U.C.L.A. Law Review

How Constitutional Norms Break Down

Josh Chafetz & David E. Pozen

ABSTRACT

From the moment Donald Trump was elected president, critics have anguished over a breakdown in constitutional norms. History demonstrates, however, that constitutional norms are perpetually in flux. The principal source of instability is not that these unwritten rules can be *destroyed* by politicians who deny their legitimacy, their validity, or their value. Rather, the principal source of instability is that constitutional norms can be *decomposed*—dynamically interpreted and applied in ways that are held out as compliant but end up limiting their capacity to constrain the conduct of government officials.

This Article calls attention to that latent instability and, in so doing, begins to taxonomize and theorize the structure of constitutional norm change. We explore some of the different modes in which unwritten norms break down in our constitutional system and the different dangers and opportunities associated with each. Moreover, we argue that under certain plausible conditions, it will be more worrisome when norms are subtly revised than when they are openly flouted. This somewhat paradoxical argument suggests that many commentators have been misjudging our current moment: President Trump's flagrant defiance of norms may not be as big a threat to our constitutional democracy as the more complex deterioration of norms underway in other institutions.

AUTHORS

Josh Chafetz is a Professor of Law at Cornell Law School. David Pozen is a Professor of Law at Columbia Law School.

This Article was prepared for the UCLA Law Review's February 2018 symposium on *The Safeguards of Our Constitutional Republic* and was also presented at a Duke Law School roundtable on "Constitutional Conventions in the United States and Commonwealth Countries." For helpful comments, we are grateful to the participants in those events and to Jessica Bulman-Pozen, Mike Dorf, Jeremy Kessler, Mike Klarman, Marty Lederman, Kelly Miller, Catherine Roach, and Fred Schauer.



TABLE OF CONTENTS

Introduction 1432
I. Breaking Down Norm Breakdown: Destruction, Decomposition, and Displacement 1435
II. Breaking Down Norm Breakdown: Axes of Instability 1438
III. Some Normative Implications of Norm Instability 1445
IV. Reassessing Threats to Constitutional Norms in the Age of Trump 1450
Conclusion 1458

INTRODUCTION

From the moment Donald Trump was elected president, critics have anguished over a breakdown in constitutional norms. Commentators of all stripes agree that "Trump's flouting of norms . . . has become a defining feature of his presidency,"[1] perhaps even its "most consequential aspect."[2] New watchdog groups[3] and media projects[4] have been established to highlight the importance of unwritten rules and conventions for democratic governance, and to monitor breaches. "Suddenly," a *New Yorker* column remarks, "all we hear about is 'norms'— . . . norms violated, norms overthrown, norms thrown back in the faces of their normalcy. Not since 'Cheers' went off the air, back in the nineties, have we heard so much about Norms."[5]

Concerns about a breakdown in constitutional norms long predate the Trump presidency, however. Allegations of norm violations were a staple of the Franklin Roosevelt[6] and Richard Nixon[7] administrations, for example, and

1. Emily Bazelon, *How Do We Contend With Trump's Defiance of 'Norms'?*, N.Y. TIMES MAG. (July 11, 2017), http://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html; *see also, e.g.*, Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Sept. 12, 2017), http://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921 [https://perma.cc/H4EV-9KRK] ("Donald Trump is a norm-busting president without parallel in American history.").
2. Michael Grunwald, *Donald Trump Is a Consequential President. Just Not in the Ways You Think.*, POLITICO (Dec. 30, 2017), http://www.politico.com/magazine/story/2017/12/30/rating-donald-trump-year-one-2017-216199 [https://perma.cc/DAZ6-XX8Y] ("The most consequential aspect of President Trump—like the most consequential aspect of Candidate Trump—has been his relentless shattering of norms . . . ."); *see also, e.g.*, Matthew Cooper, *Joe Biden Says Donald Trump Has Trashed 'Norms' and Made the World More Dangerous*, NEWSWEEK (Oct. 17, 2017, 4:00 PM), http://www.newsweek.com/biden-says-trump-doesnt-understand-governing-687185 [https://perma.cc/4XL8-F9GP] ("Biden argued that Trump's 'breaking down of norms' of civility is more dangerous than any particular policy position . . . .").
3. *See, e.g.*, BRIGHT LINE WATCH, http://brightlinewatch.org [https://perma.cc/Y4U9-9N3U].
4. *See, e.g.*, Katerina Wright, *Norms Watch: Tracking Team Trump's Breaches of Democratic Traditions*, JUST SECURITY (Jan. 13, 2017), http://www.justsecurity.org/36303/normalization-watch [https://perma.cc/6ZR8-MQUX].
5. Adam Gopnik, *Norms and Cliffs in Trump's America*, NEW YORKER (Aug. 3, 2017), http://www.newyorker.com/news/daily-comment/norms-and-cliffs-in-trumps-america [https://perma.cc/KF7S-ZVB8]. For any readers mystified by the *Cheers* reference, see *Norm Peterson*, WIKIPEDIA, http://en.wikipedia.org/wiki/Norm_Peterson [https://perma.cc/3SM4-MJ6N].
6. *See* Julia Azari, *This President Bucked Norms and Fought His Own Party. He Wasn't Named Trump.*, FIVETHIRTYEIGHT (Nov. 30, 2017), http://fivethirtyeight.com/features/

more recently of the so-called Gingrich Revolution in the House of Representatives.[8] Allegations of congressional norm violations have only intensified since the 1990s, especially from the left, as levels of polarization have increased and members of both parties have resorted repeatedly to constitutional hardball.[9] By the middle of the Obama presidency, these uncooperative dynamics had generated "a widespread fear that the breakdown of certain separation-of-powers conventions [was] contributing to a breakdown of our system of representative government."[10] If Americans "periodically (re)discover that U.S. constitutional law is heavily based on conventions or unwritten political norms,"[11] they likewise periodically rediscover that some of those norms are subject to radical revision.

Following Philip Pettit, we can define informal norms as "regularities of behavior in a society" that do not have the status of law but that, "as a matter of shared awareness, most members conform to . . . , most expect others to approve of conformity or disapprove of non-conformity, and most are reinforced in this pattern of behavior by that expectation."[12] We can then define informal constitutional norms (hereafter *constitutional norms*) as that subset of informal norms that regulates the public behavior of actors who

this-president-bucked-norms-and-fought-his-own-party-he-wasnt-named-trump [https://perma.cc/9TC4-8WDK].

7. *See, e.g.*, Mark P. Lagon & Ross Harrison, *As Disrupter in Chief, Trump Is No Nixon*, FOREIGN POL'Y (Jan. 18, 2017, 6:50 PM), http://foreignpolicy.com/2017/01/18/as-disrupter-in-chief-trump-is-no-nixon [https://perma.cc/FZ6F-AJHX]; Julian E. Zelizer, *What Is Really Unprecedented About Trump?*, ATLANTIC (Oct. 27, 2017), http://www.theatlantic.com/politics/archive/2017/10/what-is-really-unprecedented-about-trump/544179 [https://perma.cc/W69N-JPYA].
8. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 31–43 (2012) (reviewing Newt Gingrich's controversial tactics as Speaker of the House from 1995 to 1999).
9. *See generally* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).
10. David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 41 (2014); *cf.* E.J. DIONNE, JR. ET AL., ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND THE NOT-YET DEPORTED 69–70 (2017) (arguing that "Trumpism has long been in gestation," as the Republican Party "has been undercutting the norms of American politics for decades").
11. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013).
12. PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 128 (2012); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) ("Roughly speaking, by *norms* [the legal] literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.").

wield high-level governmental authority, thereby guiding and constraining how these actors "exercise political discretion."[13] Many such norms overlap with what Commonwealth theorists refer to as constitutional conventions, or the "'unwritten norms of government practice' that emerge in a decentralized fashion and 'are regularly followed out of a sense of obligation but are not directly enforceable in court.'"[14] Given that all norms, by definition, enjoy a wide measure of approval within the relevant community and that constitutional conventions are widely believed to "vindicate basic purposes of the constitutional system,"[15] the prospect of constitutional norms becoming destabilized is understandably concerning.

Yet as history demonstrates, constitutional norms are perpetually in flux.[16] The principal source of instability is not that they can be disregarded or denigrated by politicians who deny their legitimacy, their validity, or their value—although these things do sometimes happen. Rather, the principal source of instability is that constitutional norms can be dynamically interpreted in a more or less restrictive manner, and at higher or lower levels of generality, and the potential for such reinterpretation puts ongoing pressure on the integrity of the norms and their capacity to constrain the conduct of government officials.

This Article calls attention to that latent instability and, in so doing, begins to taxonomize and theorize the structure of constitutional norm change. We explore some of the different modes in which unwritten norms break down (or

13. Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1860. Although capacious, this definition does not collapse constitutional norms into political norms, as the public behavior of high-level government officials is just one aspect of politics.

14. Fishkin & Pozen, *supra* note 9, at 921 (quoting David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 930 (2016)). Constitutional norms as we define them may be a broader category than constitutional conventions, in that the latter are sometimes said to regulate dealings within and among government institutions, *see, e.g.*, Jon Elster, Unwritten Constitutional Norms 21 (undated) (unpublished manuscript) [https://perma.cc/YPN8-764G], whereas the former are not necessarily limited to intragovernmental interactions. For purposes of our analysis, nothing important hangs on the distinction (to the extent it exists) between constitutional norms and constitutional conventions.

15. Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 190 (2018). For an insightful account of the functional roles that informal norms play in the American political system, see Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37 (2012).

16. This observation is not necessarily limited to constitutional, or even explicitly political, norms. Consider, for instance, the ways in which norms of polite conversation or appropriate attire change continually over time.

solidify) in our constitutional system and the different dangers and opportunities associated with each. Moreover, we argue that under certain plausible conditions, it will be more worrisome when norms are subtly revised than when they are openly flouted. This somewhat paradoxical argument suggests that many commentators have been misjudging our current moment: President Trump's flagrant defiance of norms may not be as big a threat to our constitutional democracy as the more complex, and longer-running, deterioration of norms underway in other political institutions.

I. BREAKING DOWN NORM BREAKDOWN: DESTRUCTION, DECOMPOSITION, AND DISPLACEMENT

The language of norms "breaking down" masks a great deal of complexity. As a first cut at refining our conversations on the subject, we can distinguish among three basic ways norms change over time: when they are *destroyed*, when they are *decomposed*, and when they are *displaced*.

Norm destruction occurs when a norm is flouted or repudiated and, in consequence, ceases to exist, at least for a while. A classic example from American history involves President Franklin Roosevelt's disregard of the traditional prohibition, dating back to George Washington, against presidents serving more than two terms.[17] By Roosevelt's third and then fourth term in office, this highly salient constitutional norm appeared to have become a relic.

Norm decomposition occurs when a norm is interpreted or applied in ways that are held out as compliant but that, over time, substantially alter or reduce whatever regulative force the norm previously possessed. Daphna Renan, for instance, contends that within the executive branch, a commitment to "OLC supremacy"—according to which the Department of Justice (DOJ) Office of Legal Counsel (OLC) authoritatively resolves legal questions through written opinions—has been overtaken in the past decade by a "porous" set of practices that rely much less on OLC and much more on informal, interagency working groups.[18] No one ever made an explicit decision to jettison the old method of resolving legal questions. Yet as a growing number of White House and agency actions progressively shrank the sphere in which OLC exercises

17. *See* Whittington, *supra* note 13, at 1867–68 ("More than just an observed historical pattern, the departure of even popular presidents after a second term of office was taken to be normatively obligatory, central to the maintenance of the U.S. constitutional project.").

18. Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 815–48 (2017); *see also id.* at 809 ("While the myth of a supreme OLC dispensing formal legal opinions persists, the reality is a less insulated, more diffuse, and more informal set of institutional arrangements.").

binding authority, the relatively strict norm of OLC supremacy transformed, on Renan's account, into a relatively spongy norm of interagency deliberativeness.

Norm destruction and norm decomposition are not strictly separate categories, but rather sit toward either end of a continuum of norm change. In an ideal-typical case of norm destruction, the preexisting pattern of behavior is openly and flagrantly renounced and never again restored. In an ideal-typical case of norm decomposition, the preexisting pattern of behavior is incrementally and imperceptibly tweaked until, at some point far down the line, the aggregation of all those tweaks yields a new normative pattern, one that informed observers would agree is a departure from the status quo ante. Most cases of norm change fall well between these poles. It is worth recalling in this regard that in the decades before President Roosevelt blew through the norm of the two-term presidency, the norm itself was becoming "increasingly murky" as new questions arose concerning nonconsecutive terms and partial terms of office.[19] An extreme case of norm destruction was preceded by a much more ambiguous process of norm decomposition. Moreover, as the next Part explains, there are multiple aspects of any given norm that may be contested at any given time and thus multiple dimensions to the destruction-decomposition continuum. We term these dimensions *axes of instability*. Although certain norms may be relatively stable over long stretches—and may even be internalized to the point that no one contemplates defying them[20]—the potential for endogenous change always exists and, for many norms at many junctures, is activated to some degree. Norms are constantly being composed, decomposed, and recomposed in our constitutional system.

Informal norms may also lose force not because they are destroyed or decomposed, but because they are displaced by law. The norm of the two-term

19. Whittington, *supra* note 13, at 1868. Even after President Roosevelt successfully ran for a third term in 1940, some may have wondered whether the two-term norm was not "dead forever," as his general election opponent insisted, *see* MICHAEL J. KORZI, PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES, AND POLITICS 93 (2011) (quoting Wendell Willkie), but rather deemed "inapplicable in times of economic stress and with rumours of war abroad." Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 33 (1999). If this alternative understanding had taken hold, then Roosevelt would not have fully destroyed the norm so much as severely decomposed it by establishing a broad exception. That is to say, if people from across the political spectrum tend to characterize Roosevelt's third election as norm destructive, this is not because it is the only possible way to characterize the historical data, but because we have come to a relatively high degree of consensus about the nature and significance of Roosevelt's behavior vis-à-vis the behaviors of prior presidents.

20. *See* Pozen, *supra* note 10, at 69–70; Vermeule, *supra* note 11, at 1190–91.

presidency again supplies an example, as President Roosevelt's breach of the norm led in short order to its codification in the Twenty-Second Amendment.[21] Additionally, institutions sometimes choose to displace their own norms. In the early 1970s, at the height of the executive branch's credibility gap and President Nixon's conflicts with the press, DOJ issued guidelines clarifying and formalizing its practice of limiting the number of subpoenas issued to journalists.[22] As these examples reflect, when norms are converted by judges, legislators, regulators, or constitutional amenders into legally binding directives, it is often in response to a perceived or feared breakdown.[23]

Table 1. Modes of Norm Change

Mode	Example
Destruction	Two-term presidency → Roosevelt's third and fourth terms
Decomposition	OLC supremacy → porous legalism
Displacement by law	Prosecutorial restraint → DOJ media subpoena guidelines

If it seems odd to think that constitutional norms are constantly evolving and devolving, the basic idea can be analogized to the well-known phenomenon of rules-standards convergence. Legal rules are designed by their

21. *See* U.S. CONST. amend. XXII, § 1 ("No person shall be elected to the office of the President more than twice . . . .").

22. *See* David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 538 (2013) (discussing the development of DOJ's media subpoena guidelines, now codified at 28 C.F.R. § 50.10 (2017)). This might be understood as an example of executive self-binding to stave off more stringent measures by other actors, such as legislatures or courts. *See id.* at 539 n.142, 573–77 (suggesting this interpretation); *cf.* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 895–96 (2011) (considering motivations for and types of "executive self-constraints").

23. *See, e.g.*, Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1963 (2016) ("[T]he increasing breakdown of intragovernmental conventions of reciprocal cooperation between the parties . . . has brought about the explicit legalization and juridification of a number of executive-power questions that were previously within the domain of convention.").

drafters to be clear and precise; legal standards are designed by their drafters to be open ended and context sensitive. Yet in practice, as many scholars have noted, "these regulatory strategies gradually bleed into one another, as rules become riddled with qualifications and exceptions that reduce their clarity and standards become concretized through interpretations and understandings that reduce their flexibility."[24] So, too, can what were once crystalline informal norms ("Always consult OLC!") decompose into muddier formulations ("Consult OLC when feasible" or "Seek advice from some legal office"), and vice versa. The analogy is imperfect, though. Because most legal directives are promulgated through a formal process and then subject to interpretation within an established judicial hierarchy, there is often a canonical statement of a directive at its origin and a subsequent body of written precedent that can be consulted to assess whether the directive has become more rule-like or standard-like.

Informal norms, in contrast, generally arise as "the unplanned, unexpected result of . . . interactions,"[25] and they may never be reduced to writing or brought before a body with acknowledged interpretive primacy. It therefore can be quite difficult to pin down what a norm prescribes or proscribes, beyond some core set of behaviors and expectations, or to determine how its current contours map onto those of prior iterations. Constitutional norms plainly do become more or less constraining over time as new actors apply them in new circumstances; like Renan has done in her study of OLC,[26] we can trace their decomposition and recomposition, as well as sometimes their destruction. But as compared to judicially enforced constitutional commands, their informality may make it harder to assess when a breakdown has occurred and to what extent.

II. BREAKING DOWN NORM BREAKDOWN: AXES OF INSTABILITY

We have suggested that constitutional norms are dynamic in nature and that norm decomposition is a pervasive phenomenon.[27] In more and less subtle

24. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1869 (2016). *See generally* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

25. Cristina Bicchieri & Ryan Muldoon, *Social Norms*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/social-norms (last visited Aug. 30, 2018).

26. *See supra* note 18 and accompanying text.

