

Constitutional Norm Entrepreneurship

Oren Tamir

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CONSTITUTIONAL NORM ENTREPRENEURING

OREN TAMIR*

Everyone is obsessed today with constitutional norms. They have powerfully penetrated our vocabulary and are mentioned with dizzying frequency. We now know that any account of our valuable constitutional practices cannot end with just politics or law and must also include norms. What is further unique about the current moment in our political era is that an important and increasingly growing subset of these norms appears to be exceedingly fragile and is under persistent attack. Some even suggest that the erosion of constitutional norms is at the heart of a global trend of democratic recession. But how precisely do constitutional norms change and ultimately collapse? And is there something actors can do to influence these processes?

This Article's goal is to explore these questions, both in general and in the context of the alleged trend of democratic recession. It argues that although constitutional norms can be understood, following H.L.A Hart, as a "primitive" component in our political systems (given the way they differ from formal law), constitutional norms can attain some of the credentials Hart believed could be attributed exclusively to law. More specifically, the Article claims that we can fashion something akin to "rules of change" and "rules of adjudication" in relation to constitutional norms and accordingly gain a firmer grasp on how they develop, change, and ultimately break down and on how conflicts about constitutional norms are eventually resolved within our politics. As for "rules of change" for norms, the Article argues that constitutional norms tend to change in predictable ways and because of the working of several distinctive mechanisms. As for "rules of

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adjudication” for norms, the Article identifies a set of concrete strategies that constitutional norm entrepreneurs—who wish to change present norms, including destroying them—and constitutional norm anti-preneurs—who wish to safeguard present norms—can use to try to manipulate constitutional norms to achieve their desired, and oppositional, ends.

The Article concludes by implementing that framework to our present moment of democratic recession. It asks, in other words, what constitutional norm anti-preneurs can do to halt further encroachment upon valuable constitutional norms that appear crucial to the resilience of democratic systems, both in general and in the United States.

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INTRODUCTION: THE ASCENDENCY, IMPORTANCE, AND PRIMITIVENESS OF
NORMS

Turn back the clock fifteen, even ten years, and you will find little mention of the word “norms” in scholarship on public law and particularly scholarship on constitutional law.¹ Today, however, everyone seems obsessed with constitutional norms or, more broadly, with the idea that much that is “constitutional” in our system is found in norms of political behavior—those practices or rules of conduct that apply in the world of politics, are mostly informal in nature, and primarily enforced through political sanctions rather than law.²

Perhaps this should not be surprising. After all, ours is famously a written, so-called formal Constitution. That Constitution may have been believed to contain within its four corners all that is necessary for constitutional government in the United States. Most of the “interesting” scholarly work to be done on constitutionalism similarly seemed to call for engagement with *that* specific feature of our Constitution rather than with anything outside of the document itself or that is informal in nature.

1. The qualifiers of “public law” and “constitutional law” in the text are important since the topic of norms emphatically did draw significant attention from scholars of *other* fields of law well before it drew the focused attention of public law and ultimately constitutional law scholars. *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339 (1997); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

2. For various definitions of norms that public law scholars have found useful, see Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860 (2013); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1433–34 (2018) (supplying a survey of common definitions found in the literature). For the definition of norms that I use throughout this Article, see *infra* Part II.B.

Constitutional informality even used to be derided in our system as “free-floating.”³

These assumptions are clearly no longer valid today. Constitutional law scholars have now fully discovered the importance of informal constitutional norms.⁴ They have penetrated our contemporary constitutional vocabulary in an extremely powerful sense and are no longer recognized as something foreign, relevant only in other legal systems, which, unlike our own, lack a formal or a “master-text” Constitution.⁵ Among other things, norms are now recognized by scholars to play an important role in supplementing the written Constitution and as part of the “small-c” component that operates alongside it.⁶ Norms have been moreover identified as a source that judges draw from when interpreting or constructing the Constitution itself.⁷ And, most ambitiously perhaps, norms are also understood to potentially account for some changes in the Constitution, even though these “informal amendments” are achieved beyond the processes envisioned by Article V.⁸

The last few years have seen a particular surge of interest in constitutional norms in our system. Indeed, in many ways, what is unique about the present moment in history is not merely the appearance of norms on the radar of constitutional observers and scholars and the recognition of norms’ analytical indispensability.⁹ Rather, it is that an important subset of constitutional norms faces increased pressures and appears under direct

3. *Excerpts from Questioning of Judge Bork by Senate Committee Chairman*, N.Y. TIMES (Sept. 16, 1987), <https://www.nytimes.com/1987/09/16/us/excerpts-from-questioning-of-judge-bork-by-senate-committee-chairman.html>.

4. Or, perhaps more accurately, scholars have *rediscovered* them. See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1231 (2013) (suggesting that constitutional lawyers in the United States have recently rediscovered the phenomenon and that this may happen every other generation or so).

5. JOHN GARDNER, *LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL* 90 (2012). The British constitutional system is the primary example of a system lacking a formal Constitution. See, e.g., Erin F. Delaney, *Stability in Flexibility: A British Lens on Constitutional Success*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 393, 394 (Tom Ginsburg & Aziz Huq eds., 2016) (emphasizing the informality of the British constitution).

6. See, e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 414 (2007).

7. See, e.g., Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

8. See, e.g., Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 929–32 (2007).

9. See Adam Gopnik, *Norms and Cliffs in Trump’s America*, NEW YORKER (Aug. 3, 2017), <https://www.newyorker.com/news/daily-comment/norms-and-cliffs-in-trumps-america>.

attack.¹⁰ Our age, in other words, is not only the age of norms but also, and more distinctively, the age of *norm erosion*.

The presidency of Donald J. Trump did much to bring this to the fore.¹¹ To many, one of the defining features of Trump's tenure (perhaps THE defining feature) was exactly its multiple and frequent instances of norm flouting.¹² Trump, for his part, was powerfully accused of a series of violations of norms of political behavior that apply to the office of the presidency, such as in his decision not to release information about his business affairs, in his attempts to interfere with the integrity of the process of criminal investigations, in his approach to decision-making in the White House, and his rhetorical style most broadly.¹³ Yet Trump was far from being alone in breaking norms. His opponents from within and outside the federal government also appear to have been engaged in breaking norms themselves, particularly by exercising myriad tactics of resistance that were thought of in the not-too-remote past as beyond the pale.¹⁴

The reality wherein constitutional norms face severe pressures goes well beyond Trump's presidency, however. For quite some time now it has been commonplace to describe the behavior of political parties in our system as accompanied by persistent norm breaking. Indeed, in recent years, both Republicans and Democrats have been systematically and increasingly accused of—or have accused the other side of—norm-shattering behavior.

10. See Brendan Nyhan, *Norms Matter*, POLITICO MAG. (Sept./Oct. 2017), <https://www.politico.com/magazine/story/2017/09/05/why-norms-matter-politics-trump-215535>.

11. See Peter Baker, *For Trump, A Year of Reinventing the Presidency*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/us/politics/trump-reinventing-presidency.html> (“Mr. Trump is the 45th president of the United States, but he has spent much of his first year in office defying the conventions and norms established by the previous 44, and transforming the presidency in ways that were once unimaginable.”).

12. See Jon D. Michaels, *The Safeguards of Our Constitutional Republic: An Introduction*, 65 UCLA L. REV. 1391 (2018). This is a recurring topic of the LAWFARE blog and particularly Professor Jack Goldsmith's writing in it and outside of it. See, e.g., Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/>. The issue moreover lies at the center of attention of another legal blog—JUST SECURITY—which actually operates what it calls a “Norms Watch” on the presidency of Trump. See Katerina Wright, *Norms Watch: Tracking Team Trump's Breaches of Democratic Traditions*, JUST SECURITY (Jan. 13, 2017), <https://www.justsecurity.org/36303/normalization-watch/>.

13. For a useful survey of the various norm-shattering behaviors by former President Trump, see generally Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 177–78 (2018). Of course, Professor Siegel's account is already dated—as it hard to keep track of the issue and every day seems to bring with it new reports of President Trump's norm breaking.

14. See, e.g., Jennifer Nou, *Civil Servant Disobedience*, 94 U. CHI.-KENT L. REV. 349, 352–53 (2019) (surveying instances of leaking and other disobedience strategies and framing them as norm breaching).

One specific context in which this has been manifested is that of legislative obstruction of appointments to the judiciary and the executive branch, particularly through the use of the Senate filibuster.¹⁵ But additional episodes of potential norm breaking by the political parties can also be identified, including in the events that characterized the debt ceiling crisis or the still recent occurrences of government shutdowns.¹⁶ And, so far at least, norm breaking seems to have survived Trump's presidency and lingered well into the Biden presidency as well (though perhaps in a more civilized, less in-your-face, form).

The United States is far from being alone in this story. *Other* political systems are also experiencing unique pressures on existing constitutional norms. One prominent example of this is the United Kingdom, where the politics of implementing the referendum that determined that the United Kingdom would leave the European Union, Brexit, has led to what many informed observers characterized as a significant infringement of constitutional norms.¹⁷ But recent pressures on norms may be an *even more global trend*. Indeed, a growing number of countries worldwide appear to be experiencing a process of “democratic backsliding”¹⁸ or “constitutional retrogression”¹⁹ in which their resilience as democratic systems—or their further progression toward democratic consolidation—no longer seems guaranteed. And the possibility of their becoming authoritarian appears plausible in ways not deemed possible before. This is so much the case that some have concluded that we live in an age of global democratic decline or recession.²⁰ Among the countries to have been identified as experiencing this trend are Hungary, Poland, Turkey, and Brazil, along with the United States and the United Kingdom.

15. See, e.g., Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96 (2017); Neil S. Siegel, *Law Is Not Enough*, 45 OHIO N.U. L. REV. 197, 203–04 (2019).

16. See Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J. L. & PUB. POL’Y 503, 516–21 (2003); David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 206 (2015). For the claim that there’s a difference in the degree of willingness of the respective parties to engage in norm flouting, see Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

17. See, e.g., Edward Evans & Jonathan Browning, *How Brexit Has Unleashed a U.K. Constitutional Crisis*, WASH. POST (Oct. 3, 2019), https://www.washingtonpost.com/business/how-brex-it-has-unleashed-a-uk-constitutional-crisis/2019/09/27/f363f54e-e138-11e9-be7f-4cc85017c36f_story.html.

18. See Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5, 5 (2016).

19. See Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83 (2018).

20. See Larry Diamond, *Facing Up to Democratic Recession*, 26 J. DEMOCRACY 147 (2015).

Though it may still be too early to evaluate this phenomena of alleged global democratic decline in more definitive terms,²¹ many have come to believe that one important explanation for this observed worldwide development strongly relates to the collapse of essential constitutional norms. In this view, the problem at the heart of the alleged decline is not, or not solely, the usual obsession of constitutional lawyers and scholars—that is, the potential fragility of formal constitutional rules that regulate democratic politics and secure certain values and institutions we associate with liberal constitutionalism. Rather, what ignites these processes is precisely the weakening of relevant informal constitutional norms that help legitimize and sustain important democratic institutions such as the press, civil society, and governmental bureaucracies, along with informal rules of political fair play.²² As two leading advocates of this position put it, “[a] well-designed constitution is not enough to ensure a stable democracy Democratic institutions must be reinforced by strong informal norms [which] serve as the soft guardrails of democracy, preventing political competition from spiraling into a chaotic, no-holds-barred conflict.”²³

Despite their importance and salience in contemporary debates, we still seem to know relatively little about norms and particularly about constitutional norms. They remain shrouded in “mystery.”²⁴ One way to understand why is to recall H.L.A. Hart’s famous distinction between primitive societies and mature ones.

For Hart, a primitive society is one that operates exclusively based on what he called “primary rules,” those that regulate human behavior directly and determine the dos and don’ts expected in a particular society. In contrast, non-primitive or mature societies contain something more. In addition to primary rules, these societies contain what Hart defined as “secondary rules,” those rules wherein “primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.”²⁵ In Hart’s view, only the latter type of societies can be mature.

21. See Mark A. Graber, Sanford Levinson & Mark Tushnet, *Introduction*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* 1, 5 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (raising the possibility that the trend is temporary rather than enduring).

22. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 105–06 (2018); Mariano-Florentino Cuellar, *From Doctrine to Safeguards in American Constitutional Democracy*, 65 *UCLA L. REV.* 1398, 1413 (2018); Samuel Issacharoff, *Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World*, 98 *N.C. L. REV.* 1, 13–14 (2019).

23. Steven Levitsky & Daniel Ziblatt, *Is Donald Trump a Threat to Democracy?*, *N.Y. TIMES* (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>; see also LEVITSKY & ZIBLATT, *supra* note 22, at 97–117.

24. C. J. G. Sampford, *‘Recognize and Declare’: An Australian Experiment in Codifying Constitutional Conventions*, 7 *OXFORD J. LEGAL STUD.* 369, 374 (1987).

25. See H.L.A. HART, *THE CONCEPT OF LAW* 94 (2d ed. 1994).

This is so because absent secondary rules—composed more specifically of “rule[s] of recognition,” “rules of change,” and “rules of . . . adjudication”—and absent the institutions that control the implementation of these rules,²⁶ no society can function in an orderly fashion.

Constitutional norms seem exactly the kinds of rules that fit what Hart had in mind in describing a primitive system. They govern what is and what is not allowed in politics, much akin to Hart’s primary rules.²⁷ But they are not disciplined by any set of clear secondary rules that help in their recognition, in determining the instances in which they validly change, or in adjudicating disputes about them. There is, moreover, no unique institutional apparatus that systematically addresses them as there is with law.

This primitiveness of constitutional norms is surely part of the reason for these norms’ mysteriousness. This primitive nature is also the source of many contemporary frustrations with the state of the literature and theory on constitutional and political norms, particularly today when many seem keen on finding ways to safeguard some valuable norms from further erosion to counter the alleged trend of democratic decline or constitutional retrogression. Consider for instance Hart’s secondary rules of change and adjudication. If constitutional politics had something like these kinds of rules for constitutional norms, that is—if there had been a certain predictable logic to how they change and ultimately collapse, and certain systemic pattern to how dispute about them are eventually resolved, then it might have been possible to call out more definitively those flouting norms and to contain processes of norm erosion.²⁸ But, given their current nature as a primitive component in our systems—primitive law so to speak²⁹—the hope of domesticating norms in this way seems futile.

Or does it? Could it be that constitutional norms are not as primitive as first meets the eye? And that we can have something akin to secondary rules that apply to them?

26. This specific addition might have been Joseph Raz’s who was correct in pointing out Hart’s insufficient attention to the institutional aspect of his theory and how secondary rules in essence assume an institutional apparatus. See Joseph Raz, *The Institutional Nature of Law*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 90–98 (1979); see also N. W. BARBER, *THE CONSTITUTIONAL STATE* 98 (2010).

27. For additional analogies between political and constitutional norms and Hartian primitive systems, see Sampford, *supra* note 24, at 390; BARBER, *supra* note 26, at 97–98; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions*, 11 *OXFORD U. COMMONWEALTH L.J.* 29 (2011).

²⁸ Cf. ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING* 35 (2021) (discussing the need for, as well as challenges of, a “project of constitutional defense” for these times of potential constitutional abuse and retrogression).

29. Jeremy Bentham referred to customs as “traditionary law,” which for him was fitting merely for “barbarians.” See JEREMY BENTHAM, *OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE* 161–62 (Philip Schofield ed., 2010).

To be sure, previous literature has addressed the question captured by what we can understand as Hart's rule of recognition when it tried to define more clearly what constitutional norms are.³⁰ In addition, courts sometimes recognize constitutional norms and even enforce them during the proceedings conducted before them, as previous literature also amply documents.³¹ As a result, there is certainly a domain in which constitutional norms have secondary rules that apply to them—because they are simply immersed, within this domain, into standard, formal law. But what about cases outside the domain of judicial recognition or enforcement of constitutional norms? Is it possible to offer an account of how these norms are changed or adjudicated *in constitutional politics itself*?

This Article's principal aim is to provide for the first time an affirmative response to these queries—to illustrate how constitutional norms can become less mysterious and acquire, to the extent possible and with appropriate modifications, some Hartian credentials. In addition, this Article's goal is to illustrate the analytical and pragmatic payoffs that making constitutional norms more mature in this way carries, both as a general matter and specifically for our age of norm erosion and democratic decline.

My claim in this Article is threefold. First, while constitutional norms certainly appear different from formal law, I argue that these norms tend to change in predictable patterns and that there are specific mechanisms that can systematically and effectively cause them to do so. These mechanisms are what we could think of as rules of change for constitutional norms.

Second, I argue that we can moreover identify the core strategies savvy constitutional stakeholders may employ to successfully influence or manipulate the content and shape of constitutional norms. These strategies are something like rules of adjudication for constitutional norms because they suggest how actors can get norms to eventually land where they would want them to. And as I show below, these strategies will largely differ between the type of actors that will make use of them. On the one hand, some strategies will be relevant for the most part for what I will call *constitutional norm entrepreneurs*³² who seek to effect change in present constitutional norms, including destroying them.³³ On the other hand, other strategies

30. See, e.g., sources cited *supra* note 2, and discussion in Part I.B *infra*.

31. Compare Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 284 (2015) (defending a minimal judicial role in relation to norms), with Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional Conventions*, INT'L J. CONST'L L. 787, 788 (2019) (defending a more robust judicial role), and Issacharoff, *supra* note 22 (similar).

32. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

33. For this terminology, see Chafetz & Pozen, *supra* note 2.

would be of use primarily to what I will call *constitutional norm anti-preneurs*³⁴ who seek to safeguard present norms.

Finally, my claim is that the general framework developed here can help us face our current moment of norm erosion. Indeed, once we are equipped with these rules of change and rules of adjudication for constitutional norms, I will suggest that we can better see what constitutional norm anti-preneurs can do to halt further encroachment on valuable constitutional norms that appear crucial for the resilience of democratic systems.

The Article proceeds in four parts. Part I argues that in thinking about constitutional norms and what rules of change or rules of adjudication might apply to them, we should as a threshold matter focus mostly on evolutionary and incremental processes and that, contrary to what is a popular and intuitive view, constitutional norms don't regularly burst like soap bubbles or "die" in a moment.

Building on this, Part II then presents five mechanisms whereby constitutional norms change or ultimately expire in this evolutionary or incremental way. These mechanisms—or rules of change for constitutional norms as I will also call them based on the Hartian metaphor—are (1) layering, (2) drift, (3) conversion, (4) displacement, and (5) exhaustion. And Part II explains what each mechanism entails, as well as supplies a variety of motivating examples of each one's workings that are drawn from the constitutional practices of various jurisdictions (in addition to the United States, also the United Kingdom, Australia, and Israel) and from different times (as far as the early Republic and as late as the first impeachment trial of former President Trump).

Part III then moves to discuss the different strategies stakeholders can use to influence the content and shape of constitutional norms; what I will also call, following again H.L.A. Hart, their rules of adjudication. For constitutional norm entrepreneurs, Part III discusses and illustrates the strategies of (1) subversive layering, (2) parasitical drift, (3) opportunistic conversion, (4) competitive displacement, and (5) insurrectionary exhaustion. By contrast, for constitutional norm anti-preneurs, Part III identifies and exemplifies the strategies of (1) counter-layering, (2) politics of unfreezing, (3) politics of fidelity, (4) sheltering, (5) blaming, demonizing and valorizing, and over framing, (6) formalization, and (7) memory entrepreneuring.

Part IV finally implements this framework to our age of democratic decline or constitutional retrogression. First, I outline how constitutional

34. I borrow this term from Alan Bloomfield, *Norm Antipreneurs and Theorising Resistance to Normative Change*, 42 REV. INT'L. STUD. 310 (2015).

norm anti-preneurs who are troubled by the risks of democratic recession due to norm erosion may be able to contain those risks by *playing defense*. As Part IV explains, this largely includes (1) strict and unrelenting adherence to the relevant constitutional norms and (2) resorting to what Part IV will call, drawing on customary international law, a “rhetoric of containment.” Part IV ends, however, with skepticism that playing defense vis-à-vis constitutional norms is appropriate in circumstances such as those that characterize our own system in the United States. As I discuss below, it may be that the best approach here is altogether different. Rather than defensively adhering to constitutional norms, the most sensible approach to defend norms may actually be *playing offense*, which largely calls for active shattering of present constitutional norms.

Two preliminary notes are in order before I proceed to the argument. First, a note on terminology. In previous scholarship dealing with constitutional norms, these norms are occasionally called “conventions,” which is a term that originates from legal theory in commonwealth systems.³⁵ Given, however, that the term “convention” creates confusion with bodies like the Philadelphia Constitutional Convention of 1787 and since here in the United States it appears that the term “norms” has become more common (especially in the context of debates revolving around constitutional and democratic decline and resilience),³⁶ I employ the term *norms* here as well.

Second, a note on scope: The Article’s focus is on *constitutional* norms, which is only a subset of the broader class of political norms that exist in our—and indeed any other—system at any given time.³⁷ However, I do not deny that many of my claims or the mechanisms that I identify throughout this Article are applicable to this broader setting and may include all political norms. Indeed, I think it is very likely the case and on occasion I will refer to political norms as such. Nonetheless, to make the discussion in the Article more tractable, I leave the larger class of political norms mostly to the side and restrict my focus primarily to the subclass of constitutional norms.

35. See, e.g., Vermeule, *supra* note 4; Whittington, *supra* note 2.

36. See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2243 (2018); Chafetz & Pozen, *supra* note 2.

37. To be sure, there is a question regarding how exactly to define constitutional norms, where some take a rather limited view where others take a more capacious one. For a recent treatment, see Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710601. Though my own view is that the appropriate definition should be quite capacious, compare Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation? Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009), from the point of view of my claims here, the precise definition is irrelevant. The theory I develop applies with equal force to any of the views regarding what qualifies as an appropriately “constitutional” norm.

I. DO CONSTITUTIONAL NORMS BURST LIKE BUBBLES (REGULARLY)?

My aim in this Article is to demystify constitutional norms. I want to show that they are less mysterious than first meets the eye, to identify the logic through which they develop, change, and ultimately collapse, and to spotlight what different actors might be able to do with constitutional norms to achieve their desired ends—whether it is to defend norms or to change and destroy them.³⁸ In attempting to do exactly that, a threshold question presents itself, however: Should we focus mostly on revolutionary or evolutionary processes? Do constitutional norms change in a moment—like, as we will soon see, a soap bubble that all of the sudden bursts? Or do constitutional norms change through a more evolutionary and incremental process, that is completed only with the passage of time?

This Part first shows why this threshold question is relevant in the context of norms and why we rarely ask these questions in relation to formal law. It then argues that the more accurate perspective in relation to norms is the *evolutionary* one. While it is certainly possible that norms in general and constitutional norms in particular will change and even disappear in a moment, this is a much less likely process compared to a more stretched-out one. When we try and think about the various secondary rules that apply to constitutional norms—which is the focus of the lion's share of this Article—we should therefore take this evolutionary perspective mostly in mind.

