: 10.1080/13510347.2020.1758670.

¹⁴ Paris Climate Agreement, acceptance on behalf of the United States of America, 20 January 2021, available at <<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement>>.

level, this will be widely welcomed and will seem to re-tame the United States as an actor once more within the global mainstream. Yet Biden's presidency alone will not resolve the long-term constitutional-democratic tensions that permitted Trump's rise in the first place, and the return of a Democratic party leader to the presidency does not – and, many would argue, should not – herald a straightforward reversion to the status quo ante of a liberal international and domestic order. The tension between so-called cosmopolitan 'globalist' and America-first 'nationalist' perspectives continues to simmer within the heart of democratic projects such as the United States. This tension will continue to be seen in the future, and is exemplary of tensions faced in states globally – as exemplified by ongoing struggles with questions such as immigration, free trade and conformity to obligations such as climate agreements.

The continued importance of global constitutional study becomes particularly clear if we enumerate a number of other unresolved and potentially contestable matters that have been brought to the fore by the events charted here. Many of these matters do not simply reflect a tension between liberal constitutionalism and its classic antagonist in the form of authoritarian ethno-nationalism, but demonstrate new challenges for the neoliberal order, including rising economic and political inequality and the contested role of technology.¹⁵ For example, the increasing dominance of a small number of technology companies, which have effective monopolies over many conduits of political communication, demonstrates that unequal power is not just about wealth, but also about control over public access without clear lines of accountability. It is these tensions to which those studying the contestation of constitutional norms – whether within or across borders – must pay close attention in the coming years. They will, as ever, require the interdisciplinary scrutiny that global constitutionalism, as a set of study lenses, is well placed to provide. Matters ripe for scrutiny include the salience and effects of the public/private divide, rising economic inequality not only globally (i.e. Global North/Global South) but also within presumptively stable constitutional regimes, the discourse of (American) exceptionalism ('this is not who we are';¹⁶ we are not a

¹⁵ For recent critiques of the neoliberal dimension of global constitutionalism, see M Tushnet, 'The Globalisation of Constitutional Law as a Weakly Neo-liberal Project' (2019) 8(1) *Global Constitutionalism* 29–39, doi: [10.1017/S204538171800028X](https://doi.org/10.1017/S204538171800028X); A Shinar, 'The Ideologies of Global Constitutionalism' (2019) 8(1) *Global Constitutionalism* 12–28, doi: [10.1017/S204538171800031X](https://doi.org/10.1017/S204538171800031X).

¹⁶ Used by Joe Biden; on the dangers of American elite's perpetual disavowal of inequality and injustice by saying 'this is not who we are', see J Morefield, 'The Capitol Takeover: This is "Who We Are"', *Social Sciences Birmingham Blog*, 13 January 2021, available at <<https://blog.bham.ac.uk/socialsciencesbirmingham/2021/01/13/the-capitol-takeover-this-is-who-we-are>>.

‘banana republic’;¹⁷ etc.), and the impact of toxic white, overwhelmingly male nationalism on democratic norms. These are domains of concern in which global norms of constitutionalism are less thoroughly developed, and certainly more contested, than in relation to the question of the peaceful transfer of power after an election.

The threat posed by economic inequality to the liberal constitutional order is not novel, but Trump’s appeal in 2016 and fall in 2020 highlight its pivotal role. Biden’s victory in no small part can be attributed to his renewed appeal to working class voters, and his invocation of Trump’s own lack of class bona fides¹⁸ (and Trump’s own limpness in meaningfully tackling inequality in America during his presidency). Yet Biden’s victory does not resolve the deeper challenge facing constitutionalism. Constitutionalism’s durability relies upon a shared core of commitment by its citizens; yet, as increasing inequality spalls franchises into groups with fundamentally different economic interests and cultural anxieties and experiences, maintaining this shared core becomes increasingly difficult.¹⁹ Trump sought to leverage this tension, but failed to adequately advance the interests of the populist base he claimed to represent. Still, the underlying sentiments that facilitated Trump’s initial populist appeal have not been resolved. Indeed, the COVID-19 crisis – which has simultaneously caused mass economic pain yet seen the ultra-rich soar to dizzying new heights of wealth – shows how this trend is only accelerating.

