

ARTICLES

Codifying Constitutional Norms

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Ours is an era of fraying constitutional norms. Norms that long governed the conduct of public officials have in recent years been violated by the White House, in Congress, and in the states. In the face of threats to constitutional norms, some have proposed codifying constitutional norms—that is, enacting their content into law.

This Article examines the dynamics around codifying constitutional norms. It begins by showing that codification efforts face both practical and legal barriers. Practically, it can be difficult to define the precise contours of a constitutional norm and to codify a norm in a polarized political environment. Legally, constitutional law precludes Congress from codifying many of the most important constitutional norms.

The Article then shows that codifying constitutional norms can have significant potential benefits, but that codification is not without costs. Codification holds the promise of promoting greater compliance with norms, typically by making them legally enforceable, but codification can have unintended consequences and in some cases may actually weaken norms. Codification can clarify and stabilize norms that might otherwise be vague or unstable, but codification also risks ossifying norms by denying them the ability to evolve. And codifying a norm can shift power among institutional actors, including by giving courts a role where they previously had none.

Finally, the Article contends that understanding the benefits and costs of codification provides insight into when and how codification is appropriate. The desirability of codification will depend on the institution doing the codifying and the legal vehicle being used for codification. Codification will be more appropriate for rule-like norms than for standard-like norms. Codification through soft law or rules internal to a branch of government may sometimes be superior to codification via a judicially enforceable statute. And norms can be protected indirectly, rather than through directly

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codifying their content. Even when codifying norms is possible and advisable, however, codification cannot serve as a substitute for better politics.

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INTRODUCTION

Ours is an era of fraying constitutional norms. In Congress, norms that held for most of the twentieth century have eroded in recent decades.¹ For four years, the Trump Administration regularly made front-page news for violating norms.² Norms have also frayed in state and local governments.³ For many, shoring up threatened norms is closely tied to shoring up democracy itself. Constitutional norms can, on this view, serve “as the soft guardrails of American democracy, helping it avoid the kind of partisan fight to the death that has destroyed democracies elsewhere in the world.”⁴

Following earlier work, I take constitutional norms to refer to the nonlegal principles that govern the conduct of public officials, the structure and function of government, and the operation of campaigns and elections.⁵ Contemporary U.S.

1. *See, e.g.*, 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* 50 (rev. ed. 2016) (describing how Congress’s “rules, practices, and norms” have been “sacrificed for political expediency”).

2. For examples, see BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* 2–4, 21–22, 95–101, 147–53 (2020); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 *UCLA L. REV.* 1430, 1432, 1451–52 (2018); and Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 *IND. L.J.* 177, 190–203 (2018).

3. *See, e.g.*, Miriam Seifter, *Judging Power Plays in the American States*, 97 *TEX. L. REV.* 1217, 1221–31 (2019) (collecting examples).

4. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 9 (2018); *see also* TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 207 (2018) (noting that “unwritten political norms or constitutional conventions” safeguard “against democratic erosion”).

5. *See infra* Section I.A.

politics has sparked a new wave of interest in constitutional norms.⁶ Threats to constitutional norms naturally give rise to the question of preservation. How can those norms, or the underlying values that they serve, best be strengthened in the face of threats?

One possible answer is *codification*. If a norm is threatened—that is, if it has been, is being, or might soon be violated—it might be secured by enacting its content into law.⁷ History provides examples of these sorts of codifications. The Twenty-Second Amendment, ratified in 1951, instituted presidential term limits in the wake of President Franklin Roosevelt’s unprecedented twelve years in office.⁸ A generation later, in response to President Richard Nixon’s actions, Congress codified norms on topics ranging from ethics in government to the federal budget process.⁹ Other nations have similarly responded to violations of norms by looking to law as a tool to prevent the same norm breaches from happening again.¹⁰

Norm codification is once again topical. Violations of norms during the Trump Administration prompted a wave of calls for “legislation to codify rules and practices that were previously voluntary.”¹¹ Specific proposals included legislation to secure the independence of the Department of Justice, to regulate the use of the pardon power, and to curb presidential financial conflicts of interest.¹² Each of these proposals sought to convert norms into laws, such that future presidents who emulated President Donald Trump’s norm-breaking behavior would run afoul of the law.¹³ For those seeking to strengthen norms, these proposed codifications have intuitive appeal.

6. See *infra* note 28 (citing literature).

7. Codification of a norm does not imply use of a particular type of law. A norm could be codified as a statute, constitutional amendment, administrative regulation, cameral rule, or other sort of law. See *infra* Sections I.C, V.A.

8. See *infra* notes 70–75 and accompanying text.

9. See *infra* notes 76–84 and accompanying text.

10. See, e.g., C. J. G. Sampford, “Recognize and Declare”: An Australian Experiment in Codifying Constitutional Conventions, 7 OXFORD J. LEGAL STUD. 369, 371–73 (1987) (describing debates over codifying constitutional norms following the 1975 Australian constitutional crisis, in which a representative of the British Crown, the Governor-General, dismissed the Prime Minister and replaced him with the leader of the opposition party).

11. Ian Bassin & Justin Florence, Opinion, *Trump’s Acts Show the Urgent Need to Curb the Imperial Presidency*, N.Y. TIMES (Apr. 1, 2019), <https://nytimes.com/2019/04/01/opinion/trump-mueller-barr-letter.html>; see also *infra* notes 88–104 and accompanying text (describing renewed calls for codifying constitutional norms in the wake of the Trump Administration).

12. See *infra* Section I.C.

13. Codifying norms as law would protect the content of norms in the face of public officials who might be willing to break norms but not laws. Codification of norms as law would not, of course, preserve norms in the face of a public official willing to break the law. See, e.g., Peter L. Strauss, *The Trump Administration and the Rule of Law*, 170 REVUE FRANÇAISE D’ADMINISTRATION PUBLIQUE 433, 434–46 (2019) (summarizing developments during the Trump Administration, with a focus on executive action, and concluding that the President’s “political will, and not the law, has controlled”); see also Andrew Weissman, Sam Berger, Randall Eliason, Barbara McQuade, Paul Seamus Ryan, Susan Simpson, Gary Stein & Michael Stern, *Federal Criminal Offenses and the Impeachment of Donald J. Trump*, JUST SECURITY (Dec. 16, 2019), <https://justsecurity.org/67738/federal-criminal-offenses-and-the-impeachment-of-donald-j-trump> [<https://perma.cc/65EN-2GJH>] (essay collection discussing

But codifying constitutional norms is less straightforward than it appears. Tempting as codification can be, it will not always be possible or advisable. Moreover, there are many ways to codify norms, each with their own advantages and disadvantages. In exploring codification, this Article asks and answers three sets of questions about the practice.

First, what are the barriers to codifying constitutional norms? Codification efforts must first overcome a set of practical and political hurdles. Even if a norm's existence is recognized, there may be disagreement about its precise contours, and it will seem unnecessary to tackle this disagreement before the norm is threatened. Once norms are threatened or violated, there will typically be one political party whose short-term interests would be ill-served by codification. The many veto points in the legislative process often allow that party to block attempts at codification. Once a violation ends, opinion about the norm might remain polarized. The urgency of addressing the norm violation may also wane, though codification is easier in the post-violation period than at earlier times. Taken together, these factors help explain why so many norms are left uncoded.¹⁴

Even when these practical and political hurdles can be overcome, codification can still face legal barriers. Constitutional law prevents Congress from legislating some of the most important constitutional norms. A statute codifying norms of investigatory and prosecutorial independence from presidential interference, for instance, might well be struck down as a violation of Article II. A statute codifying norms dictating that candidates for office should not lie to the public would likely be found to violate contemporary First Amendment doctrine. These examples and others point toward a broader truth: uncoded constitutional norms are a necessary and inevitable feature of the United States' constitutional order. A constitution with open-textured language that is enforced by the courts through strong-form judicial review—precisely the situation that prevails in the United States—precludes legislative codification of many constitutional norms. Norms thus become a critical feature of the constitutional order by placing guardrails on the actions of public officials that could not be imposed by ordinary legislation. The wider the domain of constitutional law, the narrower the domain of permissible legislation. Constitutional law as it operates in the United States thereby leaves space for—indeed, demands—a robust body of uncoded constitutional norms.¹⁵

Second, what are the advantages and disadvantages of codifying constitutional norms? Codification has significant potential benefits, but those benefits come with corresponding costs. Codification can deter norm violations and allow for punishment of violators, thereby holding the promise of greater compliance. But codifying a norm might implicitly license conduct not covered by the

criminal activity by President Trump, based on the evidence produced by the House of Representatives during his first impeachment).

14. See *infra* Part II.

15. See *infra* Part III.

codification, and it could undercut the force of uncodified norms more generally. Codification can also provide a measure of settlement: it can clarify and stabilize a norm that might otherwise be vague or unstable. Yet this too comes with costs: it can be useful for norms to retain a degree of ambiguity, and codification risks freezing in place norms that ought to be able to evolve to meet shifting or unanticipated circumstances. Further, codifying a norm can shift power among institutional actors, including by giving courts a role where they previously had none. In short, codification's benefits are real, but its costs should give pause to anyone inclined to view codification as appropriate for all norms under all circumstances.¹⁶

Third, when codification is appropriate, what is the best way to proceed? This Article proposes several guiding principles. With respect to the legal vehicle for codification, an ordinary statute will sometimes be appropriate, but in other instances codification through soft law (such as nonbinding congressional resolutions) or intrabranched law (such as the internal rules governing Congress or federal agencies) will be preferable. As to the ideal form for a codification, the rules–standards distinction provides a useful framework: codification's benefits will often exceed costs if a norm can be codified in a rule-like manner, but the reverse is true for standard-like codifications. Finally, norms can also be protected in an indirect manner, through laws that empower legislators, civil servants, subnational governments, or journalists to protect norms without resorting to litigation. Codification will not always be possible or desirable, but close attention to the advantages and disadvantages of different approaches to codification can provide guidance on how threatened norms can best be protected.¹⁷

Every norm is different, and this Article does not evaluate the merits or relative importance of particular constitutional norms. Members of a political community will inevitably disagree about which norms are foundational, which are only marginally important, and which are even harmful.¹⁸ The case for or against codification of a norm will of course depend on the norm's content. A threshold question for any potential codification effort is whether the norm is substantively desirable on the grounds that it advances democracy, the rule of law, equality, or other values. Rather than focus on the merits of various norms on an individual basis, this Article analyzes the practice of codifying constitutional norms as a general matter. This approach spotlights the central role of norms in democratic politics—a reality that can be missed by focusing on the content of individual norms rather than on the category of norms as a whole.

Legal scholarship in the United States has, until recently, mostly neglected the prospect of codifying constitutional norms.¹⁹ Codification matters, however,

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* notes 210–16 and accompanying text.

19. In the aftermath of the Trump Administration, Bob Bauer and Jack Goldsmith have called for codifying a range of constitutional norms relating to presidential power. *See* BAUER & GOLDSMITH, *supra* note 2, at 357–85 (proposing new statutory provisions, some of which would codify existing

from both a practical and theoretical standpoint. As a practical matter, norm codification matters because periods of norm breaking may be followed by attempts to restore norms through codification. This Article provides guidance on how those seeking to restore norms should go about doing so. More broadly, any polity dependent on norms to regulate the conduct of public officials—which is to say, any polity—will encounter periodic calls to codify norms. For this reason, it is worth understanding the dynamics of codification, both descriptive and normative.

The question of whether and how to codify constitutional norms also implicates the relationship between politics and law. The act of codifying a norm often entails transferring future disputes over the norm from the domain of politics to the domain of law. While an uncodified norm is subject only to contestation among political actors and citizens, norms that have been codified into law can also (or instead) give rise to legal disputes. This Article considers the promise and peril of such a shift. Seeking out legal solutions to political problems can have intuitive appeal for lawyers, judges, or lawmakers. As Richard Pildes noted nearly two decades ago, “[I]ssues concerning the design of democratic institutions and the central processes of democracy have increasingly become questions of constitutional law.”²⁰ But this transformation comes with risks because legal concepts, analysis, and remedies can be a poor fit for the rough-and-tumble world of democratic politics.²¹ This Article considers when those seeking to safeguard constitutional norms should look to codify (the domain of law) and when they should leave norms uncodified (the domain of politics).

Codification of constitutional norms differs from codification in other settings. Scholars and jurists have long debated the advantages and disadvantages of codification in other contexts, typically concluding that codified law is superior to its uncodified alternative. In international law, although customary law once

norms). Other scholars have also noted the possibility of codifying constitutional norms. See Chafetz & Pozen, *supra* note 2, at 1436–37 (providing the example of the Twenty-Second Amendment to illustrate a norm being “displaced by law”); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2215 (2018) (noting that “Congress, historically, played a pivotal role in reinforcing the norm” of investigatory independence through various exercises of soft power, including the “threat of codifying the norm’s requirements”); Oren Tamir, *Constitutional Norm Entrepreneurship*, 80 MD. L. REV. (forthcoming 2021) (manuscript at 63–65) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577781 [<https://perma.cc/6CNR-GCKS>]) (discussing “formalization” of norms); Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1963 (2016) (commenting on the “explicit legalization and juridification of a number of executive-power questions that were previously within the domain of convention”); see also ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW* 49–52 (2009) (discussing codification of social conventions). Scholars from Commonwealth nations have more extensively considered the prospect of codifying constitutional norms. See, e.g., Andrew Blick, *The Cabinet Manual and the Codification of Conventions*, 67 PARLIAMENTARY AFF. 191 (2014); James W.J. Bowden & Nicholas A. MacDonald, *Writing the Unwritten: The Officialization of Constitutional Convention in Canada, the United Kingdom, New Zealand and Australia*, 6 J. PARLIAMENTARY & POL. L. 365 (2012); Sampford, *supra* note 10.

20. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 31 (2004).

21. See *id.* at 40.

predominated,²² today treaty-based international law is widespread and is seen as a more evolved type of law.²³ Similarly, in the domestic context, for decades “[n]o other subject produced such an outpouring of controversy or as much attention from legal thinkers as the struggle over codification [of the common law].”²⁴ Eventually, much of the common law was codified, and the movement for codification produced model statutes such as the Uniform Commercial Code and the Model Penal Code.²⁵ Proponents of common law codification, like their counterparts in the international law context, viewed codification as a step toward a more rational, fair, and democratic body of law.²⁶

Though it would be easy to view codification of constitutional norms as analogous to other forms of codification, such analogies can obscure more than they reveal. Some features of codifying constitutional norms, such as the trade-off between stability and flexibility, have parallels in other areas of law. But the question of whether and how to codify constitutional norms implicates distinctive considerations that warrant their own analysis for at least two reasons. First is the role of constitutional law: codifying constitutional norms often implicates constitutional law concerns that do not exist for other types of codifications in either domestic or international law settings. Second is the issue of how codifying constitutional norms can empower the courts by giving them a role in interpretation

22. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

23. The United Nations Charter, for example, tasks the General Assembly with “encouraging the progressive development of international law and its codification.” U.N. Charter art. 13, ¶ 1(a); see also Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1003 (2012) (“[Nations] have largely responded to custom’s difficulties by turning customary law into treaty law; that is, they have responded with codification.”).

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 118 (1992). The United States was not alone in having sought to codify common law and custom. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 448–98 (2000) (discussing the codification of common law in Europe).

25. Although sometimes framed as codifications, these codes were controversial in part because they did not strictly try to codify existing practices; they also sought to *reform* those practices, either openly or surreptitiously. Many viewed the Uniform Commercial Code “not merely a codification of forgotten commercial law cases[] but [rather] radical social and economic legislation . . . designed to cure the ills of the Depression.” Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 328–29 (1995). Codification of the criminal law similarly drew from existing common law and practices but also served as a blueprint for significant reform to the criminal law. See generally Herbert Wechsler, *American Law Institute II—A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524 (1955); Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); see also Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 COLUM. L. REV. 1098 (1978). On the distinction between codification and reform, see *infra* note 69 and accompanying text.

26. See, e.g., Dick Thornburgh, U.S. Attorney Gen., Remarks Before the Conference on Criminal Code Reform: Codification and the Rule of Law 2 (Jan. 22, 1990) (transcript available at <https://justice.gov/sites/default/files/ag/legacy/2011/08/23/01-22-90.pdf> [<https://perma.cc/R7CP-T493>]) (“I strongly believe that intelligent codification is fundamentally important to the rule of law. Laws in themselves do not assure the rule of law, or even that justice will be done. But complex, confused, or incomplete laws create a sense of misrule, and can lead to complex, confused, or incomplete justice.”).

and application where they previously had none. International law is not analogous in this regard, given that international law “lacks centralized and hierarchical judicial institutions to resolve . . . legal uncertainty.”²⁷ Nor is the common law analogous. Codifying the common law reduces judicial power by replacing judge-made common law with statutes passed by legislatures; by contrast, codifying constitutional norms can enhance judicial power. These dynamics distinguish the codification of constitutional norms from other sorts of codification.

The remainder of this Article proceeds in five parts. Part I provides background on constitutional norms and codification. Part II examines the practical and political hurdles to codifying constitutional norms. Part III considers the legal impediments to codification, showing how constitutional law stands in the way of codifying some constitutional norms. Part IV turns to the various advantages and corresponding disadvantages of codifying constitutional norms. Part V applies these considerations to specific approaches to codification. It argues that would-be codifiers should sometimes consider codifying norms through soft law or intra-branch law rather than through ordinary statutes; that rule-like as opposed to standard-like codification can maximize the benefits of codification while minimizing its costs; and that norms can be strengthened indirectly by enabling political actors to enforce them through nonjudicial means or by raising the political cost of violations. A brief conclusion follows.

I. PRELIMINARIES

A. CONSTITUTIONAL NORMS

By constitutional norms, this Article refers to the legally unenforceable principles that govern the conduct of public officials, the structure and function of government, and the operation of campaigns and elections.²⁸ Most accounts of constitutional norms share several common features.

27. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1803 (2009).