A. *Laws, Norms, and Soap Bubbles*

Legal rules are constantly infringed upon or ignored. Law-breaking, in other words, is just part of our everyday life. But here's the thing to notice: While law breaking is persistent, we do not typically think of any specific breach or in compliance with legal rules as detrimental to their validity or existence. Legal breaches, as such, are not normally considered "existential."

The reason is, of course, and drawing also on H.L.A. Hart's contributions to legal theory, that law is an institutionalized system of rules that has internalized secondary rules about the ways in which primary rules are recognized, validly changed, and adjudicated. The meaning of each breach or noncompliance with primary legal rules is therefore not determined in isolation. Rather, that meaning depends on the way the relevant legal institutions—usually courts, but not necessarily so—end up treating these

38. Cf. JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975).

breaches; or, in other words, on how breaches are ultimately “filtered through” these institutions.³⁹

Even when a perceived breach of the law is not actually “filtered through” the relevant legal institutions in this way, however, that mere fact is not itself considered as affecting the legal rules that were involved. After all, every system of legal institutions is imperfect and has limited capacity.⁴⁰ It cannot cover each instance of breach. In those circumstances, what we may think of as “unattended breaches” can be easily rationalized due to the system’s imperfections. We can reasonably say, in other words, that had the system not been limited in its capacity to address the relevant breach, it would have been handled in the presumed way that similar breaches, which were so enforced, would have been handled. The mere existence of legal institutions and the acknowledgment that they have secondary rules allow us to easily explain away these scenarios.⁴¹

Things will be different in relation to norms. These norms are not similarly institutionalized the way “normal” legal rules are. They are typically the result of more decentralized and diffuse political or social processes.⁴² More often than not, they lack any institution with the authority to determine their meaning and scope, and to decide whether sanctions should apply.⁴³ We simply expect that norms will be enforced through political or societal sanctions, or even by the sheer power of self-interest.⁴⁴ Indeed, this

39. In some cases, the relevant institutions might determine that the behavior in question was indeed a violation of applicable legal rules, and appropriate sanctions will follow. In other cases, the same institutions might end up rationalizing the behavior as “non-breach” by determining that it, in fact, falls within the scope of permissible legal behavior, by classifying it as a permissible change in the governing legal rule or by any other rationalization the currently internalized system of “secondary rules” permits.

40. For the influence of limited capacity of the United States Supreme court on judicial doctrine in the field of constitutional law, see generally ANDREW COAN, *RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING* (2019).

41. Especially if the cases are “easy cases.” See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985). Of course, how much “easy cases” precisely exist and what makes cases “easy” is a disputed subject. See, e.g., Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 687, 688 & n.24, 689 (1985).

42. See, e.g., Cristina Bicchieri et al., *Social Norms*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2018), <http://plato.stanford.edu/entries/social-norms> (highlighting that norms arise as “the unplanned result of individuals’ interaction”).

43. See BARBER, *supra* note 26, at 96–103 (discussing the possibility of institutions that do in fact enforce constitutional norms, though recognizing that this is usually an exceptional state rather than the rule); see also Adam Perry & Adam Tucker, *Top-Down Constitutional Conventions*, 81 MOD. L. REV. 765 (2018).

44. For the role of political and social sanctions, see Vermeule, *supra* note 4, at 1182, and for self-interest, see *id.* at 1186–89.

is precisely what makes norms, as discussed before,⁴⁵ and following H.L.A. Hart, a primitive component in our political and constitutional systems.

Consequently, and in contrast to law, it is possible that any perceived breach of a norm could have by itself a “destructive effect”⁴⁶ on its existence. Because there is no defined set of institutions where norms are expected to be “filtered through” and no clear secondary rules, the mere fact that a breach has occurred, and that the relevant societal behavior has simply been altered, can bring about a norm’s demise. We moreover cannot easily explain away nonenforcement of norms the same way we can treat nonenforcement of legal rules.

Against this backdrop, it is understandable why many seem to think that norms are incredibly fragile, much more so than laws. As Jon Elster puts it: if breached, norms may simply burst all of the sudden—like soap bubbles.⁴⁷ Or, in yet another memorable phrasing, norms can disappear “almost at a touch.”⁴⁸

This moves too quickly, however. We know, for example, that not every breach of an alleged norm necessarily leads to the norm’s demise. Sometimes what appears to be a breach of a norm is exposed shortly thereafter to relevant sanctions or does not cause any durable behavioral change. In such cases, the norm remains intact despite its breach.⁴⁹

The precise effects of a breach of a norm become even further ambiguous if we consider a *longer time horizon* than simply observing the immediate moment of the alleged breach and what happens in its immediate aftermath. Consider the familiar case of the alleged constitutional norm that used to exist in the United States and precluded a president from serving in office for more than two terms (before the introduction of the Twenty-Second Amendment). On one popular view, FDR’s third and fourth terms were a breach of this constitutional norm.⁵⁰ But, given that the Twenty-Second Amendment has since disallowed more than two terms, and because that

45. See *supra* notes 24–26 and accompanying text.

46. COLIN R. MUNRO, *STUDIES IN CONSTITUTIONAL LAW* 71 (2d ed. 1999).

47. Jon Elster, *Unwritten Constitutional Norms* 24 (Feb. 24, 2010) (unpublished manuscript), <https://perma.cc/YPN8-764G>.

48. H. W. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* 207 (1925); see also Stephen J. Majeski, *Comment: An Alternative Approach to the Generation and Maintenance of Norms*, in *THE LIMITS OF RATIONALITY* 278 (Karen S. Cook & Margaret Levi eds., 1990) (noting that “[n]orms often behave in quite nonevolutionary ways. Norms can arise and also be destroyed very quickly in a given social context”).

49. See, e.g., Vermeule, *supra* note 4, at 1201 (discussing how the norm against presidential removal of U.S. attorneys was breached during President George W. Bush’s administration but seemed to have been restored after significant political blowback).

50. See Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 *PERSP. ON POL.* 37, 44 (2012).

amendment was advanced very much with FDR's four presidential terms in mind,⁵¹ it could be said that the breach actually contributed to the reinstatement of the previous norm and even strengthened it.⁵² Indeed, much as the institutions of law take time to adjudicate and "filter" relevant disputes or alleged breaches, so too do the more decentralized forces of politics that operated to rectify FDR's breach of the no-more-than-two-terms norm. And just as we do not say that during the time in which the institutions of law are sorting out the relevant dispute, the law is invalid or that it bursts like a bubble, there is no reason this may not be true in relation to norms such as the one FDR's conduct breached.⁵³

Another reading of this historical episode reveals a further complication with the image of norms' inevitable fragility and the immediate risk of bubble bursting. On this alternative reading, FDR's third and fourth terms in office did not amount to a breach of the constitutional norm against more than two terms. Rather, they created a *valid exception* to that norm in cases of exigent circumstances, as was true at the time given the prospect of United States involvement in World War II, among other things.⁵⁴ On this interpretation, then, what may have been perceived as a breach was actually a *change* in the constitutional norm's content—from a crisp and bounded norm that prohibits more than two terms across the board to a norm that includes a qualification that applies in exceptional circumstances. In this view, moreover, what changed the relevant informal constitutional norm was not FDR, but rather the Twenty-Second Amendment.⁵⁵

As these examples suggest, the relation between an apparent breach of a norm and the norm's continued existence is more complex than what we may otherwise infer from the bubble-bursting picture depicted above. Norms can prove to be rather resilient, both in general but especially once we adopt a longer time horizon. The connection between a breach and the particular result of a norm's ultimate demise is also more tenuous. What is perceived as a breach could, in fact, be a transformation in the content of the norm, perhaps even a subtle one.

51. See generally MICHAEL J. KORZI, PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES & POLITICS 124–43 (2011).

52. See Azari & Smith, *supra* note 50, at 44.

53. I note that the example is somewhat imperfect because the norm has been replaced by a *formal* legal provision rather than a pure restoration of the informal norm. The reason this example does partially work well is because formal law functions here as a social sanction for the violation of a norm.

54. See Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 33 (1999).

55. At least to the extent that we understand it to forbid more than two terms even in exceptional circumstances. See Rosalind Dixon, *Updating Constitutional Rules*, 2009 SUP. CT. REV. 319 (2009).

As the remainder of this Part argues, there are good reasons to think that in relation to norms generally and constitutional norms particularly, bubble bursting is not at all a frequent occurrence. Instead of a scenario in which norms suddenly burst, or “disappear at a touch,” the more common scenario for norms’ change and ultimate demise is one that entails a gradual or incremental process.

B. Norms and Politics

The first reason to believe this is the case relates to the very nature of norms along with their interaction with the structure of politics.

1. The Stickiness of Norms and Critical Junctures

When we talk about a norm, we usually refer to a practice that had been *meaningfully internalized* by the various participants in it and that constrains them from pursuing alternative courses of action. Of course, the relevant internalization may sometimes be “thin” rather than “thick.” Norms are internalized in a thin sense when they are followed by the mere concern of avoiding sanctions due to what will be perceived as the norms’ breach or from sheer self-interest of losing the benefit of shared cooperative arrangements. Conversely, norms are internalized in a thick sense when they become so embedded within their adherents that they may actually not recognize any alternative path of conduct but the one the norms dictate.⁵⁶ Norms backed by thin internalization are obviously much more fragile than are those that are thickly internalized.

Nonetheless, even if norms are only thinly internalized, that thinness must still mean something more than a practice that allows every participant to defect when the rational cost-benefit calculation points in the right direction or when the relevant participant has concluded that the norm is no longer appealing or merely because of the “usefulness of the moment.”⁵⁷ A norm exists only when this sort of rational calculation or normative contestation about the validity of the norm is constrained to a not insignificant degree. With norms, moreover, that constraint has a particular structure: it stems from the fact that the relevant agent believes that *others* believe in the norm, will abide by it, and may potentially penalize what they perceive as a

56. For the distinction between thin and thick norms, see Vermeule, *supra* note 4, at 1184–86. A useful illustration of what thick internalization of norms entails, provided by Professor Ernest Young, is drawn from Moliere, whose fellow bourgeois gentlemen were so used to how he spoke that they did not realize that it was prose. See Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 563 (2016) (quoting MOLIERE, *LE BOURGEOIS GENTILHOMME*, act 2, sc. 4).

57. HORWILL, *supra* note 48, at 206.

breach. Indeed, only in these cases do norms have what may be referred to as causal efficacy.⁵⁸ And only in such instances do norms become an interesting phenomenon in their own right, as it makes them different from, on the one hand, mere politics—which is more open to immediate rational calculation and normative contestation—and, on the other hand, regular law—which is constraining given its formalization and institutionalization.⁵⁹

Once we have this view of norms in hand, it becomes easy to see why they should generally prove resilient rather than burst like soap bubbles. After all, people do not normally change their beliefs so readily, including beliefs about what other people themselves believe.⁶⁰ Their preferences may prove sticky as well—especially if they are prone to what behavioralists speak of under the umbrella term of status quo bias.⁶¹ When norms have some benefit for the participants, we would, in the normal course of events, expect this benefit to endure for at least some time; “negative feedback” usually takes some time to actually arise. And, even when it does, the returns are not immediately so significant as to decisively eliminate any value from the relevant norms.⁶²

Norms in general and constitutional norms in particular are furthermore embedded in a more complicated “political regime” or a constitutional order that exists in each political system.⁶³ This regime, if robust, will generally

58. Elster, *supra* note 47, at 36, distinguishes three mechanisms that give norms causal efficacy: coordination, cooperation, and social sanctions.

59. For norms as this kind of “third bound” in between law and politics, see generally Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949 (2016).

60. Especially if they have a “high threshold[.]” of tolerance and when they are placed in an environment of similarly tolerant individuals. See Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOCIO. 1420, 1422 (1978). For a helpful discussion, see Cass R. Sunstein, *#MeToo as a Revolutionary Cascade* (Nov. 17, 2018) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3280325.

61. See, e.g., William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988). In addition, research in the social sciences has uncovered that norms might stick even when they’re no longer truly held by their adherents. This phenomenon is also known as the “conservative lag.” See James M. Fields & Howard Schuman, *Public Beliefs About the Beliefs of the Public*, 40 PUB. OP. Q. 427, 446 (1976); Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 PERSONALITY SOC. PSYCH. BULL. 541, 543 (1994).

62. For the idea of “negative [policy] feedback[s]” in legal scholarship, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 681–97, 744 (2011) (emphasis omitted).

63. A political regime is composed of “the commitments of ideology and interest embodied in preexisting institutional arrangements.” See STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 34 (1993). For other similar definitions, see Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L. ORG. 185, 186 (1982); Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31–32 (1999).

prove resilient to some kind of unraveling of norms. It will contain within it resources to prevent the potential unraveling.⁶⁴

For these reasons, observing something that appears like bubble bursting should potentially lead us to suspect whether the previous practice that just burst was truly a norm in the relevant sense. Perhaps it was only a “myth” rather than a practice that crystallized into a fully formed norm.⁶⁵ Alternatively, it might have been an “anticipatory”⁶⁶ norm—a practice that had been in the process of crystallizing into a causally effective norm but that ultimately failed to come full circle and reach the requisite level of thin or thick internalization.⁶⁷

In light of what we can describe as their relative stickiness, robustness, or “[p]ersistence,”⁶⁸ political norms and certainly constitutional norms’ more radical and rapid transformation that ultimately leads to their demise will likely result from more *extreme shifts in the context and environment within which norms operate* rather than as sudden bubble-bursting in the normal course of politics. These kinds of changes, sometimes referred to in political science literature as “critical junctures,” can be quite dramatic, and may include wars, emergencies, other significant political crises, and, most importantly for present purposes, a change of political regimes.⁶⁹ What makes norms particularly fragile during such events is that they disrupt the conditions that make them causally effective. Indeed, critical junctures operate on a large scale to change, or at least soften, people’s beliefs and preferences, to unsettle the benefits and returns that previously established practices and institutions entailed, and to redefine the realm of possibilities that people see before them.

64. In political terms, this is because political regimes get “thickened”—people who are committed to this regime populate key positions within it that, in turn, enable them to fight-off or resist the collapse of relevant norms or rules affiliated with the regime. See SKOWRONEK, *supra* note 63, at 15. On a more conceptual level, writers have emphasized the ability of systems such as political regimes to “balance” themselves in myriad ways. See generally Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 6 (2009).

65. Elster, *supra* note 47, at 28.

66. Eric Colvin, *Constitutional Jurisprudence in the Supreme Court of Canada*, 4 SUP. CT. L. REV. 3, 15 (1982); see also Aileen McHarg, *Reforming the United Kingdom Constitution: Law, Convention, Soft Law*, 71 MOD. L. REV. 853, 858 (2008)

67. A different term may be norm in *statu nascendi*. See Elster, *supra* note 47, at 35.

68. H. Peyton Young, *The Evolution of Social Norms*, 7 ANN. REV. ECON. 359, 363 (2015).

69. A leading discussion of the concept of “critical junctures” is Giovanni Capoccia & R. Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 WORLD POL. 341, 341 (2007). Other familiar terms that are used in the literature in economics and political science and which convey similar meanings are “punctuated equilibrium,” “environmental jolts,” and “external shocks.”

As should be clear, critical junctures of this sort are rather infrequent, at least in established or stable political systems.⁷⁰ Accordingly, in the normal course of events, we should not expect established norms—and especially established constitutional norms—to burst like bubbles.

2. The “Stretched-Out” Nature of Critical Junctures

But what if the moments in which we primarily care about the resilience of norms land precisely during such critical junctures? And what if this is where we are today?

The examples mentioned in the Introduction, drawn from contemporary politics at home and around the world, appear to suggest exactly that. The politics of Brexit in the United Kingdom are what many describe as a political crisis or, if crisis is too strong, a unique juncture in the political life of the United Kingdom.⁷¹ The same applies to the United States. The events that surrounded Donald Trump’s presidency and the behaviors of political parties up until today and which bring to the fore claims of norm infringement and destruction do not seem like politics “as usual” either. Rather, they may be a symptom of a more fundamental shift or “crisis” in constitutional politics in the United States.⁷² And similar terms have been used to describe those countries that have been allegedly experiencing constitutional retrogression or democratic backsliding, such as Hungary, Poland, and Turkey.⁷³ Perhaps, then, the bubble-bursting scenario has more purchase than what the previous discussion suggests, at least in the times that we’re living in today.

Characterizations in this vein of contemporary politics in the United States and the United Kingdom, and elsewhere, are largely convincing. We may be living in an age of critical junctures in politics across the world.⁷⁴ At the same time, there remain reasons to be skeptical that the relevant norms that apply will simply burst like bubbles *even in times in which politics is during a genuine critical juncture*.

70. One support for this claim originates from the sense of wrongness that accompanies claims that exist in established democracies that emergencies arise too frequently. For work that captures this sense of concern, see, for example, Robert L. Tsai, *Manufactured Emergencies*, 129 YALE L.J. F. 590 (2020).

71. See, e.g., Vernon Bogdanor, *Britain’s Crisis isn’t Constitutional. It’s Political*, FOREIGN POL’Y (Apr. 1, 2019, 3:51 PM), <https://foreignpolicy.com/2019/04/01/britains-crisis-isnt-constitutional-its-political-brexit-tories-theresa-may-corbyn-customs-union-eu/>.

72. See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 157–60 (2017).

73. See GRABER, LEVINSON & TUSHNET, *supra* note 21.

74. See generally Anna Lührmann & Staffan I. Lindberg, *A Third Wave of Autocratization Is Here: What Is New About It?*, 26 DEMOCRATIZATION 1095 (2019).

The reason for this is simple. The description of “dramatic”⁷⁵ or radical, often attached to events identified as critical junctures, sometimes leads to the impression that these junctures are always condensed and short, as if they happen in a heartbeat. In many cases, however, this impression is misguided, and the period described as a critical juncture is quite extended.

This is particularly the case outside the context of war or specific emergencies.⁷⁶ The period in which one political regime ends and is replaced by another could be quite prolonged.⁷⁷ In our system in the United States, one such case is the transformation from the New Deal regime to the “Reagan Revolution”—which, according to some accounts, took more than ten years.⁷⁸ More relevant, the political crisis that characterizes the American political system today seems similarly extended, stretching perhaps also for a period of close to now more than ten years.⁷⁹

Even more broadly, and beyond the United States, one finding of the literature that travels under the broad umbrella of constitutional retrogression is that even political regime transitions are today becoming *increasingly stretched in time*. Instead of “authoritarian reversion[s]” that occur through swift, and usually violent, coups, a slower and more extended process of transition is becoming much more common, in which regimes that were once relatively stable constitutional democracies—or in the process of such consolidation—are reversing course and becoming deconsolidated.⁸⁰

This “stretching” of critical junctures, both as a general matter and uniquely today, suggests yet again that norms may prove more resilient than previously thought. Rather than experiencing a bubble-bursting moment, these norms will more likely gradually evolve until the relevant uncertainties that accompany stretched events of this type are ultimately resolved.

75. See Capoccia & Kelemen, *supra* note 69, at 341.

76. And even then, as emergencies today themselves tend to be quite extended, and so do wars. Consider, for example, the term “endless war” (or “forever war”) that has now become common to describe our contemporary era in which “‘peace’ coexists uncomfortably with interminable global violence.” Samuel Moyn, *Endless War Watch, Summer 2016*, LAWFARE (June 24, 2016, 11:28 AM), <https://www.lawfareblog.com/endless-war-watch-summer-2016>.

77. For the emphasis on how transitions in politics tend to be more stretched out, see Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 POL. SCI. Q. 689, 698–99 (1998); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 549 (2004).

78. For an influential account, see generally STEPHEN SKOWRONEK, *PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISAL AND REAPPRAISAL* (2008). And for the source coining the term, see ROWLAND EVANS & ROBERT NOVAK, *THE REAGAN REVOLUTION* (1981).

79. See Balkin, *supra* note 72, at 157–58.

80. See Huq & Ginsburg, *supra* note 19, at 108–10; Bermeo, *supra* note 18; DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* 4 (2018).

3. Cyclical Norms (Or: Norms that Make A Comeback)

Even at the point at which political transitions end and we are no longer in a so-called “critical juncture,” the disappearance or demise of preexisting constitutional norms is not entirely guaranteed. Norms that were under strain might ultimately make a comeback once the political transition—or the critical juncture—has concluded.

There are two primary options that we must consider in this context. The first is that the new political regime established at the end of the relevant critical juncture will choose to *retain* the previous constitutional norms. By contrast, another option is that the choices the new political regime faces at the end of the transition will be *limited*, and it will have to work with the constitutional norms currently in force rather than act to abolish them entirely.

This seems particularly likely in relation to constitutional norms that are more procedural in nature rather than substantive, namely norms that regulate the processes and institutions of political decision-making rather than politics’ ultimate goals.⁸¹ While constitutional norms of the latter kind may conflict directly with the ideological commitments or interests of a particular political regime and the policies it seeks to advance, the former types of norms may not be similarly oppositional. Any political regime can achieve its substantive commitments through various procedural and institutional configurations, including the procedures that served the previous governing political regime. These process norms may even prove conducive to a political regime’s own desired programs; they may stem from its more substantive commitments and norms, such as when a political regime—and the political leaders affiliated with it—is committed to the kinds of process norms that characterize a liberal democratic system.⁸²

Of course, as I previously said, the resilience of these process constitutional norms may not appear during the period of political transition itself. After all, to take place, the transition may actually require those who

81. Different scholars emphasize different kinds of constitutional norms. Jon Elster, for instance, focuses almost exclusively on constitutional norms that deal with “machinery of government.” See Elster, *supra* note 47, at 21. In contrast, other authors focus on more substantive political norms. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975); Young, *supra* note 6; AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012).

82. The definition of a liberal democratic system is obviously contested. For one form of definition, minimal in nature, which fits with the argument in the text, see Huq & Ginsburg, *supra* note 19, at 86–92, and see generally ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* (1971).

are leading the ascendant regime to play “hardball,”⁸³ which involves either breaking or at least ignoring certain norms that have been operating as a means of blocking the potential for any significant political or regime change. However, once the political transition is more or less complete,⁸⁴ the relevant process norms will be reestablished and will have many, though not necessarily all, of the characteristics that they had before the transition.⁸⁵ The breach of these process norms has been found, in other words, to be only temporary, as if they were put “on hold.” These norms have a kind of cyclical nature.

This dynamic is far from merely theoretical. It is evident from the history of political transitions, at least in established democracies. For instance, though the United States has seen in the past century important political regime transitions, such as between the Gilded Age and the New Deal and then between the New Deal/Great Society⁸⁶ regime and the “Reagan Revolution,”⁸⁷ and although each of these transitions was accompanied by the repudiation of some of the more substantive norms associated with the previous regime, such as in relation to the nature and extent of government regulation and involvement in the economy, many of the process norms remained more or less intact at the end of those transitions—like norms about independent judicial review and independent civil service.⁸⁸ Similarly, the United Kingdom has also experienced important political regime transitions—for example, between the “postwar consensus” and the changes ushered in by the Conservative government led by Margaret Thatcher.⁸⁹ This transition certainly entailed the wholesale repudiation of many substantive norms about the role of government in the economy and the society, very

83. See Tushnet, *supra* note 77; Mark Tushnet, *1937 Redux? Reflections on Constitutional Development and Political Structures*, 14 U. PA. J. CONST. L. 1103 (2012).