27. Again, although this Article concerns constitutional norms, the basic point generalizes beyond the constitutional context. For the suggestion that U.S. administrative law norms

ways, government officials are constantly reformulating, reinterpreting, and renegotiating their relationships with one another and with nongovernmental actors and institutions. Outright norm destruction, on the other hand, appears to be a significantly rarer phenomenon. As evidence of this, consider how frequently discussions of norm destruction in American constitutional politics turn to the same one example noted above: Roosevelt's election to a third presidential term.[28]

These two phenomena—the relative paucity of clear instances of norm destruction and the relative ubiquity of norm decomposition—are deeply related. If constitutional norms are constantly in flux and if perceived breaches trigger disapproval, as well as other possible sanctions,[29] rational politicians will generally seek to describe their own strategic behavior as consistent with prior practice. By the same token, their opponents will seek to describe that behavior as unprecedented. And because both sets of claims rest on "particular, contestable constructions of the past,"[30] both may be plausible. Unambiguous cases of constitutional norm destruction are so rare, then, not only because of the pressures on government officials to comply with norms and to be seen to comply, but also because all judgments about norm following and norm violating are subject to such interpretive contestation (again, usually in the absence of an authoritative adjudicator). The best one can do in making the case for a "breakdown" is to try to offer a persuasive account of how contemporary patterns of behavior deviate from a larger historical pattern in which they are embedded.[31]

But if we abstract from specific cases, we can also make some headway in elucidating the internal structure of norm breakdown. In particular, we can identify several axes of instability for any given norm, concerning (1) *what* conduct the norm prescribes or proscribes, (2) to *whom* the norm applies, and

have proven similarly dynamic in recent years, see Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 945 (2016) (discussing scholarship on the emergence of "novel and unorthodox administrative forms and structures").

28. *See, e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 107–08, 138 (2018); Azari & Smith, *supra* note 15, at 44–45; Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA. L. REV. 1649, 1672 & n.124 (2016); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1099–100 (2013); Siegel, *supra* note 15, at 181–82; Whittington, *supra* note 13, at 1867–69.

29. *See* Vermeule, *supra* note 11, at 1182 (noting that constitutional norms "are enforced by the threat of political sanctions, such as defeat in reelection [or] retaliation by other political institutions and actors").

30. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 97 (2017).

31. *See id.* at 130–32 (making a similar point with regard to claims of "unprecedentedness").

(3) *when* the norm is liable to be overridden. These axes largely crosscut the destruction-decomposition continuum, such that it is possible for a norm to be destroyed or decomposed along each axis. The axes themselves, moreover, are not fully distinct: They overlap with each other to some extent conceptually as well as in practice. We believe that it is nevertheless useful to pull them apart, to give a fuller sense of the varieties of norm breakdown.[32]

The first, and often the most salient, axis on which norms can break down involves their content, or the particular behaviors that are believed to be required or prohibited. As British scholars have observed, "constitutional conventions . . . are beset with problems of defining their true content."[33] Some of these problems follow from the ineliminable potential for future vagueness and uncertainty that besets all norms.[34] Ever since the failure of President Roosevelt's 1937 plan to expand the Supreme Court by as many as six justices, for instance, many assume that there has been a constitutional norm against "court packing."[35] But what exactly does this disallow? While close replicas of Roosevelt's plan would pretty plainly violate any such norm, recent events suggest that it is less clear whether and how the norm applies to efforts to expand the size of lower federal courts.[36] More generally, changes to a norm's

32. To be clear, in laying out these axes of instability, we do not claim to be illuminating the notoriously difficult question of *why* unwritten norms arise and then persist or change. We hope to shed a little light, rather, on the more formalist question of *how* norms change. Moreover, when we refer to specific norms in the discussion that follows, we are not doing the hard work of historical-political sociology that would be needed to argue persuasively that these norms existed and have broken down or are breaking down. We are simply positing that these norms have evolved in the manner described, as a means of illustrating the different dimensions on which norms can be destroyed or decomposed.

33. Jaconelli, *supra* note 19, at 32.

34. *See generally* Frederick Schauer, *On the Open Texture of Law*, 87 GRAZER PHILOSOPHISCHE STUDIEN 197 (2013).

35. *See* Pozen, *supra* note 10, at 34, 38, 69; *see also* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–87 (2017) (reviewing the role that appeals to constitutional conventions played in the debate over Roosevelt's Court-packing plan). It bears note that even as to the premise that Roosevelt's plan was a failure, significant interpretive contestation remains. *See, e.g.*, Chafetz, *supra* note 30, at 124–25.

36. *Compare* Steven G. Calabresi & Shams Hirji, *Judicial Appointments After Judge Robert H. Bork*, BALKINIZATION (Nov. 27, 2017), http://balkin.blogspot.com/2017/11/judicial-appointments-after-judge.html [https://perma.cc/B7HP-EM29] (defending a proposal to expand the size of the circuit and district courts as consistent with "past practice and norms of conventional behavior"), *with* Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), http://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [https://perma.cc/WN8F-3FTD] ("[I]t is . . . clear that the [Calabresi-Hirji] proposal threatens the permanent unraveling of a settlement that has made legitimate judicial

institutional or political context or to the incentives of relevant actors can, over time, change understandings—as well as reveal or create disagreements—as to what counts as compliance. The filibuster furnishes an important example. For most of Senate history, filibusters were employed sparingly and viewed as "the tool of last resort."[37] By the early twenty-first century, filibusters and threats of filibusters had become routine,[38] even as senators from both parties continued to denounce their "excessive" use.[39] The norm against ready recourse to the filibuster lingered on, yet as the tool became increasingly useful to increasingly organized minority parties,[40] a long series of decisions by a long list of senators unsettled assumptions about how much filibustering was "too much" and watered down the norm to the point of near collapse.

A second axis on which norms can break down involves their coverage, or the identities of the actors whose behavior is regulated.[41] While certain constitutional norms—such as cooperation or coordination equilibria in bilateral repeated games[42]—will tend to apply to a relatively fixed set of actors, the identity of the individuals subject to other norms may be more fluid, with potentially significant practical and political implications. Thus, a norm against "White House" interference with DOJ's criminal investigations could become substantially less constraining depending on which officials are

review possible for a century and a half."). As this controversy reflects, debates over the content of a norm will sometimes involve debates over the norm's scope and how broadly or narrowly to construe precedents. Constitutional scholars likewise recently debated whether Senate Republicans' refusal to consider Judge Merrick Garland's nomination to the Supreme Court violated a norm of providing timely advice and consent on such nominations (or any number of more precise permutations of that norm). *See* Chafetz, *supra* note 30, at 106–09, 128–30 (reviewing this episode and the associated constitutional controversy).

37. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 304 (9th ed. 2014).

38. *See id.* at 304–05; Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1008–11 (2011).

39. *See, e.g.*, *The Facts of Senate Dysfunction*, SENATE REPUBLICAN POL'Y COMM. (Dec. 11, 2012), http://www.rpc.senate.gov/policy-papers/the-facts-of-senate-dysfunction [https://perma.cc/5CQA-4SVL] (disputing Senate Democrats' claim that Republicans had made "excessive use of the filibuster in the 112th Congress" and arguing that the majority leader's "unilateral and often unnecessary choice[s] to file cloture" were to blame).

40. *See generally* GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE 37–187 (2010).

41. Note that this axis is not implicated by the current controversy over court packing. People may debate whether and how the anti-court-packing norm applies to lower courts, *see supra* notes 35–36 and accompanying text, but no one has been debating whose behavior the norm regulates: the behavior of presidents and members of Congress. In our terminology, the anti-court-packing norm has been experiencing instability as to its content and scope, but not as to its coverage.

42. *Cf.* Elster, *supra* note 14, at 36–43 (analyzing certain constitutional conventions as coordination and cooperation equilibria); Vermeule, *supra* note 11, at 1186–89 (similar).

considered part of the White House for purposes of the norm.[43] A more visible example of norm decomposition along this axis might be a declining sense that candidates for the presidency ought to be civil in their dealings with each other.[44] Even if understandings of what constitutes civility or incivility do not change, and the content of the norm against incivility remains stable in that sense, these particular actors may no longer believe the norm to be relevant to their own interactions, or relevant to the same degree as before. Still more dramatically, one could interpret various statements by President Trump suggesting that he sees himself as a world-historical figure whose greatness will brook no interference—that the standard rules of politics simply do not apply to him—as norm destructive along this axis.[45]

A final axis on which norms can break down involves their override conditions and the willingness of actors to derogate from the norms' ordinary strictures. As Adrian Vermeule has suggested, under certain circumstances "even genuine conventions" may be defeasible—may be openly "qualified, overridden, or breached"—without necessarily being destroyed or eliciting a severe sanction.[46] If changes in the institutional environment, the wider world, or the views of relevant segments of the public raise the expected cost of adherence to a norm, such circumstances may arise with greater frequency and thereby weaken the norm's regulative force. Over the course of his administration, for example, President Obama became increasingly willing to take measures that pushed the boundaries of executive power, on the theory that unprecedented obstructionism by congressional Republicans licensed or

43. *See, e.g.*, S. REP. NO. 110-203, at 2–3 (2007) (describing a dramatic expansion under President George W. Bush of the number of officials potentially excluded from this norm). On the norm generally, see Bruce Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. (forthcoming 2018), http://ssrn.com/abstract=3126856; Andrew McCanse Wright, Justice Department Independence and White House Control (Feb. 18, 2018) (unpublished manuscript), http://ssrn.com/abstract=3125848.

44. *See, e.g.*, *A Modest Suggestion*, WASH. TIMES (Mar. 6, 2016), http://www.washingtontimes.com/news/2016/mar/6/editorial-presidential-candidates-should-try-civil [https://perma.cc/8YWY-CPYD] ("Candidates for president . . . [now] speak in schoolyard expletives. Newspapers, once the arbiters of public discourse, no longer flinch at printing the vilest blasphemy and cursing . . . .").