28. Literature on constitutional norms focused on the United States includes Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37 (2012); Chafetz & Pozen, *supra* note 2; Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014); Renan, *supra* note 19; 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 (2003); Siegel, *supra* note 2; Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) [hereinafter Tushnet, *Constitutional Hardball*]; Mark Tushnet, *The Pirate’s Code: Constitutional Conventions in U.S. Constitutional Law*, 45 PEPP. L. REV. 481 (2018) [hereinafter Tushnet, *The Pirate’s Code*]; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) [hereinafter Vermeule, *Conventions of Agency Independence*]; Vermeule, *supra* note 19; and Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847. There is significant literature on constitutional norms in other nations. See *infra* note 149 and accompanying text.

In using the term *constitutional norms*, this Article follows earlier work on the topic. See, e.g., Chafetz & Pozen, *supra* note 2, at 1432; Jon Elster, *Unwritten Constitutional Norms 2* (undated) (unpublished manuscript) (on file with author) [hereinafter Elster, *Unwritten Constitutional Norms*]. Other work refers to either the same or closely related concepts as constitutional conventions, see, e.g.,

First, constitutional norms share basic characteristics with other types of norms. Norms “emerge from decentralized processes,” rather than through legislation, regulation, or any other formal process.²⁹ They need not be written down at all.³⁰ The content of norms “reflect[s] established practice.”³¹ If norms are enforced at all, their enforcement is informal.³² Constitutional norms, in particular, are “enforced by the threat of political sanctions, such as defeat in reelection, retaliation by other political institutions and actors, or the internalized sanctions of conscience.”³³

Second, constitutional norms are constitutional by virtue of their subject matter. They concern “the ‘machinery of government,’ that is, the relation between the main branches of government, their prerogatives, and the limitations on their powers.”³⁴ They typically dictate how public officials, whether elected or appointed, ought to behave.³⁵ To call a norm a constitutional norm distinguishes it from other kinds of norms, such as social norms, cultural norms, or academic norms.

Importantly, constitutional norms are not law. They are instead “*nonlegal* principles of appropriate or expected behavior” by public officials.³⁶ Law rarely

Vermeule, *Conventions of Agency Independence*, *supra*, at 1165; Whittington, *supra*, at 1847, or political norms, *see, e.g.*, Jon Elster, *Political Norms*, 63 IYYUN: JERUSALEM PHIL. Q. 47, 47 (2014); Siegel, *supra* note 2, at 177–78.

29. Pozen, *supra* note 28, at 29; *accord* Azari & Smith, *supra* note 28, at 49 (describing “shared understandings created and enforced outside formal or legal channels”).

30. GINSBURG & HUQ, *supra* note 4; Azari & Smith, *supra* note 28, at 49; Vermeule, *Conventions of Agency Independence*, *supra* note 28, at 1182.

31. GINSBURG & HUQ, *supra* note 4; *accord* Pozen, *supra* note 28, at 29 (asserting that constitutional norms “are regularly followed”); Elster, *Unwritten Constitutional Norms*, *supra* note 28, at 25 (arguing that “existence of [constitutional norms] is closely linked to a widespread belief, among the relevant actors, in their existence”).

32. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 130 (1991) (noting that norm enforcement is “highly decentralized”); Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT’L REV. L. & ECON. 369, 370–82 (1999) (providing a taxonomy of nonlegal sanctions).

33. Vermeule, *Conventions of Agency Independence*, *supra* note 28, at 1182.

34. Elster, *Unwritten Constitutional Norms*, *supra* note 28, at 21; *see also* Ashraf Ahmed, *The Conventional Constitution* 28–29 (Oct. 14, 2020) (unpublished manuscript) (on file with author) (distinguishing between an “actor-centric” account, under which constitutional norms concern “constitutionally identifiable actors discharging a constitutional role,” and a “practice-centric” account, under which constitutional norms “implement[] constitutional principle or text”).

35. *See, e.g.*, A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 278 (8th ed. 1915) (describing “a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the statute or the common law” (quoting EDWARD A. FREEMAN, *THE GROWTH OF THE ENGLISH CONSTITUTION FROM THE EARLIEST TIMES* 109 (London, MacMillan & Co. 1872))). Norms need not be universal among public officials: many norms are well known and widely followed within one setting or institution but unknown and inoperative elsewhere. *See infra* Section I.B (providing examples of norms specific to each branch of government).

36. *See* BAUER & GOLDSMITH, *supra* note 2, at 15; *accord* CRISTINA BICCHIERI, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* 8 (2006) (distinguishing “informal norms” from “formal, codified norms such as legal rules”). Despite the nonlegal character of constitutional norms, they have been described as part of the “small-c” constitution: the “set of rules and norms and institutions that guide the process of government.” Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1127 (2013); *see also* JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE*

requires public officials to comply with constitutional norms. And constitutional norms typically do not bear on the meaning of the written Constitution or on the body of judge-made law that interprets and implements the Constitution. They instead typically operate autonomously from the domain of constitutional law as interpreted and applied by the courts.³⁷ Constitutional norms seek to guide the actions of public officials in areas where law otherwise leaves those officials with discretion.

Third, constitutional norms are not all-or-nothing propositions.³⁸ Strong norms are virtually never violated because violations would be met with swift public backlash or political reprisal. A strong norm dictates, for example, that contemporary Supreme Court Justices not appear at campaign rallies on behalf of candidates for elected office. Weaker norms, by contrast, may be followed less consistently or violated without sanction. The norm against the Senate stonewalling well-qualified Executive Branch nominees in order to hamstring federal agencies, for instance, was broken in the early 2010s without obvious political consequences for the norm violators.³⁹ Because the strength of a norm depends in part on what would happen if the norm were to be violated, it can be difficult to measure that strength before a violation occurs. Many of the norms that President Trump violated were weaker than previously thought, given the lack of political

GOVERNMENT (1861), *reprinted in* ON LIBERTY AND OTHER ESSAYS 205, 270 (John Gray ed., 1991) (discussing “[t]he unwritten maxims of the Constitution—in other words, the positive political morality of the country”).

37. I include the qualifier *typically* because of the ways in which courts sometimes take account of norms in rendering constitutional decisions. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 418 (2012) (“[T]he Supreme Court, executive branch lawyers, and academic commentators have all endorsed the significance of . . . practice-based ‘gloss’ [in separation of powers cases.]”); Samuel Issacharoff & Trevor Morrison, *Constitution by Convention* 4 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 20-15, 2020) (“Occasionally, however, the courts are called upon to adjudicate cases that turn on whether and to what extent certain asserted institutional arrangements and conventions exist, and whether and to what extent those arrangements and conventions should be accorded legal status. In those cases, courts very often do grant legal weight to institutional accommodations embedded in repeated historical practice.”). Some have observed that violations of norms “can remove conditions that courts implicitly rely upon in their development of a presumption of regularity or other judicial forms of deference.” Renan, *supra* note 19, at 2193. For an example of this, see *Trump v. Vance*, 941 F.3d 631, 641 n.12 (2d Cir. 2019) (“We note that the past six presidents . . . all voluntarily released their tax returns to the public. While we do not place dispositive weight on this fact, it reinforces our conclusion that the disclosure of personal financial information, standing alone, is unlikely to impair the President in performing the duties of his office.”). For comparative perspectives on how constitutional norms inform judicial decisionmaking, see Farrah Ahmed, Richard Albert & Adam Perry, *Judging Constitutional Conventions*, 17 INT’L J. CONST. L. 787 (2019).

38. *See* Andrew D. Heard, *Recognizing the Variety Among Constitutional Conventions*, 22 CANADIAN J. POL. SCI. 63, 71–76 (1989) (describing five categories of constitutional conventions); *see also* Richard T. Morris, *A Typology of Norms*, 21 AM. SOC. REV. 610 (1956) (arguing that norms can differ based on how widely distributed they are, how they are enforced, how they are transmitted, and the extent to which they are followed).

39. *See, e.g.*, James Fallows, ‘A Process That Is Running Out of Control’: The New Nullification Crisis, ATLANTIC (Dec. 10, 2011), <https://theatlantic.com/politics/archive/2011/12/a-process-that-is-running-out-of-control-the-new-nullification-crisis/249754>.

consequences for many of his breaches of norms. Conversely, it was not evident that norms around firing U.S. Attorneys were especially strong until a scandal during the second Bush Administration over politicized firings forced the resignation of a U.S. Attorney General.⁴⁰

These features of constitutional norms do not furnish a precise definition. “There is no canonical list” of constitutional norms.⁴¹ It can be hard to know whether a norm exists, especially when the norm concerns events that take place infrequently, such as the presidential impeachment process. Reasonable observers can and do disagree about the definition of a norm, which in turn results in disagreement about which practices are norms. One possible axis of disagreement is whether norms must necessarily reflect a moralized view of particular conduct as being right or wrong. Must a norm be followed “out of a sense of obligation,”⁴² or is it still a norm even if it is followed exclusively because a public official anticipates being rewarded for following the norm or punished for violating it?⁴³ Another axis of disagreement concerns whether and when norms remain norms even after being broken: how many violations are required before we can conclude that a norm no longer exists?⁴⁴ Yet another concerns the relative importance of external sanction: if a norm violator goes unpunished, did the norm even exist to begin with?⁴⁵

40. See BAUER & GOLDSMITH, *supra* note 2, at 142–43.

41. See, e.g., Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921>.

42. Pozen, *supra* note 28, at 29; see also Robin M. Williams, Jr., *The Concept of Norms*, in 11 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 204, 204 (David L. Sills ed., 1968) (defining a norm as “a cultural (shared) definition of desirable behavior”). H. L. A. Hart makes this point with respect to social norms: “There is in England no rule, nor is it true, that everyone must or ought to or should go to the cinema each week: it is only true that there is a regular resort to the cinema each week. But there *is* a rule that a man must bare his head in church.” H. L. A. HART, *THE CONCEPT OF LAW* 10 (3d ed. 2012).

43. It is “extremely difficult for an outside observer to distinguish” actions taken out of rational fear of political sanction from those undertaken based on principles of political morality. Adrian Vermeule, *Conventions in Court*, 38 DUBLIN U. L.J. 283, 288 (2015). Consider, in this regard, the principle that Presidents do not seek to expand the size of the Supreme Court for political ends. Some Presidents may follow the principle out of an internalized obligation to respect the separation of powers and the independence of the judiciary. But even Presidents who would view expanding the size of the Court as justified might forbear out of prudence, knowing that they might be punished politically for violating a norm.

44. Compare *id.* at 302 (“Conventions, as usually defined and as I have defined them, are supposed to be widespread and generally acknowledged. The consequence is that serious good-faith disagreement over the existence of a convention implies that there is no convention.” (emphasis omitted)), with Tushnet, *The Pirate’s Code*, *supra* note 28, at 496 (“[T]his way of thinking misses important aspects of the role of conventions in U.S. constitutional discourse.”).

45. Behaviors undertaken based on neither an internal sense of political morality nor fear of external sanction are arguably not norms at all. They may instead be habits or reflections of equilibria that exist because no relevant actor “has an incentive and the ability to defect to some other strategy.” Peter C. Ordershook, *Constitutional Stability*, 3 CONST. POL. ECON. 137, 150 (1992). Many define equilibria as being outside the domain of norms. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1115 (2008) (“[E]quilibria are not norms.”); Williams, Jr., *supra* note 42, at 204, 207–08 (contending that a norm is “a cultural

These definitional questions are central to some treatments of constitutional norms, but this Article does not belabor them. It instead considers the dynamics of codifying existing norms—regardless of whether constitutional norms, as a category, are defined narrowly or broadly along any particular axis. Those who define norms narrowly might question the strength or even existence of some of the norms discussed in this Article. But for any definition of constitutional norms, analysis of whether, when, and how to codify has common contours.

B. THE UBIQUITY OF CONSTITUTIONAL NORMS

Constitutional norms are central to nearly every aspect of politics and governance in the United States, despite the frequent challenge of defining precisely when a norm exists and what its contours are. Norms structure the internal organization of each branch, interbranch relations, and how officials behave while running for and holding public office.

Norms are central to the functioning of the Executive Branch. Norms structure internal White House decisionmaking, providing, for example, that the President receives briefings on national security matters.⁴⁶ Norms insulate certain agencies—ranging from the Department of Justice to the Federal Reserve—from varying types of White House interference.⁴⁷ Scholars have also identified norms dictating that the President deal honestly with the public, attempt to fill senior political positions in federal agencies, show respect to the press, attempt to separate official duties from political events, and decline to use the power of the presidency for personal financial gain.⁴⁸

In Congress, norms are similarly pervasive. One canonical account of the Senate describes the chamber’s “[f]olkways”: things that “are just not done” on the ground that they violate the chamber’s “unwritten rules of the game, its norms of conduct, [and] its approved manner of behavior.”⁴⁹ Norms dictate that members of Congress take part in committee hearings and floor votes, meet with interest groups and other stakeholders, and provide constituent services.⁵⁰ Some

(shared) definition of desirable behavior,” a consequence of which is “sheer uniformity in behavior . . . [which] does not necessarily mean that a norm is involved”).

46. See Renan, *supra* note 19, at 2221–30 (describing this and other “discretion-structuring norms” (multiple capitalizations altered)).

47. See *id.* at 2207–15; Vermeule, *Conventions of Agency Independence*, *supra* note 28, *passim*.

48. See sources cited *supra* note 2; see also Matthew Stephenson, *How Should the U.S. Anticorruption Community Respond to Trump? Engagement vs. Confrontation*, GLOBAL ANTICORRUPTION BLOG (Jan. 31, 2017), <https://globalanticorruptionblog.com/2017/01/31/how-should-the-u-s-anticorruption-community-respond-to-trump-engagement-vs-confrontation> [<https://perma.cc/6HJH-AB46>] (“Much of our protection against systemic high-level corruption comes from informal norms, enforced by public opinion.”).

49. DONALD R. MATTHEWS, U.S. SENATORS AND THEIR WORLD 92 (1960). See generally Donald R. Matthews, *The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness*, 53 AM. POL. SCI. REV. 1064 (1959) (describing norms of apprenticeship, specialization, courtesy, reciprocity, and institutional patriotism in the Senate); David W. Rohde, *Studying Congressional Norms: Concepts and Evidence*, 15 CONGRESS & PRESIDENCY 139 (1988) (discussing norms in the House, with a focus on how to measure whether a norm exists).

50. Recent articles by Vicki Jackson and Neil Siegel discuss many of these activities, though they do so mainly in the context of developing theories of role morality rather than in articulating preexisting norms. See Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of*

norms within Congress were hardly noticed until they frayed: a norm that once dictated that debt ceiling legislation not be used to extract substantive policy concessions has been substantially weakened, if it still exists at all.⁵¹

Norms also exist in courts. The well-known list of modalities of constitutional interpretation are not enshrined in law but instead are best understood as norms around what sorts of interpretive methods are acceptable.⁵² Norms likewise place some modes of reasoning outside the bounds of permissible constitutional argument.⁵³ Despite its name, the Supreme Court's "Rule of Four," which provides that the votes of four Justices are sufficient for a grant of certiorari, is in fact a norm rather than a rule.⁵⁴ Norms are all that prevent Supreme Court Justices from publicly endorsing candidates for elected office or from deciding cases in which they have a conflict of interest.⁵⁵ And the day-to-day operations of the Supreme Court are governed by a long list of norms: "[T]he Justices offer their comments at conference in the order of their seniority, a brand new Justice is typically assigned an 'easy' unanimous opinion to write first, and the Chief Justice attempts to assign opinions in a way that divides the workload evenly."⁵⁶

Norms shape interbranch relations as well. Norms, not law, dictate that the House Speaker invite the President to deliver a State of the Union Address in the House chamber each winter.⁵⁷ So too, norms protect the Supreme Court from meddling by the political branches. The Constitution does not set a fixed size for the Court, and there are no legal constraints on Congress and the President

Judges and Elected Representatives in Constitutional Democracy, 57 WM. & MARY L. REV. 1717 (2016); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109 (2018).

51. See Kevin Drum, *How the Game Is Played*, MOTHER JONES (July 19, 2011), <https://motherjones.com/kevin-drum/2011/07/how-game-played-0> [<https://perma.cc/X6MR-MCX8>] (contrasting the use of the debt ceiling to extract policy concessions in 2011 with the previously existing norm under which "the minority party gives a few speeches about the recklessness of the majority, the president weighs in to say the U.S. has to honor its debts, and then the debt ceiling is raised").

52. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1982); see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192–1209 (1987) (developing a typology of interpretive methods).

53. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).

54. See, e.g., M. Patrick Yingling, *Judicial Conventions: An Examination of the US Supreme Court's Rule of Four*, 38 DUBLIN U. L.J. 477 (2015).

55. Because the Supreme Court lacks a code of ethics, there are no binding rules or even informal guidance that address these and other questions of judicial conduct that regularly arise. See Steven Lubet, *Why Won't John Roberts Accept an Ethics Code for Supreme Court Justices?*, SLATE (Jan. 16, 2019, 9:00 AM), <https://slate.com/news-and-politics/2019/01/supreme-court-ethics-code-judges-john-roberts.html> ("Is it permissible for justices to provide anonymous leaks to the press about their private conferences? May they criticize political candidates, speak at meetings of partisan legal organizations, or raise funds for charities? May they vacation with litigants in the middle of a pending case or comment on legal issues or proceedings in lower courts?").