84. Though the completion of regime change seems like an impossible feat, given the reality of sedimentation. See, e.g., Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building in the Fullness of Time*, 38 NOMOS: POL. ORD. 111 (1996).

85. In that sense, process norms are somewhat “cyclical.” For an influential account that provides some motivation for why these kinds of process norms have this pull and are henceforth cyclical, see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997).

86. See Jack Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 293–95 (2019).

87. See JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* 424 (1973).

88. See generally SKOWRONEK, *supra* note 78.

89. For leading scholarly treatments of this transition, see, for example, DENNIS KAVANAGH & PETER MORRIS, *CONSENSUS POLITICS: FROM ATLEE TO MAJOR* (2d ed. 1994); DAVID DUTTON, *BRITISH POLITICS SINCE 1945: THE RISE, FALL, AND REBIRTH OF CONSENSUS* (1997). For critique of the term “postwar consensus,” see, for example, Peter Kerr, *The Postwar Consensus: A Woozle that Wasn't?*, in *POSTWAR BRITISH POLITICS IN PERSPECTIVE* 74 (David Marsh et al. eds., 1999).

much like the parallel transition in the United States between the New Deal/Great Society and the Reagan era. By the end of the transition, however, many important process norms remained intact, or were reinstalled, in terms of important details.⁹⁰

To be sure, the specter of constitutional retrogression or democratic decline that is a feature of our time suggests that the distinction between process and substance norms is fragile. As indicated in the Introduction,⁹¹ part of the reason for the alleged decline may be the more permanent, rather than temporary, unraveling of process norms—regarding, for instance, the rules of political fair play or norms of respect given to important democratic institutions. Taken seriously, this claim suggests that we can no longer assume, as we might have previously, that political regime transitions, even in consolidated democracies, will remain *within* the larger project of democratic liberal constitutionalism. And that important democratic and constitutional process norms will ultimately make a comeback, or demonstrate cyclical, after playing “hardball” will no longer be necessary.

Note, though, that the literature discussing the establishment of more “hybrid regimes” suggests that the distinction between substantive and process norms carries weight even today and even considering the threat of constitutional retrogression. In a nutshell, what that literature shows is that even political rulers who are reasonably suspected of having authoritarian ambitions—and who are hostile to relevant democratic and constitutional process norms—face difficulties in transitioning their political systems into something we might describe as full-blown authoritarian systems.⁹² A “hybrid” system that retains some core democratic features and some democratic process norms regarding the conduct of elections, among other things, is all these rulers are often able to achieve.⁹³

In the eyes of those currently troubled by what seems like a global trend of democratic decline or constitutional retrogression, this is clearly not terribly reassuring. As my principal interest at this stage is directed at challenging the image of bubble-bursting as applied to norms, what matters for present purposes is the more general point: that the occurrence of critical

90. According to one commentator, for example, the Thatcher years can only be described as causing “fluctuations” in the U.K. constitutional norm of civil service independence. See JEFF KING, *JUDGING SOCIAL RIGHTS* 224 (2012).

91. See *supra* notes 22–23 and accompanying text.

92. See generally Larry Diamond, *Thinking About Hybrid Regimes*, 13 J. DEMOCRACY 21 (2002); STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2010).

93. In addition to the sources cited *supra* note 92, see ANDREAS SCHENDLER, *THE POLITICS OF UNCERTAINTY: SUSTAINING AND SUBVERTING ELECTORAL AUTHORITARIANISM* (2013), arguing that conducting multiparty elections has become an established norm even in authoritarian regimes.

junctures and the existence of political regime change may not necessarily entail the wholesale collapse of norms (I address the concerns underlying democratic decline or constitutional retrogression directly in Part IV of the Article).

C. Varieties of Norms: Rule-Like/Standard-Like Norms

My discussion up to this point has offered several reasons for thinking that norms, and particularly constitutional norms, will prove relatively resilient, more so than what the analogy to soap bubbles that all of the sudden burst suggests. These reasons were primarily related to the essence of norms and the structure of constitutional politics. There is, however, another reason for this conclusion, which concerns the specific content or form these norms might encompass. After all, norms do not appear in our political systems in just one variety. The distinction previously discussed⁹⁴ between substantive and process norms highlights one dimension along which norms can be distinguished from one another. Another such dimension speaks to their specificity or level of abstraction. Some norms can be quite specific in their content—as they anticipate a particular kind of behavior. Other norms, in contrast, are more plastic and flexible.

Indeed, as in law, norms can appear either in a rule-like form or in a standard-like form variety.⁹⁵ In the international relations literature that addresses norms of international affairs, a similar distinction exists. On the one hand, this literature has identified what it calls “meta norms,”⁹⁶ “principle norms,”⁹⁷ or even “foundational norms,”⁹⁸ which would correlate to what we think of in law as standards. Much like legal standards, these norms often allow a broad range of acceptable applications or appropriate variations and may set only “overarching duties of conduct in order to provide or uphold them across issue areas, but are not necessarily operationalized, or applied to any specific behaviors, until the problem is clearly defined.”⁹⁹ On the other

94. See *supra* Part I.D.

95. See Chafetz & Pozen, *supra* note 2, at 1437–38 (analogizing constitutional norms to rules and standards as they are conceived in law). For the now classic discussion of rules and standards in law, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) and Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

96. ANTJE WIENER, *A THEORY OF CONTESTATION* 10 (2014).

97. Alexander Betts & Philip C. Orchard, *Introduction: The Normative Institutionalization-Implementation Gap*, in *IMPLEMENTATION AND WORLD POLITICS: HOW INTERNATIONAL NORMS CHANGE PRACTICE* 9–10 (Alexander Betts & Philip C. Orchard eds., 2014).

98. WAYNE SANDHOLTZ, *PROHIBITING PLUNDER: HOW NORMS CHANGE* 21–22 (2007).

99. Carla Winston, *Norm Structure, Diffusion, and Evolution: A Conceptual Approach*, 24 EUR. J. INT’L REL. 638, 656 n.2 (2018). For examples of these types of norms, consider the convention about “the ‘loyal opposition’” in Westminster systems (which regulates the expected conduct

hand, there are also “policy norms,” which are much more specific and similar to legal rules.¹⁰⁰

Whether we stick with terms familiar to legal scholars or adopt the ones international relations scholarship uses, the different content of norms has an obvious implication for the forms through which norms change. Norms of the more strict and narrow type are much more exposed to the risk of bubble bursting whereas norms that are more expansive and broader seem less so, given how they can be squared with a wide variety of behaviors.

* * *

To conclude this Part: for reasons related to the nature of norms, the features of politics (in general and today), and the spectrum or varieties of these norms that operate in our political systems, the possibility that norms, and especially constitutional norms, will burst like bubbles seems much less likely than does a more gradual, evolutionary process of change. The bubble-bursting moment we often observe with norms, though memorable, may just be, and likely is in many cases, the final step or the *coup de grâce* in a much more stretched-out process of decay.

between the government and the opposition, see Gregoire Webber, *Loyal Opposition and the Political Constitution*, 37 OXFORD J. LEGAL STUD. 357, 358 (2017)) or the norms about political fair play previously discussed (see Elster, *supra* note 47, at 12. LEVITSKY & ZIBLATT, *supra* note 22, at 105–06, suggest two separate norms of mutual toleration and forbearance which seem to fall within what Professor Elster describes as norms of political “fair play”). Slightly less abstract, but in the same category, are other norms such as the ones in the United States about the “deliberative presidency” (according to which presidential decisions will be accompanied by some process of rational deliberation and vetting; see Renan, *supra* note 36, at 2221–30), the “public presidency” (according to which the United States president will address the nation when issues of high salience are unfolding; see Azari & Smith, *supra* note 50, at 48–49), and the norm that Congress must ensure that agencies are adequately staffed and supported. See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 38 (2014).

100. See Betts & Orchard, *supra* note 97, at 10–11. As examples of these kinds of norms, consider the alleged norm that exists in Germany whereby the government should guarantee the appointment of a representative of the parliamentary opposition to the role of the chair of the Bundestag Budget Committee (see Greg Taylor, *Conventions by Consensus: Constitutional Conventions in Germany*, 12 INT’L J. CONST. L. 303, 314 (2014)) or the norm whereby at least one of the two parliamentary representatives who sits on the Israeli Committee on Judicial Selection will also be drawn from the parliamentary opposition (see Malvina Halberstam, *Judicial Review, a Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZO L. REV. 2393, 2397 (2010)). In the United States, it is sometimes suggested that a current norm fixes the number of sitting judges on the Supreme Court to nine (see Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 505 (2018); Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 79 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Pozen, *supra* note 99, at 69).

Of course, this is not to say that a scenario in which norms simply burst like soap bubbles is impossible or that it is altogether rare.¹⁰¹ The lack of institutionalization of norms, *contra* law, makes this conceptual possibility a real one. But this Part's goal has been more modest than that. It was only to make the case that in trying to determine how norms change and what rules of change might apply to them, as well as identifying the ways actors might influence them, much of our focus should be on more gradual and evolutionary processes.

II. "RULES OF CHANGE" FOR CONSTITUTIONAL NORMS

If, as Part I argued, constitutional norms do not normally burst like bubbles or disappear at a touch, how precisely do we characterize the relevant process of evolution? As discussed in the Introduction, this is in many ways the key task that is facing us today in an age of fraying norms.

This Part suggests that we can make progress in this context if we think of norms from an institutional perspective.¹⁰² As I argue below, this perspective enables us to identify the logic these processes related to constitutional norms will likely follow. Taking Hart's concepts as a metaphor, this Part uncovers constitutional norms' rules of change.

Section II.A briefly explains why thinking about norms in institutional terms makes sense. Section II.B then delves into the various mechanisms or rules of change for constitutional norms the institutional framework provides in more detail. It explains what each of these mechanisms entails and how they work to effect change in constitutional norms. Section II.B moreover provides examples of each of these mechanisms' workings that are taken

101. For instance, sometimes the "negative feedback" from a norm may appear quite rapidly and be significant in scope and extent, thereby triggering the relevant players to reconsider the norm's desirability and giving them an incentive to breach or defect from it permanently. Sometimes, moreover, "critical junctures" in politics are abrupt and condensed rather than stretched, with the consequence being the immediate collapse of norms. In addition, within any given political regime, some norms are more important than others. *See, e.g.*, RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 76 (2015) (distinguishing between "foundational" level and "marginal" level norms (emphases omitted)). Accordingly, when the norms of the inferior or marginal kind come under some pressure, the overall system may "signal" that it can do without it or that it is replaceable in ways that facilitate the conditions for bubble bursting. When these inferior norms are breached, the regime and the institutions that reflect and enforce it in specific polities will not necessarily come to these norms' defense.

102. Previous accounts dealing with these questions are Joseph Jaconelli, *Continuity and Change in Constitutional Conventions*, in *THE BRITISH CONSTITUTION: CONTINUITY AND CHANGE, A FESTSCHRIFT FOR VERNON BOGDANOR* 121 (Matt Qvortrup ed., 2013); Chafetz & Pozen, *supra* note 2; and Nicholas Barry, Narelle Miragliotta & Zim Nwokora, *The Dynamics of Constitutional Conventions in Westminster Democracies*, 72 *PARLIAMENTARY AFFS.* 664 (2019). As the discussion in the text and notes makes clear, the account presented here differs along important dimensions than those previous accounts.

from an array of jurisdictions, including: the United States, the United Kingdom, Australia, Israel, and even from the global context. The examples are also drawn from different periods of time: as early as the beginning of the American Republic and as late as President Donald Trump's first impeachment trial.

A. Norms as Informal Institutions

The broad literature analyzing norms in general and constitutional norms in particular often resorts to discussing them as “equilibri[ums].”¹⁰³ This image is valuable, as it illustrates some core features of these norms, including that they are built on a set of expectations and beliefs that multiple participants share.¹⁰⁴ At the same time, that image can be misleading if it is taken as exhaustive or if it prevents us from seeing what political norms, including constitutional norms, might share with other relevant phenomena.

As is relevant here, the image of equilibrium can prove misleading if it distracts us from the fact that norms are very much like *normal institutions*, though of an informal nature rather than a formal one.

Given that institutions are sometimes depicted (and explained) in scholarship as equilibriums themselves,¹⁰⁵ this should not be surprising.¹⁰⁶ The analytical benefits that this relatively straightforward move yields may be surprising though. Indeed, as I argue in the next Section, that insight enables us to identify the mechanisms through which constitutional norms are likely to change—either to transform into something entirely different or to completely disappear or die. And in Part III below, we will also see that these mechanisms can further help us identify the various strategies different actors can use to try to manipulate constitutional norms for their own purposes.

B. Mechanisms of Gradual Change

In scholarship that studies institutions, the idea that institutional transformations occur only via more radical external shifts in the political or social environment might have been strong in the past, but it is no longer

103. For discussion of the equilibrium analogy, see Siegel, *supra* note 13, at 180–81.

104. See *supra* notes 55–59 and accompanying text.

105. See, e.g., Adrian Vermeule, *Intermittent Institutions*, 10 POL. PHIL. & ECON. 420, 439 (2011) (“Institutions are just equilibria, temporarily settled networks of mutually-adjusted expectations.”). This view, to be sure, is controversial in the philosophical literature. See generally CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS* (2011).

106. Indeed, some previous literature discusses constitutional norms in the US context explicitly as a form of “informal institutions.” See Azari & Smith, *supra* note 50.

dominant.¹⁰⁷ Largely as a result of the work historians did examining institutions through time, it is now widely acknowledged that institutions often change gradually. This “gradualist”¹⁰⁸ literature has furthermore exposed a frequent disconnect between processes and results. Despite the reality in which institutional change happens gradually and piecemeal, the extent of the change brought forth may in reality be quite significant, both qualitatively and quantitatively.¹⁰⁹ As work in this vein began to accumulate, scholars were able to identify distinct mechanisms of change that seemed to apply more generally across various institutional contexts.¹¹⁰

Until now, implementation of these mechanisms of gradual institutional change has been more focused on formal institutions. Nothing, however, makes those mechanisms inapplicable to the context of informal institutions as well. Though in relation to these informal institutions, such as constitutional norms, the informality makes it difficult to identify the relevant institutional rules by which each of the mechanisms operates to effect change; this is an empirical difficulty, not a conceptual one. And while empirical challenges are not to be dismissed, they are also not prohibitive.¹¹¹

107. See generally Jeroen van der Heijden, *A Short History of Studying Incremental Institutional Change: Does Explaining Institutional Change Provide Any New Explanations*, 4 REGUL. & GOVERNANCE 230 (2013) (supplying a survey of the evolution in thinking about institutional change within the academy, and how the focus has particularly moved to more evolutionary processes).

108. Martin B. Carstensen, *Institutional Bricolage in Times of Crisis*, 9 EUR. POL. SCI. REV. 139, 139 (2017).

109. This literature is especially legion in the context of studies in political economy. See, e.g., GREAT EXPECTATIONS, SLOW TRANSFORMATIONS: INCREMENTAL CHANGE IN POST-CRISIS REGULATION (Manuela Moschella & Eleni Tsingou eds., 2013) (collection of essays on gradual institutional change); COLIN CROUCH, CAPITALIST DIVERSITY AND CHANGE: RECOMBINANT GOVERNANCE AND INSTITUTIONAL ENTREPRENEURS 16 (2005); Marie-Laure Djelic & Sigrid Quack, *Overcoming Path Dependency: Path Generation in Open Systems*, 36 THEORY & SOC'Y 161, 166 (2007); Marc Schneiberg, *What's on the Path? Path Dependence, Organizational Diversity and the Problem of Institutional Change in the U.S. Economy, 1900-1950*, 5 SOCIO.-ECON. REV. 47, 48 (2007); Gregory Jackson & Richard Deeg, *The Long-Term Trajectories of Institutional Change in European Capitalism*, 19 J. EUR. PUB. POL'Y 1109, 1110 (2012).

110. I rely here mostly on the pioneering work of Professor Kathleen Thelen and her collaborators. See Wolfgang Streeck & Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 1–39 (Wolfgang Streeck & Kathleen Thelen eds., 2005); James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1 (James Mahoney & Kathleen Thelen eds., 2009).

111. I note that Professors Chafetz and Pozen's account, *supra* note 2, at 1438, takes more seriously the limitation created by the informality of norms given that they do not pursue the analogy to rules/standards “bleed[ing]” into each other more fully.

1. Layering

The first mechanism helpfully fleshed out by the scholarship on institutional change is layering. In this dynamic, institutional change does not occur via the attempt to abolish institutional rules or understandings currently in place. Rather, it occurs via the *grafting of new rules on top of, or alongside, existing ones*. These new layered rules may interact with the previous ones in various ways. They may, for instance, introduce exceptions to the previous rules or add limitations to their scope. But the new layers may also be new rules with no direct bearing on the preexisting ones.

The effect that layering has on an institution and that leads to change is therefore quite subtle. First, it may be in the way that the resulting new reality—where we find a more “layered” institution—eventually structures institutional behavior and whether these new behavioral structures result in “compromis[ing] the stable reproduction of the original ‘core’”¹¹² of the institution.¹¹³ Second, given the new behaviors or expectations that occur due to layering, layering brings forth a cognitive effect on the way individuals perceive the institution, as this process disrupts or complicates institutional coherence and creates uncertainties about institutional expectations and goals (through what is sometimes called “differential growth”¹¹⁴ or what we can describe as change by complexity).

The identification of the process of layering in the context of formal institutions is ubiquitous. For instance, layering has been used to describe how the United States Congress has changed over time¹¹⁵ or how the political economy of social democracies has evolved to a narrower version of capitalism.¹¹⁶ In both examples, what was found to foster the change was the accumulation of new institutional rules rather than the complete replacement

112. Mahoney & Thelen, *supra* note 110, at 17.

113. “System analysis” has illustrated the ways that small institutional changes within a system can influence its entire operation. See generally Vermeule, *supra* note 64.

114. Streeck & Thelen, *supra* note 110, at 23.

115. See generally ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001).

116. For a general survey, see Jeroen van der Heijden, *Institutional Layering: A Review of the Use of the Concept*, 31 *POLITICS* 9 (2011). See also Kathleen Thelen, *Institutional Change in Advanced Political Economies*, 47 *BRIT. J. INDUS. REL.* 471, 484 (2009) (discussing the German economy as a case of “institutional layering”); KATHLEEN THELEN, *HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN* (2004) (identifying layering as instrumental in the process of change that has gone through the institutional framework in charge of supplying skills for workers in various countries); Bruno Palier, *Tracking the Evolution of a Single Instrument Can Reveal Profound Changes: The Case of Funded Pensions in France*, 20 *GOVERNANCE* 85 (2007) (identifying layering in the process of pension regulation in France).

of old ones, which cumulatively made the relevant institution function differently from how it was originally imagined.¹¹⁷

As mentioned earlier, there is no conceptual barrier to applying the logic of layering in the context of informal institutions generally and to constitutional norms specifically.¹¹⁸ And, indeed, layering seems to perfectly capture some, perhaps even many, processes of change in relation to constitutional norms. To illustrate this, I begin with an example from overseas and then return to one that more directly draws on constitutional affairs in the United States.

(1.1) The Royal Prerogative over Military Affairs in the United Kingdom: One useful site to demonstrate the workings and utility of layering as a mechanism of change in the context of constitutional norms lies in the U.K. government's prerogative power to authorize use of military force. In the not-so-remote-past, that power—which is a well-known constitutional norm or convention in the United Kingdom rather than hard or formal law—was understood as allowing the government to decide matters relating to the use of the military without needing to secure any form of parliamentary approval.¹¹⁹ This understanding, however, no longer seems valid in the

117. Professors Chafetz and Pozen's work, *supra* note 2, suggests that the process of change in constitutional norms resembles the process by which rules and standards become "standard[ized]" or "rul[ified]" (respectively). *See id.* at 1437–38; *see also* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2005). Rulification or standardization of formal legal norms may however just be examples of the more general mechanism of institutional layering in the context of formal legal rules.

118. Though this Article is the first to apply the concept of layering to the informal institutions that are constitutional norms, I note that similar ideas could be found in other contexts. For instance, psychologists have described the idea of "concept creep" according to which particular psychological concepts gradually expand to include new incidents. *See* Nick Haslam, *Concept Creep: Psychology's Expanding Concepts of Harm and Pathology*, 27 PSYCH. INQUIRY 1, 1 (2016). This process is precisely what institutionalists would describe as layering, given that it includes adding new layers to a previously established institution—in this case, the informal institution of diagnostic criteria in professional psychology. In the sociology of sciences, layering has affinities with Thomas Kuhn's conceptualization of the way scientific revolutions in relation to specific scientific paradigms occur. *See* THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (Otto Neurath et al. eds., 2d ed. 1970). As Kuhn theorized, scientific paradigms change after a long period of experimentation that gradually qualifies the paradigm, a period he called "normal science." When a significant number of qualifications has been accumulated—a "crisis" is generated in relation to the relevant scientific paradigm, which in turn brings forth the birth of a new scientific paradigm. Layering, it seems, captures this process of normal science-ing. Note that both the examples just mentioned are familiar to legal scholars. For a treatment of the idea of psychological "concept creep" to law, see Cass R. Sunstein, *The Power of the Normal* 1 (Nov. 26, 2018) (unpublished manuscript) (on file with the SSRN) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239204. Kuhn's theory has gained many applications in legal thinking. For a relatively recent one, see Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016).

119. *See* Claire Mills, *Parliamentary Approval for Military Action*, HOUSE OF COMMONS LIBRARY BRIEFING PAPER NO. 7166, at 4 (May 8, 2018). Of course, in the United States the

United Kingdom. Rather, the norm has been qualified, perhaps substantially so. As it stands now, it seems that at least some level of parliamentary involvement is required for at least some domain of warfare decisions.¹²⁰

The exact details of the qualifications—or the precise contours of the current constitutional norm in the United Kingdom—are less important for present purposes. They are presently unclear and hotly disputed.¹²¹ What is clear though that a change has indeed occurred. And what is of interest here lies in the process whereby that change in the meaning of that constitutional norm was ultimately achieved.