45. Put differently, a politician's claim to be a Schmittian sovereign may amount to a claim that constitutional norms (as well as legally binding constitutional rules) do not apply to her. *See* Noa Ben-Asher, *Legalism and Decisionism in Crisis*, 71 OHIO ST. L.J. 699, 711–12 (2010). Some have interpreted Donald Trump's boast upon accepting the Republican presidential nomination that "I alone can fix it" as such a claim. *Transcript: Donald Trump at the G.O.P. Convention*, N.Y. TIMES (July 22, 2016), http://www.nytimes.com/2016/07/22/us/politics/trump-transcript-rnc-address.html.

46. Vermeule, *supra* note 11, at 1184.

even required him to exercise particular forms of "self-help."[47] The intransigence of these Republicans and the frustrations of Democratic voters and legislators made it politically rational, from Obama's perspective, to reconsider a range of constitutional norms that were inhibiting government action as part of his "We Can't Wait" campaign.[48] Across both the Democratic and Republican coalitions, more broadly, the waning influence of traditional party insiders may be putting pressure on elected officials to rethink their compliance with norms of interparty and interbranch restraint in a growing number of situations.[49]

Table 2. Axes of Norm Instability

Axis	Decomposition Involves . . .	Example
What conduct does the norm prescribe or proscribe?	A growing set of arguably irregular behaviors are claimed to be compliant.	Norm against "excessive" use of Senate filibusters
To *whom* does the norm apply?	A growing set of actors are claimed not to be subject to the norm.	Norm against "White House" interference with DOJ
When is the norm liable to be overridden?	A growing set of circumstances are claimed to justify qualifying or breaching the norm.	Norms against executive unilateralism during President Obama's "We Can't Wait" campaign

Each of these axes of instability has an analogue in the context of legally binding directives, but the discrepancies between law and norms mean that they work in somewhat different ways. This difference is likely smallest along the axis of changed content. As already mentioned,[50] the literature on rules-standards convergence has shown how interpreters and enforcers routinely change the effective meaning of legal directives even in the absence of a formal amendment, so that, for example, a rule that says "Speed limit 55"

47. *See* Pozen, *supra* note 10, at 4–8, 41–47.
48. *Id.*
49. *See* Fishkin & Pozen, *supra* note 9, at 944–51.
50. *See supra* notes 24–26 and accompanying text.

comes over time to mean something more like "Do not drive recklessly and in any case don't exceed 70."

Legal instability based on shifting understandings of whom a law regulates is less common but not altogether unfamiliar. Consider in this vein recent debates over whether the federal antinepotism statute applies to positions in the White House[51] and whether the Constitution's Incompatibility Clause applies to the president or only to officers serving under the president.[52] Or consider the recent extension to same-sex couples of the constitutional right to marry.[53] Both the generality that is characteristic of promulgated law and the possibility of an authoritative interpretation of a law's reach by a body such as the Supreme Court or OLC, however, limit legal instability on this axis at any point in time.

Breakdowns based on shifting understandings of a law's override conditions are still less familiar, at least in the constitutional context. For it is a fundamental feature of contemporary American constitutionalism—and itself a constitutional norm—that "government officeholders and aspirants cannot, if they wish to remain politically viable, . . . admit to violating the Constitution, or even to having doubts about the wisdom of following the Constitution."[54] Although officials may well take liberties in construing any given constitutional provision, they virtually never suggest (explicitly, at least[55]) that the Constitution's commands should be qualified, set aside, or breached in light of practical exigencies or changed circumstances.[56]

51. *See* Melina Delkic & Alex Mallin, *Nepotism Laws Don't Apply to Jared Kushner Appointment, DOJ Says*, ABC NEWS (Jan. 21, 2017, 4:14 PM), http://abcnews.go.com/Politics/nepotism-laws-apply-jared-kushner-appointment-doj/story?id=44951811 [https://perma.cc/2MQK-ATSQ].

52. *See* Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134 (2008).

53. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

54. David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 941 (2016); *see also* Pozen, *supra* note 10, at 66–67 (explaining that while U.S. government officials sometimes respond to perceived norm violations by other officials with norm violations of their own, it is never considered legitimate to respond with violations of legally binding constitutional constraints).

55. *Cf.* Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 85–86 (2014) (arguing that while the "skeptical tradition" in American constitutionalism may appear to have died out in the modern period, it persists "beneath the surface").

56. As Robert Cover famously chronicled, even abolitionist judges in the antebellum period felt constrained to issue proslavery rulings on account of their situatedness in the legal system writ large. *See generally* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

Thinking in terms of axes of instability, then, not only allows us to begin to taxonomize norm breakdown; it also allows us to clarify a number of similarities and dissimilarities between legal change and norm change. And with this finer-grained picture of the latter phenomenon in view, we might begin to refine our judgments about specific cases. In particular, we might gain some purchase on the question of what sorts of norm breakdowns ought to worry us most, and under what circumstances.

III. SOME NORMATIVE IMPLICATIONS OF NORM INSTABILITY

Our most basic evaluative claim is that it is difficult to make strong normative claims about norm stability or instability in the abstract. After all, the mere fact that members of a community conform to certain behavioral regularities and disapprove of nonconformity does not make those behavioral regularities *good*. At points in American history, perhaps including the present, constitutional norms have helped entrench everything from white supremacism to patriarchal gender relations to the marginalization of the poor.[57] Moreover, the observation that many of today's constitutional norms are very different from those that obtained at earlier points in American history[58] should caution against a too-easy assumption that prevailing practices are desirable or that their breakdown would necessarily be regrettable.[59]

57. For instance, to the extent that there is a constitutional or political norm against officeholders' labeling racism as such except in the most extreme circumstances, it will tend to legitimize and reinforce various forms of racism, especially structural racism. Consider in this regard the condemnation that President Obama faced in 2009, eventually leading to White House backpedaling, when he implied that police racism was to blame for the arrest of Henry Louis Gates Jr. outside Gates's own home. *See* Christina Bellantoni, *Gates Remark Steals Focus for Obama—Police Unions Voice Anger*, WASH. TIMES, July 24, 2009, at A1. For this reason, white supremacists have made assiduous efforts to maintain this norm. *See* Gene Demby, *Is It Racist to Call Someone 'Racist'?*, NPR: CODE SWITCH (Nov. 23, 2016, 6:47 PM), http://www.npr.org/sections/codeswitch/2016/11/23/503180254/is-it-racist-to-call-someone-racist; *see also* Aziz Huq, Conventions as a Consequence of the Incomplete Nature of Constitutional Bargains 4–5 (2018) (unpublished manuscript) (on file with authors) (suggesting that certain constitutional conventions, including the House of Representatives's pre–Civil War "gag rule" forbidding the consideration of antislavery petitions, have entrenched "rotten compromises"); Corey Robin, *Democracy Is Norm Erosion*, COREY ROBIN BLOG (Jan. 28, 2018), http://coreyrobin.com/2018/01/28/democracy-is-norm-erosion [https://perma.cc/F8LB-2RLH] (describing abolitionist and Reconstructionist politics from the 1850s through the 1870s as "a politics of norm-shattering").

58. *See, e.g.*, Azari & Smith, *supra* note 15, at 48 (describing the radical shift in the public role of the presidency over the past century).

59. *Cf.* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 6 (2017) ("[I]lluminating both the fact of change across time and

Whatever one's moral priors or views on government, one is likely to find fault with at least some of the constitutional norms in effect at any given moment.[60] Democracy, in the words of political theorist Corey Robin, is among other things "a permanent project of norm erosion"[61]—and, we would add, norm reconstruction.

Even so, one might believe that there are important general advantages to norm stability. Norm stability could be defended, for instance, on Burkean grounds. In Anthony Kronman's telling, Burke subscribed to "the ancient . . . idea that the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative."[62] The mere existence of a norm, on this view, provides a presumptive reason to preserve it. Sounding a Burkean note, leading theorists of constitutional conventions have suggested that deviating from them amounts to "a breach of 'constitutional morality'"[63] or a failure of "institutional citizenship."[64] Related to the Burkean rationale might be an Oakeshottian one, or the idea that the rejection of prevailing rules in favor of something "better" represents a form of epistemic hubris, one that mistakenly applies abstract reasoning when practical reasoning is called for and thereby threatens to bring on a much worse state of political

---

the agency and contingency that have factored into that change . . . is a useful corrective to accounts of politics that treat extant institutional arrangements as inevitable. Contingency creates room for effective critique . . . .").

60. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1033 (2008) (explaining that "there is no reason to expect that interaction between national lawmaking institutions will tend to produce anything like efficient," or social welfare-maximizing, "customs or norms"); Pozen, *supra* note 10, at 80–81 ("Longstanding interbranch norms . . . may be workable and attractive to a Burkean traditionalist, yet suboptimal from any number of perspectives. On some readings of the Constitution, they may even be unlawful." (footnote omitted)).