56. Allison Orr Larsen, *Supreme Court Norms of Impersonality*, 33 CONST. COMMENT. 373, 379 (2018) (footnotes omitted).

57. The Constitution does not require an in-person address. See U.S. CONST. art. II, § 3, cl. 1. Century-old norms around the Speaker inviting the President to deliver an in-person address were hardly ever noticed until 2019, when they became the subject of front-page controversy. See Julie Hirschfeld Davis & Nicholas Fandos, *Pelosi Asks Trump to Reschedule State of the Union amid Shutdown*, N.Y. TIMES (Jan. 16, 2019), <https://nytimes.com/2019/01/16/us/politics/pelosi-state-of-the-union-trump.html>.

increasing the number of Justices in order to change the Court's ideological balance. But a norm dictates that the political branches should not attempt to change the number of Justices on the Court to influence the Court's jurisprudence.⁵⁸

Among the most scrutinized interbranch norms are norms around the Senate confirmation process. Norms dictate a degree of congressional deference in allowing the President to make appointments to Executive Branch positions so long as appointees are qualified.⁵⁹ Conversely, norms dictate that the White House owes some deference to senators' input on appointments to federal district court judgeships.⁶⁰ Many understand there to be a norm dictating that the Senate give fair consideration to a President's nominees to the Supreme Court, though others contest that such a norm exists at all.⁶¹ Norms once dictated that federal district and appellate judges be confirmed only with the consent of one or both of the nominees' home-state senators, but the Senate in recent years began

58. See Elster, *Unwritten Constitutional Norms*, *supra* note 28, at 16. The law has set the Court's size at nine Justices since the passage of the Judiciary Act of 1869. The only serious attempt to expand the Court occurred during the 1930s, but some have argued that the failure of that attempt may have reinforced the norm rather than weakened it. On whether possible future attempts to expand the Court would violate norms, see, for example, Neil Siegel, *The Anti-Constitutionality of Court-Packing*, BALKINIZATION (Mar. 26, 2019), https://balkin.blogspot.com/2019/03/the-anti-constitutionality-of-court_36.html [<https://perma.cc/5HKE-9DLP>]. For a broader discussion of norms around judicial independence, see, for example, Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 470 (2018) (“[B]eginning around the 1930s, a bipartisan consensus developed that Congress could remove federal judges only through the impeachment process. The bipartisan norm requiring compliance with federal court orders emerged only in the wake of the civil rights movement of the 1950s and 1960s. And although some scholars assume that President Franklin Roosevelt violated an already-existing norm when he proposed to ‘pack’ the Supreme Court in 1937, a closer look reveals that Roosevelt’s plan had considerable support—and came close to passage.”).

59. Bob Bauer, *The Unintended Consequences of Enshrining Norms in Law*, LAWFARE (Oct. 16, 2018, 11:01 AM), <https://lawfareblog.com/unintended-consequences-enshrining-norms-law> [<https://perma.cc/HX3N-JW6V>] (“Congress normally scrutinizes a president’s nominations to judge core qualifications and personal fitness—but except for clear questions on those measures, it deems presidents entitled to their preferences for high-level appointments.”).

60. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 118 (2003) (noting that “all presidents have relied rather heavily on senatorial input for district court appointments” and that “[r]ather than increasing their staffs to deal with the increasing number of federal judgeships they must fill, more recent presidents have instead looked for assistance from senators and their staffs”); see also *id.* at 143–44 (discussing norms of “senatorial courtesy” with respect to appointments).

61. Compare, e.g., LEVITSKY & ZIBLATT, *supra* note 4, at 136 (“[B]etween 1866 and 2016, the Senate never once prevented the president from filling a Supreme Court seat.”), and Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 266–67 (“[B]locking Judge Garland’s nomination to the Court broke the patterns of more than 100 years in which the Senate held confirmation hearings for all but two Supreme Court nominees (who had withdrawn their nominations prior to their hearings). . . .”), with Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 119–26 (2017) (describing Senate stonewalling of several Supreme Court nominations, including President Lyndon Johnson’s 1968 nomination of Associate Justice Abe Fortas to serve as Chief Justice).

confirming judicial nominees without consent from either home-state senator.⁶² And norms long led Presidents to nominate Democrats and Republicans to the Federal Election Commission in bipartisan pairs, though that norm, too, has frayed in recent years.⁶³

The electoral process is likewise regulated by norms. Some norms concern what candidates may and may not say on the stump, such as the long-standing norm against candidates calling for the prosecution of their political opponents.⁶⁴ Other norms concern the rites of passage that characterize modern campaigns. Over the past half-century, for example, there has been a norm that major-party presidential candidates participate in televised debates.⁶⁵ No law requires participation, but a strong norm makes it almost unthinkable that a candidate would refuse to take part. “Whether they like it or not, modern candidates have little choice but to accept the inevitability of joint televised appearances,”⁶⁶ one scholar writes. “For a presidential contender who flat-out refused to take part, no amount of spin could offset what voters and journalists would interpret as an unacceptable departure from the norm.”⁶⁷

C. CODIFYING CONSTITUTIONAL NORMS

Much of the contemporary discourse about constitutional norms concerns threats to those norms. Attempting to codify a norm, by changing the law to compel compliance with the norm’s content, is one possible response to these threats. The paradigmatic codification involves passing a statute that enacts the norm’s substance into law. But a norm can be codified through other means as well, including constitutional amendments, administrative regulations, and cameral rules. Codification occurs whenever a norm is enacted into law via a formal, written instrument, regardless of which instrument is used.⁶⁸

62. See Deanna Paul, ‘Damaging Precedent’: Conservative Federal Judge Installed Without Consent of Home-State Senators, WASH. POST (Feb. 28, 2019, 1:34 PM), <https://washingtonpost.com/politics/2019/02/27/dangerous-first-conservative-judge-installed-after-vetting-by-only-two-senators/>; see also Brannon P. Denning, *The “Blue Slip” : Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001); MITCHEL A. SOLLENBERGER, CONG. RESEARCH SERV., RL32013 THE HISTORY OF THE BLUE SLIP IN THE SENATE COMMITTEE ON THE JUDICIARY, 1917–PRESENT (2003), <https://fas.org/sgp/crs/misc/RL32013.pdf> [<https://perma.cc/JS24-LC7B>].

63. See Kenneth P. Doyle, *Senate Breaks Tradition by Advancing Only GOP FEC Nominee (1)*, BLOOMBERG GOV’T (Mar. 4, 2020, 12:14 PM), <https://about.bgov.com/news/senate-breaks-tradition-by-advancing-only-gop-fec-nominee-1>.

64. See Yoni Appelbaum, *Trump’s Promise to Jail Clinton Is a Threat to American Democracy*, ATLANTIC (Oct. 10, 2016), <https://theatlantic.com/politics/archive/2016/10/trumps-promise-to-jail-clinton-is-a-threat-to-american-democracy/503516>.

65. See ALAN SCHROEDER, PRESIDENTIAL DEBATES: FIFTY YEARS OF HIGH-RISK TV 303 (2d ed. 2008).

66. *Id.*

67. *Id.*

68. This Article considers only codification through positive law. It does not consider the related issue of whether and when courts should choose to recognize a constitutional norm and what the implications of such judicial recognition might be. See *supra* note 37 (discussing the relationship between norms and judicial doctrine).

Efforts to codify constitutional norms differ from efforts to enact political reforms. Reformers seek to change the status quo. Codifiers seek to stabilize and entrench the status quo that either prevails at the time of codification or existed immediately prior to a norm violation. Scores of statutes regulate politics and governance, but nearly all of them were passed as reforms, rather than as codifications of existing norms.⁶⁹ This Article does not engage with broader questions of when political reform is appropriate and how it should be pursued. It instead considers only the dynamics of codifying existing constitutional norms.

There has never been an attempt to codify all constitutional norms on a wholesale basis. There have, however, been attempts—sometimes successful, sometimes not—to codify specific norms.

The two-term presidency is a paradigmatic codified constitutional norm. From the nation's Founding until 1951, no law barred Presidents from seeking and winning third terms.⁷⁰ Yet, on the standard account, a strong norm dictated that Presidents serve no more than two terms.⁷¹ In the early twentieth century, leading constitutional theorists cited the two-term limit as a constitutional norm that, though uncodified, was a powerful constraint on behavior.⁷² President Franklin Roosevelt broke that norm by running for and winning a third term in 1940 (and a fourth in 1944).⁷³ In response to President Roosevelt's breach of the norm, the two-term limit was codified through the ratification of the Twenty-Second Amendment in 1951.⁷⁴ The codification was fiercely contested: many viewed the

69. Consider two prominent statutes structuring how government operates. The Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered Sections of 5 U.S.C.), was passed not to codify norms but rather to address new questions that arose from the expansion of the administrative state during the New Deal. *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1680 (1996) (providing a detailed history of the statute, and concluding that it was “the armistice of a fierce political battle over administrative reform”). The Antideficiency Act, 31 U.S.C. § 1341 (2018), which bars the Executive Branch from incurring financial obligations or spending money in excess of amounts appropriated by Congress, was passed to reform a status quo in which “it was not uncommon for agencies to incur obligations in excess of or in advance of appropriations,” and “some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these ‘coercive deficiencies.’” 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-92-13, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-9* (2d ed. 1992) (quoting Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679): And Funding Federal Contracts: An Analysis*, 80 *MIL. L. REV.* 51, 58 (1978)). Like the APA and the Antideficiency Act, most of the other statutes that structure how government functions were passed to reform the status quo, not as codifications of preexisting norms.

70. *See, e.g.*, MARTIN B. GOLD, *THE TWENTY-SECOND AMENDMENT AND THE LIMITS OF PRESIDENTIAL TENURE: A TRADITION RESTORED 25–218* (2020); MICHAEL J. KORZI, *PRESIDENTIAL TERM LIMITS IN AMERICAN HISTORY: POWER, PRINCIPLES, AND POLITICS 124–42* (James P. Pfiffner et al. eds., 2011).

71. *See, e.g.*, Siegel, *supra* note 2, at 181–82 (discussing the two-term norm).

72. *See* Whittington, *supra* note 28, at 1855–56 (discussing the views of A. V. Dicey and Herbert Horwill). *But see id.* at 1856 (noting that James Bradley Thayer presciently predicted that a “good enough” candidate could be repeatedly reelected as President).

73. *See* KORZI, *supra* note 70, at 129.

74. *See id.* at 127.

Amendment as a de facto referendum on President Roosevelt's Administration and supported or opposed it accordingly.⁷⁵

A generation later, Congress sought to codify many of the norms violated by President Nixon.⁷⁶ In response to Democratic views that President Nixon misused the impoundment power,⁷⁷ Congress formally prohibited impoundment in the Congressional Budget and Impoundment Control Act of 1974.⁷⁸ Similarly, archiving presidential records had long been "an unofficial norm" that "Congress didn't feel the need to enforce through legislation until . . . Nixon very publically broke it."⁷⁹ President Nixon's actions led Congress to pass statutes in 1974⁸⁰ and 1978⁸¹ governing the preservation and release of presidential records. After the Nixon Administration used government agencies to collect personal or compromising information about political opponents,⁸² Congress included provisions in both the Privacy Act of 1974⁸³ and the Tax Reform Act of 1976⁸⁴ to prevent future presidents from doing the same.

The Roosevelt and Nixon examples are the most prominent instances of norm violations that prompted successful codification, but they are not the only ones. Consider so-called faithless elector laws, which either require Electoral College electors to cast their ballots for the candidate who won their state or impose a fine

75. See *infra* notes 138–40 and accompanying text.

76. See Sam Berger & Alex Tausanovitch, *Lessons from Watergate: Preparing for Post-Trump Reforms*, CTR. AM. PROGRESS (July 30, 2018, 9:00 AM), <https://americanprogress.org/issues/democracy/reports/2018/07/30/454058/lessons-from-watergate> [<https://perma.cc/PVP3-W3C7>] (describing federal statutes passed in the aftermath of the Nixon Administration).

77. See 1974 *Congressional Budget and Impoundment Control Act*, U.C. BERKELEY: SLAYING THE DRAGON OF DEBT—FISCAL POL. & POL'Y FROM THE 1970S TO THE PRESENT (Mar. 7, 2011), <https://bancroft.berkeley.edu/ROHO/projects/debt/budgetcontrolact.html> [<https://perma.cc/9U86-YDJC>] (noting that legislation on impoundment was motivated by the Nixon Administration's "refusal to disburse nearly \$12 billion of congressionally-appropriated funds in 1973–74 through the executive power of impoundment").

78. Pub. L. No. 93-344, 88 Stat. 297. Although President Nixon engaged in impoundment to a greater extent than his predecessors, impoundments by earlier presidents raise questions about the strength and even the existence of any anti-impoundment norm that may have existed before the passage of the 1974 Act. See Gerald A. Figurski, *Presidential Impoundment of Funds: A Constitutional Crisis*, 7 AKRON L. REV. 107, 111 (1973) ("Presidents from FDR on impounded various programs and irritated Congress in the process.").

79. Becky Little, *Watergate-Era Law Means Presidents Can't Just Rip Up and Toss Documents*, HISTORY (Oct. 16, 2018), <https://history.com/news/presidential-records-watergate-law-official-documents> [<https://perma.cc/4PJB-43ZM>].

80. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (reprinted at 44 U.S.C. § 2111 note (2018)) (concerning records from the Nixon Administration).

81. Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201–2207 (2018)) (concerning presidential records generally).

82. See Berger & Tausanovitch, *supra* note 76.

83. Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a (2018)).

84. Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered titles of the U.S. Code); see also James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns—The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 950–51 (1979) (noting that "[t]he basic premise of the provisions of the [Act] is that there shall be no disclosure of tax returns and return information for uses other than tax administration" and that the Act "provide[s] stricter penalties for unauthorized disclosure of tax information" (footnote omitted)).

on electors who decline to do so. More than half of states have enacted such laws.⁸⁵ These laws codify the norm that an elector must vote for the candidate who won the most votes in their state. Many of the states that have codified the norm did so in the aftermath of an elector violating the norm, or to preempt that possibility. Alabama, for instance, codified the norm as a direct reaction to the state's electors refusing to vote for the Democratic Party's nominee in 1948.⁸⁶ Justice Robert Jackson recognized Alabama's law as a codification rather than a reform, noting that it did "no more than to make a legal obligation of what has been a voluntary general practice."⁸⁷

This past is prologue to contemporary politics. For four years, President Trump was "a norm-busting president without parallel in American history."⁸⁸ The bill of particulars on this score is long and has been well-documented.⁸⁹ Violations of norms by President Trump and his Administration prompted a revival of interest in codifying constitutional norms. Advocates for codification contend that norms are vulnerable precisely because they are not law. Self-consciously drawing on the post-Roosevelt and post-Nixon precedents,⁹⁰ they have proposed codifying a wide range of norms. One member of Congress put the issue simply: "A lot of things over time in our history of government were custom and practice and somebody came along and broke it, and then we passed a law to fix it."⁹¹

Proposed norm codifications in light of actions taken during the Trump Administration included the following:

85. See *Faithless Elector State Laws*, FAIRVOTE (July 7, 2020), https://www.fairvote.org/faithless_elector_state_laws [<https://perma.cc/QVJ4-4JGK>] (cataloging state laws); see also *infra* notes 167–71 and accompanying text (describing litigation over faithless elector laws).

86. See *Ray v. Blair*, 343 U.S. 214, 233 (1952) (Jackson, J., dissenting).

87. *Id.*

88. Goldsmith, *supra* note 41.

89. See, e.g., *id.* ("[Trump] has told scores of easily disprovable public lies; he has shifted back and forth and back again on his policies, often contradicting Cabinet officials along the way; he has attacked the courts, the press, his predecessor, his former electoral opponent, members of his party, the intelligence community, and even his own attorney general; he has failed to release his tax returns or to fill senior political positions in many agencies; he has shown indifference to ethics concerns; he has regularly interjected a self-regarding political element into apolitical events; he has monetized the presidency by linking it to his personal business interests; and he has engaged in cruel public behavior."); see also *supra* note 2 (citing sources discussing these norm violations in detail and providing additional examples).

90. The Brennan Center's ambitious proposal to codify constitutional norms in response to conduct during the Trump Administration, for example, situates its proposed codifications in the context of these past codification efforts. See PREET BHARARA, CHRISTINE TODD WHITMAN, MIKE CASTLE, CHRISTOPHER EDLEY, JR., CHUCK HAGEL, DAVID IGLESIAS, AMY COMSTOCK RICK & DONALD B. VERRILLI, JR., BRENNAN CTR. FOR JUSTICE, PROPOSALS FOR REFORM 1 (2018), https://brennancenter.org/sites/default/files/publications/TaskForceReport_2018_09_.pdf [<https://perma.cc/5PED-BEQ5>].

91. *Hearing on Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 116th Cong. (2019) (statement of Rep. Jimmy Gomez, Member, H. Comm. on Ways & Means), <https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Transcript%20-%20Final.pdf> [<https://perma.cc/2FEE-X9W3>].

- A norm dictates that the President not interfere with federal investigations.⁹² Several reforms were proposed in response to concerns about the White House meddling in investigations during the Trump Administration: a bipartisan group of legislators introduced legislation to protect special counsels from being fired without cause,⁹³ and House Democrats introduced legislation requiring that certain White House communications with the Department of Justice be disclosed to the Department's Inspector General and, under some circumstances, to Congress itself.⁹⁴
- A norm dictates that presidential candidates and sitting Presidents release their income tax returns.⁹⁵ In response to President Trump's refusal to do so, House Democrats introduced legislation that would require presidential candidates and sitting Presidents to make their last ten years of tax returns publicly available.⁹⁶
- A norm dictates that Presidents not use the pardon power to place themselves, their family members, or their close associates above the law. In response to concerns that President Trump might pardon advisors who broke the law during his presidential campaign,⁹⁷ House Democrats introduced legislation that would require special disclosures to Congress for pardons arising from matters in which the President or one of the President's relatives is a target, subject, or witness.⁹⁸
- A norm dictates that White House decisionmaking follows an established process designed to ensure that decisions are well reasoned and grounded in fact.⁹⁹ In response to a chaotic White House decisionmaking environment,¹⁰⁰ an advocacy group proposed legislation to strengthen requirements that presidential decisions be made based on high-quality and objective information.¹⁰¹

Perhaps the most striking feature of these proposed codifications is that none have become law. Some were proposed by nongovernmental organizations but

92. See Renan, *supra* note 19, at 2206–42.

93. See Mary Clare Jalonick, *As Trump Fumes, Senators Bid to Protect the Special Counsel*, AP NEWS (Apr. 11, 2018), <https://apnews.com/9a5a0ba245814a9b8259c6290b698ff5> (discussing the Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. § 2 (2018)).

94. See Protecting Our Democracy Act, H.R. 8363, 116th Cong. §§ 601–604 (2020); see also BHARARA ET AL., *supra* note 90, at 17–21 (making a similar proposal).