More specifically, the changed scope of the power of the British government over military affairs was achieved gradually, through a series of cumulative steps.¹²² First, in 2002, the norm was first somewhat qualified in practice by parliament's ability to extract a debate on the legislative floor about a matter understood to be covered by the norm: British military involvement in Iraq.¹²³ Second, it was later further qualified in 2003 given parliament's ability to guarantee that votes would in fact be taken after debate. At the time, the U.K. government had agreed to the arrangement given that it controlled a disciplined parliamentary majority and knew that it was not likely to lose any specific vote, including on matters the relevant constitutional norm seemed to clearly cover.¹²⁴ But that new qualification also proved resilient through time and despite the replacement of governments¹²⁵ until, eventually, in 2013, it led to a government's defeat on a vote regarding British military intervention in Syria.¹²⁶ In the final development, that defeat was followed by an announcement by the then prime minister, David Cameron, that the government would respect the vote's outcome.¹²⁷

question of whether the President has unilateral power in military affairs is deeply contested. The text of the Constitution seems to require some not insignificant intervention of Congress. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

120. See VERONKIA FIKFAK & HAYLEY HOOPER, PARLIAMENT'S SECRET WAR 2 (2018).

121. See Mills, *supra* note 119, at 5–6; see also James Strong, *The War Powers of the British Parliament: What Has Been Established and What Remains Unclear?*, 20 BRIT. J. POL. & INT'L REL. 19 (2018).

122. The description in the text is based mostly on the account provided by Philippe Lagassé, *Parliament and the War Prerogative in the United Kingdom and Canada: Explaining Variations in Institutional Change and Legislative Control*, 70 PARLIAMENTARY AFFS. 280 (2017).

123. *Id.* at 285.

124. *Id.*

125. For the discussion of the various events that kept breathing life to the new qualification, see *id.* at 285–89.

126. See *Syria Crisis: Cameron Loses Commons Vote on Syria Action*, BBCNEWS (Aug. 30, 2013), <https://www.bbc.com/news/uk-politics-23892783>.

127. Lagassé, *supra* note 122, at 289.

Whatever the merits and demerits of legislative involvement in military affairs, the process described here in an extremely stylized way typifies the layering dynamic. Each qualification or extraction achieved by parliament throughout the process did not replace the norm of prerogative power or abolish it. More accurately, it was rather akin to a new rule or practice that was added on top of that original constitutional norm. Importantly, moreover, each distinct layer added might have been crucial for the process of change. Without parliament's ability to extract the rule that votes would be allowed even if the government controls parliament with a disciplined majority, a vote when parliament did not have a similarly disciplined majority might not have transpired. And without the prime minister's announcement that the government would respect the vote, making clear that there is a rule that parliament's input could play a role in decisions about military affairs, we might not have arrived at where the norm seems to be today.

(1.2) The Norm Against More Than Two Presidential Terms: In our own system in the United States, the previously mentioned¹²⁸ constitutional norm that allegedly existed about presidents not serving more than two terms supplies another example of layering—at least on some interpretations of the historical record. As is well-known, Franklin Delano Roosevelt was of course the first, and thus far the only, president to serve more than two terms in office prior to the Twenty-Second Amendment's passage. But FDR's bid at least partly relied on earlier events that served to complicate the meaning of the previous constitutional norm that prohibited more than two terms. Indeed, none of these events were directly applicable or covered FDR's own case—either because they were unusual¹²⁹ or because they ultimately proved unsuccessful.¹³⁰ Nonetheless, it may well be that without those previous occurrences, FDR might not have made his bid for a third term or at least that those circumstances helped him greatly in doing so.¹³¹ Again, as in the context of the norm on absolute government authority over military affairs in the United Kingdom, each event that composes the story about the norm of the no presidential third term can be viewed as a layer that, in accumulation, led to the overall change or made it possible.

128. See *supra* notes 48–53 and accompanying text.

129. Theodore Roosevelt's bid was for a nonconsecutive third term and after he had been elected to office only once. See Azari & Smith, *supra* note 50, at 44.

130. Theodore Roosevelt had been defeated, and Ulysses Grant, whose circumstances more closely resembled FDR's, lost his bid at the nomination stage. For a useful survey and discussion, see KORZI, *supra* note 51, at 43–79.

131. In Professor Korzi's account, the decisive cause for FDR's success is attributed to the prospect of United States involvement in WWII. See *id.* at 80.

Many more potential examples of layering exist.¹³² Indeed, layering is very likely an extremely common process whereby constitutional norms change in an evolutionary way.

2. *Drift*

Layering is only one type of gradual institutional change mechanism, however. A second mechanism of change earlier literature on institutional change has usefully identified is drift.

In contrast to layering, institutional drift is not accompanied by an attempt to add new layers of rules to the preexisting institution. Layering, in that sense, is an active process of change. What is unique about institutional change through drift is that the institutional rules remain in place even though the institutional environment is changing at the same time. Drift then can be described as *passive* change or change through institutional *inaction*. When drift occurs, the institution may look as though it remains the same. But ultimately it is discovered to accomplish far different goals from the ones it was meant to initially achieve. The change is affected through the way an unchanged (or even neglected) institution interacts with a different environment.¹³³

Drift has been extensively applied to the study of formal institutions, including legal ones. Drift, for instance, was used to explain the evolution in the institution of the United States' minimum wage.¹³⁴ Professor David Pozen's work on the Freedom of Information Act ("FOIA") has also identified the process of drift that occurred in that context, which transformed the regulatory framework of transparency in our system from one that was meant to achieve more distributive and social justice types of goals to a framework that actually supports corporate and commercial interests.¹³⁵ In both cases, the change occurred because the relevant institutions simply did not adapt in response to new realities—either to the changed levels of inflation, as in the case of the minimum wage, or the use of the regime by

132. In the United States, the evolution of the norms that regulate the legal advice function in the executive branch and specifically to the incumbent president might be a relevant example. See Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017). For a comparative example, the developments in the norms that govern the so-called pacifist Constitution of Japan are illustrative as well. See Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMPAR. L. 145 (2019).

133. Mahoney & Thelen, *supra* note 110, at 17. For another seminal account of drift as a mechanism of change, from which Professors Mahoney and Thelen's analysis significantly draws, see Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004).

134. Professor Jacob Hacker's work in the context of welfare policy is considered canonical. See Hacker, *supra* note 133.

135. See David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018).

different types of institutions and players than were originally expected, as in the case of FOIA.¹³⁶

The mechanism of drift seems applicable as well to informal institutions such as constitutional norms, as the following examples seek to illustrate.¹³⁷ Again, I start with some examples from overseas before I return to our own system in the United States.

(2.1) Norms Governing Appointments in Australia and Israel: In the state of Queensland in Australia, a constitutional norm exists whereby whenever a seat in the upper legislative house opens up in between elections—in what is known as “casual vacancy”¹³⁸—the vacancy ought to be filled by a representative of the *same party* with which the previous incumbent was affiliated. In 1975, a seat opened after the death of an incumbent senator and Queensland’s prime minister appointed a replacement from within the ranks of the party that held the vacant seat. Nonetheless, the person appointed was known to have consistently voted *against* his party and with the government.¹³⁹

Similarly, Israeli constitutional politics includes what is at least arguably a constitutional norm whereby one of the two legislative representatives in the Committee on Judicial Selection must be a member of the parliamentary opposition.¹⁴⁰ During some time in the lifetime of recent former governments in Israel, however, the member who occupied the relevant seat in the committee was, though nominally a member of the opposition, in fact a member of a party that usually votes within the political bloc that supports the government.¹⁴¹

136. For an additional example drawn from Germany, see Thelen, *supra* note 116.

137. In fact, similarly to what we have seen in the context of the mechanism of layering, such application is not entirely novel. David Pozen’s account of FOIA, *supra* note 135, discusses formal institutions (in law), but it relies heavily on Jack Balkin’s conceptualization of “ideological drift,” which seeks to capture how legal concepts, ideas, or tropes of arguments, all informal institutions, may experience drift. See Jack M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870 (1993); Jack M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1148 (1994).

138. For this term, see Joan Rydon, *Casual Vacancies in the Australian Senate*, 11 POLITICS 195 (1976).

139. See Paul D. Williams, *Leaders and Political Culture: The Development of the Queensland Premiership, 1859-2009*, 16 QUEENSL. REV. 15, 24–25 (2009).

140. See Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and the United States*, 31 CARDOZO L. REV. 2393, 2396 (2010).

141. See Lahav Harkov, *Yisrael Beytenu MK Ilatov Can Stay on Judicial Selection Committee*, JERUSALEM POST (May 22, 2016), <https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Yisrael-Beytenu-MK-Ilatov-can-stay-on-Judicial-Selection-Committee-454667>.

In Queensland, Australia similar circumstances to the one previously described did not recur.¹⁴² And in Israel, it is unclear as of yet whether what has previously happened will be repeated.¹⁴³ We also do not know with any degree of certainty whether the fact that these Queenslandian and Israeli constitutional norms make party affiliation so central was because, at the time they crystalized, and in the conditions of each state or country, such affiliation served as an accurate proxy for political behavior and whether this particular reality had changed in any systematic way. Suppose though that it had and that that incident would repeat itself in Israel and has theoretically repeated itself in Australia. Under those conditions, the relevant constitutional norms in both instances would be perfect examples of how change through drift occurs—the norms remained the same while the surrounding conditions changed.¹⁴⁴

(2.2) Separation of Powers Norms in the United States: The examples from above were somewhat exceptional. The context of political parties seems, however, ripe for similar examples of drift given how the function of parties has changed so substantially during the twentieth century and given how many of our political and constitutional norms interact with political party operations.¹⁴⁵ In this spirit, and for something more enduring and that characterizes our own system, consider the following.

Beginning in the second half of the twentieth century, a movement of “responsible party government” was underway in the United States.¹⁴⁶ The movement criticized the American constitutional order based on more or less the following: In this movement’s view, the political landscape in the United States has changed dramatically since the time of the United States Constitution’s drafting in 1789. Despite the framers’ lack of foresight, political parties were almost immediately established after the Constitution’s ratification. Moreover, as time passed, and certainly in the twentieth century

142. In fact, following the controversy that arose in 1975, the Constitution of Queensland was amended to prevent such events from recurring. See Gerard Newman, *Senate Casual Vacancies*, PARLIAMENT OF AUSTRALIA (May 14, 2002), <https://web.archive.org/web/20100914110822/http://www.aph.gov.au/library/pubs/rn/2001-02/02rn35.htm>.

143. At the time of writing, Israel is going through another round of coalition government negotiations post-election. See Gil Hoffman, *Compromises Paving Way to Unity*, JERUSALEM POST (June 2, 2021), <https://www.jpost.com/israel-news/new-government-still-not-ready-669875>.

144. The change is in relation to the effectivity of party/coalition-opposition affiliation as the relevant proxy for political behavior.

145. See, e.g., Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

146. See generally Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 827–31 (2000); AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE* (1954).

when parties had become more polarized and disciplined, political parties transformed into one of the defining institutions in American constitutional politics.

In the eyes of those affiliated with what we associate today with the responsible party government movement, this was a positive development given the high value they saw in the institutions of political parties and the opportunities they provide for organizing a more diffuse republic. Nonetheless, the proponents of responsible party government believed that something was hindering their program. That something, they thought, lay in the fixation they believed many in the United States attach to the separation of powers framework and specifically the separation between Congress and the presidency. To advocates of responsible party government, this separation should not be as salient and significant as many others thought it should be, at least during periods of unified government, common during this time. Rather, policy decisions should be exclusively or at least primarily filtered through the party. When parties are strong, they suggested, inter-branch conflict during times of unified government should not normally occur.¹⁴⁷ If this were to happen regularly, it would be akin to an illegitimate hold out by factions seeking to increase their standing outside normal party structures.¹⁴⁸

In the United States, as many today recognize, the rules of separation of powers are only partially enforced by hard law and are regulated by a set of constitutional norms.¹⁴⁹ In that sense, we can understand the claims advanced by advocates of responsible party government in terms of the drift that has occurred in the norms that underlie understandings of how structural constitutional arrangements in the United States operate. Even though a significant change in the environment has transpired—given the reality and centrality of parties to the working of constitutional government in the United States—the old separation-of-powers norms were still applied rather rigidly as if the change had not occurred. The norms failed to adapt and hence to achieve what they were originally designed to do—among other things, to

147. As James Wilson puts it, the party system should be able to “overcome the separation of powers by bringing together under informal arrangements what the founders were at pains to divide by formal ones.” See James Q. Wilson, *Political Parties and the Separation of Powers*, in *SEPARATION OF POWERS — DOES IT STILL WORK?* 18, 18 (Robert A. Goldwin & Art Kaufman eds., 1986).

148. For recent discussion that emphasizes these kinds of concerns—though in my view that also inflates their importance—see Gregory Elinson, *Party Divisions and the Separation of Powers*, *BALKINIZATION* (Sept. 22, 2020), <https://balkin.blogspot.com/2020/09/party-divisions-and-separation-of-powers.html>.

149. For one illustration of this view, see Pozen, *supra* note 99.

channel the public view and to make sure that the government accomplishes what it has set out to do.¹⁵⁰

In the last quarter of the twentieth century, the reality of divided government returned to the United States and became commonplace, even persistent. Accordingly, most of the momentum behind the responsible party government movement has waned.¹⁵¹ Today, however, very similar impulses to the ones that characterized the responsible party government movement are appearing in a different incarnation. Indeed, it may very well be that what replaced the claims of responsible party government in this day of divided government in the United States is the thesis of “presidential administration.”¹⁵²

Like the responsible party government’s claim, the presidential administration thesis is critical of assertions that norms of separation of powers require—in all cases—the involvement of all branches of government in a so-called articulated or classic process.¹⁵³ For supporters of this thesis, moreover, insistence on this understanding of separation of powers norms causes drift in the relevant separation of powers norms. Unlike supporters of responsible party government, however, advocates of presidential administration no longer rely primarily and directly on political parties as the institutional remedy for the changed circumstances in the larger political environment. Given the reality of recurring instances of divided government, these keen-spirited advocates turned their eyes elsewhere and found the institution of the presidency to be the most fitting (suggesting, in essence, that only acknowledgment of the legitimacy of and place for muscular presidential policy leadership would best serve the goals that structural constitutional norms in the United States were meant to achieve in the first place).¹⁵⁴

As the discussion of these examples suggests, it can be rather difficult to find clear instances of constitutional norms that have changed through processes of drift.¹⁵⁵ Nonetheless, the mechanism of drift should not be ruled

150. See, e.g., Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 795 (2001).

151. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 329–32 (2011).

152. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

153. For this claim, see Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013).

154. For a highly enthusiastic endorsement of this view, see generally WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT—AND WHY WE NEED A MORE POWERFUL PRESIDENCY* (2016); ERIC A. POSNER & ADRIAN VERMEULE, *EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010).

155. Because norms are not formalized, this may not be that surprising, as they usually would be able to change in accordance with new realities and circumstances—precisely what would make

out of hand in the context of the informal institutions that are constitutional norms. In some instances, we may find a particular political system that has so deeply internalized specific norms that relevant players in this system find it impossible to adapt them to respond to changes in the larger political environment, for example, given the rise in significance of political parties. Though likely controversial, the last two examples suggest that norms regarding the separation of powers in the United States are one context in which drift has indeed been occurring. Discussions of constitutional reverence in the United States suggest other contexts exist as well.¹⁵⁶

3. *Conversion*

A third mechanism of institutional change, conversion, captures yet another process of gradual transformation. Conversion describes a process whereby the preexisting institutional rules are reinterpreted and redeployed in the service of new institutional goals.¹⁵⁷

To gain a better sense of the mechanics of conversion and its distinctiveness, it can be contrasted with the previously discussed mechanisms of both layering and drift. Like layering but unlike drift, conversion requires active engagement with institutional rules. Like drift but different from layering, conversion leads to a straightforward change in the purposes that institutions serve and not only change that can be identified at the system level or through complexity and ambiguation. And again, unlike layering, the engagement is achieved through reinterpretation of preexisting rules rather than via the addition of new layers on top or alongside these rules.

At times, institutional conversion can be full or complete—in the sense that the institution is simply repurposed into completing an entirely new task. Sometimes, however, the institutional conversion can be more nuanced, as when a new goal is added to an institution through the reinterpretation of preexisting institutional rules or when its previously established priorities are

drift impossible (or, perhaps more accurately, they will be able to do so more easily because they lack the barriers that formalized norms face). As identifying drift requires examining the interaction between the original substance or content of the norms and the present environment in which they operate, any claim that norms are experiencing drift will likely also be disputed, not only because different people will pursue different understandings of what the original form of the norm was but also because of norms' informal and uncodified nature. Another complication in identifying drift is that those who flag it will also likely be suggesting institutional reforms. In turn, these reforms may hide the way the critique is restorative rather than related to changing the institution into something that is new. The rhetoric of "reform," in other words, may be misleading. *See also infra* notes 240–246 and accompanying text (discussing "politics of unfreezing" in response to change through drift).

156. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) IX (2006).

157. *See* Mahoney & Thelen, *supra* note 110, at 17–18.

rearranged via similar reinterpretation. For example, when an institution maintains two principal goals, one primary and another secondary, the process whereby an institution begins to enforce the secondary goal more consistently than the primary one through a reinterpretation of the relevant institutional rules that speak to those priorities is also considered a case of conversion.

A useful illustration of conversion in institutional reality is “mission creep” that sometimes is traced in military units that begin with one specific mandate but then, over time, that mandate changes course. For instance, many explain what happened during the Korean War as a case of conversion—given how the goals of the unit sent to fight in Korea changed from driving North Korea out of South Korea to removing the regime and reuniting the Korean Peninsula.¹⁵⁸ In addition, the Sherman Act¹⁵⁹ may also exemplify a case of conversion. The act was initially implemented with the explicit goal of breaking up business trusts that were “in restraint of trade.”¹⁶⁰ Nonetheless, corporations were able to convince federal courts in the more medium run to apply the Sherman Act to labor unions, too, a development that significantly changed the act’s original goal through reinterpretation and hence conversion.¹⁶¹

Conversion also occurs in relation to informal institutions, including constitutional norms. To illustrate this, we may in fact begin with the example with which we ended the discussion of the mechanism of drift—about the American presidency.

3.1 Norms Regarding Presidential Policy Leadership in the United States: The “presidential administration” thesis previously mentioned¹⁶² is not only a normative project that seeks to expose, in the terms I have used, how separation-of-powers’ norms in the United States have drifted. It is also a descriptive project that highlights the fact that American presidents play a much more significant role in leading policymaking on the domestic front than they did previously.

Indeed, until around the end of the nineteenth and even the beginning of the twentieth century, the American president played a rather marginal role

158. See, e.g., Lawrence J. Korb & Max Hoffman, *Mission Creep: A Short History*, POLITICO, (Sept. 5, 2013, 5:06 AM), <https://www.politico.com/story/2013/09/barack-obama-war-syria-096308>.

159. Sherman Act, 15 U.S.C. §§1–7 (1890).

160. *Id.* at § 1.

161. See Jacob S. Hecker, Paul Pierson, & Kathleen Thelen, *Drift and Conversion: Hidden Faces of Institutional Change*, in *ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS* 181 (James Mahoney & Kathleen Thelen eds., 2015).

162. See *supra* notes 152–154 and accompanying text.

in domestic policy, and Congress used to take the lead.¹⁶³ Presidents rarely proposed legislation, for instance, but would rather satisfy themselves with making suggestions when asked about it.¹⁶⁴ Presidents moreover maintained only a small staff to aid them with pursuing and developing more robust domestic policy visions.¹⁶⁵

Over time, this began to change, and the president has taken on a much more significant domestic policy role. Presidents now regularly propose bills to Congress and have become what some describe as “Legislator[s]-in-Chief.”¹⁶⁶ Presidents furthermore regularly use their powers to steer the various administrative agencies that formulate and implement policy in the United States in ways that would make them most responsive to the president’s own policy wishes.¹⁶⁷ Although some of this was achieved by formal means or institutions, such as legislation,¹⁶⁸ the core features of this new role the presidency now possesses in the United States—especially given the marginalization of Congress in this process—are often described as something that occurred informally at the constitutional level, through changed understandings of the constitutional norms that surround the presidency and separation of powers more broadly.¹⁶⁹

Given that this portrays the redeployment of the institution of the presidency toward new goals through reinterpretation of norms that apply to it, we can accordingly identify this process as one of conversion. It is different from layering because nothing new was added at the constitutional level itself, which remained the same throughout the process of transition of the role of the presidency. Much of the relevant “work” that caused change in the nature of the presidency was carried out via the reinterpretation or redeployment of previously existing norms that applied to this institution in the larger constitutional scheme, given the rise of a robust policy state in the twentieth century.¹⁷⁰

163. See, e.g., Renan, *supra* note 132, at 2234–35.

164. See FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 346–81 (1994); Tushnet, *supra* note 77, at 533.

165. See, e.g., David J. Barron, *Foreword—From Takeover to Merger: Reforming Administrative Law in the Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095, 1105–06 (2008).

166. See, e.g., Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 *WM. & MARY L. REV.* 1, 4 (2002).

167. See, e.g., Kagan, *supra* note 152, at 2248–50.

168. See, e.g., Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (codified at 5 U.S.C. §§ 901–912).

169. For a recent and crisp articulation of this position, see Renan, *supra* note 132, at 2245–46.

170. For an outstanding overview and exposition of this claim, see KAREN ORREN & STEPHEN SKOWRONEK, *THE POLICY STATE: AN AMERICAN PREDICAMENT* 123–38 (2017). It may be interesting to note that a similar process of conversion may in fact be one element characterizing

3.2 Norms Regulating Impeachment in the United States: The previous example about the role of the presidency demonstrates conversion in which priorities or goals are *added* to an informal institution or norm via reinterpretation. But as discussed earlier, conversion can also cause a rearrangement in priorities if it makes what appeared to be an institution's secondary goal transform into the principal one. This can also occur to constitutional norms.

An example of this dynamic can be found in the constitutional norms that regulate presidential impeachment in the United States. Again, as in the context of separation of powers discussed in relation to drift, the impeachment process in the United States is also importantly regulated by informal constitutional norms rather than by hard law.¹⁷¹ In recent times, these constitutional norms were at the center of public attention, given the first and then second impeachment trials of former President Trump (as is well-known, both were ultimately unsuccessful).