61. Robin, *supra* note 57.

62. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990). Kronman describes this idea as "now largely discredited." *Id.* *But see* Gerald J. Postema, *On the Moral Presence of Our Past*, 36 MCGILL L.J. 1153, 1156, 1160 (1991) (arguing that "[i]n law, as in much of the rest of our lives, the past is present in our moral or practical deliberations in the form of *precedent*" and that "[t]he moral force of precedent must be, at least to some degree, *independent* of the merits of the decision").

63. Bradley & Siegel, *supra* note 35, at 266 (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 346 (London, MacMillan & Co. 3d ed. 1889)). This suggestion is especially plausible when the convention violator has benefited from others' adherence to the convention in the past; such cases may implicate not only considerations of institutional continuity and functioning but also the internal morality of promise keeping, even if the promise is only implicit. From an external perspective, however, if the bargain reflected in a constitutional convention seems likely to generate bad policy or like a cartel deal, it is unclear why anyone who is not party to the bargain would be morally committed to its maintenance.

64. Siegel, *supra* note 15, at 189.

affairs.[65] One might accordingly assume that, all else equal, more norm instability is clearly worse than less norm instability and that norm destruction is clearly worse than norm decomposition. Norm destruction can upend settled behavioral patterns quickly and dramatically, as in the case of President Roosevelt's third term. Norm decomposition occurs relatively quietly and incrementally—indeed, those who are reinterpreting the norm will tend to deny that any change is occurring—and thus the damage to constitutional expectations and small-c conservative values may be relatively modest.

This is not wholly off base. We do not dismiss the content-independent rationales for norm stability, nor do we deny that there are good reasons to be concerned about norm destruction. Such concerns may be especially acute when it appears that a norm is being undermined out of narrow personal or partisan self-interest. But the dynamic character of constitutional norms does provide some reason to be skeptical of theories that would valorize constitutional norm continuity as such. Given, for example, the way in which norms about acceptable levels of legislative obstruction by the minority party have fluctuated throughout American history,[66] it is not clear why a maneuver that departs from the immediately preceding period's patterns of obstruction should cause alarm on that basis alone.

In addition, and somewhat paradoxically, if one is enamored of a constitutional norm in its current form—or, at least, if one thinks that it is superior to the likely alternatives—then spectacular efforts to destroy that norm may be less troubling than subtler efforts to decompose it. The basic reason is

65. *See* MICHAEL OAKESHOTT, *Rationalism in Politics*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 5 (Liberty Fund rev. ed. 1991). Other rationales have been put forward for the desirability of norm stability, including the fostering of intragovernmental cooperation and coordination, the promotion of accountability and efficiency, and the avoidance of tit-for-tat retaliatory cycles. *See, e.g.*, GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 1 (1984) (cooperation); *id.* at 18, 210 (accountability); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1227 (1997) (efficiency). These virtues are not features of norms qua norms, however, but rather features of particular norms. For instance, it is entirely possible to have norms *against* cooperation and coordination. Norms that enable certain forms of agency independence, notably, disable corresponding forms of collaboration with other arms of the state. *See generally* Vermeule, *supra* note 11, at 1194–214. Likewise, the efficiency of norms depends on their content and context. *See generally, e.g.*, Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027 (2001) (describing scenarios in which decentralized processes are unlikely to produce efficient norms). To make a case for the inherent social value of norm stability, and therefore for the inherent undesirability of norm erosion, one must point to virtues that are not contingent in this way.

66. *See* CHAFETZ, *supra* note 59, at 280–90, 296–301; Chafetz, *supra* note 30, at 111–19.

that behaviors seen as flouting a constitutional norm will almost invariably have greater salience, both among political elites and the public at large, than incremental revisions or refinements. This salience differential means that a norm flouter is highly likely to face questions from, and to have to offer justifications to, her political opponents. Such critical dialogue is less likely to be sparked by norm decompositions, which, as discussed above, are generally asserted to be norm compliance. Insofar as vigorous public debate improves decisionmaking, apparent attempts to destroy a constitutional norm may produce better or more democratic outcomes than attempts to modify its content or coverage.[67]

Related to, and enabled by, the greater salience associated with norm flouting is the greater likelihood of backlash. This backlash could take any number of forms, from media outcry to protests in the streets to the use of institutional leverage by other government actors (including by displacing the imperiled norm with a binding legal directive); and it could be sited in any number of institutions, from civil society groups to the courts to the legislature. The typically greater transparency and simplicity of norm destruction are thus valuable not only in themselves, from the perspective of public comprehension and deliberation, but also instrumentally for triggering sanctions. Publicity-dependent enforcement mechanisms are unlikely to work as well in cases of decomposition.

For a simple set of reasons, then, norm-decomposing maneuvers may in many instances be more worrisome than norm-flouting maneuvers. Only the latter reliably generate their own correctives.[68] We believe this argument has

67. This is loosely analogous to David Dyzenhaus's argument that legal *grey holes*—situations in which "there are some legal constraints on executive action . . . but the constraints are so insubstantial that they pretty well permit government to do as it pleases"—can be even worse than the "lawless void" of *black holes*. DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 42 (2006). For Dyzenhaus, this is because the creation of law-free zones may force government actors to state a politically unacceptable truth, while grey holes allow them to "have [their] cake and eat it too" by achieving the same functional result without being held accountable for it. *Id.*; *see also* David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2025–26 (2006). Likewise, norm decomposition may have the same endpoint as norm destruction, but without drawing nearly as much scrutiny or debate.

68. In a recent essay, Vermeule draws a sharp distinction between what he calls extragovernmental and intragovernmental conventions. "Some conventions are indeed enforced by the threat of moralized outrage on the part of the diffuse mass of public opinion," he writes; "let us call those extragovernmental conventions." Vermeule, *supra* note 23, at 1956. "Other conventions are enforced by the credible threat of retaliation from the other political party, another branch of the government, or some other institutional actor, even as to issues about which the general public is largely oblivious. . . . We might call those intragovernmental conventions." *Id.* (footnote omitted). Yet conventions are

important implications for American constitutional practice generally and the Trump administration specifically. Before turning to Trump, however, we hasten to note several crucial complications. First, the argument itself generates something of an endogeneity problem. If attempted norm destruction is not as worrisome as attempted norm decomposition because of the distinctive pushback it generates, it may become worse precisely to the extent that civil society actors internalize this point and refocus their energies away from combatting attempted destructions and toward combatting decompositions. Moreover, because there is no bright line separating destruction from decomposition, political struggles over allegedly counternormative behaviors not only will be shaped by perceptions of whether those behaviors amount to destruction or decomposition, but also may shape those very perceptions.

Second, norm flouting and norm decomposition need not be mutually exclusive. If the flouting of one set of norms by one actor leads that same actor or her political allies to engage in more opportunistic behavior with respect to other norms—if it complements rather than substitutes for decomposition—there may be cause for greater, rather than lesser, concern. On the other hand, insofar as norm flouting generates broad critique and backlash, norm decomposition that is coupled with norm flouting may actually be less successful than norm decomposition on its own, depending on partisan and ideological alignments.

Third, flouting can succeed. If desirable norms are flouted frequently enough with enough success, we have a significant problem no matter how transparent the flouting or how vigorous the backlash. And one might wonder whether various attributes of today's political and informational environment, such as high levels of partisan polarization or the rise of media "filter bubbles," have decreased the odds that the flouting of desirable constitutional norms will be effectively repulsed.

As this last complication implies, the argument that constitutional norm decomposition is more worrisome than constitutional norm flouting will hold only under certain sociopolitical conditions. Specifying these conditions in any detail would be an enormously challenging, multidisciplinary task. But at a minimum, the argument presupposes that democratic institutions are in reasonably good working order, with basically functioning electoral systems, a strong press and civil society, and dispersion of power across government

not necessarily one or the other. Virtually any constitutional convention has the potential to take on an "extragovernmental" dimension if a high-level official sets out to destroy it, as in our political culture such efforts are apt to arouse public opinion.

bodies. If these baseline conditions fail, the mechanisms of deliberation and disputation are far less likely to materialize and far less likely to have any impact if they do.

As the next Part explains, the experience of the first year and a half of the Trump administration suggests that these baseline conditions continue to obtain in the United States. This is consistent with Aziz Huq and Tom Ginsburg's conclusion that the United States has relatively strong legal and institutional safeguards against what they call "authoritarian reversion," involving "a wholesale, rapid collapse into authoritarianism."[69] Instead, Huq and Ginsburg contend, the more plausible danger in the United States is "constitutional retrogression," involving an incremental "decay in [the] basic predicates of democracy," such as "autonomous bureaucratic capacity" and a "shared epistemic foundation."[70] The irony here is that if explicit efforts to destroy constitutional norms in America today are less dangerous than many assume, seeing them as a fundamental threat to the republic is apt to distract us from other risks and thereby make efforts to decompose constitutional norms even more dangerous.

IV. REASSESSING THREATS TO CONSTITUTIONAL NORMS IN THE AGE OF TRUMP

Let us now bring the analysis fully up to the present: What does our account of norm breakdown suggest about constitutional norms in the age of Trump?