95. See BAUER & GOLDSMITH, *supra* note 2, at 73; Jill Disis, *Presidential Tax Returns: It Started with Nixon. Will It End with Trump?*, CNN (Jan. 26, 2017, 2:06 PM), <https://money.cnn.com/2017/01/23/news/economy/donald-trump-tax-returns/index.html> [<https://perma.cc/J38K-3NR5>].

96. See For the People Act of 2019, H.R. 1, 116th Cong. § 10001(b)(1).

97. See Jennifer Rodgers, *Trump Is Turning His Pardon Power into a Shield*, CNN (Feb. 18, 2020, 2:52 PM), <https://cnn.com/2019/03/19/opinions/trump-pardon-power-abuse-rodgers/index.html> [<https://perma.cc/AN64-X5P2>].

98. See Abuse of the Pardon Prevention Act, H.R. 1627, 116th Cong. § 2(a) (2019).

99. See Renan, *supra* note 19, at 2221–30.

100. See generally MICHAEL WOLFF, FIRE AND FURY: INSIDE THE TRUMP WHITE HOUSE (2018).

101. See Bassin & Florence, *supra* note 11 (proposing changes to the Information Quality Act, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (reprinted at 44 U.S.C. § 3516 note (2018))).

never introduced in Congress, and others were introduced in Congress or even passed by one chamber.¹⁰² The obvious reason these bills did not pass is that nearly all of these proposed codifications were supported only by Democrats,¹⁰³ which prevented them from passing a divided Congress. Even if both chambers were to have passed a bill to codify a norm that President Trump or his Administration violated, that bill would no doubt have been vetoed.¹⁰⁴

For these reasons, proposed norm codifications in response to actions by the Trump Administration did not become law during his time in office. Their fate is uncertain in the Biden Administration. But the recent proliferation of codification proposals calls for a closer look at codification. The remainder of the Article takes up that task.

II. PRACTICAL AND POLITICAL CONSTRAINTS

There are significant barriers to codifying norms. Both practical considerations, such as the difficulty of agreeing on a norm's existence and scope, and political constraints, such as the ability of norm violators and their co-partisans to block attempted codifications, can stand in the way of codifying constitutional norms.

A. IDENTIFYING AND AGREEING UPON NORMS

There is an intuitive appeal to codifying norms before they are violated or even threatened. Partisans should, the reasoning goes, be able to consider the wisdom of any given norm from behind a veil of ignorance,¹⁰⁵ weigh the advantages and disadvantages of codification, and proceed accordingly. But this seemingly straightforward path to codification is bumpier than it looks.

A first challenge is identifying the existence of a constitutional norm. Though some norms have been identified even without any instances of noncompliance,¹⁰⁶ in many instances norms go unnoticed prior to being violated.¹⁰⁷ Before

102. *See, e.g.*, For the People Act of 2019, H.R. 1, 116th Cong. (proposing democracy-related legislation containing provisions codifying several norms, including presidential tax return disclosure).

103. The sole Trump-era exception was proposed legislation to protect the special counsel, which had bipartisan support in the Senate with two Republican and two Democratic cosponsors. *See* Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. § 2 (2018) (reintroduced as S. 71, 116th Cong. § 2 (2019)). The House version of the legislation was bipartisan in name only, with nearly all of its support coming from Democrats. *See* Special Counsel Independence and Integrity Act, H.R. 5476, 115th Cong. § 2 (2018) (reintroduced as H.R. 197, 116th Cong. § 2 (2019)).

104. Such a bill could have become law if Democrats had held a veto-proof supermajority in both chambers, but it is virtually impossible to garner such a supermajority in the contemporary Congress.

105. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 118–23 (rev. ed. 1999); *see also* Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399 (2001).

106. *See, e.g.*, Blick, *supra* note 19, at 192 (noting that the U.K. Cabinet Manual was drafted in advance of elections that some anticipated “might not produce a single-party majority in the House of Commons,” making it particularly important that “the constitutional procedures to be followed in such circumstances be made clear and open”); *cf.* Renan, *supra* note 19, at 2204 (“Administrative structures and procedures, professional practices, or congressional processes will sometimes develop to protect a particular form of presidential behavior.”).

107. *See, e.g.*, Goldsmith, *supra* note 41 (arguing that constitutional norms “are rarely noticed until they are violated”); *see also* Elster, *Unwritten Constitutional Norms*, *supra* note 28, at 29 (“Suppose that a certain behavior falls outside written as well as unwritten norms, because nobody has practiced or even

the norm was broken, who would have thought it necessary to specify that the President should review written briefing materials containing intelligence and national security information?¹⁰⁸ The difficulty of identifying some norms before they have been threatened or violated serves as an obstacle to codification.

Even when a norm can be identified, would-be codifiers might not be able to agree on its precise content. “Social norms are hard to describe; they are fuzzy; they drift.”¹⁰⁹ The same holds for constitutional norms, which are “beset with problems of defining their true content.”¹¹⁰ A norm’s precise scope will often be debatable, subject to different interpretations as different actors read the relevant history differently.¹¹¹

Norms surrounding presidential terms are illustrative. It might seem that there was a norm from the birth of the republic: no President may serve more than two terms. But a closer look reveals considerable ambiguity. President Washington did not view his decision to forgo running for a third term as setting a precedent or as resulting from normative obligation.¹¹² Prior to President Franklin Roosevelt running for and winning a third term, several presidents either considered running for a third term or ran for a third term unsuccessfully.¹¹³ There was disagreement about whether partial terms¹¹⁴ or nonconsecutive terms¹¹⁵ should count for purposes of the two-term norm. Although many believed that the norm existed so long as voters would electorally punish any President who ran for a

envisaged it. One might still claim that there is and always has been a [norm] against it, since . . . at any given time in the past a violation, had it occurred, would have been sanctioned.” (emphasis omitted)).

108. See Carol D. Leonnig, Shane Harris & Greg Jaffe, *Breaking with Tradition, Trump Skips President’s Written Intelligence Report and Relies on Oral Briefings*, WASH. POST (Feb. 9, 2018, 10:02 AM), https://washingtonpost.com/politics/breaking-with-tradition-trump-skips-presidents-written-intelligence-report-for-oral-briefings/2018/02/09/b7ba569e-0c52-11e8-95a5-c396801049ef_story.html.

109. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 221 (2000); see also ELLICKSON, *supra* note 32 (“Norms are harder [than laws] to verify because their enforcement is highly decentralized and no particular individuals have special authority to proclaim norms.”); William Hubbard, *Inventing Norms*, 44 CONN. L. REV. 369, 378 (2011) (“Evidence of norms is often reflected in circumstantial evidence of behavior patterns,” so a significant “challenge in analyzing social norms is identifying them.”).

110. Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 LEGAL STUD. 24, 32 (1999).

111. Cf. Chafetz, *supra* note 61, at 96 (“Precedential relationships [in politics] are made, not found, and therefore charges of unprecedentedness represent a political judgment—but one that comes in the guise of a discovery of a fact about the world.” (footnote omitted)).

112. Azari & Smith, *supra* note 28, at 44. Although President Washington did not see himself as creating a norm, President Jefferson did. See *id.* (“Believing that a representative Government responsible at short periods is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall essentially impair that principle, and I should unwillingly be the person who . . . should furnish the first example of prolongation beyond the second term of office.” (quoting Letter from Thomas Jefferson, President of the U.S., to Vermont State Legislature (Dec. 10, 1807))).

113. *Id.*; see also AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 433–36 (2005).

114. See, e.g., GOLD, *supra* note 70, at 68–73 (discussing former President Theodore Roosevelt’s campaign in 1912 and describing “[t]he third-term issue” as an “albatross weighing down Roosevelt’s candidacy”); *id.* at 107–08 (discussing whether the norm applied to Calvin Coolidge, who had served part of his predecessor’s term before being elected to a full term of his own).

115. See *id.* at 69 (noting President Theodore Roosevelt’s view that “[t]he reasoning on which the anti-third term custom is based has no . . . application whatever to an ex-President . . . and no application whatever to anything but consecutive terms”).

third term,¹¹⁶ others denied that the norm existed in the first instance.¹¹⁷

The two-term norm remained uncoded for well over a century, which allowed questions about its scope, application, and even its existence to linger in the background. Codification forced these issues to the foreground. The congressional debate over the Twenty-Second Amendment featured discussion of how to treat both partial and nonconsecutive terms.¹¹⁸ That debate shows how codification can force public officials to confront details and edge cases, even if there is broad agreement about the norm's core application.¹¹⁹

These issues are especially acute for norms that cannot be readily expressed in rule-like form. Consider an apparent norm against Presidents openly attacking federal judges or attacking the courts' legitimacy. It is difficult to articulate any precise rule that would bar criticism widely viewed as inappropriate¹²⁰ without also sweeping in criticism of the courts and judicial decisions that many see as perfectly reasonable. Indeed, many presidents have publicly criticized particular Supreme Court decisions.¹²¹ Some have gone further, criticizing the Court more generally or calling for it to play a reduced role in the constitutional system.¹²² Presidential criticism of the Court's decisions or its role in governance is certainly

116. See, e.g., *id.* at 108–09 (quoting a group of Republican activists warning that “[i]f the Republican Party should nominate a candidate for a third consecutive term, all other issues would be lost sight of in the campaign” because “the party would be accused of trying to set up a dictatorship”).

117. Elster, *Unwritten Constitutional Norms*, *supra* note 28, at 15 n.31 (noting that James Bradley Thayer held this view as early as 1908); see also, e.g., Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 579–84 (1999) (noting that few nineteenth- and early-twentieth-century presidents completed a second term, so there were only a small number of presidents who were even in a position to challenge the two-term norm).

118. See GOLD, *supra* note 70, at 242–45.

119. Disagreement of this sort has been a characteristic feature of attempted codifications in other contexts as well. One description of the creation of the Uniform Commercial Code notes that “there was not widespread agreement among merchants as to either the meaning of common terms of trade or the content of many basic commercial practices,” and as a result, “[r]ules committee debates sometimes went on for years” and “customs relating to important aspects of transactions were left uncoded because consensus could not be achieved.” Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715 (1999). Prior to codification attempts, disagreements about the character of commercial law could be evaded altogether or dealt with on a case-by-case basis. Codification surfaced disagreements that otherwise could have been avoided.

120. During the Trump Administration, former judge Michael W. McConnell argued that “Trump [has] shredd[ed] longstanding norms of etiquette and interbranch comity” by attacking the courts in general and individual judges in particular. See Julie Hirschfeld Davis, *Supreme Court Nominee Calls Trump's Attacks on Judiciary 'Demoralizing'*, N.Y. TIMES (Feb. 8, 2017), <https://nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html>.

121. See Adam Liptak, *Supreme Court Gets a Rare Rebuke, in Front of a Nation*, N.Y. TIMES (Jan. 28, 2010), <https://nytimes.com/2010/01/29/us/politics/29scotus.html> (providing examples from Presidents Nixon, Bush, and Obama).

122. See, e.g., Franklin D. Roosevelt, President of the U.S., *Fireside Chat on Reorganization of the Judiciary* (Mar. 9, 1937) (transcript available at http://xroads.virginia.edu/~ma02/volpe/newdeal/court_fireside_text.html [<https://perma.cc/4BL7-PNP4>]) (“In the last four years . . . [t]he Court has been acting not as a judicial body, but as a policy-making body. . . . We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself.”).

an appropriate and healthy part of democratic discourse. Codification of any norm against Presidents criticizing the courts would force codifiers into exceptionally difficult line-drawing exercises. Similar challenges would arise in attempting to codify many other constitutional norms.

B. CAPTURING POLICYMAKERS' ATTENTION

Even if these challenges could be overcome, the scarcity of policymakers' time, attention, and political capital can stand in the way of codification. This holds especially true for unthreatened norms. Policymakers have little reason to codify a constitutional norm before it is threatened or violated. With respect to codification by statute, political scientists have shown that the scarcity of time is a key constraint on legislative action.¹²³ This scarcity of time means that Presidents and Congresses must make difficult choices between many possible agenda items. Codification of an unthreatened norm will almost never be a priority. Legislation of nearly every other variety—whether relating to the economy, the welfare state, the regulatory state, or foreign affairs—will take priority over codifying an unthreatened norm. It is no coincidence that, although presidential term limits were proposed over two hundred times between the Founding and the ratification of the Twenty-Second Amendment,¹²⁴ there was never enough political support to codify the norm until after President Roosevelt broke it. It is unsurprising that Presidents and Congresses opt to pursue substantive policy aims rather than attempt to identify and codify norms that might be threatened only in the distant future. Scarcity of legislative time, in short, helps explain why constitutional norms are seldom codified before they are threatened or violated.

C. PARTISANS, VETOGATES, AND NORMS

It might seem that it would be easier to codify a norm in the face of a threat or violation. After all, several of the hurdles just discussed are lower when a violation is imminent or has just occurred. The problem of identifying a norm becomes easier as facts on the ground give those advocating for codification a clear picture of precisely which conduct they wish to prohibit. Relatedly, disagreement about the content of the norm might recede when codifiers focus on a specific fact pattern rather than hypothetical edge cases.¹²⁵ And the problem of scarce legislative

123. See, e.g., Gary W. Cox & Mathew D. McCubbins, *Managing Plenary Time: The U.S. Congress in Comparative Context*, in *THE OXFORD HANDBOOK OF THE AMERICAN CONGRESS* 451 (Eric Schickler & Frances E. Lee eds., 2011).

124. KORZI, *supra* note 70, at 127.

125. This is not to say that all will agree in the face of a potential norm violation. To the contrary, those violating a norm can often plausibly argue that their actions are in fact compliant with the norm. See, e.g., Perry Bacon Jr. & Carrie Dann, *Battle Begins over Whether Obama or Next President Should Fill Scalia Seat*, NBC NEWS (Feb. 14, 2016, 8:18 PM), <https://nbcnews.com/politics/supreme-court/there-s-now-vacancy-supreme-court-what-happens-next-n518206> [<https://perma.cc/9ERP-6KG5>] (quoting the Senate's then-Majority and Minority Leaders' divergent views about whether norms required a hearing for presidential nominees to the Supreme Court); *supra* note 61 (citing scholarly views on this issue). But the presence of a discrete violation (or would-be violation) provides those inclined to codify with a focal point for codification efforts.

time fades if a norm violation is severe enough that codification becomes a priority.

But once a norm violation has occurred, partisan contestation can make codification nearly impossible. Polarized parties are a defining feature of contemporary U.S. politics.¹²⁶ In polarized times, a constitutional norm may come under threat because one political party sees violating the norm as a way to gain a political advantage.¹²⁷ There can be myriad short-term benefits to violating norms: remaining in office, achieving a preferred policy outcome, enhancing one's power, avoiding accountability (whether formal and legal, or informal and political), or installing one's appointees in judicial or bureaucratic positions. And, under conditions of polarization, "elites become quick to assert, for partisan gain, that the other side has breached norms of constitutional governance."¹²⁸ Even if the two parties could have agreed on the contours of a constitutional norm from behind a veil of ignorance, once it becomes clear which party will benefit from violating a norm, the parties' attitudes about the norm diverge. One party seeks to codify the norm and enforce it against their political rivals, while the other party has a strong incentive to block any attempt at codification.¹²⁹

Partisan divides intersect with the many vetogates in the U.S. legislative process to prevent the passage of most legislation, including legislation to codify norms. "No other advanced industrialized country has so many institutional veto points" as does the United States.¹³⁰ The requirements of a House majority, a Senate majority (or, more typically, a supermajority), and presidential approval are obstacles to lawmaking on any topic, not unique obstacles to codification.¹³¹

126. See generally POLITICAL POLARIZATION IN AMERICAN POLITICS (Daniel J. Hopkins & John Sides eds., 2015); SAM ROSENFELD, THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA (2018); BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING (2014 ed.).

127. Cf. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 4 (2016) (noting the insecure nature of contemporary partisan majorities, and arguing that under such conditions elected officials "worry more about partisan advantage and work harder to win it").

128. Renan, *supra* note 19, at 2206.

129. There is an unusual case where risk aversion is so strong as to create an exception to this rule: if those in power are especially worried about the other party's future violations of norms, they might seek to codify a norm to tie their opponents' hands in the long term, even if a consequence of doing so is that they tie their own hands in the short term.

130. See David Karol, *American Political Parties: Exceptional No More*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 208, 212 (Nathaniel Persily ed., 2015). Disagreement exists about the precise impact of these veto points and whether they are desirable features of the constitutional order. Compare, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 25–78 (2006), with, e.g., Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 380–83 (2009).

131. See U.S. CONST. art I, § 7, cl. 2 (describing the requirement of bicameralism and presentment); STANDING RULES OF THE SENATE r. XXII(2), S. DOC. NO. 113-18, at 15–16 (1st Sess. 2013), <https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/6N4T-AES9>] (describing the Senate's supermajority cloture requirement). Veto overrides are extremely rare, having occurred only 112 times in U.S. history and only 9 times in the past three decades. See *Vetoed, 1789 to Present*, U.S. SENATE, <https://www.senate.gov/legislative/vetoed/vetoCounts.htm> [<https://perma.cc/MHV7-J2J9>] (last visited Jan. 22, 2021).

But the veto points that beset lawmaking generally are also barriers to codifying constitutional norms. Norm violators or their loyal co-partisans will almost always be able to use the system's many veto points to block an attempted codification.

The failure of attempts to codify norms during the Trump Administration shows how the intersection of partisanship and veto points prevents Congress from codifying norms relating to presidential conduct. Some proposed codifications, such as tax return disclosure requirements or protection for the special counsel, were considered or even passed by a Democratic House of Representatives. But a Republican Senate would not take up, much less pass, a statute designed to rein in the sitting Republican President's violations of norms.¹³² And, even if a proposed codification were to have passed both houses of Congress, a President who saw a bill as a repudiation of his own norm violations could simply veto the bill. When codification of a presidential norm becomes a partisan exercise, as it almost always will when a norm is threatened or violated in a polarized age, then the many veto points in the lawmaking process mean that the President's party will typically be able to block the other party's attempts to codify norms.