In the context of the first impeachment trial, one of President Trump's main lines of defense was that he should not be impeached and removed because his conduct did not amount to a criminal offense. Many believe that this claim—presented most forcefully by President Trump's attorney and former Harvard Law School professor Alan Dershowitz—is false as a matter of history or appropriate constitutional interpretation. Indeed, as more than ample evidence suggests, the goals of the impeachment process were rather

the position of chief executives *more broadly*. After all, the appearance of robust policy states is not a unique American phenomenon but occurred in many other political systems as well. Accordingly, much like this development helped empower the presidency in the United States, as just discussed, so too did it have a similar effect of empowering the position of the chief executive in those other systems. Some have moreover described this trend as the “presidentialization of politics.” *See generally* THE PRESIDENTIALIZATION OF POLITICS: A COMPARATIVE STUDY OF MODERN DEMOCRACIES (Thomas Poguntke & Paul Webb eds., 2005). The United Kingdom serves as an example of this trend, one that in many ways also resembles that found in the United States. Although in the past, and particularly before WWII, the prime minister played a rather minimal role in domestic policy making, and the task was understood to fall to the constitutional executive in the form of the cabinet as a whole, things are rather different today. Though the norm of “cabinet government” is still understood to apply in the United Kingdom, its meaning has undoubtedly changed. Today the prime minister is often the “hub” through which many of the policies are filtered and often dictated, rather than the cabinet (this was particularly evident during most of the premiership of Tony Blair. *See* Martin Burch & Ian Holliday, *The Blair Government and the Core Executive*, 39 GOV'T & OPPOSITION 1 (2004)). The British premiership, in other words, has been redeployed to achieve new goals—from exclusively a role of chairperson of cabinet to a more active domestic policy leader and even independent policy decider. And this has all occurred through what is essentially a reinterpretation of the relevant governing constitutional norms, very much like the parallel process that transpired in the American presidency. *See generally* ANDREW BLICK & GEORGE JONES, *PREMIERSHIP: THE DEVELOPMENT, NATURE, AND POWER OF THE OFFICE OF THE BRITISH PRIME MINISTER* (2010).

171. *See, e.g.,* Keith E. Whittington, *A Formidable Weapon of Faction? The Law and Politics of Impeachment*, 55 WAKE FOREST L. REV. 381, 394–96 (2020).

broad, and the meaning of the term “high crimes and misdemeanors” used to be—in a norm-based sense—that impeachment could be exercised for a potentially expansive class of political offenses, *including* offenses that can be indicted by criminal law.¹⁷² And this view also has strong normative appeal. Given this, Trump’s claims appeared, certainly for many, to be no more than “constitutional nonsense.”¹⁷³

There is, however, a different view available that portrays Trump’s claims as less nonsensical. While it is true that the relevant constitutional norms around the process of impeachment were broad in the past, some suggest that these norms have changed.¹⁷⁴ More specifically, given the reality and growth of political parties, and especially at times of increased political partisanship in the United States, the contemporary understanding of impeachment has become much more limited than in the past and may indeed include—as President Trump has argued—only behaviors that are criminally indictable.¹⁷⁵ As one commentator puts it, the “party-political logic overwhelmed the Framers’ design.”¹⁷⁶

There is undeniable force to this claim, at least as a descriptive matter.¹⁷⁷ In times of political polarization, the broad understanding of which forms of conduct constitute an impeachable offense simply does not make sense; or perhaps more accurately, simply no longer coincides with the reality in which the willingness of political parties to use the tool of impeachment against presidents from their own parties ought to cross a very significant threshold of severity. And criminal offenses fit the bill much more conspicuously than any fuzzy notion of abuse of office or maladministration.¹⁷⁸

To be clear, my intention here is not to arbitrate these claims on the normative front. For my purposes, what matters is that in this view—and only at the level of description—we can say a conversion in the informal

172. See, e.g., CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 56, 154 (2017); LAURENCE TRIBE & JOSHUA MATZ, *TO END A PRESIDENCY: THE POWER OF IMPEACHMENT* 44–47 (2018).

173. Charlie Savage, ‘Constitutional Nonsense’: Trump’s Impeachment Defense Defies Legal Consensus, *N.Y. TIMES* (Jan. 20, 2020), <https://www.nytimes.com/2020/01/20/us/politics/trump-impeachment-legal-defense.html?action=click&module=Top%20Stories&pgtype=Homepage>.

174. See Stephen M. Griffin, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 *CONN. L. REV.* 413 (2019).

175. *Id.* at 425.

176. *Id.* at 419.

177. See also Julia Azari, *The Trump Presidency Thrives on Norms*, *MISCHIEFS FACTION* (May 8, 2020), <https://www.mischiefsoffaction.com/post/the-trump-presidency-thrives-on-norms>.

178. I note that Professor Griffin also makes a claim that relies on a different reading of the historical record and which highlights that there is some truth to the claim that all former presidential impeachments were indeed based on a criminal wrong. For a summary of this particular view, see Stephen M. Griffin, *On the Persistence of Really Bad Constitutional Arguments*, *BALKINIZATION* (Jan. 21, 2020), <https://balkin.blogspot.com/2020/01/on-persistence-of-really-bad.html>.

constitutional norms that control the process of impeachment and removal in the United States has occurred: from an informal constitutional norm that covers a broad range of priorities or goals—impeaching presidents for a variety of inappropriate behaviors and for general maladministration—to something that focuses solely on a subset of the priorities that this informal norm used to comprise—impeaching only for criminal offenses.

4. Displacement

A fourth mechanism of institutional change is displacement. In this dynamic, “new models emerge and diffuse which call into question existing, previously taken-for-granted organizational forms and practices.”¹⁷⁹

To better grasp the dynamic of displacement, it can be usefully compared with the mechanism of layering discussed previously. The two are alike in the way in which the process that ultimately leads to institutional change does not entail abolishing existing institutional rules, or even reinterpreting them as in the case of conversion. They are different because layering describes additions to the institutional rules whereas displacement is essentially an adding of a *new institution*, or the *resurrection of a dormant one*, that operates alongside the existing institution in a dynamic of competition. With displacement, the change is achieved by, first, making the broad environment denser with competing institutions and, second, by creating a dynamic that encourages participants in one institution *to defect* to the new institution.

A previously studied example of this mechanism in the context of formal institutions includes the effect of the introduction of new financial regulatory schemes in the EU regarding preexisting trading practices.¹⁸⁰ In relation to informal norms, consider the following illustrations.

179. See Streeck & Thelen, *supra* note 110, at 19.

180. See Daniel Gozman & Wendy Currie, *The Role of Investment Management Systems in Regulatory Compliance: A Post Financial Crisis Study of Displacement Mechanisms*, 29 J. INFO. TECH. 44 (2014). For close analogues in the literature to the mechanism of displacement, see MARIANA MOTA PARDO & MICHAEL J. TREBLICOCK, INSTITUTIONAL BYPASSES: A STRATEGY TO PROMOTE REFORMS FOR DEVELOPMENT 18-23 (2018) (discussing and identifying “institutional bypasses”); Ronald J. Gilson, et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 478 (2011) (discussing and identifying “regulatory dualism”); Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 212 (discussing the competitive effects of overlapping jurisdiction); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (developing further the insights of competitive jurisdictional powers). I note as well that the mechanism of displacement has some connections to ideas associated with mimicry and isomorphism in sociological studies of institutions. See, e.g., Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147 (1983).

4.1 Foreign State Immunity Norm in Customary International Law: One useful example of what is captured by displacement can be found in customary international law (I discuss other connections to this field in Part IV). Today, most countries adhere to a customary international norm of restrictive foreign state immunity, meaning that their citizens can sue foreign states only in specific cases. This was not true, though, in the not-too-remote past. Rather, the norm in customary international law used to be absolute state immunity, which wholly restricted the right to sue.

How has this change occurred? According to one account,¹⁸¹ it simply happened when some states began introducing the norm in a more qualified form of restrictive immunity. With time, many more states found this norm attractive (among other things, because they wanted to respond to the fact that they might now be exposed to legal liability in countries that enjoy absolute immunity in these states' own jurisdictions). As an increasing number of states began defecting from the norm of absolute immunity, a new reality became established. Indeed, in those states that still abide by a norm of absolute immunity, the function immunity fulfills is quite different from what it had originally been.¹⁸²

4.2 Norms on Delivering the State of the Union in the United States: Displacement clearly captures the process of change in the norm of foreign state immunity. For another example of this dynamic, related more closely to *constitutional* norms, consider the change that occurred concerning the norm in the United States about the form of the State of the Union address.

As is well known, President George Washington instituted a practice of delivering the State of the Union to Congress in person. However, President Thomas Jefferson changed course early in the life of the country to deliver the State of the Union in writing rather than orally. This practice persisted for a long time and was thought of as what we would describe today as a clearly established constitutional norm. But when Woodrow Wilson became president in the twentieth century, he chose to revert to the practice of

181. The discussion in the text draws on Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209 (2015).

182. For the claim that the process of what I describe here as displacement is in fact a very common, perhaps even the pervasive model of change of customary international law, see Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 914–15 (1986) ("In order to effect that change, states interested in a new rule of customary law must take action that violates existing law and they must encourage others to do the same. . . . If the proponents of the new rule are successful, a new consensus of state practice and *opinio juris* will develop and those nations which had the audacity to violate customary law will be found to be behaving consistently with the law.").

delivering the State of the Union orally.¹⁸³ And that change has remained until today.

One way to explain this change is through the lens of displacement. What President Wilson essentially did was revive an old institution—the oral deliverance of the State of the Union. That awakening of the dormant practice had a strong enough “pull” that it essentially encouraged every successive president to follow the then-dormant practice up until today. The old norm was simply displaced.

4.3 Norms on Party Selection Methods. A final example of displacement in the context of informal constitutional norms can be found in the way political parties conduct themselves. Today, many countries around the world use public primaries to choose party leaders.¹⁸⁴ Indeed, this has become so entrenched that the primary system has come to be described as something like a global norm regarding the organization of political parties.¹⁸⁵ Peering into the history of how this development has occurred reveals that displacement might have been at work. Though in the past many parties had more closed and elitist processes, once one party began crossing the line and adopted a more public type of process, other parties quickly followed suit—both within the same jurisdiction and across jurisdictions.¹⁸⁶

5. Exhaustion

All the mechanisms I discussed above are about institutional change *generally*. They, in other words, capture dynamics that lead to an array of changes to institutions and not necessarily a change that will ultimately bring about the institution’s demise. Indeed, institutions that become more complex or ambiguous through a process of layering or begin to serve different functions (or have their priorities rearranged) due to drift or conversion and even exposed to competition and the risk of defection by

183. This fact is well documented in the literature. See, e.g., STATE OF THE UNION: PRESIDENTIAL RHETORIC FROM WOODROW WILSON TO GEORGE W. BUSH xi (Deborah Kalb et al. eds., 2007). See also HORWILL, *supra* note 48, at 199–201.

184. For a survey, see Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U L. REV. 647 (2018). See also William Cross & Andre Blais, *Who Selects the Party Leader?*, 18 PARTY POL. 127 (2012).

185. See William P. Cross & Jean-Benoit Pilet, *The Selection of Party Leaders in Contemporary Parliamentary Democracies*, in THE SELECTION OF POLITICAL PARTY LEADERS IN CONTEMPORARY PARLIAMENTARY DEMOCRACIES: A COMPARATIVE STUDY 10 (Jean-Benoit Pilet & William P. Cross eds., 2014) (describing “an “era in which norms of participatory democratization were gaining strength in many countries”).

186. See Anika Gauja, *The ‘Push’ for Primaries: What Drives Party Organisational Reform in Australia and the United Kingdom?*, 47 AUSTL. J. POL. SCI. 641, 653–54 (2012) (discussing examples).

processes of displacement, can still be stable institutions.¹⁸⁷ They might be able to survive.

In contrast, the next and final mechanism of institutional change that I focus on is exclusively about a process of change that leads to institutional abolishment or institutional death. In the dynamic captured by the mechanics of what has come to be called exhaustion, “behaviors invoked or allowed under existing rules operate to undermine” the institution leading to “institutional breakdown rather than change.”¹⁸⁸ The undermining that is characteristic of exhaustion occurs through the *demonstration of the institution’s disutility*. That it is not in reality fulfilling its goals but is rather a burden or an irrelevance.

Exhaustion includes two additional features worth emphasizing. First, as we have seen in the case of conversion, exhaustion also has either a complete or a more nuanced version. Sometimes the institution’s disutility that is characteristic of exhaustion is demonstrated in relation to *the entire domain* or mandate of that institution. In such a case, exhaustion may ultimately lead to this institution’s complete demise. Sometimes, however, the disutility would characterize *only parts* of what the institution was meant to be undertaking. In these circumstances, the institution will become depleted only in part—what some describe as “shrinkage.”¹⁸⁹

Second, processes of exhaustion can take either an active or an inactive form. Inactively, the mere dis-utilization of an institution might be considered an example of exhaustion. The more it is unused, the greater chance it will die because it has been essentially forgotten or is simply believed to be useless, even unjustified. Actively, any breach of institutional rules may do the same, especially if that breach occurs in circumstances that lie at the core of where the institution was meant to work. The more instances of this type accumulate, the greater the likelihood that the institution’s fate will be doomed.

In the literature on gradual transformations of formal institutions, the study of exhaustion has focused, for example, on the slow disappearance of various social-democratic assisted-labor programs—usually as a case of

187. Of course, it may be that the complexity brought forth by the layering or the repurposing of the institution given processes of drift and conversion will prove untenable to relevant institutional stakeholders who will eventually operate to abolish the institution itself. A Kuhnian “crisis” is a relevant example. See *supra* note 118. Perhaps the defection encouraged by displacement will also lead to the same result. But there is no reason to think that this will typically or even primarily be the case with all relevant institutions, formal and informal alike.

188. Streeck & Thelen, *supra* note 110, at 29.

189. Simon Steinlin & Christine Trampusch, *Institutional Shrinkage: The Deviant Case of Swiss Banking Secrecy*, 62 REGUL. & GOVERNANCE 242, 243 (2012) (identifying “shrinkage” as a specific variant of the mechanism of exhaustion).

active exhaustion.¹⁹⁰ For cases of inactive exhaustion, consider what Professor Adrian Vermeule describes as constitutional atrophy in the case of Section 33 of the Charter of Rights and Freedoms in Canada, which allows the federal legislature to enact statutes in certain constitutional matters notwithstanding adverse judicial rulings.¹⁹¹ In Professor Vermeule's telling, the mere fact that this formal power has not been invoked for some time has de facto exhausted it, as relevant spectators simply came to believe that it no longer has any use or even that it has become illegitimate.¹⁹²

Exhaustion seems also to apply in equal force to the context of the informal institutions that are constitutional norms. In fact, exhaustion explains much of the concern that stands at the heart of the claims that connect norm erosion to a potential trend of democratic decline and constitutional retrogression.

5.1 Active Exhaustion—Democratic Decline in the United States and Elsewhere: At home in the United States, the concerns relating to former President Trump's behavior and his recalcitrance, for example, to adhere to norms about disclosing his finances or about prosecutorial independence, are not just that his conduct is aberrational and that he is disrupting the original function of the relevant norms. If the concerns were only limited to that, the worry would be that these constitutional norms are exposed to the process of layering.¹⁹³ This is not the case, however. Rather, what ignites the concern about President Trump and about those who "resist"¹⁹⁴ him and the tactics they use to halt Trump is that by their continued disregard of valuable political and constitutional norms, both factions are exhausting valuable norms. In other words, the continued breaches of these norms, if not stopped,

190. See, e.g., Marius R. Busemeyer & Christine Trampusch, *Liberalization by Exhaustion: Transformative Change in the German Welfare State and Vocational Training System*, 59 ZEITSCHRIFT FÜR SOZIALREFORM 291 (2013) (examining this case study in terms of the working of the mechanism of active exhaustion).

191. See Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEGAL STUD. 421, 425 (2012).

192. For completeness I note that recently there were some attempts to invoke Section 33 in the Canadian state of Ontario. For an illuminating discussion, see Janet L. Hiebert, *The Charter's Influence on Legislation: Political Strategizing About Risk, Presidential Address to the Canadian Political Science Association, Regina, Saskatchewan, May 31, 2018*, 51 CANADIAN J. POL. SCI. 727 (2018). In addition, in recent work, U.K. scholar Professor Aileen Kavanagh has challenged the common understanding according to which Section 33 of the Canadian Charter has been, in the terms used here, inactively "exhausted." Instead, Kavanagh claims that it was a *deliberate* design feature of the mechanism of notwithstanding. See Aileen Kavanagh, *Underuse of the Override* (work-in-progress) (on file with the author).

193. See *supra* Part II.B.I.

194. See generally THE RESISTANCE: THE DAWN OF ANTI-TRUMP OPPOSITION MOVEMENT 22 (David S. Meyer & Sidney Tarow eds., 2018).

will end up proving their disutility in ways that would ultimately bring about their demise.

Similar characterizations apply to other behaviors occurring today in the United States, specifically in the context of political parties. When the Republican and Democratic Parties in recent years have engaged in the practice of legislative obstruction against one another—either related to appointments to the executive branch or the judiciary through the tool of the filibuster or in other contexts—the concern being raised isn’t merely an issue of complicating the relevant norms as in layering. Rather, what has provoked serious concerns is that this type of behavior potentially exhausts norms of political fair play¹⁹⁵ or of regulated political rivalry.¹⁹⁶ It creates a “death spiral”¹⁹⁷ or brings the prospect of an endless cycle of tit-for-tat between the parties.¹⁹⁸

Similar applications of the idea of exhaustion can be carried out in relation to events in other jurisdictions that have been claimed to also exemplify the global trend of democratic decline, including the United Kingdom.¹⁹⁹ What the discussion therefore helps flag is that the growing concerns that appear today around the erosion of constitutional norms center on the mechanism of exhaustion.²⁰⁰ The worry, in other words, is about the

195. See also Jack Goldsmith, *What Was Most Important in Today’s Supreme Court Immigration Decision*, LAWFARE (June 26, 2017, 10:03 PM), <https://www.lawfareblog.com/what-was-most-important-todays-supreme-court-immigration-decision>.

196. See NANCY L. ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* 121 (2008) (invoking Edmund Burke’s idea of regulated rivalry).

197. Justin Amash, *Our Politics is in a Partisan Death Spiral. That’s Why I’m Leaving the GOP.*, WASH. POST (July 4, 2019, 6:00 AM), https://www.washingtonpost.com/opinions/justin-amash-our-politics-is-in-a-partisan-death-spiral-thats-why-im-leaving-the-gop/2019/07/04/afbe0480-9e3d-11e9-b27f-ed2942f73d70_story.html?utm_term=.5eef506d1278.

198. Noah Feldman, *Don’t Pack the Supreme Court, Democrats. You’d Live to Regret It*, BLOOMBERG (Mar. 28, 2019, 11:59 AM), <https://www.bloomberg.com/opinion/articles/2019-03-28/supreme-court-packing-would-backfire-on-democrats>; see also LEVITSKY & ZIBLATT, *supra* note 22, at 211; Issacharoff, *supra* note 22, at 16.

199. See, e.g., Tarunabh Khaitan, *On Coups, Constitutional Shamelessness, and Lingchi*, U.K. CONST. L. ASS’N (Sept. 16, 2019), <https://ukconstitutionallaw.org/2019/09/06/tarunabh-khaitan-on-coups-constitutional-shamelessness-and-lingchi/> (arguing that Prime Minister Boris Johnson’s decision to prorogue parliament was a significant blow to accepted constitutional norms in the United Kingdom on legitimacy of political opposition and parliamentary sovereignty). Of course, as is known, the Supreme Court of the United Kingdom ultimately resolved that Johnson’s decision to prorogue parliament was unconstitutional and that it is within its powers to so declare and order. For sympathetic discussion, see Nick Barber, *Prorogation, Prerogative, and the Supreme Court*, HARV. L. REV. BLOG (Oct. 3, 2019), <https://blog.harvardlawreview.org/prorogation-prerogative-and-the-supreme-court/>.

200. From this perspective, the institutionalist framework fleshed out here seems to help disentangle two distinct dynamics that can be suggested via Professors Chafetz and Pozen’s analogy to rules/standards bleeding into each other as a process of change. See Chafetz & Pozen, *supra* note 2, at 1437–38. In one, the issue is of layering, which may lead to institutional change without

continued and active demonstration of the disutility of valuable political and constitutional norms.

(5.2) Inactive Exhaustion and Shrinkage—Royal Refusal of Assent and the Sewel Convention: Exhaustion, as mentioned previously, can be carried out not only actively and completely but also inactively and partially. And although the latter dynamic is of less salience to the contemporary debates that focus on democratic decline and constitutional retrogression,²⁰¹ it is nonetheless an important dynamic that should be noted.

Two examples of inactive exhaustion of constitutional norms from the United Kingdom are worth mentioning. The first relates to the constitutional norm that exists there and which affords the Queen the authority to refuse legislative assent and thereby deny legislative bills from attaining binding status. Since that power has not been used since the eighteenth century, many believe that it has been exhausted and disappeared.²⁰² The second relates to the norm in the United Kingdom known as the Sewel Convention, which addresses the distribution of powers between the central British legislature and devolved legislatures in Scotland, Wales, and Northern Ireland. Though the Sewel Convention determines that the central legislature must seek the consent of devolved legislatures for legislation in matters that have been devolved *in the normal course of affairs*, “the only significant examples of the UK Parliament legislating with regard to devolved matters *without* devolved consent relate to the wholly exceptional circumstances of Northern Ireland.”²⁰³ Accordingly, it has been suggested that the norm’s scope has, in the terms used here, been partially exhausted or has shrunk.²⁰⁴ If used only and consistently in what appears like extremely extraordinary circumstances,

necessarily causing institutional “death”; in another, the issue is of exhaustion, which is geared precisely toward the latter and focuses on illustrations of disutility.

201. Professors Chafetz and Pozen make a further point according to which the fact that some cases of norms’ “exhaustion,” in the terms used here, are less conspicuous may be particularly dangerous in terms of the relevant norms’ ultimate chances of survival. *Id.* at 1445–50.

202. Vermeule, *supra* note 191, at 424 makes this case most explicitly. I note that during the complex politics revolving around Brexit, there have been some pressures on the “exhaustion” of the constitutional norm that provides for the Queen’s power to refuse legislative assent. For a moment it seems as though the Queen might utilize this power, after it has lain dormant for so long. See John Finnis, *Only One Option Remains With Brexit—Prorogue Parliament and Allow Us Out of the EU with No-Deal*, TELEGRAPH (Apr. 1, 2019), https://www.telegraph.co.uk/politics/2019/04/01/one-option-remains-brexit-prorogue-parliament-allow-us-eu/?WT.mc_id=tmg_share_tw (arguing that the Queen should employ her power to refuse assent); Richard Ekins & Stephen Laws, *Stop This Power Grab by MPs or Chaos Governs*, TIMES (Mar. 31, 2019, 1:01 AM), <https://www.thetimes.co.uk/article/stop-this-power-grab-by-mps-or-chaos-governs-bnd3nvbzc> (same).

203. Aileen McHarg, *Constitutional Change and Territorial Consent: The Miller Case and the Sewel Convention*, in THE UK CONSTITUTION AFTER MILLER: BREXIT AND BEYOND 155, 162 (Mark Elliott et al. eds., 2018) (footnote omitted).

204. *Id.*

a reasonable conclusion may be that absent these extraordinary conditions, the central legislature must still request consent.

* * *

Let me conclude all the foregoing. My goal in this Part has been to demonstrate that we can make progress in theorizing processes of incremental or evolutionary change in constitutional norms. To this extent, I broke off from the traditional image of norms as equilibriums. Instead, I borrowed from a specific framework used in literature on institutional change and identified five mechanisms of change: (1) layering, (2) drift, (3) conversion, (4) displacement, and (5) exhaustion. I also argued that they aptly apply in the context of constitutional norms and supplied various motivating examples of their working.