Descriptively, President Trump's critics are not wrong to insist that he has flouted a large number of norms.[71] Yet given our skepticism about strong versions of theories that venerate constitutional norm stability as such,[72] we believe that the more important criticisms look to the substance of his transgressions. In other words, if Trump's defiance of constitutional norms is unusually disturbing, it is not so much because these norms are norms as because they are beneficial.[73]

69. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83, 100–17 (2018).
70. *Id.* at 83, 117–62.
71. *See supra* notes 1–5 and accompanying text.
72. *See supra* notes 57–66 and accompanying text.
73. In a similar spirit, Steven Levitsky and Daniel Ziblatt have emphasized that while President Trump "was a serial norm breaker" during his first year in office, where he "really stands out from his predecessors is in his willingness to challenge . . . norms that are essential to the health of democracy." LEVITSKY & ZIBLATT, *supra* note 28, at 195.

Without delving too deeply into political or moral theory, we think we can safely say that it is bad for a president or presidential candidate to: lie constantly,[74] deny the validity of fairly administered elections,[75] threaten to jail political opponents,[76] maintain business interests while in public office in a manner that invites foreign governments and political allies to funnel money toward those interests,[77] make racist remarks and wink at white supremacists,[78] strive to delegitimize the press,[79] invite a foreign government to interfere in American electoral processes,[80] appoint unqualified friends and family members to important government positions,[81] and so on. Individually, these

74. For a running tally of President Trump's lies in office, see Daniel Dale, *Donald Trump Has Said ____ False Things as U.S. President*, TORONTO STAR, http://projects.thestar.com/donald-trump-fact-check/index.html (last updated Aug. 29, 2018) [https://perma.cc/K68Z-QEZH] (counting 2436 false statements by President Trump at the time of this Article's publication).

75. *See, e.g.*, Chas Danner, *Donald Trump Falsely Blames Popular-Vote Loss on Voter Fraud*, N.Y. MAG. (Nov. 27, 2016), http://nymag.com/daily/intelligencer/2016/11/donald-trump-blames-popular-vote-loss-on-voter-fraud.html [https://perma.cc/V2YK-Q9AV]; Richard L. Hasen, *Trump's Voting Investigation Is a Great Idea*, SLATE (Jan. 25, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/01/trump_s_voting_fraud_investigation_is_a_great_idea.html [https://perma.cc/QVL6-STSG].

76. *See, e.g.*, Charlie Savage, *Threat to Jail Clinton Smacks of 'Tin-Pot Dictators,' Experts Say*, N.Y. TIMES (Oct. 10, 2016), http://www.nytimes.com/2016/10/11/us/politics/donald-trump-hillary-clinton-special-prosecutor.html.

77. *See, e.g.*, David A. Fahrenthold & Jonathan O'Connell, *Nine Questions About President Trump's Businesses and Possible Conflicts of Interest*, WASH. POST (Jan. 30, 2018), http://www.washingtonpost.com/politics/nine-questions-about-president-trumps-businesses-and-possible-conflicts-of-interest/2018/01/29/f8b2a3a8-014f-11e8-9d31-d72cf78dbeee_story.html [https://perma.cc/Z37V-ZE3E].

78. *See, e.g.*, Dylan Scott, *"Shithole" Countries, Donald Trump's Latest Racist Tirade, Explained*, VOX (Jan. 12, 2018, 11:40 AM), http://www.vox.com/policy-and-politics/2018/1/12/16882840/donald-trump-shithole-daca [https://perma.cc/H3VR-4UPL]; Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), http://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html.

79. *See, e.g.*, Steve Coll, *Donald Trump's "Fake News" Tactics*, NEW YORKER (Dec. 11, 2017), http://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics [https://perma.cc/2U7U-Z6RF].

80. *See, e.g.*, Ashley Parker & David E. Sanger, *Donald Trump Calls on Russia to Find Hillary Clinton's Missing Emails*, N.Y. TIMES (July 27, 2016), http://www.nytimes.com/2016/07/28/us/politics/donald-trump-russia-clinton-emails.html.

81. *See, e.g.*, Peter Baker et al., *Jared Kushner and Ivanka Trump: Pillars of Family-Driven West Wing*, N.Y. TIMES (Apr. 15, 2017), http://www.nytimes.com/2017/04/15/us/politics/ jared-kushner-ivanka-trump-white-house.html; David Faris, *Trump's White House Is a Hurricane of Dysfunction and Incompetence*, WEEK (July 31, 2017), http://theweek.com/articles/715385/trumps-white-house-hurricane-dysfunction-incompetence [https://perma.cc/YV8P-REC6]; Paul Waldman, *Donald Trump Has Assembled the Worst Cabinet in American History*, WASH. POST (Jan. 19, 2017), http://www.washingtonpost.com/

violations of unwritten rules are dismaying. Combined, they amount to a wholesale assault on the ideal of a constitutionally restrained and responsible executive. President Trump, we might say, is a constitutional norm flouter par excellence.

At the same time, and as our analysis in the preceding Part would predict, Trump's presidency has been marked by impassioned resistance to his norm flouting. By a variety of metrics, many civil society organizations are stronger than they have been in quite some time, in a manner attributable to—and facilitative of—pushback against President Trump. Daniel Dale, the reporter who has most assiduously tracked Trump's lies,[82] is emphatic that the lies "haven't worked," given, among other things, polling data that suggest Americans overwhelmingly view Trump as untrustworthy and have become more accepting, not less, of Muslims and other groups he has denigrated.[83] Public interest journalism has flourished in the face of Trump's attacks, as subscriptions and donations to media outlets ranging from the *New York Times* to the *Wall Street Journal* to *Mother Jones* to ProPublica have spiked since his election,[84] and the *Washington Post*'s David Fahrenthold won a Pulitzer Prize (and a cult following) for his reporting on Trump's misrepresentations of his charitable giving.[85] Donations to groups ranging from the American Civil Liberties Union to the Southern Poverty Law Center to Planned Parenthood to

blogs/plum-line/wp/2017/01/19/donald-trump-has-assembled-the-worst-cabinet-in-american-history [https://perma.cc/S35X-BZAY].

82. *See supra* note 74.

83. Daniel Dale, *Donald Trump Has Spent a Year Lying Shamelessly. It Hasn't Worked*, TORONTO STAR (Dec. 22, 2017), http://www.thestar.com/news/world/analysis/2017/12/22/donald-trump-has-spent-a-year-lying-shamelessly-it-hasnt-worked.html [https://perma.cc/FHQ4-XWNU].

84. *See, e.g.*, Matthew J. Belvedere & Michael Newberg, *New York Times Subscription Growth Soars Tenfold, Adding 132,000, After Trump's Win*, CNBC (Nov. 29, 2016, 10:32 AM), http://www.cnbc.com/2016/11/29/new-york-times-subscriptions-soar-tenfold-after-donald-trump-wins-presidency.html [https://perma.cc/3Q77-724G]; Jackie Flynn Mogensen, *10 Great Things That Trump Has Given America in the Last Year*, MOTHER JONES (Nov. 8, 2017, 6:00 AM), http://www.motherjones.com/politics/2017/11/ten-great-things-that-trump-has-given-america-in-the-last-year [https://perma.cc/X2AV-W2MZ].

85. *See* Paul Farhi, *Washington Post's David Fahrenthold Wins Pulitzer Prize for Dogged Reporting of Trump's Philanthropy*, WASH. POST (Apr. 10, 2017), http://www.washingtonpost.com/lifestyle/style/washington-posts-david-fahrenthold-wins-pulitzer-prize-for-dogged-reporting-of-trumps-philanthropy/2017/04/10/dd535d2e-1dfb-11e7-be2a-3a1fb24d4671_story.html [https://perma.cc/6S73-5EN5]. The 2018 Pulitzers continued in this vein, awarding prizes for skeptical coverage of President Trump's proposed border wall and for coverage of Russian interference in the 2016 election and in the Trump administration. *See 2018 Pulitzer Prize Winners: Full List*, N.Y. TIMES (Apr. 17, 2018), http://www.nytimes.com/2018/04/16/business/media/pulitzer-prize-winners.html.

the Environmental Defense Fund have likewise swelled during Trump's presidency.[86]

Government institutions have also pushed back against President Trump in ways that respond directly and indirectly to his norm violations. Pointing at times to Trump's anti-Muslim rhetoric as well as various procedural irregularities, federal courts have struck down, stayed, or forced significant modifications to his administration's immigration policies regarding travel bans,[87] sanctuary cities,[88] and the Deferred Action for Childhood Arrivals program,[89] leading some to conclude that judges are part of a "legal resistance" against Trump.[90] Despite the fact that Republicans control both the House and the Senate and are continually charged by Democrats with partisan obsequiousness to the president, Congress has been an additional (if uneven) site of resistance. This has taken forms ranging from new economic sanctions on Russia passed by nearly unanimous majorities in both chambers as

86. *See According to Charity Navigator, First 100 Days of Trump Administration Changed a Pattern in Charitable Donations*, CHARITY NAVIGATOR (Apr. 24, 2017), http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=4890 [https://perma.cc/A4N2-P56L].