Debates over codification can likewise divide on party lines if the norm violator is in Congress rather than in the Executive Branch. If the relevant norm is being violated by a majority party or its leadership in Congress, the prospects of codification are close to zero—no congressional majority would vote to codify a norm that it is violating or has just violated. Even if a majority party is not violating a norm today, it might be unable or unwilling to codify the norm. It may wish to preserve flexibility for tomorrow,¹³³ or its caucus may not be able to agree on precisely what the codification's scope should be.¹³⁴ A party in Congress might codify a norm that is violated by only a few of its members as a means of publicly distancing the party from the bad behavior of its wayward members.¹³⁵ But, generally, codification will be an uphill climb when norms are the subject of partisan conflict.

132. Congress is less likely to check the President when the President's party holds unified control over both ends of Pennsylvania Avenue. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) ("The practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics."); Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 306–07 (2008) (finding that a shift from unified to divided government yields a five-fold increase in the number of congressional oversight hearings held and quadruples their duration).

133. See Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1958 & n.32 (2020) (discussing how awareness of the possibility of losing majority status can lead majorities to respect minority rights in Congress).

134. Cf. RUTH BLOCH RUBIN, *BUILDING THE BLOC: INTRAPARTY ORGANIZATION IN THE U.S. CONGRESS* (2017) (discussing intraparty conflict in Congress over the past century).

135. See JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 232–66 (2017) (discussing internal discipline rules in Congress and associated political dynamics).

D. OPPORTUNITIES FOR CODIFICATION

The intersection of partisanship and vetogates means that codification is most likely to be successful once the norm violator has left office or when political conditions have otherwise changed. Successful codifications in response to norm violations, like successful government reform legislation of other sorts, have most often occurred after a change in which party controls the levers of power. Some impediments to codification persist, but a change in political control often provides the most promising opportunity to codify norms.

The main reason for this window of opportunity is that the departure of the norm violator from office—and the ascension of their political opponents—can change the politics of codification. Serious movement toward what would become the Twenty-Second Amendment began in the fall of 1945, just months after President Roosevelt’s death and the end of the Second World War.¹³⁶ The timing is no coincidence. It is hard to imagine Congress giving serious consideration to the issue when President Roosevelt was still in office in light of his landslide victories in both 1940 and 1944. President Roosevelt’s death allowed Congress to consider presidential term limits as a general matter without directly repudiating a sitting President. The term limit issue would still not have resulted in a constitutional amendment if not for significant Republican gains in the 1946 midterm elections: Republicans gained control of both the House and Senate, giving much-needed momentum to term limit proponents.¹³⁷ Changing politics, in short, made codification possible.

This is not to say that politics entirely fade when a norm violator leaves office. To the contrary, the process for ratifying the Twenty-Second Amendment was highly contentious. Congressional Republicans unanimously supported the Amendment, while a majority of Democrats opposed it.¹³⁸ Even after President Roosevelt’s death, the Amendment was viewed as a referendum on his Administration. Democrats charged that a term limit would have denied the nation President Roosevelt’s leadership during the Second World War, with Republicans countering that others could have successfully led the nation during that period.¹³⁹ Rhetoric was heated: one Democratic member of Congress asked “[c]an we not be fair enough to let rest in peace a man who has done so much for our country and for humanity?”¹⁴⁰ Nonetheless, even though political

136. See GOLD, *supra* note 70, at 194–95 (describing a special subcommittee of the Senate Committee on the Judiciary that convened to consider possible constitutional amendments to restrict presidential terms).

137. See *id.* at 219–20 (noting that the term limits issue was at the top of the Republican agenda when the party took control of Congress).

138. See KORZI, *supra* note 70, at 126 (noting that nearly all of the Democrats who supported the Amendment were southern conservatives, some of whom would later become Republicans); see also GOLD, *supra* note 70, at 219–68 (providing a detailed overview of the politics of the amendment process).

139. KORZI, *supra* note 70, at 135–38.

140. 93 CONG. REC. 842 (1947) (statement of Rep. Sabath). Clinton Rossiter similarly described the Amendment as an “undisguised slap at the memory of Franklin D. Roosevelt,” arguing that “the

divisions made codification difficult after President Roosevelt's death, changed politics allowed the codification effort to succeed.

Legislation enacted after President Nixon left office likewise demonstrates how a change in leadership can open the door to legislation that previously would not have been politically viable. Some of the statutes passed after President Nixon left office codified norms in direct response to violations by him or his White House.¹⁴¹ Other legislation did not codify preexisting norms but did seek to impose stricter ethics requirements or otherwise reform government in response to Nixon-era behavior.¹⁴² In each instance, Congress's legislative action took place in the shadow of the Nixon Administration in general and Watergate in particular. After President Nixon's resignation, President Ford sought to repair relations between the White House and Congress.¹⁴³ President Ford had to work with congressional Democrats, who controlled both chambers when he took office and expanded their majorities in the 1974 midterm elections.¹⁴⁴ Democrats then recaptured unified control of government in the 1976 elections. These political changes allowed Congress to codify norms and reform government. The governance-related statutes of the 1970s would have looked quite different (or would not have been enacted at all) if President Nixon or his allies had retained power.

III. CONSTITUTIONAL CONSTRAINTS

A. CONSTITUTIONAL LAW AND CONSTITUTIONAL NORMS

Constitutional law serves as another obstacle to codifying constitutional norms. Many constitutional norms would likely be struck down by contemporary U.S. courts as unconstitutional if they were codified in the form of ordinary statutes. Norms can thus fulfill an important function that law cannot: they can constrain public officials in ways that the Constitution (as interpreted by the courts) places beyond the domain of ordinary law.

Basic features of the U.S. constitutional order interact with constitutional norms in ways that can easily go unrecognized. The presence of strong-form judicial review means that courts have the power to declare a statute

Constitution 'is not the place to engage in a display of rancor.'" KORZI, *supra* note 70, at 125 (quoting CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 224 (rev. ed. 1964)). Edward Corwin likewise noted Republican "haste to register disapproval of the late President Roosevelt for seeking a third and then a fourth term." *Id.* at 126 (quoting EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 38 (4th rev. ed. 1957)).

141. See *supra* notes 76-84 and accompanying text (discussing legislation relating to impoundment, preservation of presidential records, and privacy of individual tax returns).

142. See, e.g., Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of the U.S. Code); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended in scattered sections of 5 U.S.C. app.); Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

143. See YANEK MIECZKOWSKI, *GERALD FORD AND THE CHALLENGES OF THE 1970s*, at 56-60 (2005).

144. See *id.* at 61-69. See generally JOHN A. LAWRENCE, *THE CLASS OF '74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP* (2018).

unconstitutional, a power which includes enjoining enforcement of the statute.¹⁴⁵ Courts deploy the power of judicial review to strike down acts of Congress that they understand to infringe on the Constitution's structural provisions, such as Article II's grants of power to the President,¹⁴⁶ and its rights-based provisions, such as the First Amendment's guarantee of freedom of speech.¹⁴⁷ The Constitution, as implemented by the courts, therefore limits the range of permissible ways in which ordinary law can be used to regulate the behavior of public officials.¹⁴⁸

These features of constitutional law create space for a robust body of constitutional norms—indeed, they demand it. Put differently, one implication of the U.S. constitutional order is that some norms must necessarily remain uncodified. The scope of constitutionally permitted legislation is inversely related to the need for norms: when constitutional law takes a broader range of possible legislation off the table, norms become more important in achieving what legislation cannot. Uncodified norms serve as a substitute for law when judicial interpretations of the Constitution prevent Congress from legislating.

The intersection of constitutional law and constitutional norms provides a uniquely American spin on a topic that is most often associated with Westminster systems.¹⁴⁹ In the United Kingdom, constitutional norms serve as a sort of alternative to a written constitution, providing content that elsewhere might be specified by a written constitution. In the United States, norms complement a written constitution. Norms give content to “features of the constitutional terrain that are not adequately described in constitutional text.”¹⁵⁰ But norms are also important because they can regulate the operation of government and the conduct of public

145. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW*, at ix (2008); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1354 (2006).

146. See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (finding unconstitutional a legislative requirement concerning language on passports on the grounds that the requirement burdened the President's exclusive power to recognize foreign nations).

147. See, e.g., *United States v. Alvarez*, 567 U.S. 709 (2012) (finding unconstitutional a statutory provision that criminalized false statements about having received military honors).

148. Any norm could, in theory, be codified through a constitutional amendment. See *infra* Section V.A.1. However, the extreme difficulty of enacting constitutional amendments in the modern era means that nearly all codification efforts, like nearly all lawmaking, proceed through other means.

149. In Westminster systems, what this Article refers to as constitutional norms are more commonly called constitutional conventions. The large literature on such conventions includes RODNEY BRAZIER, *CONSTITUTIONAL PRACTICE: THE FOUNDATIONS OF BRITISH GOVERNMENT* (3d ed. 1999); *CONSTITUTIONAL CONVENTIONS IN WESTMINSTER SYSTEMS: CONTROVERSIES, CHANGES AND CHALLENGES* (Brian Galligan & Scott Brenton eds., 2015); DICEY, *supra* note 35, at pt. 3; ANDREW HEARD, *CANADIAN CONSTITUTIONAL CONVENTIONS: THE MARRIAGE OF LAW AND POLITICS* (2d ed. 2014); GEOFFREY MARSHALL, *CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY* (1984); Joseph Jaconelli, *Do Constitutional Conventions Bind?*, 64 *CAMBRIDGE L.J.* 149 (2005); Jaconelli, *supra* note 110; and Colin R. Munro, Note, *Laws and Conventions Distinguished*, 91 *LAW Q. REV.* 218 (1975).

150. See Whittington, *supra* note 28, at 1854; see also *id.* (“Creative efforts at interpretation might help close the gap between text and practice, but more is likely needed to fully understand the effective constitution.”).

officials in ways that the Constitution does not—and in ways that constitutional law places off limits to ordinary law.

B. HOW CONSTITUTIONAL DOCTRINE CONSTRAINS CODIFICATION

Several areas of constitutional doctrine can impede efforts to codify constitutional norms. In some instances, a codified norm would be squarely unconstitutional under current law. In others, a codified norm would raise difficult constitutional questions, leaving codifiers with the hard choice of deciding whether it is worth codifying a norm when the codification risks later being struck down by the courts.

Structural constitutional law provides many examples of this kind of tension. Consider the relationship between norms that structure presidential power and judicial interpretations of Article II of the Constitution. Daphna Renan has described presidential power as being “both augmented and constrained by . . . unwritten rules of legitimate or respectable behavior,”¹⁵¹ and has created a taxonomy of the varieties of norms that structure the contemporary presidency.¹⁵² Constitutional law creates a barrier to codifying many of the norms that Renan discusses.¹⁵³

Norms dictating that the President not meddle in certain agency activities, most notably investigations and prosecutions, are a first category of norms that would raise constitutional questions if codified via statute. Norms “insulate some types of prosecutorial and investigatory decisionmaking from the President” and “prohibit[] presidential direction in individual investigatory matters.”¹⁵⁴ But Article II vests the executive power in the President¹⁵⁵ and dictates that the President “shall take Care that the Laws be faithfully executed.”¹⁵⁶ These clauses can at least plausibly be read to give the President control over federal investigations and prosecutions, and there is no judicial or scholarly consensus on whether the Constitution grants the President full control over those domains.¹⁵⁷ A statute seeking to limit presidential authority over federal investigations and prosecutions would likely be challenged, and it might well be struck down by the courts.¹⁵⁸

Similar analysis holds for norms structuring discretion and deliberation within the Executive Branch. A family of norms “structure the process of presidential

151. See Renan, *supra* note 19, at 2189.

152. *Id.* at 2206–42.

153. See BAUER & GOLDSMITH, *supra* note 2, at 16 (“[T]he Constitution does not permit Congress to regulate some elements of presidential behavior.”).

154. See Renan, *supra* note 19, at 2207.

155. U.S. CONST. art. II, § 1, cl. 1.

156. *Id.* art. II, § 3, cl. 5.

157. See Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 7 (2018) (noting that “[s]ome scholars argue that a U.S. President can require the Attorney General or a subordinate federal prosecutor to initiate or dismiss a criminal prosecution and otherwise control the prosecutor’s discretionary decisions,” and that “[o]thers insist that the President has no such power”).

158. See Renan, *supra* note 19, at 2207 (noting that norms of investigatory and prosecutorial independence “might insulate certain officers or decisions that statutes could not regulate under prevailing understandings of the written Article II”).

decisionmaking and its informational inputs in the context of high-stakes domestic and foreign policy decisions” in order to “promote certain epistemic values or a form of institutional expertise.”¹⁵⁹ These norms would be vulnerable to constitutional challenge if enacted into law. A norm dictates, for instance, that the President directs troops and undertakes military strikes only in close consultation with senior officials such as the members of the National Security Council (including the Secretaries of State and Defense) and the Joint Chiefs of Staff. A statute requiring that consultation, however, would plausibly be an unconstitutional infringement on the Commander-in-Chief power.¹⁶⁰

By the same token, statutes codifying norms concerning the use of the President’s pardon power would raise constitutional questions. As noted above, a bill was introduced in the House of Representatives in 2019 to require disclosures to Congress when the President pardons someone in connection with an investigation relating to the President or to one of the President’s family members.¹⁶¹ One could also imagine a statute requiring the President to follow the bureaucratic process that customarily governs the consideration and granting of presidential pardons,¹⁶² given that several presidents have circumvented that process in high-profile cases.¹⁶³ Defenders of such a statute would certainly have plausible arguments for its constitutionality.¹⁶⁴ But critics of congressional regulation of the pardon power would reply that the Court has described the power in

159. *Id.* at 2221.

160. The constitutionality of such a statute would turn on whether it burdens a “core” executive power. See 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, 726 (2008) (“The notion is that certain Article II clauses, such as the Commander in Chief Clause, might afford the President . . . not only a power to act in the absence of legislative authorization, but also an indefeasible scope of discretion . . .”).

161. See Abuse of the Pardon Prevention Act, H.R. 1627, 116th Cong. § 2(a) (2019); see also *supra* notes 97–98 and accompanying text.

162. See Ronald Goldfarb, *How Presidential Pardons Work—Or Should*, AM. PROSPECT (July 19, 2018), <https://prospect.org/article/how-presidential-pardons-work-or-should> (describing the role of the Office of the Pardon Attorney).

163. See Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1259–60 (2003) (“The pardons of former President Nixon, Caspar Weinberger, and Marc Rich were all hatched directly within the White House itself, without any review by the Pardon Attorney.”); Tucker Higgins, *Trump Brings the Power of the Pardon to His Battle with the Justice Department*, CNBC (June 6, 2018, 11:44 AM), <https://cnbc.com/2018/06/01/trump-brings-the-power-of-the-pardon-to-his-battle-with-the-justice-department.html> [<https://perma.cc/5XF2-78TW>] (“Rather than relying on the Justice Department for recommendations on who should be pardoned, Trump has chosen to pardon individuals he knows personally or has seen on television.”).

164. See, e.g., S. REP. NO. 106-231, at 10–17 (2000) (report of the Senate Committee on the Judiciary defending the constitutionality of procedural and disclosure requirements); see also BAUER & GOLDSMITH, *supra* note 2, at 113–14 (“The exclusive, ‘unlimited’ nature of the pardon power has been routinely overstated.”); Peterson, *supra* note 163, at 1252 (“Just because the Congress could not impose procedural requirements on the President himself, however, does not mean that Congress would be barred from adopting legislation to regulate subordinate officials who perform duties related to the pardon process.”).

extraordinarily broad terms.¹⁶⁵ “It is unlikely,” one scholar has noted, “that the Supreme Court would permit Congress to impose even [modest] procedural restrictions directly on the President himself.”¹⁶⁶

Constitutional concerns about codifying norms extend beyond presidential power. The fate of so-called faithless elector laws also shows the intersection of constitutional law and constitutional norms. In 2016, one of Colorado’s presidential electors violated Colorado law by voting against the candidate who won the support of a majority of Colorado voters.¹⁶⁷ Colorado’s secretary of state removed the elector and discarded his vote, and the state found a replacement elector.¹⁶⁸ The removed elector sued, alleging that Colorado acted unconstitutionally, and prevailed in the Tenth Circuit.¹⁶⁹ The Supreme Court ultimately upheld state faithless elector laws as constitutional.¹⁷⁰ But the dispute itself (and the elector’s success at the appellate level) shows how constitutional law has the potential to overpower a codified constitutional norm. Even if a norm dictates that each elector should vote for the candidate winning the popular vote in their state, the codified version of the norm could well have been struck down by the courts.¹⁷¹

Finally, tensions can exist between the Constitution’s rights-related provisions and constitutional norms. More than half of the states have enacted laws to codify a norm against telling certain types of lies to the public in an attempt to influence an election.¹⁷² These laws have run headlong into expansive judicial interpretations of the First Amendment. The Sixth Circuit has struck down Ohio’s prohibition on knowingly or with reckless disregard for the truth making false statements

165. *See, e.g.*, *Schick v. Reed*, 419 U.S. 256, 266 (1974) (“[T]he [pardon] power flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.”).

166. Peterson, *supra* note 163, at 1252. The Department of Justice has argued against the constitutionality of legislation that imposes procedural and disclosure requirements on the pardon process on the ground that “[t]he assignment of the pardon power to the President . . . reflects a conscious decision to deprive Congress of any power to regulate pardons.” *Id.* at 1254 (first alteration in original) (quoting Letter from Robert Raben, Assistant Attorney Gen., to the Honorable Orrin G. Hatch, Chair, Senate Judiciary Comm. 3 (Feb. 17, 2000) (on file with Todd D. Peterson, Professor, George Wash. Univ. Law Sch.)).

167. *Baca v. Colo. Dep’t of State*, 935 F.3d 887, 901 (10th Cir. 2019), *rev’d per curiam* 140 S. Ct. 2316 (2020).

168. *Id.*

169. *Id.* at 902 (“[W]e conclude the state’s removal of [the faithless elector] and nullification of his vote were unconstitutional.”).

170. *See Chiafalo v. Washington*, 140 S. Ct. 2316 (2020); *see also Baca*, 140 S. Ct. at 2316 (citing *Chiafalo* to reverse the Tenth Circuit’s decision).