The strange role of technology in both enabling and now muting Trump likewise points up new challenges for constitutionalism and further arenas for constitutional study.²⁰ What if the institutions that can act as bulwarks against extremism are not public bodies but rather private corporations, nested within incomplete and often incoherent networks of national and

¹⁷ Used by George W Bush, among others: ‘George W Bush, Others Criticized for Comparing Capitol Unrest to “Banana Republics”’, *NBC News*, 8 January 2021, <<https://www.nbcnews.com/news/world/george-w-bush-others-criticized-comparing-capitol-unrest-banana-republics-n1253251>>.

¹⁸ J Williams, ‘How Biden Won Back (Enough of) the White Working Class’, *Harvard Business Review*, 10 November 2020, available at <<https://hbr.org/2020/11/how-biden-won-back-enough-of-the-white-working-class>>.

¹⁹ For an argument about how liberal constitutionalism might resist inequality and plutocracy, see T Khaitan, ‘Political Insurance for the (Relative) Poor: How Liberal Constitutionalism Could Resist Plutocracy’ (2019) 8(3) *Global Constitutionalism* 536–70, doi: 10.1017/S2045381719000200.

²⁰ For recent analyses of the global constitutional implications of internet technologies, see A Fischer-Lescano, ‘Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures’ (2016) 5(2) *Global Constitutionalism* 145–172, doi: 10.1017/S204538171600006X; D Flonk, M Jachtenfuchs and A Obendiek, ‘Authority Conflicts in Internet Governance: Liberals vs. Sovereignists?’ (2020) 9(2) *Global Constitutionalism* 364–86, doi: 10.1017/S2045381720000167.

international regulation? What are the implications for the various free speech principles in play across the world that Twitter was originally Donald Trump's megaphone, but it has now banned him on the grounds that his words could be read by those receiving them as inciting violence?²¹ Is this solely a matter for one individual private corporation, its senior officials, its directors and perhaps also its shareholders? It seems a reasonable starting position to argue that a private corporation has no obligation to host any particular individual on its webservers. But Twitter used Trump from the beginning. He was one of the main reasons that it was able to establish itself as the most important global conduit of political communication in the second decade of the twenty-first century. Should we now be concerned that these powers – assuming they exist – are being exercised without any meaningful accountability, either to the public or even to its shareholders?²² Furthermore, it is widely established that social media – now the object of close scrutiny in the wake of Trump's banning – is a more hostile environment for women and people of colour than it is for white men. This has increasingly become a matter of public concern. The world of policing is also consistently hostile for people of colour. Many have pointed out that the overwhelmingly white protestors on 6 January were initially treated much more leniently by the overstretched Capitol Police than had been Black Lives Matter or disability protestors in recent years. These latter groups have typically faced a wider array of different DC-based security forces than the insurrection protestors did initially, and have often been met by displays of overwhelming force. There seem to be elements of white and male privilege embedded in certain forms of soft policing.

After Trump will come the political reaction and the extended reflections. All of these points are ripe for further elaboration in single-country case studies (not just in the United States), comparative constitutional studies and work within the register of global constitutionalism, with its critical focus on the contested concept of diffusion of norms globally. It is apt that in our tenth editorial we should look forward in this way.

²¹ Twitter statement: 'Permanent suspension of @realDonaldTrump', *Twitter Blog*, 8 January 2021, available at <https://blog.twitter.com/en_us/topics/company/2020/suspension.html>.

²² See, for example, German Chancellor Angela Merkel expressing concern about Twitter banning Trump: 'Angela Merkel attacks Twitter over Trump ban', *The Financial Times*, 11 January 2021, available at <<https://www.ft.com/content/6146b352-6b40-48ef-b10b-a34ad585b91a>>.