87. The Supreme Court, by a 5–4 vote, ultimately upheld the third iteration of the administration's travel ban in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). However, lower court decisions enjoining the ban not only had the effect of delaying its implementation, but also resulted in a significant narrowing of the original version. *See* Steve Vladeck, *The Supreme Court's Muslim Travel Ban Case Proves the Power of the Judiciary Branch in the Age of Trump*, NBC NEWS (Apr. 24, 2018, 2:27 PM), http://www.nbcnews.com/think/opinion/muslim-travel-ban-supreme-court-case-proves-power-judiciary-branch-ncna868736 [https://perma.cc/KV79-VERX] (noting, prior to the Supreme Court's decision, that "whether the justices ultimately side with the president or the challengers in Trump v. Hawaii, the . . . federal courts . . . have been instrumental in pushing the executive branch to more properly tailor what Trump calls the 'travel ban' in the first place").

88. County of Santa Clara v. Trump, 275 F. Supp. 3d 1196 (N.D. Cal. 2017); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017), *aff'd* 888 F.3d 272 (7th Cir. 2018).

89. Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

90. This terminology has been used by conservative critics and liberal supporters alike. On the conservative side, see, for example, Josh Blackman, *On the Judicial Resistance*, LAWFARE (Feb. 12, 2018), http://lawfareblog.com/judicial-resistance [https://perma.cc/B73C-3NWW]; *Judging the Travel Ban—and Judges*, WALL ST. J., Jan. 20, 2018, at A12. On the liberal side, see, for example, Eric Schneiderman, *A Year of Legal Resistance*, MEDIUM (Dec. 26, 2017), http://medium.com/@AGSchneiderman/over-100-official-acts-to-protect-new-yorkers-from-washingtons-harmful-agenda-cf046c5dbd07 [https://perma.cc/H8AP-R3GG]; Jeff Turrentine, *This Leader of the (Legal) Resistance Has Never Felt More Ready*, NRDC (Dec. 7, 2017), http://www.nrdc.org/stories/leader-legal-resistance-never-felt-more-ready [https://perma.cc/8TED-QMXV]. Others on the left, however, urge that this characterization of the judiciary be rejected. *See* Dahlia Lithwick & Steve Vladeck, *Resisting the Myth of the Judicial Resistance*, SLATE (Jan. 25, 2018, 4:44 PM), http://slate.com/news-and-politics/2018/01/the-judges-whove-ruled-against-trump-arent-part-of-some-judicial-resistance.html [https://perma.cc/3TNQ-6DT5].

punishment for Russia's pro-Trump electoral meddling,[91] to resolutions that convey disagreement with the president's foreign policy provocations,[92] to oversight hearings that have damaged his public standing,[93] to refusals to confirm some of his preferred personnel.[94] Nor is the governmental resistance limited to federal institutions. For instance, state officials have brought some of the leading lawsuits against the administration; several state legislatures are considering more aggressive measures, such as requiring presidential candidates to disclose their tax returns as a condition of ballot access;[95] and at

91. Countering America's Adversaries Through Sanctions Act, Pub. L. No. 115-44, 131 Stat. 886 (2017).

92. *E.g.*, H.R. Res. 256, 115th Cong. (2018) (enacted) (expressing support for the NATO alliance in the face of Trump's attacks); H.R. Res. 397, 115th Cong. (2017) (enacted) (same); S. Res. 584, 115th Cong. (2018) (enacted) (expressing opposition to allowing Russia to question former U.S. diplomatic and military personnel, a proposal to which Trump had signaled openness). On the importance of such resolutions, see generally Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons From Congressional Practice*, 61 STAN. L. REV. 573 (2008).

93. *See* Josh Chafetz, *The Real 'Resistance' to Trump? The GOP Congress.*, POLITICO (June 6, 2017), http://www.politico.com/magazine/story/2017/06/06/the-real-resistance-to-trump-the-gop-congress-215230 [https://perma.cc/7KF3-3G3R].

94. *See, e.g.*, Aaron Blake, *4 Trump Nominees Have Gone Down in One Week, and He's Got GOP Senators to Blame*, WASH. POST (Dec. 19, 2017), http://www.washingtonpost.com/news/the-fix/wp/2017/12/19/four-trump-nominees-have-gone-down-in-one-week-and-hes-got-gop-senators-to-blame [https://perma.cc/4BF3-VBLP]; Karoun Demirjian, *White House Withdraws Judicial Nominee Ryan Bounds, After GOP Realizes He Didn't Have Votes for Confirmation*, WASH. POST (July 19, 2018), http://www.washingtonpost.com/powerpost/senate-gop-withdraws-judicial-nominee-ryan-bounds-delivering-a-blow-to-trumps-court-plans/2018/07/19/0d81ff50-8b83-11e8-8aea-86e88ae760d8_story.html [https://perma.cc/USP3-LQHZ]; Alan Rappeport, *Labor Choice Drops Out After Republicans Balk*, N.Y. TIMES, Feb. 16, 2017, at A1. *See generally* Anne Joseph O'Connell, *After One Year in Office, Trump's Behind on Staffing but Making Steady Progress*, BROOKINGS (Jan. 23, 2018), http://www.brookings.edu/research/after-one-year-in-office-trumps-behind-on-staffing-but-making-steady-progress [https://perma.cc/MZ69-VHCM] ("In the first year, President Trump had a higher [nominee] failure rate . . . than all but one of his predecessors [going back through the George H.W. Bush administration].").

95. The California State Legislature actually passed such a bill, only to have it vetoed by Democratic Governor Jerry Brown over constitutional concerns. *See* John Myers, *Trump Won't Have to Disclose Tax Returns to Get on California's Ballot, as Gov. Jerry Brown Vetoes Bill*, L.A. TIMES (Oct. 15, 2017, 11:54 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-trump-tax-returns-veto-jerry-brown-1508092026-htmlstory.html [https://perma.cc/7PEU-SCAZ]. On the debate over the constitutionality of such laws, see, for example, Richard L. Hasen, *How States Could Force Trump to Release His Tax Returns*, POLITICO (Mar. 30, 2017), http://www.politico.com/magazine/story/2017/03/donald-trump-tax-returns-release-214950 [https://perma.cc/5JNZ-YSRC]; Derek T. Muller, *Don't Use the Ballot to Get Trump's Tax Returns*, N.Y. TIMES (Apr. 3, 2017), http://www.nytimes.com/2017/04/03/opinion/dont-use-the-ballot-to-get-trumps-tax-returns.html.

least one state is conducting its own investigation into Trump's business dealings.[96]

Voters, too, have gotten in on the act. If some of President Trump's supporters thrill to his norm transgressions, elections since November 2016, both special and regular, have demonstrated widespread discontent with Trump and his party.[97] Relatedly, Republican members of Congress (including the Speaker of the House) are retiring in droves,[98] while Democrats are experiencing a banner recruiting season,[99] spurred in part by new groups like Run for Something.[100]

Largely as a consequence of these interrelated developments, Trump is by many measures "a weak president," if not "on the brink of a failed

96. *See* Danny Hakim & William K. Rashbaum, *New York Attorney General Seeks Power to Bypass Presidential Pardons*, N.Y. TIMES (Apr. 18, 2018), http://www.nytimes.com/2018/04/18/nyregion/schneiderman-trump-mueller-pardons.html; Colby Hamilton, *After Shake-up, NY AG's Office Remains Backstop for Trump-Related Probes*, N.Y.L.J. (May 24, 2018), http://www.law.com/newyorklawjournal/2018/05/24/after-shake-up-ny-ags-office-remains-backstop-for-trump-related-probes [https://perma.cc/Y6AH-NDY2].

97. On special elections, see Philip Bump, *This Is What the Democratic Special Election Wave Looks Like*, WASH. POST (Jan. 17, 2018), http://www.washingtonpost.com/news/politics/wp/2018/01/17/this-is-what-the-democratic-special-election-wave-looks-like [https://perma.cc/6JKX-KT5U]; Harry Enten, *Special Elections So Far Point to a Democratic Wave in 2018*, FIVETHIRTYEIGHT (Dec. 13, 2017), http://fivethirtyeight.com/features/special-elections-so-far-point-to-a-democratic-wave-in-2018 [https://perma.cc/Z8AD-XZU3]; G. Elliott Morris, *What Happened in Pennsylvania's 18th and What It Means for Democrats in November*, CROSSTAB (Mar. 16, 2018), http://www.thecrosstab.com/2018/03/16/pa-18 [https://perma.cc/6XEV-SNG2]; Matthew Yglesias, *Democrats Flipped a Missouri State Legislature Seat That Trump Won by 28 Points*, VOX (Feb. 7, 2018, 10:30 AM), http://www.vox.com/policy-and-politics/ 2018/2/7/16984836/missouri-special-election-results [https://perma.cc/4BSB-V3JM]. On regular elections, see Eric Bradner, *Democrats Sweep in Virginia, New Jersey*, CNN (Nov. 8, 2017), http://www.cnn.com/2017/11/07/politics/2017-us-election-highlights/index.html [https://perma.cc/44VY-8LPS].

98. *See* Russell Berman, *The 2018 Congressional Retirement Tracker*, ATLANTIC (June 5, 2018), http://www.theatlantic.com/politics/archive/2018/01/the-2018-congressional-retirement-tracker/545723 [https://perma.cc/UUL6-8KYL]; Michael Tackett, *Republican Retirements Raise Talk of Democratic Wave in November*, N.Y. TIMES (Jan. 9, 2018), http://www.nytimes.com/2018/01/09/us/politics/republicans-retirements-house-democrats-wave-2018.html.