To be sure, my claim is decidedly *not* that implementing the framework I draw on will necessarily be easy. Indeed—and inevitably—boundary questions will arise whereby it would be difficult to identify which mechanisms are precisely in play. After all, reality is much messier than any generalization permits—and it may on occasion be unclear whether a particular instance of institutional change—including change in norms—is actually a case of one particular mechanism over another.²⁰⁵ Moreover, processes of institutional change may be complex and involve more than one of the aforementioned mechanisms. A process of change can be initiated by one specific mechanism, but later the work leading to change may be accomplished by a completely different kind of mechanism. At times, various mechanisms can be at work simultaneously.²⁰⁶

Nonetheless, the framework available from the study of formal institutions does supply a rich repertoire for the analysis of constitutional norms' change. At its core, each of those mechanisms captures a separate dynamic that can plausibly explain and illuminate various processes of change that occur in relation to constitutional norms in our political system and in other systems as well. In that sense, the various mechanisms help construct something akin to Hart's idea about rules of change in relation to constitutional norms.

205. As we will see below, this ambiguity might also have important pragmatic implications. See *infra* notes 265–270, 294–299 and accompanying text (discussing “over-framing” and “down-framing”).

206. See van der Heijden, *supra* note 107, at 240.

For ease, the discussion can also be summarized in the following table:

Table 1: Rules of Change for Constitutional Norms

	The Key Work	Examples from Formal Institutions	Examples from Informal Norms
Layering	Grafting of rules on top of existing ones (including exceptions). Change through complexity and ambiguity	1. The evolution of Congress 2. The evolution of advanced economies	1. The norm/prerogative over military affairs in the U.K. 2. The norm against more than two presidential terms in the U.S.
Drift	Inaction despite environmental change	1. FOIA 2. The minimum wage	1. Norms on “casual vacancy” appointments for the Senate in Queensland, Australia 2. Norms on appointments to the judicial selection committee in Israel 3. Separation-of-powers norms in the U.S.
Conversion	Redeployment/re-interpretation of existing rule (which can be done in a complete or a more nuanced way)	1. Military units’ “mission creep” 2. The Sherman Act	1. Norms regulating the role of the U.S. president in domestic policy (“presidential administration”) 2. Evolution of norms that regulate impeachment in the U.S.

Displacement	Creation of <i>new</i> institutions (or awakening of dormant ones) that encourage defection from the previous institution	Financial regulatory schemes in the E.U.	<ol style="list-style-type: none"> 1. The norm on state immunity in customary international law 2. Norms on delivering the State of the Union 3. Norms on selecting members in political parties
Exhaustion	Demonstrations of disutility (which can be active or passive and can apply to the institution in full or in part)	<ol style="list-style-type: none"> Disappearance of assisted-labor programs in Europe 2. The atrophy of Section 33 of the Canadian Charter 	<ol style="list-style-type: none"> 1. Constitutional retrogression in the U.S. and around the world 2. The norm empowering the Queen to refuse legislative assent in the U.K. 3. The Sewel Convention in the U.K.

III. "RULES OF ADJUDICATION" FOR CONSTITUTIONAL NORMS

My perspective in this Article so far has been analytical in nature. If successful, then my argument in Parts I and II may hopefully supply analysts interested in constitutional norms analytical tools to study norms, and particularly processes of change in constitutional norms, more carefully.

This Part goes further. It suggests that the framework developed above may also play a more pragmatic role. More concretely, my claim is that this framework also contains the resources for how relevant agents who either wish to change constitutional norms that exist in the status quo—which I will call *constitutional norm entrepreneurs*²⁰⁷—or to defend the status quo and the norms endemic to it—which I will call *constitutional norm anti-*

207. See Sunstein, *supra* note 32, at 909; see also Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 772 (1998). I note that Professor Robert Ellickson develops a distinction between "norm entrepreneurs," on the one hand, and "opinion leaders," on the other hand. The former targets particular norms and the latter are generalists. See Robert C. Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, in SOCIAL NORMS 35, 53–54 (Michael Hechter & Karl-Dieter Opp eds., 2001).

*preneurs*²⁰⁸—can in fact behave to achieve their distinct goals. In that sense, this Part argues that the framework developed in Part II can be thought of not only as analytical Hartian rules of change but also as operational Hartian rules of adjudication—because it points out the ways in which disputes about norms are ultimately adjudicated within politics itself.

Obviously, the rules of adjudication for constitutional norms I discuss in this Part will not operate like the parallel ones that exist in relation to formal and in Hart's terms mature law do. After all, as we already saw, constitutional norms rarely have an authoritative institution in charge of adjudicating claims in relation to them.²⁰⁹ It is pointless, therefore, to accept the analogy between law and norms in full.

Nonetheless, the strategies I identify do supply a template for potentially successful attempts to manipulate constitutional norms. They are mid-level strategies: located at a higher level than the micro-foundations of norms are (e.g., the psychological and behavioral forces that support norms) and at a lower level than the macro-foundations of norms are (e.g., the larger political, cultural, and economic conditions that support them).²¹⁰ And, given the features of norms as inherently primitive, they are, I believe, simply the best we can do—realizing of course that the ultimate success of these strategies will depend on political dynamics and the level of political savvy and sophistication of those who will employ them.

Section III.A identifies strategies or rules of adjudication that would be of particular relevance for *constitutional norm entrepreneurs* whereas Section III.B turns to the side of *constitutional norm anti-preneurs*.

A. Constitutional Norm Entrepreneurship

Part II introduced five mechanisms of institutional change—layering, drift, conversion, displacement, and exhaustion. I also argued that they apply with similar force to explain changes in the informal institutions that are constitutional norms, and perhaps norms more generally. These mechanisms seem of particular interest to agents unhappy with the consequences of existing constitutional norms. But how exactly will constitutional norm entrepreneurs be able to employ them? And which of those mechanisms will prove most beneficial and in what circumstances?

208. Bloomfield, *supra* note 34.

209. *See supra* Part I.A.

210. *See, e.g.,* Gary Alan Fine, *Enacting Norms: Mushrooming and the Culture of Expectations and Explanations*, in *SOCIAL NORMS* 139, 139 (Michael Hechter & Karl-Dieter Opp eds., 2005) (highlighting that literature on norms often take either a micro or a macro perspective, and emphasizing the need for mid-level theorization).

As it happens, each of the mechanisms of change may prove itself relevant to different types of norm entrepreneurs and in different circumstances.

1. Subversive Layering

When the relevant constitutional norm is relatively robust, the mechanism of layering seems particularly apt. Given that it does not entail abolishing what had previously been in place but rather introducing something new, sophisticated norm entrepreneurs can achieve through layering what they could not have achieved otherwise. They can, for example, suggest that what they are doing is not a breach of a previous norm or a full-blown reinterpretation but rather an exception to it. Alternatively, they can imply that they are again, not breaching, but only making the relevant constitutional norm more complex and nuanced in ways that supposedly adapt it to changed circumstances or new realities. In this way, constitutional norm entrepreneurs can escape the costs that might be associated with more direct and explicit attempts to override the relevant norm while maintaining hope that the ultimate result of their layering will subversively change the norm in a more long-term way.²¹¹

Subversive layering in this way is far from unheard of. It can be found in both its forms in the process that transpired in relation to the constitutional norm that prohibited more than two presidential terms. Indeed, some of FDR's supporters suggested at the time that his election for a third term would not break the norm but would rather be an exceptional state that would not persist afterward.²¹² Others, by contrast, emphasized that FDR's election to a third term meant only that the norm had become more qualified rather than full-blown shattered.²¹³ Both agents could be understood as subversively layering the relevant constitutional norm that supposedly existed in our system in the past.

2. Parasitical Drift

At first blush, drift does not seem to be a deliberate change strategy norm entrepreneurs can use. After all, as previously discussed,²¹⁴ drift is in an important respect an inactive process in which institutions do not change

211. See Mahoney & Thelen, *supra* note 110, at 26 (discussing subversion through layering).

212. See KORZI, *supra* note 51, at 133.

213. See Jaconelli, *supra* note 54, at 33. Professors Chafetz and Pozen's "axes of instability" suggest further moves that could be made in this direction of "layering." See Chafetz & Pozen, *supra* note 2, at 1438-45.

214. See *supra* Part II.B.II.

while the circumstances do. However, there may in fact be circumstances in which drift can serve in this more strategic, even active, role.

Consider a society that reveres certain constitutional norms. Suppose moreover that changes have occurred in the environment around these norms and that these changes make that reverence problematic. Finally, suppose that some observers are aware of this problem and advocate for change and detachment from the reverence. Constitutional norm entrepreneurs, who favor the status quo and the way in which the norms have ultimately developed, can in fact operate to further entrench this conventional or norm-based status quo. They may latch onto these norms like parasites and engage in actions to increase the likelihood of the freeze.²¹⁵ And they may do so relatively easily because their action will not be viewed—certainly superficially—as conflicting with the relevant norm. In all likelihood, these parasitical norm entrepreneurs will accuse the *other side* of attempting to breach and thus increase the reverence for the status quo.

As discussed in Part II, situations in which constitutional norms are exposed to drift are likely going to be tricky to identify in reality and highly controversial. But as the examples discussed there also suggest, drift should not be ruled out. Some supporters of the “responsible party government” movement certainly thought that those who confronted them and celebrated reverence to “classic[al]” norms of separation of powers could be understood as parasites causing drift rather than genuinely preserving norms.²¹⁶ Today, many proponents of the “presidential administration” thesis,²¹⁷ those with a broad view of the permissible scope of the administrative state,²¹⁸ or those critical of the current function of structural constitutional norms in the United States more broadly,²¹⁹ could similarly be understood as accusing their opponents who advocate for a classical understanding of separation of powers norms as leaching onto these norms like parasites and trying to freeze them to advance their own *contemporary* values (rather than for the sake of genuinely preserving these norms).²²⁰

215. See Mahoney & Thelen, *supra* note 110, at 18–20 (discussing parasitical drift).

216. See, e.g., Lloyd N. Cutler, *To Form a Government*, FOREIGN AFFS. (Fall 1980), <https://www.foreignaffairs.com/articles/united-states/1980-09-01/form-government>.

217. See Kagan, *supra* note 155.

218. See generally ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* (2016); Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1 (2017).

219. See LEVINSON, *supra* note 156.

220. In Professor Adrian Vermeule’s account, these values are either one form or another of libertarianism or legalism. See VERMEULE, *supra* note 218, at 23.

3. *Opportunistic Conversion*

Conversion seems like an appealing strategy for constitutional norm entrepreneurs facing a more plastic constitutional norm than that associated with layering—like constitutional norms in the form that resembles legal standards or, as international relations scholars describe it, “meta norms.”²²¹ Rather than simply breach or directly attack the present meaning or sense of the constitutional norm in question, norm entrepreneurs can engage in attempts to repurpose it via reinterpretation. In this way, constitutional norm entrepreneurs appear to be adhering to the dictates of the constitutional norm even though they are opportunistically engaged in changing it through interpretation or deployment toward new goals, or in rearranging its priorities.²²²

An example of this strategy can be found in the context of the evolution in the position of the American presidency in the constitutional order, discussed above.²²³ When Progressives began to reimagine the institution of the presidency in the United States, one of their main claims was not that the new role they were hoping to create for this institution was unconstitutional and in direct conflict with its original purposes. Rather, they claimed that the Constitution is a living document that requires dynamic interpretation—including in the sense of the relevant constitutional norms that supplement the formal document and regulate the presidency’s position within the larger constitutional scheme.²²⁴

4. *Competitive Displacement*

Displacement as a mechanism seems primarily attractive in cases in which constitutional norm entrepreneurs cannot affect the relevant constitutional norm directly but can instead rely on the logic of competition and then defection. This may be most useful when constitutional norm entrepreneurs cannot access the norms in question, for example, because they are not part of the audiences these norms speak to or regulate directly or because they are not members in the relevant institution wherein the norm applies. In these cases, constitutional norm entrepreneurs can nonetheless capture other institutions that operate in parallel to those they wish to influence, introduce a new norm into them, and then hope for the defection

221. See *supra* notes 96–100 and accompanying text.

222. See Mahoney & Thelen, *supra* note 110, at 28.

223. See *supra* notes 163–170 and accompanying text.

224. See Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2075, 2078–79 (2009).

that may ensue.²²⁵ This is one interpretation for what happened in the context of the change to the norms governing the selection process in political parties. The relevant constitutional norm entrepreneurs were successful in initiating the change to direct leadership primaries in one specific party, or jurisdiction, and the others followed suit and mimicked it, defecting from their previous, more elite-focused leadership selection process.²²⁶

Sometimes, though, these constitutional norm entrepreneurs can introduce a new norm *within* the same institution that will operate in tandem with the previous one and then hope for the same dynamic of competition and ultimate defection to occur. For instance, Woodrow Wilson could be described as a constitutional norm entrepreneur who, by awakening the dormant practice of delivering the State of the Union orally, operated as a displacer of the previous constitutional norm that directed that the State of the Union should be delivered in writing.²²⁷ Indeed, ever since Wilson rekindled the old practice of delivering the State of the Union in person, all other presidents followed suit; they deserted the previous constitutional norm of doing so in writing. The revival of the old norm competed with the present one so successfully that it made the previously effective norm dormant and the previously dormant norm effective.

An additional contemporary example of competitive displacement in the United States is the campaign for conscientious electors, which tries to resurrect the dormant practice of independent voting in the Electoral College. Today, the constitutional norm is to vote “faithfully,” in accordance with the wishes of those who put the electors in place. Among the main strategies this campaign adopted is to convince enough electors to adhere to the previously dormant, now awakened, practice of independent electoral voting, that others will similarly defect from the contemporary constitutional norm that directs presidential electors to vote faithfully.²²⁸

5. *Insurrectionary Exhaustion*

Through all of these, constitutional norm entrepreneurs can try to effect change in the relevant constitutional norms they are directing. But of course, some constitutional norm entrepreneurs are not really interested in simply changing the content of constitutional norms and leave it at that. At times,

225. For the claim that such a dynamic also explains other important dynamics in constitutional matters, see Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1, 3–4 (2014) (identifying competition, learning, and acculturation as important drivers of constitutional rights’ diffusion worldwide).

226. See *supra* notes 184–186 and accompanying text.

227. See *supra* note 183 and accompanying text.

228. For a critical discussion, see Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903 (2017).

constitutional norm entrepreneurs want to bring about the expiration of specific norms. And when they can do so without incurring too many costs, or when these costs are worthwhile for them, they can engage in what we have seen is entailed by the mechanism of exhaustion; they can become, in other words, insurrectionary exhausters of constitutional norms. More specifically, what constitutional norm entrepreneurs can do is engage in practices that constantly emphasize the disutility of the relevant constitutional norm, either by breaching it and demonstrating that it is not fulfilling its goals or is obstructing the achievement of other more valuable goals—in the case of *active* exhaustion—or by simply guaranteeing that the norm is forgotten—in the case of *inactive* exhaustion.²²⁹

As discussed earlier, this may be the exact same dynamic that has been occurring in the context of norms of political fair play in various systems, including the United States.²³⁰ President Trump, his supporters, and his resisters are all in this sense exhausting the relevant constitutional norms through repeated demonstration of their disutility. The campaign for conscientious electors can also be read in part as an attempt to exhaust the existing constitutional norm that directs electors to vote in a faithful way. In addition to attempts to try to resurrect a dormant practice of independent voting by electors and encourage electors to defect to that resurrected practice, as in competitive displacement, those who are pushing the campaign are constantly engaged in what we can understand as attempts to actively exhaust the current norm that regulates presidential electors' voting—emphasizing how the current constitutional norm that locks in electors' choices blocks the attainment of more valuable practices. Among other things, they attack the legitimacy of the Electoral College—including by suggesting that it was a “pro-slavery” ploy²³¹—and point to various ways in which the norm brings forth extremely unattractive results, most recently, in their eyes: the election of President Trump.²³²

B. Constitutional Norm Anti-Preneuring

Constitutional norm entrepreneurs are not the only beneficiaries, so to speak, of the framework developed in this Article. Whenever such constitutional norm entrepreneurs exist, we are also likely to find constitutional norm anti-preneurs seeking to achieve exactly the opposite

229. For ways that constitutional norm entrepreneurs can achieve that see *infra*, note 287 and accompanying text.

230. See *supra* notes 195–198 and accompanying text.

231. See Akhil Reed Amar, *Actually, the Electoral College Was a Pro-Slavery Ploy*, N.Y. TIMES, (Apr. 6, 2019), <https://www.nytimes.com/2019/04/06/opinion/electoral-college-slavery.html>.

232. For an extremely effective survey of current controversies, see Whittington, *supra* note 228.

goal and to safeguard contemporary norms. And much like the identification of the relevant mechanisms by which constitutional norms change can help norm entrepreneurial work, so too may it assist the contrary maintenance work²³³ that constitutional norm anti-preneurs perform. Moreover, for each mechanism that may possibly be engaged by norm entrepreneurs, norm anti-preneurs can devise an appropriate response.²³⁴

1. Counter-Layering

If constitutional norm anti-preneurs identify subversive layering as the process of change that is being attempted by their norm entrepreneurial opponents, constitutional norm anti-preneurs can potentially engage in counter-layering—creating exceptions or new rules that either cancel the layer introduced by the norm entrepreneurs or simply weaken and water-down²³⁵ its overall effect on the constitutional norm.²³⁶ Though norm entrepreneurs might have enough political clout to “layer” and can disguise their desires to bring forth change in the prevailing norms by minimizing the actions these norm entrepreneurs take, constitutional norm anti-preneurs can take advantage of the fact that this clout does not permit more significant inroads into the existing norms.

As an example of this, consider that when the U.K. government lost the vote that led Prime Minister David Cameron to acknowledge the change as to the extent of the government’s prerogative power in military affairs, as we saw earlier,²³⁷ he immediately added that the new meaning did not suggest that there is no scope at all for an absolute prerogative.²³⁸ This “counter-layer” in fact persists until today, as the United Kingdom government consistently insists that there is a domain of the prerogative that is free from parliamentary monitoring.²³⁹

233. See Thomas Lawrence & Roy Suddaby, *Institutions and Institutional Work*, in SAGE HANDBOOK OF ORGANIZATION STUDIES 215, 229 (Steward R. Clegg, et al. eds., 2d ed. 2006).

234. For the claim that there are similarities between the strategies used by various kinds of what is, in the terms used here, norm entrepreneurs and anti-preneurs, see generally CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* (2012).

235. Fredrik Engelstad, *Property Rights, Governance, and Power Balances*, in COOPERATION AND CONFLICT THE NORDIC WAY: WORK, WELFARE, AND INSTITUTIONAL CHANGE IN SCANDINAVIA 36, 38 (Fredrik Engelstad & Anniken Hagelund eds., 2015) (emphasis omitted).

236. I note that this strategy has strong affinities with scholarship discussing the implications of the general theory of the second best to constitutional politics. See, e.g., Adrian Vermeule, *Hume’s Second Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003) (discussing the general implications of the theory of the second best to constitutional theory).

237. See *supra* notes 122–127 and accompanying text.

238. See Lagassé, *supra* note 122, at 230.

239. See Mills, *supra* note 119, at 30; see generally Strong, *supra* note 121.

2. *Politics of Unfreezing*

If used by norm entrepreneurs, drift calls for an altogether different response by norm anti-preneurs. Rather than oppose what superficially seems like norm change, they should rather forcefully encourage it, as the change is actually what is required to deliver the goals the norm was originally meant to achieve. Constitutional norm anti-preneurs therefore must engage in those cases in what we can think of as a politics of unfreezing,²⁴⁰ which is aimed at relaxing whatever reverence the norm attaches to it or dislodging the inertial “rust” that the norm has accumulated through time.²⁴¹

In many ways, the work of Professor Sanford Levinson, which persistently—even obsessively—points out possible ways in which venerating norms affects our understandings of the Constitution serves as a good example of what politics of unfreezing entails both at the level of political rhetoric and institutional reform.²⁴² Similar examples in the same vein can be found in the writing of scholars such as Daniel Lazare,²⁴³ Louis Michael Seidman,²⁴⁴ Aziz Rana,²⁴⁵ and Mark Tushnet.²⁴⁶

3. *Politics of Fidelity*

When constitutional norm anti-preneurs identify that the process of change being engaged in by relevant norm entrepreneurs is opportunistic

240. Kurt Lewin, *Frontiers in Group Dynamics: Concept, Method, and Reality in Social Science; Social Equilibria and Social Change*, 1 HUM. RELS. 5, 7 (1947) (describing the importance of “unfreezing” in institutional reform).

241. *Id.*; see also William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735 (1949) (“Social forces like armies can sweep around a fixed position and make it untenable.”)

242. See LEVINSON, *supra* note 156. At the level of rhetoric, Levinson constantly emphasizes the “false necessities” that underlie our constitutional assumptions. At the level of institutional action, Levinson is an avid supporter of a new constitutional convention to amend the Constitution. See *id.* at 254.

243. See DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* (1996).

244. See LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

245. See, e.g., Aziz Rana, *Goodbye, Cold War*, 30 N+1: MOTHERLAND (2018), <https://nplusonemag.com/issue-30/politics/goodbye-cold-war/>.

246. See, e.g., Mark Tushnet, “*Our Perfect Constitution*” Revisited, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 131, 131 (Peter Berkowitz ed., 2005). I note, though, that there is a difference in the extent that these scholars are willing to engage in what I describe as politics of unfreezing. Professor Sanford Levinson’s approach seems to be limited to what he describes as the norms regulating the “constitution of conversation” and not to the norms included in what he calls the “constitution of settlement.” See LEVINSON, *supra* note 156, at 246–54. Other scholars seem to go further, however, and advance unfreezing also within what Levinson understands as the “constitution of settlement.” See, e.g., Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499 (2009).

conversion, the anti-preneurial maintenance work should include actions that resist any potential for norm creep. One particular way to do so is to engage in politics of fidelity so as to highlight how the attempt to convert the norm is hostile to the institution's original purposes.²⁴⁷

A case in point is of course the reaction to the growth and conversion of the role of the presidency in the United States. When the institution of the American presidency had begun to change during the Progressive Era, one source of effective critique was originalist in tone and style—which clearly exemplifies this type of strategy.²⁴⁸ Similarly, a politics of fidelity can be identified in legislative responses to the United States Supreme Court's perceived erroneous interpretations of “super-statutes.”²⁴⁹ Given that these super-statutes are believed to reflect a more significant level of societal acceptance and, in fact, a constitutional norm, overruling Supreme Court interpretations that seem to go against the dictates of the norm was often given a special label: the Civil Rights *Restoration* Act of 1987²⁵⁰ (emphasis added)—so as to signal not only the overturning of the precedent via legislation but also the resilience of the constitutional norm.