171. One way to mitigate (but not eliminate) this tension is for courts to take account of historical practice as a factor in constitutional interpretation. *See supra* note 37 (discussing this approach and citing sources); *see also Chiafalo*, 140 S. Ct. 2327–28 (noting that, putting aside one anomalous nineteenth century election, faithless electors represent just one-half of one percent of total electors in U.S. history).

172. State laws prohibiting false campaign speech take a variety of approaches: “Some are based on claims of incumbency, statements about endorsements, providing voter information about where and when elections are held, and veteran status.” Mark Listes & Wendy Underhill, *Campaign Fair Practice Laws (Is There a Right to Lie?)*, NAT’L CONF. ST. LEGISLATURES (Oct. 29, 2014), <https://ncsl.org/research/elections-and-campaigns/campaign-fair-practice-laws-is-there-a-right-to-lie.aspx> [<https://perma.cc/8XUA-GJCA>].

that promote the election, nomination, or defeat of any candidate.¹⁷³ The Eighth Circuit has struck down a similar prohibition in a Minnesota statute.¹⁷⁴ The Supreme Court, if confronted with the same question, might well read the First Amendment to prohibit bans on false or misleading campaign speech.¹⁷⁵

In each of these instances, tensions exist between constitutional doctrine and codifications (real or hypothetical) of constitutional norms. For norms that courts would plausibly strike down if codified, the norm's proponents should hesitate before attempting to codify the norm. If courts were to strike down a statute codifying a norm, judicial repudiation could leave the underlying norm weaker than if the norm had never been codified to begin with. This is but one of the many trade-offs that would-be codifiers face. I now turn to a more general discussion of those trade-offs.

IV. CODIFICATION TRADE-OFFS

Despite the difficulties associated with codifying constitutional norms, sometimes codification will be feasible (practically and politically) and permissible (constitutionally). In such instances, is codification desirable? The precise benefits and costs of codification will differ depending on the specific norm at issue, but some general conclusions can be drawn. The key advantages of codification are closely related to corresponding disadvantages. Codification holds the promise of increasing compliance with a norm's content, because codified norms can often be legally enforced, but this enforceability might in some cases have unintended consequences that actually reduce compliance. Codification also poses a trade-off between the benefits of clarity and stability, on the one hand, and the risk of ossification, on the other. And codifying norms can alter the distribution of decisionmaking authority among different institutional actors, most notably by increasing the power of courts. In short, “‘legalizing a norm’ is *not* a neutral act—even if the substantive content of the norm and the law are exactly the same.”¹⁷⁶

173. See *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472–76 (6th Cir. 2016). The Ohio statute specifically prohibited false statements about a candidate's voting record, but it was not limited to that topic. See *id.* at 470.

174. See *281 Care Comm. v. Arneson*, 766 F.3d 774, 777–79, 782–96 (8th Cir. 2014) (striking down a provision of the Minnesota Fair Campaign Practices Act that prohibited knowingly or with reckless disregard for the truth making a false statement about a proposed ballot initiative).

175. Cf. *United States v. Alvarez*, 567 U.S. 709, 715–30 (2012) (applying strict scrutiny in striking down a federal statute that banned untruthful statements about receipt of military honors). At least one member of the *Alvarez* Court recognized that false statement rules concerning political speech implicate distinctive considerations:

In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker), but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas.

Id. at 738 (Breyer, J., concurring in the judgment).

176. Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 155 (2003); see also *id.* at 156 (noting a “de facto system of

A. COMPLIANCE

A first set of trade-offs involves compliance. Codifying a constitutional norm can make it more likely that public officials comply with the norm's content, either by including a mechanism for enforcement or by otherwise raising the cost of violations. But codification can also have unintended consequences with respect to compliance: codification of a norm can allow courts to narrow the norm's scope, can crowd out other norms, or can provide guidance to would-be norm violators.

1. Promoting Compliance

Codification can promote compliance with a norm's content. Officials who might have been willing to violate (or push the limits of) norms might well be less willing to violate (or push the limits of) laws. If public officials perceive there to be a greater threat of punishment for violations of law as opposed to violations of norms, then codifying a norm holds the promise of increasing compliance with its content.

The case for codification promoting compliance is clearest when the codification allows for judicial enforcement. Norms codified as civil law could be enforced through suits filed by private parties, through civil enforcement by the Executive Branch, or through suits filed by other government actors, such as Congress or state attorneys general. Norms codified as criminal law could be enforced by prosecutors. Either way, the substance of norms would be enforced through a familiar legal process, with judges applying law to facts to determine whether challenged conduct is lawful.

Judicial enforcement can significantly raise the costs of noncompliance. The only remedies for an uncodified norm are, by definition, political remedies. Though voters or other political actors can reward compliance with norms or punish noncompliance, recent years have shown the limits of political enforcement as candidates and elected officials have violated norms with seeming impunity. Judicial enforcement can disrupt this dynamic. Elected officials, the logic goes, would be less likely to violate norms if they could be held accountable for violations in court.¹⁷⁷ A robust literature shows how the threat of legal sanctions

jurisdiction, remedies, and the like within which [a] norm is actually given content," and thus arguing that "codifying and legalizing a norm or principle can, in fact, transform the practical meaning and effect of that norm, even when the legal and informal substantive content remains the same").

177. My claim here is not that codifying norms as law would eliminate violations. Some political actors will nonetheless decide to take actions that violate the law. *See, e.g.*, Jonathan Chait, *Why Republicans Can Get Away with Violating Laws Democrats Have to Obey*, N.Y. MAG.: INTELLIGENCER (Aug. 26, 2020), <https://nymag.com/intelligencer/2020/08/republican-convention-hatch-act-illegal-law-trump-white-house.html> (describing the 2020 Republican National Convention as "a festival of massive lawbreaking," and quoting the White House Chief of Staff's view that "[n]obody outside of the Beltway really cares"). But because the costs of breaking the law will likely be greater than the costs of breaking norms, as a general matter, codification will typically increase rather than decrease compliance.

shapes behavior in a wide range of areas.¹⁷⁸ Constitutional norms should be no different.

Codification could promote compliance with norms even *without* the prospect of judicial enforcement. Codification can magnify the power of norms in political discourse by allowing norm breaking to be called out as lawbreaking as well. It is one thing to criticize a public official's conduct as a violation of a norm; it is a more serious thing to criticize that conduct as a violation of the law. Public officials might fear that a public determination that they broke the law would expose them to greater political peril than would a mere norm violation. Frederick Schauer, for example, though generally a skeptic about legal violations leading to political sanctions, concludes that "the fact of law violation increases the political penalty for those official actions that are or turn out to be unacceptable on policy or political grounds."¹⁷⁹ Even if law is limited in its power to constrain public officials' actions, it can be more effective than norms alone in shaping how public officials behave.

This is especially true because violating norms can become a political strategy. For some public officials, violating norms can serve as "a bellows for the fire of transgressive politics."¹⁸⁰ A public official, especially one purporting to speak on behalf of a disempowered group, might denounce norms as tools of elites and impediments to necessary political change.¹⁸¹ In the United States, recent years have witnessed these sorts of criticisms of norms from both the right¹⁸² and the left.¹⁸³ Although anti-norms discourse might gain traction in the public sphere, it is unlikely that anti-law discourse would fare as well.¹⁸⁴ If "norm violator" can be an effective political brand but "lawbreaker" cannot, then codifying norms as law

178. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 41 (1972) ("[A] rational lawbreaker will discount the gravity of any legal sanction by the probability that it will be imposed."); see also, e.g., Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241, 249 (Eyal Zamir & Doron Teichman eds., 2014) (concluding that legal regulations prohibiting smoking in most public spaces directly shaped smoking behavior).

179. Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 J. LEGAL ANALYSIS 83, 85 (2012).

180. Julia Azari, *The Trump Presidency Thrives on Norms*, MISCHIEFS FACTION (May 8, 2020), <https://mischiefsoffaction.com/post/the-trump-presidency-thrives-on-norms> [<https://perma.cc/62FV-4HLF>].

181. For populist leaders, "[t]he violation of established norms, whether by inciting violence, failing to make routine disclosures, or engaging in nepotism, reflects [their] claim of being aligned against rather than with the political system in ways that maywell [sic] redound to their ultimate electoral benefit." GINSBURG & HUQ, *supra* note 4, at 82.

182. See, e.g., Charles R. Kesler, *Breaking Norms Will Renew Democracy, Not Ruin It*, N.Y. TIMES (Aug. 23, 2018), <https://nytimes.com/2018/08/23/opinion/trump-democracy-norm-breaking.html> (diminishing norms as merely the "etiquette of modern liberalism and modern liberal governance," and asking "but so what?" about President Trump's norm violations).

183. See, e.g., Jedediah Britton-Purdy, *Normcore*, DISSENT (Summer 2018), <https://dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [<https://perma.cc/H6SH-RYD8>] ("[N]orms are intrinsically conservative (in a small-c sense) because they achieve stability by maintaining unspoken habits—which institutions you defer to, which policies you do not question, and so on.").

184. *But see* GINSBURG & HUQ, *supra* note 4, at 82 ("Indeed, it is possible that there is even an affirmative political benefit to populists from breaking the rules.").

can decrease the likelihood that public officials will break norms in order to bolster their reputations.

2. Unintended Consequences

Even if codifying a constitutional norm is intended to increase compliance with that norm, codification could sometimes inadvertently decrease compliance with either the codified norm or other norms. A codification effort might undermine compliance if courts strike down or narrow the scope of the codified norm, if the codification of one norm crowds out other uncoded norms, or if the codified norm becomes a roadmap for those looking to undermine it.

First, if a court struck down or narrowed the scope of a codified norm, that norm might end up weaker than it was prior to codification. As the previous Part showed, many norms would be susceptible to constitutional challenge if codified. Even if a codified norm were not struck down, a court could narrowly construe a statute or regulation codifying a norm. Public officials might then feel licensed to act in ways that the uncoded norm would have condemned. Even if the official's conduct would have been inconsistent with the uncoded norm, the official could argue that their conduct had been blessed by the courts and that this legal permissibility is all that is needed to justify that conduct. The prospect of judicial narrowing makes it possible that the very conduct that codification sought to prevent might be seen as more permissible, rather than less, in the aftermath of codification.

This account might seem overly skeptical of a judicial role in shaping regulation of the political process. But recent history provides reasons for that skepticism. Attempts by Congress and state legislatures to regulate the political process have frequently been met with judicial invalidation, often at the hands of an expansive reading of the First Amendment.¹⁸⁵ Even if a codified norm survives constitutional review, narrow judicial construction is always a risk. The Supreme Court has not, for example, struck down federal anticorruption statutes, but it has repeatedly narrowed their scope.¹⁸⁶ If courts were to strike down or narrowly construe statutes codifying constitutional norms, those norms could be left weaker than they would have been if never codified.

185. The most notable examples come from the contemporary Supreme Court's deregulatory campaign finance jurisprudence. *See, e.g.,* *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davis v. FEC*, 554 U.S. 724 (2008); *Randall v. Sorrell*, 548 U.S. 230 (2006); *see also, e.g., supra* notes 172–74 and accompanying text (discussing judicial invalidation of state laws prohibiting lying to the electorate).

186. *See Kelly v. United States*, 140 S. Ct. 1565 (2020); *McDonnell v. United States*, 136 S. Ct. 2355 (2016); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999). One motivation for narrowly reading public corruption statutes is a concern about the criminalization of politics. *See generally* George D. Brown, *McDonnell and the Criminalization of Politics*, 5 VA. J. CRIM. L. 1 (2017); Edwin M. Yoder, *The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749 (1999). Codifications of constitutional norms in the form of criminal prohibitions could raise similar concerns as these public corruption cases.

Second, codification of one norm could inadvertently crowd out political morality of other kinds. Michael Dorf has argued that the written Constitution can crowd out constitutional norms.¹⁸⁷ “The existence of the written Constitution,” Dorf contends, “blinds judges, scholars, and . . . political actors” to the importance of norms that are not part of the written Constitution.¹⁸⁸ Similar sorts of crowding out arguments have been made about other areas of law, ranging from private law¹⁸⁹ to human rights law.¹⁹⁰

Codification of a constitutional norm might crowd out norms against conduct that lie just beyond the scope of the codification. Imagine if Congress passed a statute banning Presidents from personally buying and selling securities during their time in office. A President could direct a family member or close associate to trade securities on their behalf and then argue that their conduct, because it is within the letter of the law, should be beyond reproach. Such a claim would be plausible to any who view the new statute as replacing previous norms surrounding presidential financial conflicts of interest.¹⁹¹

Codifying some constitutional norms also might undermine the status of *other* norms. If a sufficient number of norms were to be codified, it would become plausible to characterize any remaining uncoded norms as less important by virtue of their being uncoded. Dorf makes a parallel point with respect to constitutional law: “In American legal and political culture, constitutionality is so frequently assumed to be the ultimate test of legitimacy that those who would rely on [norms] are at a serious rhetorical disadvantage.”¹⁹² The same would hold with codification, even if codification takes place through ordinary law rather

187. See 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, 74–75 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (warning how written law can crowd out the “small-c ‘unwritten’ constitution” (emphasis omitted)). Drawing on H. L. A. Hart’s terminology, Dorf refers to the small-c constitution as “the extraconstitutional [r]ule of [r]ecognition.” *Id.* at 74 (emphasis omitted).

188. *Id.* at 86; see also Bruno S. Frey, *A Constitution for Knaves Crowds Out Civic Virtues*, 107 *ECON. J.* 1043, 1049 (1997) (“Following crowding theory, to imply in the constitution that politicians are crooks in any case is likely to undermine their civic virtue and to make them more dishonest.”).

189. Some have argued that private law can crowd out trust between individuals or firms. See, e.g., Iris Bohnet, Bruno S. Frey & Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 *AM. POL. SCI. REV.* 131, 141–42 (2001) (finding that, under some circumstances, trustworthiness is crowded out by legal enforcement); Mark T. Kawakami, *Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over*, 24 *IND. J. GLOBAL LEGAL STUD.* 147, 147 (2017) (“[T]he crowding out effect . . . that come[s] with legalizing otherwise voluntary norms could lead to a series of unintended and harmful consequences.”). *But see* Frank B. Cross, *Law and Trust*, 93 *GEO. L.J.* 1457, 1545 (2005) (“Whatever the intuitive appeal of the claims that legalization undermines trust, they cannot be sustained once they are subjected to scrutiny and empirical testing.”).

190. See, e.g., SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 3 (2018) (“Before the age of human rights came, dreams of equality were taken quite seriously, both nationally and globally. In the age of human rights, the pertinence of fairness beyond sufficiency has been forgotten.”).

191. Historically, “norms rather than legal commands did almost all the work of regulating and, for the most part, preventing [presidential financial] conflicts of interest from arising or appearing to arise.” BAUER & GOLDSMITH, *supra* note 2, at 21.

192. Dorf, *supra* note 187, at 69, 86.

than through constitutional law. Codification of some constitutional norms may reduce the likelihood that public officials would respect those other norms that have not been codified.

Third, codifying a norm could even provide guidance to those seeking to circumvent the spirit of the norm. Duncan Kennedy has warned that law risks “identif[y]ing] for the [Holmesian] bad man the precise limits of toleration for his badness, [and] it authorizes him to hew as close as he can to those limits.”¹⁹³ Consider, in this regard, how some Enron employees viewed the General Accepted Accounting Principles as themselves providing a “road map” for how to engage in fraudulent conduct.¹⁹⁴ Kennedy’s warning resonates in the context of constitutional norms: codification risks providing public officials with a road-map of how to subvert a norm without running afoul of the law.

B. SETTLEMENT AND FLEXIBILITY

Codification also implicates a trade-off between settlement and flexibility. Codification has the benefit of providing what some scholars have called settlement.¹⁹⁵ The settlement benefit of codification is that the content of norms would be clear to relevant actors, stable over time, and difficult to change. Yet a necessary corollary to settlement is a loss of flexibility and a corresponding risk of ossification. An uncoded norm that comes to be seen as unjust, outdated, or counterproductive can evolve organically. It can expand, contract, or otherwise change in response to new circumstances. A codified norm, by contrast, is more difficult to change. Codification gives rise to a risk of tomorrow’s polity being stuck with rigid versions of today’s constitutional norms.¹⁹⁶

1. Stability

Codification can help stabilize otherwise unsettled norms. As Part II showed, the content of norms will often be indeterminate. The fuzzy character of norms can cause controversy about what they require and can allow norms to erode over time. Codification can sometimes address these challenges by providing clarity on the scope of norms and by serving as a bulwark against norm erosion.

Committing a norm to writing can clarify its content. David Strauss has highlighted the importance of settlement for contested constitutional questions and

193. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773 (1976).

194. See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 142 (2013 ed.).

195. See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 19–28 (2012); David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 55–56 (2015).

196. Richard Pildes has identified a parallel trade-off in the international law context, examining how the U.N. Charter made it harder to bring about the multilateral military intervention in Kosovo. See Pildes, *supra* note 176, at 152 (“The choice is between the greater rigidity (and loss of flexibility) that tends to come with formal codification and the greater flexibility (and opportunity for unprincipled exercise of power) that comes from a less text-bound system of general principles of international relations.”).

argued that “text is especially well suited to performing the settlement function” because “text can state a rule clearly; evolutionary norms are less able to do that.”¹⁹⁷ Not every codification entails clarification, and an unclear norm could be just as unclear even when codified as law.¹⁹⁸ But in many cases, codification and clarification go hand in hand.

Codification can also entrench a norm that might otherwise be liable to break down. Norms can be “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.”¹⁹⁹ Codification, if done well, can prevent norm decomposition by changing the procedures through which the norm can be altered. Although uncodified norms can be revised through informal practice alone, the only way to change a codified norm is through formal channels—by repealing, modifying, or reinterpreting the law codifying the norm.