99. *See* Seth Masket, *The Sheer Number of Democrats Running for Congress Is a Good Sign for the Party*, FIVETHIRTYEIGHT (Aug. 17, 2017, 5:51 AM), http://fivethirtyeight.com/features/the-sheer-number-of-democrats-running-for-congress-is-a-good-sign-for-the-party [https://perma.cc/G5HC-RSKE].

100. *See* Edward-Isaac Dovere, *'Run for Something' Backs Dozens of Progressive Candidates*, POLITICO (Oct. 17, 2017, 1:01 PM), http://www.politico.com/story/2017/10/17/run-for-something-backs-dozens-of-progressive-candidates-243867 [https://perma.cc/VM2J-8WZH]; RUN FOR SOMETHING, http://runforsomething.net [https://perma.cc/YW3H-AQAL].

presidency."[101] Given their control of all three branches of the federal government, Republicans have accomplished remarkably little thus far in Trump's tenure, and those accomplishments they can point to—judicial appointments and tax cuts, primarily[102]—are the sorts of things any Republican leaders would have done. In short, the perception that President Trump is an extraordinary norm flouter has helped fuel an extraordinary pushback, which has had significant success.[103]

It is, of course, too early to tell how the remainder of Trump's presidency will play out. If Trump is reelected, certain constitutional norms might well be upended in the process, although this would depend on a close reading of how he actually behaves in his second term and what effects that behavior has. At this writing, however, the evidence surveyed in this Part suggests that many of the constitutional norms Trump has tried to destroy may emerge not just intact but stronger for it.

By contrast, some of the norm decomposition transpiring in Congress and in state legislatures has generated less public pushback and—partly for that very reason—likely poses the more serious threat to our constitutional future. As we argued in Parts II and III, the line between norm adherence and norm decomposition is irreducibly a matter of interpretation, and every norm is subject to walking that line. But even still, there is a case to be made that various constitutional norms are in the process of unraveling in especially worrisome ways that have little to do with President Trump. Or rather, the decomposition of these norms predates and to some extent helps explain Trump's political ascent; he is more symptom than cause of the democratic decay it reflects.[104]

101. Matthew Glassman, *Donald Trump Is a Dangerously Weak President*, VOX (Dec. 27, 2017), http://www.vox.com/the-big-idea/2017/12/4/16733450/donald-trump-weak-president-neustadt [https://perma.cc/W36Z-XL9X]; *see also* Corey Robin, *If Authoritarianism Is Looming in the US, How Come Donald Trump Looks So Weak?*, GUARDIAN (Jan. 13, 2018), http://www.theguardian.com/usnews/commentisfree/2018/ jan/13/ american-democracy-peril- trump-power [https://perma.cc/J79J-RFG2].

102. *See, e.g.*, Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Fishkin & Pozen, *supra* note 9, at 982 n.266 ("Perhaps the most unifying action [President Trump] has taken to date—the action that most appeals to the disparate strands of the Republican coalition—is . . . pushing through ideologically conservative judicial nominees, in particular Justice Gorsuch, under the banner of constitutional restorationism.").

103. *See* Max Boot, *America Is Resisting Trump's Onslaught. Just Don't Get Cocky.*, WASH. POST (Feb. 7, 2018), http://www.washingtonpost.com/opinions/global-opinions/america-is-resisting-trumps-onslaught-just-dont-get-cocky/2018/02/07/d75f5c5a-0c21-11e8-8890-372e2047c935_story.html [https://perma.cc/JU4T-4UKQ].

104. *Cf.* Jack M. Balkin, *Constitutional Rot*, *in* CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA 19, 27 (Cass R. Sunstein ed., 2018) (describing the Trump presidency as "a symptom of constitutional rot and constitutional dysfunction").

We do not have the space here to go into any detail, but among many possible candidates, we would highlight the decomposition over the past two or so decades of: (1) norms that foster respect for governmental expertise, whether in the context of OLC,[105] the Congressional Budget Office,[106] the Senate Parliamentarian,[107] or elsewhere;[108] (2) norms that proscribe certain forms of high-stakes brinksmanship, including debt-ceiling default;[109] (3) norms that constrain the influence of lobbyists and donors on elected officials;[110] and (4) norms that constrain legislative efforts to shape the electorate for partisan advantage.[111] Each of these categories of norms is vital to sustaining fair and

105. *See supra* note 18 and accompanying text; *see also* Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13 (2011) (decrying the "politicization" of OLC and the rise of the White House Counsel as an alternative source of interpretive guidance).

106. *See, e.g.*, Michael R. Strain, *Stop Bashing the CBO, Republicans*, BLOOMBERG (Aug. 1, 2017, 4:30 AM), http://www.bloomberg.com/view/articles/2017-08-01/stop-bashing-the-cbo-republicans [https://perma.cc/Z56U-4L8U] (critiquing recent Republican efforts to discredit and defund the office).

107. *See* Fishkin & Pozen, *supra* note 9, at 931, 939 n.99 (discussing Senate Republicans' dismissal in 2001 of their own hand-picked parliamentarian in response to a disfavored ruling).

108. *See, e.g.*, *id.* at 930 (noting Newt Gingrich's maneuvers as Speaker of the House in the late 1990s "to consolidate power in the Speaker's office and 'dismantle' congressional institutions with professional staff" (quoting Bruce Bartlett, *Gingrich and the Destruction of Congressional Expertise*, N.Y. TIMES: ECONOMIX (Nov. 29, 2011), http://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise [https://perma.cc/MS6N-MZHV])); Kevin R. Kosar, *The Struggle Between Objectivity vs. Neutrality Continues at the Congressional Research Service*, LEGBRANCH (Feb. 13, 2018), http://www.legbranch.com/theblog/2018/2/11/the-struggle-between-objectivity-vs-neutrality-continues-at-the-congressional-research-service [https://perma.cc/CPQ5-VQYN] (describing partisan threats since the 1990s to a range of legislative support agencies that "were established to add knowledge to the political process").

109. *See* Fishkin & Pozen, *supra* note 9, at 932–33, 947 n.123, 961 & n.184 (discussing debt-ceiling brinksmanship in recent Congresses).

110. *See, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 99–107 (2011) (arguing that increasing pressure to raise money has coincided with "radically different congressional norms" on fundraising and lobbying over the past several decades); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266–68 (2008) (describing the growing role of campaign expenditures in state court races and observing that, "[w]ith remarkable speed, the distinctive rules, norms, and politics of judicial elections have begun to disappear").

111. *See* Fishkin & Pozen, *supra* note 9, at 931 n.61 ("The post-2000 wave of Republican-sponsored measures aiming to restrict voting in one way or another came as a surprise to voting rights scholars, who had generally assumed that 'vote denial' controversies were a thing of the past."). On the other side of the aisle, Republican officials have characterized certain Democratic governors' attempts to circumvent felon disenfranchisement laws as norm decomposing. *See, e.g.*, Graham Moomaw, *McAuliffe Restores Voting Rights for 206K Ex-Felons; GOP Calls It Move to Boost Clinton*, RICHMOND TIMES-DISPATCH (Apr. 22, 2016), http://www.richmond.com/news/virginia/government-politics/mcauliffe-restores-voting-rights-for-k-ex-felons-gop-calls/article_771db279-34d6-5a3d-9557-

effective constitutional governance. Within each category, however, a complex chain of behaviors has arguably already drained pertinent norms of much of their regulative force. And with some partial exceptions in areas such as gerrymandering, this has happened largely without triggering bipartisan condemnation, robust countermeasures, or sustained public debate.

CONCLUSION

This Article has sought, primarily, to illuminate the structure of constitutional norm breakdown. We have tried to show that distinguishing norm destruction from norm decomposition and appreciating the multiple axes of norm instability can go a long way toward clarifying how unwritten rules and conventions do and do not change over time. Building on this conceptual framework, we have further argued that when one believes some existing constitutional norm to be desirable, in many cases—indeed in most cases—one ought to be more concerned about its being incrementally revised than about its being openly flouted. And this, in turn, suggests a somewhat surprising lesson: President Trump's most significant legacy for the evolution of constitutional norms may not be that he laid waste to so many of them, but rather that he obscured where the real normative decay was occurring. Insofar as there is an economy of outrage in American politics and civil society, that economy strikes us as overly fixated on President Trump himself.

If we are right about this, it would seem to counsel not only new forms of political mobilization but also a new focus for public law scholarship. While perceived attempts to destroy constitutional norms will continue to demand (and, by their very nature, receive) critical attention, our analysis implies that constitutional scholars could bring their distinctive expertise to bear by identifying and explicating ongoing constitutional norm decompositions—a task that often requires significant historical perspective and institutional acumen.[112] Given the inherent instability of such norms, scholars could add still more value by offering explicit normative critiques or defenses of particular formulations of the practices in question. Dealing effectively with norm change

a417a8afb212.html [https://perma.cc/DPN5-CC2R]. The fact that many committed citizens—ourselves included—find felon disfranchisement laws to be morally and democratically repugnant only proves our point in Part III about the limits of content-independent analyses of norm breakdowns.

112. For an important recent study in this mold, see generally Renan, *supra* note 18 (documenting decomposition of the norm of "OLC supremacy").

requires, for academics and activists alike, changing some of the ways we think and talk about norms.