4. *Sheltering*

In yet another option, when the source of change is the mechanism of displacement, constitutional norm anti-preneurs need to engage in another complicated task. Very much like overprotecting parents, they ought to eliminate possibilities for temptations—by closing and “shelter[ing]” the relevant institutions from outside opportunities and information, by

247. The metaphor of fidelity is of course strong in the constitutional culture in the United States. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); JACK BALKIN, LIVING ORIGINALISM 8–9 (2011). But it is familiar in other contexts too, which exemplify the general import of the idea of politics of fidelity and its potential effectivity to constitutional norm anti-preneuring. See, e.g., Kim Jonker & William F. Meehan, *Curbing Mission Creep*, STAN. SOC. INNOVATION REV. 60, 61 (Winter 2008), https://ssir.org/articles/entry/curbing_mission_creep# (discussing the importance of fidelity to “mission statements” in order to curb the tendency of organizations, and especially non-governmental organizations, for mission creep).

248. See, e.g., JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION (1959). It may be worth mentioning that in the United Kingdom, most critical reactions to the conversion of the role of the prime minister into a significant domestic policy role were also “traditional[ist],” in the sense of emphasizing the ways in which the conversion stands in contrast to this role's original function as it had been crystallized in constitutional norms. See DENNIS KAVANAGH & ANTHONY SELDON, THE POWERS BEHIND THE PRIME MINISTER: THE HIDDEN INFLUENCE OF NUMBER 10, at 76 (2000); PETER HENNESSY, THE PRIME MINISTER: THE OFFICE AND ITS HOLDERS SINCE 1945, at 538 (2001).

249. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

250. Pub. L. No. 100-259, 102 Stat. 28 (1988).

increasing the costs of defection, or by eliminating and delegitimizing dormant practices.²⁵¹

As an example, consider that during the Prohibition Era “the forces in favor of prohibition never wanted any objective check on public sentiment. They tried to kill off straw polls on the subject of prohibition.”²⁵² And indeed, that sheltering tactic seemed to have worked, at least for a while: “As a consequence of their tactics even the politicians were fooled by an illusion of universality of opinion in favor of the Eighteenth Amendment.”²⁵³

5. *Blaming, Demonizing and Valorizing, Over-Framing*

When constitutional norm anti-preneurs face constitutional norm entrepreneurs who engage in the process of exhaustion and have the direct aim of bringing forth the relevant constitutional norms’ demise, the best course of action for the former is to operate in ways that highlight the utility of the relevant norms and simultaneously make the further acts of exhaustion costly. This, of course, entails respecting the relevant constitutional norms, a point to which I will return further below in Part IV.²⁵⁴ But it also involves calling out norm entrepreneurs for what they are doing, including by effectively characterizing them as norm flouters and breachers.

Much of our contemporary constitutional politics, around President Trump, his resisters, and the Democratic and Republican parties, is obviously a living example of calling out norm breakers and identifying them as such, though the efficacy of this is questionable. as I discuss in Part IV).²⁵⁵ For an example taken from a different time, consider the following: Prior to the passage of the Twenty-Fifth Amendment, those who believed that vice presidents cannot succeed the full office of the presidency should a president die while in office kept resisting Vice President John Tyler’s attempt to fully succeed deceased President William Henry Harrison by constantly calling him “Acting President” or, even more vividly, “His Accidency.”²⁵⁶

251. See, e.g., Hannah Rosin, *The Overprotected Kid*, ATLANTIC (Apr. 2014), <https://www.theatlantic.com/magazine/archive/2014/04/hey-parents-leave-those-kids-alone/358631/> (discussing strategies used by parents to halt change in norms regarding playgrounds).

252. DANIEL KATZ & RICHARD L. SCHANCK, SOCIAL PSYCHOLOGY 175 (1938).

253. *Id.*

254. In social psychology, it is accepted that to strengthen norms, one important move is “to highlight the direction and uniformity of the group’s behavior.” See Deborah A. Prentice, *The Psychology of Social Norms and the Promotion of Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 23, 35 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012).

255. See *infra* Part IV.B.

256. I draw this example from Michael J. Gerhardt, *Nonjudicial Precedents*, in THE POWER OF PRECEDENT 113–16 (2008).

But calling out breachers in this way may prove harder to do than first meets the eye. A crucial complication constitutional norm anti-preneurs may face in their attempt to resist exhaustion of constitutional norms is that norm entrepreneurs may try to deny that they have any personal responsibility or agency for exhausting relevant norms.²⁵⁷

To overcome this challenge, constitutional norm anti-preneurs may be able to create credible narratives of causation that connect the relevant players to the breaches directly, or, in other words, to create narratives of blaming.²⁵⁸ The effectiveness of this strategy has clear antecedents. For instance, in the campaign preceding FDR's third term, FDR's opponents were at pains to counter the narrative that FDR and his supporters were advancing, according to which an additional term was inevitable because of the exigent circumstances and that FDR had only begrudgingly agreed to run because he was approached and asked to do so.²⁵⁹ Rather, they emphasized that FDR had actively and personally chosen to do so. Specifically, FDR's Republican opponent, Wendell Willkie, referred to FDR consistently throughout the presidential campaign as "Mr. Third-Term Candidate."²⁶⁰

Beyond this, there could be further ways to bolster attempts to fight off constitutional norm exhaustion by norm entrepreneurs. One particular strategy that constitutional norm anti-preneurs could adopt is that of "[v]alorizing and demonizing."²⁶¹ Demonizing is directed toward dramatizing the negative consequences that have ensued from the acts of norm flouting. For example, it has been suggested that a rhetoric of disdain or, in the terms used here, "demonization," toward FDR's failed court-packing plan is what explains the relative robustness of the constitutional norm against "[c]ourt[]packing" in the United States.²⁶² In contrast, valorizing entails exaggerating the norm's effectivity and utility; it is

257. In most cases, this would be easy to do given the nature of norms, as we saw in Parts I and II, as complicated institutions or equilibriums that may downplay *individual* responsibility. As a comparison, consider the difficulty of criticizing *individual* judges, given the nature of courts as collective institutions. See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823 (1982).

258. For an extremely useful exploration of the effectiveness of narratives of causation in related matters, see Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

259. For Roosevelt's portrayal of his running for a third term begrudgingly, see KORZI, *supra* note 51, at 87–91, 95–100 (discussing how "heavily invested Roosevelt was . . . in the idea that he was truly drafted by the [Democratic Convention] and that he was merely responding to the will of the people").

260. See *id.* at 91–92.

261. See Lawrence & Suddaby, *supra* note 233, at 232–40; see also Roy Suddaby & Royston Greenwood, *Rhetorical Strategy of Legitimacy*, 50 ADMIN. SCI. Q. 35, 49 (2005).

262. See Grove, *supra* note 100, at 531–32.

something like cheerleading on steroids.²⁶³ Some of the reactions to the specter of norm erosion in the context of democratic decline have this kind of valorizing character when they emphasize the importance and value of democratic norms while glossing over the many problematic results that they brought about—like enabling racism or other “rotten [political] compromises”²⁶⁴—or when they exaggerate the positive results stemming from judicial review.²⁶⁵ In addition, valorization as a strategy of constitutional norm maintenance sometimes seems to appear in writing that celebrates contemporary separation-of-power norms in the United States.²⁶⁶

To be sure, constitutional norm anti-preneurs can engage in these practices not only when norm entrepreneurs engage in exhaustion as such. To further increase the costs associated with change of norms that they wish to protect, norm anti-preneurs can frame—or, more accurately, over-frame—attempts at layering, conversion, drift, and displacement as in essence occasions of exhaustion. Indeed, constitutional norm anti-preneurs need not accept the world as it is; they should keep “continually poking and pushing the world to get the result they want.”²⁶⁷

One way to effectively achieve this is by supposedly “peeking” behind the veil and claiming that the real intentions of norm entrepreneurs are to completely exhaust the relevant norms, rather than to more subtly change them by virtue of layering, conversion, etc.²⁶⁸ Another way may be to resort to “slippery slope” or precautionary rhetoric—of the “better-safe-than-sorry” kind—that dramatizes the consequences of more subtle changes pushed through by norm entrepreneurs.²⁶⁹ Finally, constitutional norm anti-preneurs

263. Cheerleading is the term used by Professor Robert Ellickson to capture support for norms of a particular kind. See Ellickson, *supra* note 207, at 45.

264. See Chafetz & Pozen, *supra* note 2, at 1445 n.57 (quoting Aziz Huq, *Conventions as a Consequence of the Incomplete Nature of Constitutional Bargains* 4–5 (2018) (unpublished manuscript)).

265. See Mark Tushnet, *Expanding the Judiciary, the Senate Rules, and the Small-C Constitution*, BALKINIZATION (Nov. 25, 2017), <https://balkin.blogspot.com/2017/11/expanding-judiciary-senate-rules-and.html> (remarking that the “view held by many of my Democratic-leaning academic colleagues, that there is still enough legitimacy left [of the Supreme Court] to worry about a further loss [in that legitimacy], seems to me a triumph of hope over experience”).

266. See, e.g., Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001).

267. WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* 142 (1986). Another relevant source for this sort of perspective about politics is, of course, ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

268. For a discussion of the challenges entailed in understanding the *real* intentions of contemporary political leaders, see Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

269. Professor Albert Hirschman called this the “Imminent-Danger Thesis.” See HIRSCHMAN, *supra* note 267, at 149–54.

can abate attempts at norm entrepreneuring by shifting the level of generalization with which they would describe the relevant constitutional norm.²⁷⁰ To take a concrete example, constitutional norm anti-preneurs may be able to say that although the specific rules around the use of the Senate filibuster have not been breached,²⁷¹ or have only been layered, a higher-level norm regarding political fair play might indeed have been breached by the constant filibuster obstruction, a familiar language in this context may be reference to the real “spirit” of the relevant constitutional norm.²⁷²

6. Formalization: Hard and Soft

Thus far I have highlighted strategies that correspond to the ones that could potentially be used by constitutional norm entrepreneurs. However, two additional strategies seem to go beyond this correlation and might likely be particularly appealing to constitutional norm anti-preneurs.

The first strategy involves an attempt to formalize present constitutional norms, to move them from the realm of the informal, in which they are usually situated, to that of the formal.

Formalization can come in two forms: hard or soft. Hard formalization occurs when formalization is meant to give the norms the full force of law. The logic here is that by transforming informal constitutional norms into formalized constitutional—or even sub-constitutional—law, the system of law and its relevant enforcement agents—especially courts and lawyers—may effectively assist in enforcing the relevant constitutional norms and better protecting them. For example, in the debates that arose because of President Trump’s interference with the criminal procedures conducted by the Department of Justice,²⁷³ and contrary to established constitutional norms that secure this independence,²⁷⁴ one of the key proposals suggested in response takes exactly the direction of hard formalization: giving DOJ’s independence a statutory footing.²⁷⁵

270. This is of course an issue familiar to the law. See Adam M. Samaha, *Levels of Generality, Constitutional Comedy, and Legal Design*, 2013 U. ILL. L. REV. 1733 (2013).

271. This view is presented in Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387, 399 (2015).

272. For further illustrations of this rhetorical strategy, see Mahoney & Thelen, *supra* note 110, at 24; Whittington, *supra* note 2, at 1860.

273. See, e.g., Katie Benner, Sharon LaFraniere & Nicole Hong, *Fearful of Trump’s Attacks, Justice Dept. Lawyers Worry Barr Will Leave them Exposed*, N.Y. TIMES (Feb. 15, 2020), <https://www.nytimes.com/2020/02/15/us/politics/trump-barr-justice-department.html?action=click&module=Top%20Stories&pgtype=Homepage>.

274. See, e.g., Renan, *supra* note 36, at 2207–15.

275. See Cass R. Sunstein, *Imagine that Donald Trump Has No Control over Justice*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/opinion/trump-barr-justice-department.html?referringSource=articleShare>. For the potential constitutional difficulties that this

But formalization can take a softer form as well. This occurs when the relevant existing constitutional norms are simply put down in writing even without pretensions to go through the relevant procedures that would give the formalized document the full force of law.

Soft formalization of constitutional norms is far from unheard of.²⁷⁶ In the United States, various kinds of attempts to formalize political norms—some of them have constitutional pedigree—have been documented.²⁷⁷ In Westminster systems, the formalization of constitutional norms is a growing trend and has attracted significant political and academic attention.²⁷⁸

Though the formalization is only soft, it has important potential benefits for constitutional norm anti-preneurs. For one thing, soft formalization increases the cognitive salience of current constitutional norms and shields them from some of the risks associated with inactive exhaustion—given the potential to simply forget un-utilized constitutional norms.²⁷⁹ For another, the existence of a formalized document containing the contours of the relevant constitutional norms can also establish a sort of veto point or a slowing-down mechanism in favor of constitutional norm anti-preneurs, especially if the existence of a formal document contributes to the creation of a separate norm, according to which when issues are raised that potentially engage formalized norms, their formalized expression must be consulted.²⁸⁰

proposal faces, see Josh Blackman, *Trump Has the Constitutional Power to Intervene in Roger Stone's Sentencing*, WASH. POST (Feb. 19, 2020), <https://www.washingtonpost.com/outlook/2020/02/19/trump-has-constitutional-power-intervene-roger-stones-sentencing/>. I note that this proposal to formalize DOJ's independence is only the most recent in a growing flurry of proposals to formalize constitutional norms in "hard" ways that have been on the agenda since former President Trump assumed office. For suggestions involving increased *judicial* role in enforcing constitutional norms, see Renan, *supra* note 36, at 2265–73; Issacharoff, *supra* note 22, at 5.

276. See, e.g., Jacob Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 574 (2008).

277. See, e.g., Jack Goldsmith, *Independence and Accountability at the Department of Justice*, LAWFARE (Jan. 30, 2018), <https://www.lawfareblog.com/independence-and-accountability-department-justice>.

278. See Andrew Blick, *The Cabinet Manual and the Codification of Conventions*, 67 PARLIAMENTARY AFFS. 191, 202, 205 (2014); Carol Harlow & Richard Rawlings, *Proceduralism and Automation: Challenges to the Values of Administrative Law*, in THE FOUNDATIONS AND FUTURE OF PUBLIC LAW (IN HONOUR OF PAUL CRAIG) 3 (Elisabeth Fisher, Jeff King & Allison Young eds., 2019) (commenting that they "also note a tendency in recent times to formalise parts of soft law . . . in published documents").

279. See Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOCIO. 319, 326–29 (1988) (discussing the importance of formalization of experience to the persistence of organizational learning).

280. I draw this idea of a norm about consulting written norms from Professor Nicholas Barber. See BARBER, *supra* note 26, at 100.

Finally, and following E. E. Schattschneider's insight that "the outcome of all conflict is determined by the *scope* of its contagion,"²⁸¹ soft formalization can be understood as a strategy of contagion: it may attract to the field of contestation about constitutional norms other players who would not have otherwise been involved with it. Indeed, one explanation often offered for the trend of formalization of constitutional norms in Westminster is that they are geared toward involving courts in the adjudication of constitutional norm-related conflicts.²⁸² More broadly, formalizing constitutional norms in a soft manner may call for greater involvement by lawyers who may claim a privileged position in interpreting the relevant official documents—even if those documents are not hard law. To the extent that courts and lawyers might be allies of constitutional norm anti-preneurs, soft formalization could therefore be perceived as a way of pulling them into the field of contestation.²⁸³

7. *Memory Entrepreneurship*

A final strategy for constitutional norm anti-preneurs worth flagging relates to what a growing literature in international relations has identified as memory entrepreneurs. These kinds of entrepreneurial memory agents operate in various ways to sustain narratives of memory that serve these agents' goals, as if they are self-appointed "missionaries of historical truth."²⁸⁴

Constitutional norm anti-preneurs can embrace similar strategies to enhance the salience of the norms they seek to defend. Such strategies of memory entrepreneurship can help constitutional norm anti-preneurs make sure that constitutional norms that are rarely, or at least irregularly, practiced will remain very much alive in relevant audiences' memories. Moreover, this

281. E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 2 (1960).

282. See, e.g., Blick, *supra* note 278, at 202.

283. This, I believe, is more than possible given how law is, in important respects, retrospective: it ought to address the past and build on it, for example, in its focus on "preexisting" rights and in its increased reliance on doctrines such as *stare decisis*. See generally FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 36–61 (2009). For the locus classicus on this, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

284. See Dovile Budryte, *Traumatic Memory and Its Production in Political Life: A Survey of Approaches and a Case Study* 9 (2013) (unpublished manuscript) (cited with permission from author), https://www.academia.edu/3094290/Traumatic_Memory_and_Its_Production_in_Political_Life_A_Survey_of_Approaches_and_a_Case_Study; see also Elsa Abou Assi, *Collective Memory and Management of the Past: The Entrepreneurs of Civil War Memory in Post-War Lebanon*, 61 INT'L SOC. SCI. J. 399, 401 (2010); ROBYN AUTRY, *DESEGREGATING THE PAST: THE PUBLIC LIFE OF MEMORY IN THE UNITED STATES AND SOUTH AFRICA* 27–65 (2017).

strategy can enhance the existence and livelihood of contemporary norms, even if practiced regularly, by highlighting them even further—so that they can achieve a level of “cognitive hegemony”²⁸⁵—or by minimizing events that might disrupt them.²⁸⁶ For example, Tara Leigh Grove has suggested that part of the reason a norm of compliance with federal court orders has proven robust in the United States is because instances of defying federal court orders have been forgotten and have disappeared from our collective memory in light activities we can understand as memory entrepreneuring (specifically, the way these events have gone unmentioned in relevant legal casebooks).²⁸⁷

* * *

A summary of the various strategies or “rule of adjudication” for constitutional norms discussed in this Part can be captured in the following tables:

Table 2: Constitutional Norm Entrepreneuring

	The Key Work	When Is It Appealing	Examples
Subversive Layering	Adding layers/complexity to present norms rather than directly breaching them	Robust/resilient norms and rule-like norms	Changing the norms against two presidential terms
Parasitical Drift	Leaching to previous norms like parasites and attempting to freeze change	Change in the surrounding of norms without their adaptation is desirable	Resistance to responsible party government, the administrative state, and

285. For the use of this term, see Vermeule, *supra* note 4, at 1190 (emphasis omitted).

286. A strategy memory entrepreneurs can employ is that of “mythologiz[ation],” which is characterized by “[p]reserving the normative underpinnings of an institution by creating and sustaining myths regarding its history.” See Lawrence & Suddaby, *supra* note 233, at 230.

287. See Grove, *supra* note 100, at 531–32; see also Chafetz, *supra* note 15, at 130. I note, however, that memory entrepreneuring is more neutral than that. It may also be of service to norm entrepreneurs. For example, norms’ displacers who seek to resurrect dormant practices may resort to similar strategies to wash away as much as possible the baggage that characterizes the practice in light of its period of dormancy. Professor Grove’s discussion of how the norm that currently allows “jurisdiction stripping” is illustrative. See Grove, *supra* note 100, at 533–38. In addition, when norm entrepreneurs are only able to operate infrequently, memory entrepreneuring can be useful as a way to construct narratives that connect the dots and counter the risk that their actions will be viewed as a “wilderness of single instances.” Jaconelli, *supra* note 54, at 31.

			presidential administration
Opportunistic Conversion	Strategically reinterpreting present norms	Plastic norms/standard-like norms	Presidential administration and the “living Constitution”
Competitive Displacement	Creating competitive norms	Difficulty penetrating the immediate environment of the norm	1. Party selection methods 2. State of the Union transformation 3. “Unfaithful” electors
Insurrectionary Exhaustion	Demonstrating disutility	Benefits of breaching norms exceed its costs	Causing constitutional retrogression

Table 3: Constitutional Norm Anti-Preneuring

	The Key Work	When Is It Appealing	Examples
Counter-layering	Responding with layers that cancel-out or water down the impact of previous layers	In response to subversive layering	Government response to parliamentary encroachment on military prerogative in the U.K.
Politics of Unfreezing	Emphasizing the malleability and radical openness of norms	In response to parasitical drift	Constitutional disobedience in the U.S.
Politics of Fidelity	Calling on fidelity to original function and meaning of norms	In response to opportunistic conversion	Originalism(s) in the U.S.
Sheltering	Like over-protecting parents, preventing exposure to	In response to competitive displacement	Norms at the time of the Prohibition Era

	temptations and information		
Blaming, Demonizing and Valorizing, and Over framing	<ol style="list-style-type: none"> 1. Adhering to present norms while creating convincing narratives of personal blame 2. Exaggerating the consequences of norm-breaking and excessively celebrating present norms 3. Changing level of abstraction through which we perceive norms 	<ol style="list-style-type: none"> 1. In response to insurrectionary exhaustion 2. As preemption against other kinds of norm entrepreneurial strategies 	<ol style="list-style-type: none"> 1. The norm against more than two presidential terms 2. Norms that provide legitimacy to the Supreme Court 3. Norms that provide legitimacy to the Electoral College
Formalization: Hard and Soft	Putting norms in writing, either as hard law or soft law	A general preemptive strategy	<ol style="list-style-type: none"> 1. Norms on the independence of federal criminal proceedings in the U.S. 2. The officialization of norms in the U.S. and Westminster systems
Memory Entrepreneuring	Sustaining strategic memories as “self-appointed missionaries” of historical truth about norms	A general preemptive strategy	Norms regarding respecting federal courts’ orders

IV. CONSTITUTIONAL NORM ANTI-PRENEURING FOR AN AGE OF DEMOCRATIC DECLINE

Part III was neutral in its outlook. Its goal was to flesh out the relevant strategies on which either constitutional norm entrepreneurs or constitutional anti-preneurs can rely to manipulate constitutional norms. Borrowing from H.L.A. Hart, these are akin to constitutional norms’ rules of adjudication.

This neutrality, I believe, has good reasons underlying it. Norms, including constitutional norms, can be either good or bad and can be replaced for good purposes or bad ones, and it would be hard to judge in the abstract which case is which.²⁸⁸ Reasonable minds can also differ.²⁸⁹ This is true as a general matter but also more specifically when the relevant norms we are focusing on are of the kind captured by “meta norms” or that appear as what we would describe in law as an extremely abstract standard.²⁹⁰ As discussed previously, these norms allow various forms and applications—and the spectrum of reasonableness is likely quite wide.

Nonetheless, it is difficult to deny that we live in times in which the pressures on constitutional norms, and particularly the ones related to political fair play, might bring forth consequences such as a more permanent political capture by one political group.²⁹¹ Though it is too early to tell whether this is in fact the case, and whether we truly live in an age of enduring democratic decline or constitutional retrogression,²⁹² the mere risk itself—which in some contexts appears both substantial and credible—merits more elaborate thinking about what a specifically defensive program related to existing constitutional norms might look like.

This is the topic of the present Part. Section IV.A fleshes out one potential defensive program that might be relevant to constitutional norm anti-preneurs who are interested in preserving and safeguarding existing constitutional norms, which we can think of as playing defense. Section IV.B discusses however the relevant limitations of this program and argues that these limitations actually apply in the context of the United States. It then briefly develops an alternative program that could be more relevant for countries such as the United States, namely a more offensive program with regard to norms.