The Twenty-Second Amendment demonstrates how settlement operates in practice. The Amendment addresses the core case of a second-term President running for a third consecutive term.²⁰⁰ But it also addresses an important edge case: the status of a President who takes office partway through their predecessor’s term. The Amendment resolves any ambiguity with respect to this case, providing that “no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”²⁰¹ This may or may not be the optimal rule, but it plays an important settlement function. Keith Whittington has argued that the “[f]ormalization of the [two-term norm] in constitutional text was eventually necessary to more effectively stabilize and settle” its content.²⁰² More generally, “sometimes it is more important that matters be resolved than that they be resolved correctly.”²⁰³

The settlement function of codification can be achieved not only through constitutional law but also through ordinary lawmaking. Statutes can be vehicles for norm codification, and thus settlement, as in the post-Nixon Administration examples.²⁰⁴ So too can administrative regulations, as in the case of guidelines

197. Strauss, *supra* note 195, at 56. Whatever settlement function we might hope uncodified norms can serve, that settlement “will probably be less secure than a settlement that is explicitly stated in the text.” *Id.* Strauss’s discussion focuses on constitutional text, but the benefit of settlement can accompany any written legal text, including statutes, regulations, and cameral rules. See *infra* notes 204–05 and accompanying text.

198. See *infra* Section V.B (discussing rule- and standard-like codification).

199. Chafetz & Pozen, *supra* note 2, at 1435. Chris Kutz has likewise described a dynamic of “norm death”: the process through which norms that were once fully decisive weaken, becoming a factor to be weighed and then a nominal deliberative consideration, before perhaps disappearing altogether. See Christopher Kutz, *How Norms Die: Torture and Assassination in American Security Policy*, 28 ETHICS & INT’L AFF. 425, 430 (2014).

200. U.S. CONST. amend. XXII, § 1.

201. *Id.*

202. Whittington, *supra* note 28, at 1868–69.

203. Strauss, *supra* note 195, at 55.

204. See *supra* notes 76–84 and accompanying text.

issued by the Department of Justice in the 1970s to “clarify[] and formaliz[e] its practice of limiting the number of subpoenas issued to journalists.”²⁰⁵ Even cameral rules can play this role. No Senate rule requires committee hearings for Supreme Court nominees. In 2016, the parties disagreed sharply about whether norms required that the Senate hold hearings when a Supreme Court nomination is made in the last year of a President’s term. The entire debate could have been avoided if the Senate’s rules had provided precisely whether and when confirmation hearings are required. Senate rules could in theory mandate hearings (or even a floor vote) on any Supreme Court nominee, either with or without an exception for nominations during the last year of a President’s term. Different rules would favor different outcomes, but any rule could have provided much-needed settlement.

2. Ossification

The flip side of settlement is a loss of flexibility. Uncodified norms can evolve organically; a codified norm is harder to change. The degree of rigidity depends on the form that codification takes: constitutional provisions are harder to change than statutes, and statutes are harder to change than cameral rules or administrative regulations. Any type of codification, however, risks ossifying a norm, making future evolution more difficult.²⁰⁶

Freezing a constitutional norm in place raises concerns because norms should be able to adapt to changing political circumstances. A norm that develops during a period of greater bipartisan comity might not be appropriate for today’s age of constitutional hardball.²⁰⁷ A norm that develops during ordinary circumstances might not be appropriate for a time of emergency, such as a war, pandemic, or economic depression. Congressional norms around extended deliberation or committee consideration of legislation, for instance, should arguably give way when extenuating circumstances require immediate congressional action. Codifying norms, especially in the form of precise rules, risks creating barriers to government action when political situations arise that codifiers did not anticipate.

Closely related, a norm might be made obsolete by the development of new technologies. Few would argue for restoring the old norm that Presidents not

205. See, e.g., Chafetz & Pozen, *supra* note 2, at 1437 (“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.”).

206. See BAUER & GOLDSMITH, *supra* note 2, at 16 (“[One] reason to prefer norms over laws is flexibility”); Heard, *supra* note 38, at 79 (“The judicial protection which formal codification may entail must be balanced against a possible loss of flexibility.”).

207. See generally Fishkin & Pozen, *supra* note 28; Tushnet, *Constitutional Hardball*, *supra* note 28. Violations of norms by one party or branch might in some cases justify behavior by another party or branch that would not be appropriate under ordinary political conditions. See Pozen, *supra* note 28, at 75–76 (noting that whether obstructionism justifies self-help is “inescapably dependent on one’s theory of constitutional legitimacy and the particulars of the case at hand”).

leave the country while in office,²⁰⁸ given changes to communications technologies that allow contemporary Presidents to fulfill their duties from anywhere in the world. The noncodification of the norm against presidential international travel allowed Presidents to simply begin traveling when technology permitted them to do so without forsaking their official duties—they did not need to first change the law in order to begin traveling. In a similar vein, one former President has argued that the rise in life expectancies since the ratification of the Twenty-Second Amendment provides a reason to revisit the Amendment’s term limit rule.²⁰⁹ This is an argument about ossification. Even if the norm was not necessarily a bad one in prior generations, freezing it in place, one might argue, was unwise because changed circumstances (here, increasing lifespans) call the norm into question in the present day.

Changes in political morality can also counsel in favor of flexible norms. Today’s norms might be anathema to tomorrow’s dominant conceptions of justice, equality, or democracy. The once-widespread norm against women holding elected office provides a helpful illustration. That norm is now recognized as sexist and contrary to a core principle of democratic equality. The norm was able to decompose gradually precisely because it was not codified in many states.²¹⁰ Many of the first women to hold federal elected office succeeded their late husbands or fathers.²¹¹ Others won elections in midwestern or western states that lacked the political gatekeeping establishments that existed elsewhere.²¹² Eventually, women began running for—and winning—elected office in greater numbers nationwide.²¹³ If the norm against women running for office had been

208. See Oren Tamir, Political Stare Decisis 41 (Sept. 30, 2020) (unpublished manuscript) (on file with author) (citing HERBERT W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 201–03 (1925) for this example).

209. Martin Kettle, *Clinton Wants Third Term in Office*, GUARDIAN (Dec. 7, 2000, 10:48 PM), <https://theguardian.com/world/2000/dec/08/uselections2000.usa3>; see also Table 15. *Life Expectancy at Birth, at Age 65, and at Age 75, by Sex, Race, and Hispanic Origin: United States, Selected Years 1900–2016*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://cdc.gov/nchs/data/hus/2017/015.pdf> [<https://perma.cc/HJ7E-77QH>] (last visited Jan. 27, 2021) (documenting that the additional expected life expectancy for a sixty-five-year-old American rose from 13.9 years in 1950 to 19.4 years in 2016).

210. In some states women were barred from holding elected office by law, but in many others norms rather than law prevented women from holding office. See, e.g., Elizabeth D. Katz, “A Woman Stumps Her State”: *Nellie G. Robinson and Women’s Right to Hold Public Office in Ohio*, 53 AKRON L. REV. 313, 316 (2019) (noting that “the pertinent [state] constitutional text, statutes, or court opinions permitted women to hold at least some offices prior to voting”).

211. See generally Diane D. Kincaid, *Over His Dead Body: A Positive Perspective on Widows in the U.S. Congress*, 31 W. POL. Q. 96, 96 (1978) (discussing this trend).

212. The first two women to serve in Congress were from Montana and Oklahoma, respectively. See RANKIN, *Jeannette*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, [https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-\(R000055\)/](https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-(R000055)/) [<https://perma.cc/99B2-2Y9J>] (last visited Jan. 27, 2021); ROBERTSON, *Alice Mary*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, [https://history.house.gov/People/Listing/R/ROBERTSON,-Alice-Mary-\(R000318\)/](https://history.house.gov/People/Listing/R/ROBERTSON,-Alice-Mary-(R000318)/) [<https://perma.cc/G6ZS-YYZS>] (last visited Jan. 27, 2021).

213. See, e.g., CONG. RESEARCH SERV., R43244, WOMEN IN CONGRESS: STATISTICS AND BRIEF OVERVIEW 3 fig. 1 (2020), <https://fas.org/sgp/crs/misc/R43244.pdf> [<https://perma.cc/P4YC-PQK9>].

codified in federal or state statutes, proponents of gender equality would have first had to repeal legal restrictions—and only later could women have begun to run for office. Codification of the norm would have served as an additional hurdle to political equality.

Most norms are not as obviously unjust as the old norm against women holding elected office, but it is wrong to assume that constitutional norms are uniformly good. “The core values underlying [norms] are what matter,”²¹⁴ Julia Azari has noted. Looking to these underlying values reveals that many norms implicate hard questions about the character of democracy. The norm that each Electoral College elector vote for the candidate who won the popular vote in their state is a useful example. On the one hand, there is a democratic objection to an elector who thwarts the will of their state’s citizenry by refusing to support the candidate who won a majority or plurality of the state’s votes. On the other hand, there are counterarguments in favor of a system that allows electors to exercise independent judgment.²¹⁵ The presence of plausible normative arguments on both sides of the issue provides reason to hesitate before codifying the norm. More generally, if at least some constitutional norms undermine good government or democracy—or even if they only possibly have these effects—codification risks entrenching bad norms.²¹⁶

C. DECISIONMAKING AUTHORITY

Who decides what a norm requires? The answer to this question will vary depending on whether the norm is codified. Uncodified norms arise and evolve organically, rather than through any formal legal process.²¹⁷ Some highly salient norms, such as the norm that presidential candidates participate in televised debates, are enforced by the public at large.²¹⁸ Others, such as norms dictating how members of Congress or judges are to go about their jobs, are enforced within institutions.²¹⁹ But in all cases, the content of an uncodified norm is not defined by law.

Codification entails enacting a norm into law through an official process. There are several different vehicles for codifying a norm, including ordinary

214. Azari, *supra* note 180; *see also* Corey Robin, *Democracy Is Norm Erosion*, COREY ROBIN (Jan. 28, 2018), <http://coreyrobin.com/2018/01/28/democracy-is-norm-erosion> [<https://perma.cc/DPX7-B8FL>] (“When you set up ‘norms’ as your standard, without evaluating their specific democratic valence in each instance, . . . how could you know whether a norm contributes to democracy, in the substantive or procedural sense, or detracts from it?”).

215. *See, e.g.*, THE FEDERALIST NO. 68, at 411–13 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing electors’ discretion).

216. Some have made broader arguments against norms not on a retail basis, with reference to the merits of particular norms, but rather on a wholesale basis, with reference to the category of norms as a whole. *See, e.g.*, Britton-Purdy, *supra* note 183 (critiquing norms as “intrinsically conservative (in a small-c sense)”).

217. *See supra* notes 29–33 and accompanying text.

218. *See supra* notes 65–67 and accompanying text.

219. *See supra* notes 49–51 and accompanying text (members of Congress); *supra* notes 52–56 and accompanying text (judges).

statutes, cameral rules within Congress, and internal agency rules. Although these vehicles differ in important respects,²²⁰ all are more formal than the decentralized process that governs uncoded norms.²²¹ And all can give new actors a voice in defining the content of norms that were previously in the domain of informal practice alone.

Perhaps most notably, codifying a constitutional norm can channel what would otherwise be political conflict into judicial conflict.²²² When a norm is uncoded, ambiguity about what it requires leads to political contestation, with partisans arguing about whether particular conduct is consistent with the norm. When a norm is coded, by contrast, that political contestation can morph into legal contestation. Litigation can arise about the scope of coded norms, which in turn can lead courts to rule on what conduct is and is not encompassed by the codification.²²³ Ambiguities become questions of legal interpretation to be resolved by judges, at least in the typical case, leaving a diminished role for the public and their elected representatives.²²⁴

Judicial involvement comes with risks for those who wish to protect constitutional norms. One risk of judicial involvement, which we have already seen, is the risk that courts might strike down statutes codifying norms. Even if this does not occur, courts might still do more harm than good in interpreting statutes that codify norms. In particular, courts might view constitutional norms quite differently from how citizens and elected officials do. In election law and campaign finance cases, courts often focus on individual rights to the exclusion of “structural problems concerning the proper allocation of political representation.”²²⁵ The result can be an “unreflective analogical transfer of rights and equality frameworks from other domains [that] can seriously damage and distort the processes of politics.”²²⁶ This criticism sheds light on possible unintended consequences of codifying constitutional norms. In interpreting or evaluating statutes codifying constitutional norms, courts might understand coded norms only in rights-based terms. Doing so may cause them to miss the stakes for power, democracy,

220. See *infra* Section V.A (discussing different vehicles for codification).

221. Democratic values arguably demand that there be a formal process for modifying uncoded norms. See Vermeule, *supra* note 43, at 304 (“Where such a mechanism is lacking, the panoply of democratic values—clear accountability for law-making, responsiveness to citizens, deliberation in common and formalised participation in self-government—are all compromised.”).

222. This assumes that courts would play a role in interpreting the coded norm. I relax that assumption in Part V, *infra*, which considers several approaches to codifying norms without giving rise to judicial involvement.

223. See Heard, *supra* note 38, at 79 (noting that codification can lead to “the increased power of the judiciary to regulate the activities of elected politicians”).

224. This dynamic is consistent with Alexis de Tocqueville’s famous observation that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question” and that public discourse consequently tends to “borrow from the ideas and language of justice,” causing legal language to “infiltrate[] all society.” See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257–58 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

225. Pildes, *supra* note 20, at 59.

226. *Id.* at 40.

governance, and political representation that make the substance of constitutional norms important in the first instance.²²⁷

V. MEANS OF CODIFICATION

Codifying a constitutional norm might sometimes be the best course of action, despite the complications and costs that can accompany codification. When this is the case, how should the norm be codified? One decision concerns what *vehicle* should be used to codify a constitutional norm. Codifiers could pass a new statute, use nonbinding “soft law,” or proceed through other means such as a cameral rule or administrative regulation. A second regards the *form* that a codified norm should take. On this point, the rules–standards distinction is useful: a rule-like codification’s benefits will often exceed its costs, while a standard-like codification’s costs may well exceed its benefits. A third consideration is whether codified norms should be *enforceable* and, if so, by whom. In some instances, codification without judicial enforceability might be desirable. Norms could instead be protected by political actors through nonjudicial avenues.

A. VEHICLES OF CODIFICATION

The first choice that codifiers face is what vehicle to use. A norm could be codified through a constitutional amendment; an ordinary statute; a nonbinding congressional resolution; or intrabranched legal mechanisms, such as cameral rules or administrative regulations. The framework developed in the previous Parts can inform an assessment of the advantages and disadvantages of each of these vehicles of codification.

1. Constitutional Amendments

A first possible vehicle for codifying a constitutional norm is the enactment of a constitutional amendment. Codification by amendment will almost never be possible, however. The main hurdle is a practical one: “[T]he United States Constitution is extraordinarily difficult to formally amend, in contrast to most other less-rigid democratic constitutions.”²²⁸ This difficulty channels constitutional change into other processes, most notably common law judicial decision-making, rendering the formal amendment process “incidental to the main processes of constitutional change.”²²⁹ Only one constitutional norm has ever

227. An important distinction exists between judicial enforcement, on the one hand, and judicial interpretation or judicial lawmaking, on the other. The objection outlined here applies only to judicial interpretation or judicial lawmaking that risks misunderstanding or undercutting the codified norm—not to straightforward judicial enforcement. But this boundary, although it exists in principle, becomes porous in practice because courts must interpret the law in order to enforce it.

228. Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 220 (2016); see also U.S. CONST. art. V (requiring that constitutional amendments be ratified by three-fourths of the states, after first being proposed either by two-thirds of Congress or by a constitutional convention).

229. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1461 (2001).

been codified by constitutional amendment,²³⁰ and there is no prospect of any constitutional norm being codified by amendment in the foreseeable future.

Even when it is possible to codify a norm through a constitutional amendment, doing so might not be advisable. Constitutional amendments can entrench norms against future erosion, given the extreme difficulty of modifying or repealing an amendment. But for that very reason, concerns about ossification are at their height for constitutional amendments. Codifying a norm through a constitutional amendment assumes that the norm will be desirable in the indefinite future, regardless of the inevitable changes to social, economic, technological, and other facts on the ground.²³¹ Further, codifying a norm through a constitutional amendment would likely transfer power to determine the norm's content to the courts, which are the final arbiters on most matters of constitutional law.²³² Although this can have benefits in some settings, codifying a constitutional norm through a constitutional amendment gives rise to the risk of courts distorting the norm.²³³ Regardless of how one weighs this risk, however, the practical impossibility of constitutional amendment in nearly all instances makes the amendment process a poor vehicle for codifying norms.

2. Statutes

A more common approach is to seek to codify norms through ordinary statutes. In response to President Nixon's conduct, Congress passed several new governance-related statutes.²³⁴ Legislators and advocacy groups likewise proposed new statutes in response to norms violated by President Trump.²³⁵ The prominence of proposals to codify norms through the passage of statutes calls for understanding the benefits and costs of such an approach.

Codifying a norm by passing a statute holds the promise of greater compliance. Political actors who might deem it worthwhile to violate a norm might think twice before violating a statute, either because of the possibility of legal enforcement or, even without such enforcement, because the political cost of lawbreaking exceeds the political cost of norm breaking. And a statute seems to occupy a reasonable place on the settlement–flexibility spectrum: statutes are difficult to modify or repeal but far easier to change than constitutional amendments.