288. Literature in economics and psychology is divided between what Professor Robert Ellickson describes as optimists and pessimists in relation to norms and whether we should think of them as good or bad. See Ellickson, *supra* note 207, at 54–55.

289. My own position is also that there is nothing sacred in norms *qua* norms. For similar views, see Corey Robin, *Democracy Is Norm Erosion*, JACOBIN MAG. (Jan. 29, 2018), <https://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms>; Jedediah Britton-Purdy, *Normcore*, DISSENT (July 2, 2018), <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy>; and for a general discussion see Chafetz & Pozen, *supra* note 2, at 1445–48.

290. See *supra* notes 94–98 and accompanying text.

291. See generally LEVITSKY & ZIBLATT, *supra* note 22; Issacharoff, *supra* note 22.

292. See Graber, Levinson & Tushnet, *supra* note 21, at 6; Lührmann & Lindberg, *supra* note 74, at 1108 (suggesting that while there is some amount of troubling evidence “it is premature to proclaim the ‘end of democracy’ now”).

A. Playing Defense

Constitutional norm anti-preneurs worried about the potential collapse of invaluable constitutional norms that seem essential to the continued resilience of democratic systems, including norms about political fair play and ones that guarantee objective press and civil society, seem desperate for a program of defense.

What would this program look like, though?

Part of the answer certainly lies in what we have seen in Part III about the various tactics constitutional norm anti-preneurs can use in response to norm exhaustion.²⁹³ As mentioned, these strategies may prove successful in maintaining constitutional norms, especially when the norms in question are still relatively resilient. In these situations, the strategies constitutional norm anti-preneurs can use may either arouse enough public resentment or simply shame norm entrepreneurs into disengaging from their entrepreneurial endeavors. By engaging in active demonstration of the utility of norms, including, most importantly, by *continuously and un-relentlessly adhering to them*, constitutional norm anti-preneurs can also resist the temptation that constitutional norm entrepreneurs might want to encourage, according to which the contemporary status of norms is in flux and that a continuing tit-for-tat game in relation to these norms is about to be played, which may ultimately lead to the norms' exhaustion.

These are likely the central and most straightforward components of such defensive program in relation to norms. This doesn't entirely conclude the repertoire of choices for constitutional norm anti-preneurs, however. There is an additional component that we can add, which originates from the world of customary international law, a field that has clear parallels with the kind of constitutional norms this Article focuses on.

Indeed, one of the primary goals of customary international law—which regulates rules of the international community that resemble constitutional norms—can be understood, in the terms used here, as an attempt to contain potential breaches of the relevant rules applicable in this field, which are again quite like informal constitutional norms. The strategy through which customary international law achieves this goal is through creating a language or “logic” for classifying behavior that allows containment.²⁹⁴ For example, in the International Court of Justice (“ICJ”) case on the matter of Nicaragua, it was decided that if a state breaks a rule of customary international law but

293. See *supra* Part III.B.

294. See, e.g., Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 394 (2014) (quoting Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 476 (2012)).

“defends its conduct by appealing to exceptions or justification contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”²⁹⁵

Adopting something like this practice that exists in customary international law may be useful in the context of a more defensive program regarding constitutional norms and as part of a politics of containment that constitutional norm anti-preneurs might want to implement. It suggests a suitable *rhetoric of containment*. More specifically, when constitutional norm anti-preneurs observe what they view as a breach of a relevant norm and attempts at exhausting them, instead of claiming that this may in fact be the case, an alternative option would be to “bite the bullet,” or to “count [in]” the breaches so as to minimize the breach or make it as immaterial as possible, and even confirm it, just like in customary international law.²⁹⁶ If in Part III.B we have seen that norm anti-preneurs might want to over-frame, in the present context of containment for an age of potential democratic decline, an alternative posture of *down-framing* seems relevant as well—as part of a concerted attempt at “reflexive normalization”²⁹⁷ of potential breaches of norms.²⁹⁸

The different rhetorical tools available to achieve this goal are myriad. The language of layering noted in Parts II and III is obviously one option, in the sense that constitutional norm anti-preneurs can announce breaches to be just layers—new rules or exceptions rather than the undermining of the norm. In some cases, constitutional norm anti-preneurs can further downplay the behavior of the breach by suggesting that despite appearances, the behavior that seems to be breaching the norm does not speak to the norm’s general validity but only to the norm’s specific application,²⁹⁹ or, in a similar vein, they can say that the breach was a permissible, though exceptional,

295. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 186 (June 27).

296. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 866, 871 (1998) (referring to John Searle’s idea of trying to create understandings that make a certain behavior “counts as” belonging to certain categories rather than not belonging to them as a strategy for sustaining norms (emphasis omitted)); see generally JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

297. Jaco Lok & Mark de Rond, *On the Plasticity of Institutions: Containing and Restoring Practice Breakdowns at the Cambridge University Boat Club*, 56 ACAD. MGMT. J. 185, 186 (2013).

298. Another way to understand this sort of strategy is as sophisticated naiveté, see ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 37 (2011); or strategic Panglossianism, see Frederick Schauer, *Rights, Constitutions, and the Perils of Panglossianism*, 38 OXFORD J. LEGAL STUD. 635, 644 (2018).

299. See Nicole Deitelhoff & Lisbeth Zimmermann, *Things We Lost in the Fire: How Different Types of Contestation Affect the Validity of International Norms* 1 (Peace Rsch. Inst. Frankfurt, Working Paper No. 18, 2013), https://www.files.ethz.ch/isn/175046/PRIF_WP_18.pdf.

override.³⁰⁰ Finally, constitutional norm antipreneurs wishing to engage in rhetoric of containment may suggest, specifically during times that the breach of norms does seem salient and cannot be easily downplayed, that the breach's effects have only temporarily *downgraded* the norm—from what Andrew Heard calls a “meso-level” norm to an “infra-level” norm.³⁰¹

B. Playing Offense

What conditions make this program attractive or feasible, however? When should constitutional norm antipreneurs play defense in this way?

Two conditions seem particularly important.³⁰² The first is that the constitutional norm entrepreneurs who engage in norm breaking possess—at the relevant timing—some incentive to be restrained, to belong in other words to the “[g]ood people”³⁰³ who maintain the current existing norms.³⁰⁴ After all, only in these circumstances is there a point to applying rhetoric that,

300. This is, I believe, the broad import from Pozen, *supra* note 99, at 76–80.

301. See ANDREW HEARD, CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW & POLITICS 150 (1989) (discussing “[m]eso-conventions” and “[i]nfra-conventions”). For an application of this idea, see Barry et al., *supra* note 102, at 671–72. In addition, sometimes it may be best to ignore the alleged breach altogether. See, e.g., Joan Donovan & Danah Boyd, *The Case for Quarantining Extremist Ideas*, GUARDIAN (June 1, 2018), <https://www.theguardian.com/commentisfree/2018/jun/01/extremist-ideas-media-coverage-kkk>. For discussion of “prudential silence[]” in the context of judging, see VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 192–94 (2010); Richard H. Fallon, Jr., *Judicial Legitimacy and the Unwritten Constitution: A Comment on Miranda and Dickerson*, 45 N.Y.L. SCH. L. REV. 119, 139 (2000).

302. The text mentions the two most important conditions for the efficacy of the program, but I note briefly another one here, which relates to how the analogy to customary international law is imperfect in the context at hand. After all, in customary international law, some relevant institutions address the issue of breaches, which the context of norms is generally lacking. There is a relatively powerful community of international lawyers uniquely devoted to the issue of containment of international law norms, which again will be lacking in regard to the norms that regulate our constitutional and normal politics (or at least is currently lacking or is only in “building-up” stage). Finally, in international law, the rhetoric used for containment is more cohesive and determined, and henceforth its signaling effect is more easily served. It is doubtful that such level could be achieved in the more diffuse political world.

303. James D. Fearon, *What Is Identity (As We Now Use the Word)?* 27 (1999) (unpublished manuscript), <https://web.stanford.edu/group/fearon-research/cgi-bin/wordpress/wp-content/uploads/2013/10/What-is-Identity-as-we-now-use-the-word-.pdf>; see also POSNER, *supra* note 1, at 18–21 (discussing how adherence to norms is significantly influenced by the need to illustrate one’s belonging to the “good type” rather than to the “bad type”).

304. This is true even if that need is purely strategic. In some scholarship, this is described as “rhetorical entrapment.” See Frank Schimmelfennig, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, 55 INT’L ORG. 47, 66 (2001). In another strand of scholarship, this is more familiar as the “civilizing force of hypocrisy.” See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 349 (2000) (emphasis omitted).

as in customary international law, would classify perceived breaches as non-existential.

Second, even if the relevant constitutional norm entrepreneurs do not have such an incentive, a politics of containment in the ways previously described might still be attractive if the constitutional norm anti-preneurs are disadvantaged compared with the position of their constitutional norm entrepreneurs adversaries, or if the consequences of losing the fight are potentially extraordinarily harmful, such as a transition of the political regime into some version of authoritarianism (what the literature now calls constitutional retrogression or democratic decline).

Perhaps there are some, even many, jurisdictions in the world where these conditions seem to hold.³⁰⁵ It is doubtful, however, that the United States is one of those jurisdictions.

Currently, both sides of the political divide that characterizes contemporary constitutional politics in the United States, represented by the Republican and the Democratic Parties, have no particular incentive to engage in restraint. And moreover, it is unclear whether restraint is at all advisable. Though it may well be that the United States currently faces a period of political regime transition, and some believe that there are risks that at the end of this transition, the United States will retrogress into a regime outside the project of liberal constitutionalism,³⁰⁶ at this point, the likelihood that something like this will transpire still seems quite slim.³⁰⁷ More specifically, it appears that what the United States is experiencing is similar in nature to the situation described in Part I of the Article, wherein political regime transitions ultimately retain important democratic process norms (what we can call perhaps an intra-liberal political transition).³⁰⁸

To that we should add that the various visions fighting for dominance within this transition—the vision pursued by the Republican Party and the Democratic Party—though not entirely cohesive and fixed at this point, seem to be sharply oppositional. Each party furthermore views the other side's vision as completely repellent. Levels of polarization also seem so high that the two parties are unable to even agree on what the applicable relevant constitutional norms are and what they dictate.³⁰⁹

305. South Korea is a potential case on point. *See, e.g.*, Gi-Wook Shin & Rennie J. Moon, *South Korea After Impeachment*, 28 DEMOCRACY 117 (2017).

306. *See* Huq & Ginsburg, *supra* note 19, at 163–65.

307. For a collection of essays that are mostly skeptical of the prospect of constitutional retrogression in the United States, see CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).

308. *See supra* Part I.D.

309. *See* Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481, 484–86 (2018).

Given these features of the contemporary constitutional regime in the United States, and because the battle is at a point at which it is not yet clear who holds the upper hand, it is not at all obvious why playing defense in the ways previously described is the right course of action. Playing defense in this way by the one side that is potentially more poised for restraining itself³¹⁰ seems like unjustified “unilateral disarmament.”³¹¹ The case for a defensive play seems furthermore based on a too static perspective of politics. Though it may be true that in the current composition of political parties in the United States, the likelihood of continual cycles of “tit-for-tat”—and the ultimate exhaustion of valuable norms—seem plausible,³¹² it is also possible that changes pursued by norm-shattering behavior may alter those compositions, in ways that complicate the endless tit-for-tat account.

As a result, a more appropriate response in the circumstances that exist in the United States is exactly the opposite: to play offense, not defense. In other words, to engage in active breaking of norms in response to the norm-breaking of the other side.

Of course, following this offensive path has obvious risks, and the stakes are also quite high. As a result, it makes sense to ask whether there is anything to do to minimize the risks associated with norm-shattering behavior?

The answer seems to be not much but perhaps something. In the usual state of affairs, when intra-liberal political transitions occur, there are sufficient incentives after the stabilization of the new political regime to revert to valuable norms related to political fair play and other process norms.³¹³ But it might be advisable to consider ways to strengthen that tendency and supplement whatever existing incentives the end-of-regime transitions might create.

In the context of constitutional emergencies, we are familiar with the concerns revolving a ratchet effect.³¹⁴ In the world of transitional justice, though the dominant framework usually warns that “[t]hose who cannot remember the past are condemned to repeat it”³¹⁵ and the oft-adopted slogan is accordingly “forgive but do not forget,” some voices insist on a different

310. See generally Fishkin & Pozen, *supra* note 16.

311. See Michael Klarman, *Why Democrats Should Pack the Court*, TAKE CARE (Oct. 15, 2018), <https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court>; Tushnet, *supra* note 265.

312. See Siegel, *supra* note 15, at 209; Feldman, *supra* note 198.

313. See generally Weingast *supra* note 85.

314. See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 44 (2006).

315. See GEORGE SANTAYANA, REASON IN COMMON SENSE: THE LIFE OF REASON 284 (1905); see also Barry Friedman, “Things Forgotten” in the Debate Over Judicial Independence, 14 GA. ST. U. L. REV. 737, 737 (1998).

stance. These alternative voices emphasize the virtue not of remembering but of forgetting so a promising “fresh start” can be made.³¹⁶ Borrowing from these ideas, we may therefore understand our contemporary projects in countries such as the United States as ones involving avoiding ratcheting down (as in constitutional emergencies), preemptively forgetting (as in transitional justice), or—more congenial to the terms used in Part III—engaging in preemptive memory entrepreneuring whose goals is to decrease the likelihood that current behaviors will guide future behavior and serve as relevant political precedents *even after the period of political transition will end*.

To be sure, achieving this preemptive forgetting in expectation of the future and the end of transition time is a complex task. It will require using appropriate rhetoric and narratives that will allow a schizophrenic reality of norm-shattering behavior but that will simultaneously negate that behavior (by, for instance, suggesting that “[t]his is not [us]”).³¹⁷ It is an act of “strategic forgetting.”³¹⁸

Though complicated,³¹⁹ this seems, as of now, like the task ahead both in the contemporary United States and in other countries currently facing similar types of political transitions.

* * *

The conclusions from this Part can be summarized as follows:

316. See NELSON MANDELA, *THE STRUGGLE IS MY LIFE* 210 (1978) (describing reconciliation as a goal to be achieved “where the injustices and grievances of the past would be buried and forgotten, and a fresh start made”); see also DAVID RIEFF, *IN PRAISE OF FORGETTING: HISTORICAL MEMORY AND ITS IRONIES* (2017). It should be noted that later in his life, Nelson Mandela seems to have retreated from this early view about the desirability of forgiveness accompanied by forgiveness. See <https://www.theguardian.com/world/1999/jul/03/guardianreview.books7>.

317. See, e.g., Stephen Collinson & Caitlin Hu, *This Is Not America*, CNNWORLD (Jan. 7, 2021), <https://www.cnn.com/2021/01/07/world/meanwhile-in-america-january-7-intl/index.html>. For an example of such use in the specific context of constitutional norms, see Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal/> (criticizing a suggestion for expanding and appointing lower court judges to eradicate the legacy of President Obama’s judicial appointments as reminiscent of a deeply unattractive political past). Compare David A. Super, *A Hiatus in Soft Power Administrative Law: The Case of Medicaid Eligibility Waivers*, 65 UCLA L. REV. 1590, 1590 (2018) (framing the present moment as “hiatus in consensus for good-faith decisionmaking”).

318. See Pablo Martin de Holan & Nelson Phillips, *Organizational Forgetting as Strategy*, 2 STRATEGIC ORG. 423, 430 (2004); Pablo Martin de Holan & Nelson Phillips, *Remembrance of Things Past? The Dynamics of Organizational Forgetting*, 50 MGMT. SCI. 1603 (2014).

319. In addition to the sources cited in note 315, an illuminating discussion and application of psychoanalysis to constitutionalism, on which such an attempt—as my use of the term “negation” suggests—could draw, see MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* (2010).

Table 4: Two Strategies for Defending Norms in Times of Constitutional Retrogression

	The Key Work	When Is It Appealing
Playing Defense	1. Adhering to present norms 2. Rhetoric of containment—biting the bullet and trying to “count-in” norm breaches	1. Incentives for restraint 2. Risks of constitutional retrogression are high
Playing Offense	Actively breaking norms (and, as a precaution, to accompany the breaking with denial that breaking instances are precedential, including “this is not us” rhetoric)	1. No incentives for restraint (or asymmetrical incentives) 2. Risks of constitutional retrogression are low (intra-liberal transitions)

CONCLUSION: MATURE LAW AS PRIMITIVE LAW?

My goal in this Article was to demonstrate that constitutional norms, despite being what we may describe, following H.L.A. Hart, as primitive components of our political systems, can mature or grow up, in the sense that we can better understand how they change and how they are adjudicated in politics. As the various Parts of this Article detailed, constitutional norms—when fully crystalized—will likely not burst like bubbles but rather gradually evolve to either become different or to disappear entirely. The process of constitutional norms’ evolution can also be theorized more crisply by identifying five distinct mechanisms that cause norms to change: layering, drift, conversion, displacement, and exhaustion. These are what this Article described as rules of change for norms.

The Article also emphasized the pragmatic value of the discussion by outlining the strategies that *constitutional norm entrepreneurs* and *constitutional norm anti-preneurs* can use to change present norms or safeguard them. These are what this Article described as constitutional norms’ rules of adjudication. Finally, given the current moment we live in in which some valuable constitutional norms appear especially fragile and highlight the potential risks of democratic decline or constitutional retrogression, the Article outlined two different strategies of defending norms—playing defense and playing offense. And it argued that at least as

things stand today, the latter strategy is likely more appropriate for the United States .

The discussion in the Article has focused squarely on constitutional norms (and in several respects on norms more generally) as informal institutions within our politics. At this point, though, it seems worth noting briefly that the discussion can also illuminate some important features of *the formal institution of law*.

From one perspective, this is not surprising, even obvious. The mechanisms of change I relied on in this Article originate from scholarship that addresses formal institutions. It is therefore clear why these mechanisms are easily exportable to law as one type of formal institution. Accordingly, much as norms can be changed through layering, conversion, drift, displacement, and exhaustion, so too can formal laws change in this way.³²⁰

From a different perspective, however, the implications of this Article's framework for formal, standard law run deeper than what first meets the eye. Any formal institution inevitably contains informal features that supplement and interact with its formal components. The various norms that regulate our constitutional politics, and that are the focus of this Article, continue to operate alongside formal law. But this does not exhaust the entire spectrum of relevant norms. Some informal norms regulate our constitutional politics. But some norms *regulate the institutions of formal law themselves*. And as much as the framework developed in this Article applies to the former, so too does it apply to the latter.

An easy example of this is *stare decisis*. More than anything, *stare decisis* seems like an informal norm about how judges in top courts in common law systems should treat prior rulings with respect and constraint.³²¹ In the United States, and at the level of the Supreme Court, many believe that

320. The primary import of this is that formal law does not only change in direct ways, such as when a piece of legislation is repealed or a precedent overruled. Formal law can change, certainly in a *de facto* sense, in the various ways that the evolutionary mechanisms of institutional change point to: by layering the statute with additional provisions (or by creating exceptions to the judicial precedent), by reinterpreting and repurposing the relevant statute (or precedents), and so forth. We have seen this in the examples of the Sherman Act and the FOIA framework discussed in Part II *supra*. Another relevant import is that lawmakers or judges who are unhappy about the prospect of change in this way need not remain passive. They can instead engage in all the practices that norm anti-preneurs can use and that are described in Part IV, including counter-layering, politics of fidelity, politics of unfreezing, demonizing and valorizing, and so forth. In my view, this explains much of what occurs today in the judicial "attack" on the administrative state—where the judiciary seems to be working through subversive layering to change the body of law that supports the existing administrative state and those who resist that attempt engage in many of the tactics norm anti-preneurs utilize. *See generally* Metzger, *supra* note 218.

321. *See, e.g.*, Young, *supra* note 56, at 565. I deal with this issue in a separate piece. *See generally* Oren Tamir, *Political Stare Decisis*, 22 CHI. J. INT'L. L. (forthcoming, 2021) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3712418.

the norm of stare decisis has become extremely weak and is on the verge of impotence.³²² The framework fleshed out here can accordingly help explain why and how this happened. What it illustrates is that the norm of stare decisis has been consistently *exhausted* given that judges have continually disregarded it and proved its disutility, essentially demonstrating that they are willing to disregard past rulings and pursue the substantive results they deem more attractive rather than be constrained. Alternatively, the norm of stare decisis experienced at the Supreme Court level a significant, perhaps overwhelming, process of *layering*—the accumulation of exceptions upon exceptions. That layering has ultimately transformed stare decisis from a norm about respecting precedents to one that limits judges from overriding past decisions too frequently—or, more cynically, to nothing more than rhetoric rather than genuine constraint.

But even this specific example does not yet capture the full story about the Article’s potential to tell us valuable things about formal, ordinary law. The reason is that informal norms affect formal legal decision-making in even more subtle and meaningful ways. First, the practices of legal argumentation are themselves importantly regulated by norms, those second-order norms that apply broadly in the legal profession.³²³ Second, norms always stand in the background of the various substantive fields of law and provide specific lenses or paradigms, or constitute a relevant gestalt, that determine the scope of permissible contestation in those fields.³²⁴ In that sense, understanding how norms change, develop, and are “adjudicated” has a much wider import. Doing so can provide us the tools to appreciate how formal law itself really is changed in a deeper sense, including how issues that had been perceived as “off the wall” began to look as if they are “on the

322. Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 143 (2018).

323. See, e.g., Dan M. Kahan, *The Supreme Court 2010 Term—Foreword, Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27 (2011) (“Judges and lawyers subscribe to an elaborate network of craft norms. Acquired through professional training and experience, these norms generate a high degree of convergence . . . on what counts as appropriate decisionmaking.”); RICHARD H. FALLON, *LAW AND LEGITIMACY IN THE SUPREME COURT* 88 (2018) (“American constitutional law is a practice in this sense, constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practices.”); Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1957 (2008) (“[T]he recognition and non-recognition of law and legal sources is better understood as a *practice* in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law.”).

324. See Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 3 (2013).

wall”³²⁵ and how more fundamental shifts in legal regimes are achieved. In a nutshell, very much like other norms, these norms that apply in law also change not only given the merits of the claims individual players are pursuing through the law, but also through the working of the various mechanisms of layering, drift, conversion, displacement, and exhaustion *within* the institutions of formal law and through the sophisticated play of norm entrepreneurs and anti-preneurs.

H.L.A. Hart, whose name has constantly appeared throughout this Article, famously argued that at its basis, law is just a set of what we now understand as informal norms that legal officials have internalized—and that serve, in his terminology, as the “ultimate rule of recognition.”³²⁶ If Hart was right—and perhaps ironically—making primitive law less primitive in the various ways I have suggested in this Article, may very well be the key to unlocking much of mature, formal law.

325. See Jack Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

326. See HART, *supra* note 25, at 89–91. For a clarifying discussion of Hart’s thought on this point, see Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT’L L.J. 523 (2013).