Despite these benefits, codification by statute will not always be possible or advisable. The dynamics laid out in Part II make codification by statute politically difficult in all but a few circumstances. Even when political conditions do allow

230. See U.S. CONST. amend. XXII; see also *supra* Section I.C.

231. See *supra* Section IV.B.2 (discussing ossification).

232. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

233. See *supra* notes 225–26 and accompanying text.

234. See *supra* notes 76–82, 141–44 and accompanying text (discussing post-Nixon statutes).

235. See *supra* notes 92–101 and accompanying text (providing examples of proposed statutes that would codify norms in response to Trump Administration conduct).

for codification by statute, doing so will make sense only when each of the several costs of codification is sufficiently small. One possible cost is the prospect of ossification, which turns on the content of the norm. If the underlying norm has virtues that are likely to persist into the future, then ossification is costless—indeed, it is a good thing under such circumstances. But if the norm is one for which change could later be desirable, passage of a statute risks ossifying a bad norm. Another cost is the possibility of judicial interference: the greater the likelihood that courts would strike down or narrowly construe a statute codifying a norm, the greater the likelihood that codifying the norm might in fact undercut the values that the uncodified norm once protected.²³⁶

When these risks are low and a norm is substantively desirable, codification by statute is advisable. The proposed Scientific Integrity Act,²³⁷ for example, is a strong candidate for codification under this reasoning. The bill sought to codify a norm of scientific integrity in federal agencies,²³⁸ having been first introduced in response to what its sponsors described as “a disturbing pattern of scientific oppression” by Trump Administration officials.²³⁹ The bill would have prohibited suppression of an agency’s scientific or technical findings, protected agency employees who wish to disseminate scientific findings, and required agencies to develop scientific integrity policies that ensure scientific conclusions are not made based on political considerations.²⁴⁰ The Scientific Integrity Act served values that are likely to be stable over time, set out clear rules, and was squarely

236. The likelihood that courts would strike down or narrowly construe a statute codifying a norm depends on both whether a dispute would land in court in the first instance and, if so, how the courts would likely resolve the dispute. On the latter score, it would be presumptuous to confidently declare any statute codifying a norm safe from constitutional invalidation given the contemporary Supreme Court’s willingness to create new doctrinal limitations on Congress’s power. *See, e.g.,* *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down the Voting Rights Act’s coverage formula based on a principle of equal state sovereignty); *NFIB v. Sebelius*, 567 U.S. 519, 546–61 (2012) (limiting Congress’s power under the Commerce Clause); *id.* at 575–88 (limiting Congress’s power under the Spending Clause); *see also* Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <https://theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> (describing how “off the wall” constitutional arguments can become mainstream). Nonetheless, statutes codifying norms in some domains, such as those concerning the pardon power, *see supra* notes 161–66 and accompanying text, seem especially vulnerable to constitutional challenge.

237. H.R. 1709, 116th Cong. (2019); S. 775, 116th Cong. (2019).

238. *See* 2 PREET BHARARA, CHRISTINE TODD WHITMAN, MIKE CASTLE, CHRISTOPHER EDLEY, JR., CHUCK HAGEL, DAVID IGLESIAS, AMY COMSTOCK RICK & DONALD B. VERRILLI, JR., BRENNAN CTR. FOR JUSTICE, PROPOSALS FOR REFORM 10 (2019), https://www.brennancenter.org/sites/default/files/2019-09/2019_10_TaskForce%20II_0.pdf [<https://perma.cc/K284-YWDX>] (noting that the bill would “create a clearly defined, government-wide prohibition against improper influence over government research and data that has until now existed only in specific statutes or as a matter of executive branch policy”).

239. Paul Tonko & Brian Schatz, Opinion, *Trump Administration’s ‘Scientific Oppression’ Threatens US Safety and Innovation*, USA TODAY (July 23, 2019, 12:53 PM), <https://www.usatoday.com/story/opinion/2019/07/22/donald-trump-war-on-science-hurts-america-and-americans-column/1765301001/> (providing examples).

240. H.R. 1709 § 3; S. 775 § 3.

permissible under then-existing Supreme Court precedent.²⁴¹

The analysis is thornier for other proposed statutes that would codify norms. Most notably, some recent proposals would almost certainly give rise to constitutional challenges. Consider statutes proposed during the Trump Administration to limit communication between the White House and the Department of Justice, to require the release of income tax returns by presidential candidates and sitting Presidents, and to mandate certain disclosures relating to the pardon process.²⁴² Though there are strong arguments for the constitutionality of each of these proposals based on constitutional text, history, and precedent, there are at least plausible arguments that a President could make in challenging statutes codifying each of these norms.²⁴³ These latter arguments should give would-be codifiers pause. If a statute codifying a norm were to be struck down or narrowly construed, the codified norm might be left weaker than it was prior to codification—a result that would make the codification process a self-defeating one.

3. Soft Law

Another approach to codification is the use of *soft law*, “statements by lawmaking authorities that do not have the force of law.”²⁴⁴ Gregory Koger, for example, has argued that Congress should “pass resolutions stating what our shared norms are and applying these norms to recent events.”²⁴⁵ Doing so would formalize norms without making them judicially enforceable.

Congress’s joint resolution in response to President Trump’s failure to condemn racist violence in Charlottesville, Virginia in 2017 shows the use of soft law in response to a norm violation.²⁴⁶ Events in Charlottesville highlighted the threat of long-marginalized racist views infiltrating mainstream political discourse.²⁴⁷ Politicians from both parties swiftly and strongly condemned the violence in Charlottesville. President Trump, however, declined to denounce the

241. This is not to say that the Scientific Integrity Act would not face constitutional challenges. One could easily imagine a constitutional challenge to the Act grounded in the unitary executive theory, and some elements of the federal judiciary could be responsive to such a challenge even if it seems implausible based on current doctrine. *See supra* note 236.

242. *See supra* notes 92–98 and accompanying text.

243. *See Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1177–81 (E.D. Cal. 2019) (discussing tax return disclosure requirements in the context of the Constitution’s Qualifications Clause, U.S. CONST. art. II, § 1, cl. 5, and related precedents); *supra* notes 154–58 and accompanying text (discussing constitutional issues relating to the relationship between the White House and the Department of Justice); *supra* notes 161–66 (discussing constitutional limits on congressional interference with the pardon power).

244. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 577 (2008).

245. Gregory Koger, *The Job of Congress: Articulating Norms*, VOX (Apr. 25, 2018, 4:50 PM), <https://vox.com/mischiefs-of-faction/2018/4/25/17248550/congress-articulating-norms> [https://perma.cc/9JBE-A5MG].

246. *See id.*

247. *See* SIMON CLARK, CTR. FOR AM. PROGRESS, HOW WHITE SUPREMACY RETURNED TO MAINSTREAM POLITICS 9–10 (2020), https://cdn.americanprogress.org/content/uploads/2020/03/30072742/WhiteNationalism-report1.pdf?_ga=2.232921758.1831276784.1611938442-1591793848.1611166422 [https://perma.cc/7W8V-NG7T].

white nationalist protesters, instead asserting that there were “some very fine people on both sides.”²⁴⁸ In response, Congress passed a joint resolution “urging the President and the President’s Cabinet to use all available resources to address the threats posed by” white nationalists and other hate groups.²⁴⁹ The resolution did not impose enforceable legal obligations on any public official. It was nonetheless a powerful bipartisan statement rebuking President Trump and seeking to punish him for failing to condemn far-right violence.²⁵⁰

The biggest downside of codifying a norm through soft law is that soft law is not legally binding or judicially enforceable. As a result, soft law lacks much of hard law’s ability to induce compliance with a norm’s content. A public official who violates a norm codified through hard law risks being subject to legal sanction, whether civil or criminal. The result is that hard law typically provides both an *ex ante* deterrent effect and an *ex post* remedy that are absent in the soft law context.²⁵¹

This major disadvantage aside, codification through soft law has significant benefits. It may not provide as much settlement as hard law, but it can still provide clarity about the contours of an otherwise fuzzy norm. A congressional resolution articulating what Congress thinks a norm requires can help define the norm’s content, highlight its importance, make it more salient to the public, and reinforce it in the face of threats.²⁵² A codified norm can help structure political contestation, providing those who seek to protect the norm with a rhetorical tool for attacking violators and potential violators. Although soft law is weaker than hard law in promoting compliance, it still provides a reference point that can guide public debate.²⁵³ Public officials might think twice before violating a codified norm, even if there are no formal legal consequences for a violation.²⁵⁴

Use of soft law to codify norms can also avoid some of the most significant pitfalls of codification through hard law. Soft law can allow Congress to circumvent

248. Rosie Gray, *Trump Defends White-Nationalist Protesters: ‘Some Very Fine People on Both Sides,’* ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012>.

249. Joint Resolution of Jan. 3, 2017, Pub. L. No. 115-58, 131 Stat. 1149 (2017).

250. The use of soft law to codify constitutional norms is more widespread in Commonwealth nations, several of which have published “cabinet manuals” that “represent the ‘officialization’ . . . of constitutional conventions.” These manuals contain “official interpretations of [norms] endorsed by Cabinet that describe the proper exercise of constitutional authority.” Bowden & MacDonald, *supra* note 19, at 366.

251. See Gersen & Posner, *supra* note 244, at 597 (“The binding effect of hard law is its straightforward advantage over soft law.”). Indeed, for a public official whose brand is norm violation, soft law might invite fresh violations: a norm’s codification as soft law might induce norm violations as a means of the public official signaling to their supporters that they are willing to violate norms. See *supra* notes 180–83 and accompanying text.

252. See Kutz, *supra* note 199, at 444 (describing a task of institutional design as “ensuring the continuing salience of [core] values”).

253. Even if a codification effort fails, the very act of undertaking it can produce benefits from the standpoint of democratic discourse and accountability: legislators publicly make arguments for and against the norm and go on record with votes for or against codification.

254. See Gersen & Posner, *supra* note 244, at 604–05 (discussing the political consequences of soft law, despite its nonbinding character).

veto points in the legislative process, given that Congress can pass a nonbinding resolution with a majority of either a single chamber (for simple resolutions) or both chambers (for concurrent resolutions), in both instances without presidential assent.²⁵⁵ Using soft law also avoids the risk of courts striking down or narrowing codified norms. Norms that could not be codified through hard law because of constitutional limitations can be codified as soft law without running afoul of the Constitution as understood by the courts. Similarly, because courts do not construe or apply soft law, there is no risk that a codification through soft law would later be narrowed by the courts.

4. Intrabranch Law

Finally, for the subset of norms that govern only the internal workings of a single branch of government, codification is possible without the involvement of other branches. Intrabranch rules in all three branches provide possible means of codification: federal agencies make internal rules to govern their operations,²⁵⁶ both chambers of Congress make their own cameral rules to set legislative procedure,²⁵⁷ and federal courts make their own internal rules.²⁵⁸ Codification through any of these types of rules can achieve some of the benefits of codification via statute while avoiding some costs.

Norms concerning behavior within Congress are illustrative. Congress's cameral rules are "essentially endogenous—matters for the House and Senate to decide for themselves and by themselves"²⁵⁹ and are virtually unreviewable by the courts.²⁶⁰ Consider again a hypothetical Senate rule requiring hearings on Supreme Court nominees under condition *A* but not *B*.²⁶¹ Such a rule would have provided much-needed clarity in 2016, during the dispute over Judge Garland's nomination. If a rule had not required a hearing for Judge Garland but had required one in other circumstances, Senate Republicans would have been on solid ground in refusing to hold hearings. If, by contrast, a rule had required a hearing for Judge Garland, Senate Democrats could have called out Republicans for violating the Senate rules and conceivably could have enforced the rule

255. See *id.* at 594–95 (describing the relative "cheapness" of producing soft law); see also *Congressional Glossary*, LIBR. CONGRESS, <http://loc.gov/rr/program/bib/congress/congress-glossary.html> [<https://perma.cc/PX6T-7HVL>] (last visited Jan. 29, 2021) (describing the various types of resolutions in Congress).

256. See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (discussing the "internal directives, guidance, and organizational forms through which agencies structure the discretion of their employees").

257. See generally RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 113-181 (2015); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18 (2013).

258. See, e.g., SUPREME COURT OF THE U.S., RULES OF THE SUPREME COURT OF THE UNITED STATES (2019), <https://supremecourt.gov/ctrules/2019RulesoftheCourt.pdf> [<https://perma.cc/PJR5-TCQ3>].

259. Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731 (1989).

260. See *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("Article I clearly reserves to each House of the Congress the authority to make its own rules, and judicial interpretation of an ambiguous House [or Senate] Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution.").

261. See *supra* text following note 205.

through Congress's internal adjudicatory process.²⁶² To be sure, if a unified Republican majority were sufficiently committed to preventing a hearing, it could have broken or repealed the relevant rule. But some caucus members who were willing to breach a norm might not have been willing to break a Senate rule. Even if they were willing to break a rule, it is likely that the political cost of breaking a rule would have been higher than the cost of violating a norm.

This example shows how cameral rules can provide some of the benefits of hard-law codification while avoiding hard law's costs. The reasoning closely parallels the reasoning in the discussion of soft law. A cameral rule could have provided clarity on what the norm requires, reflected the formal views of the Senate as a body, and potentially allowed for enforcement within Congress. It would not have, however, risked judicial interference or the surrender of Congress's prerogatives to another branch. Because courts do not review Congress's internal rules, they would not have the opportunity to strike down, interpret, or apply whatever rules Congress devises to codify norms.²⁶³ The biggest downside of codifying norms through cameral rules is that cameral rules are not entrenched against future change—a later House or Senate can always change an earlier House or Senate's cameral rules by a simple majority.²⁶⁴ But even without formal entrenchment, there are political costs to changing cameral rules that can make such rules stickier than informal norms.

Similar analysis counsels in favor of codifying some Executive Branch practices through agency guidance or directives. Federal agencies at times commit their internal norms to writing. The Department of Justice, for instance, has issued a series of memoranda over two decades setting out its policies on prosecution of corporate crimes.²⁶⁵ Most of these policies have been codified in the

262. Cf. Gould, *supra* note 133, at 1959–73 (describing that process).

263. See *supra* notes 259–60 and accompanying text. Codifying a constitutional norm through a cameral rule may transfer authority to the House or Senate parliamentarians, the procedural referees tasked with interpreting and applying cameral rules. Given that the parliamentarians operate under a different set of institutional constraints than do federal judges, the risk of them trying to distort or undermine a codified norm is low. Cf. Gould, *supra* note 133, at 1991 (“The fact that majority parties in Congress hold the power to overrule, ignore, or even remove the parliamentarian exerts a gravitational pull on the parliamentarians’ jurisprudence.”).

264. The two chambers operate somewhat differently in this regard. In the House, simple majorities pass new rules at the beginning of each Congress and can change the rules at any time. See CONG. RESEARCH SERV., RL30725, THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR 9 (2020), <https://fas.org/sgp/crs/misc/RL30725.pdf> [<https://perma.cc/98H9-JY3J>]. In the Senate, rules carry over from one Congress to the next, and a two-thirds supermajority is formally required to close debate on any proposed rule change. But, as a functional matter, rules can be (and sometimes are) changed by a simple majority vote through an appeal of a ruling of the chair. See Gould, *supra* note 133, at 1976–77.

265. See Memorandum from Mark Filip, Deputy Attorney Gen., to Heads of Department Components and United States Attorneys (Aug. 28, 2008), <https://justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [<https://perma.cc/3T2Q-V7W7>]; Memorandum from Deputy Attorney General to All Component Heads and United State Attorneys (June 16, 1999), <https://justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [<https://perma.cc/H9FU-8SK6>]; Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., to Heads of Department Components and United States Attorneys (Oct. 21, 2005), <https://perma.cc/A35N-LTP7>; Memorandum from Paul J. McNulty, Deputy

Department's Justice Manual.²⁶⁶ Adjustments to Department policy have come through new memos and updates to the Justice Manual. The Department's policies on this topic, like many internal agency policies across the administrative state, are neither formally entrenched against change nor enforceable in court.²⁶⁷

Whatever one thinks of the merits of any given approach to corporate crime, there are virtues to the Department committing its approach to writing. When the Department codifies its practices, it clarifies its policies and promotes consistency across the Department and U.S. Attorneys' offices. A written policy allows the public to understand and criticize relevant policies.²⁶⁸ It can also promote settlement, even though there is no formal entrenchment against change. Changing a codified policy will likely be more publicly salient and thus more vulnerable to criticism than changing an uncodified norm. An agency's leadership can change the agency's policies at any point, and changes in party control typically mean changes in at least some agency operating procedures as well. But even when it is possible to change an agency policy, doing so can impose a political cost that is probably greater than the political cost of departing from an uncodified norm.

B. CODIFICATION OF RULES AND STANDARDS

Regardless of the legal vehicle used for codification, would-be codifiers must also decide what sorts of language to use in codifying norms. The rules–standards distinction neatly maps on to norms: norms can be *rule-like*, providing clear guidance as to what conduct is required, permitted, or forbidden, or *standard-like*, setting out general, open-ended principles.²⁶⁹ This distinction matters for codification: codifying a rule-like norm is more likely to maximize codification's benefits while minimizing its costs.

Attorney Gen., to Heads of Department Components and United States Attorneys (Dec. 12, 2006), https://justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf [<https://perma.cc/VA3Q-JYX8>]; Memorandum from Larry D. Thompson, Deputy Attorney Gen., to Heads of Department Components and United States Attorneys (Jan. 20, 2003), <https://perma.cc/WWF3-45QP>; Memorandum from Sally Quillian Yates, Deputy Attorney Gen., to United States Attorneys et al. (Sept. 9, 2015), <https://justice.gov/archives/dag/file/769036/download> [<https://perma.cc/HVT6-7BVE>].

266. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-28.010 (2020), <https://justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations> [<https://perma.cc/87Q9-TQD3>] (entitled "Principles of Federal Prosecution of Business Organizations"). The Justice Manual was known as the United States Attorneys' Manual until 2018.

267. *But see* Metzger & Stack, *supra* note 256, at 1249 (noting that under "[a] cluster of judicial doctrines . . . , the more that agencies articulate norms of internal law and management in a way that sounds binding or mandatory, the more they invite external judicial review of their actions," creating an incentive under which agency "internal norm setting is pushed to higher levels of generality"); *id.* at 1281–86 (discussing relevant cases).

268. *See, e.g.*, Jillian Berman, *Eric Holder's 1999 Memo Helped Set the Stage for 'Too Big to Jail,'* HUFFINGTON POST (June 4, 2013, 4:56 PM), https://huffpost.com/entry/eric-holder-1999-memo_n_3384980 [<https://perma.cc/7DFN-4QXF>]; Dylan Tokar, *The Department of Justice Is Turning Back the Clock on Corporate Accountability,* NATION (Mar. 6, 2019), <https://thenation.com/article/archive/financial-crisis-justice-department-corporate-prosecutions-yates-memo>.

269. *See* Chafetz & Pozen, *supra* note 2, at 1437–38 (drawing this distinction).

The rules–standards distinction has been a mainstay of legal thought for decades.²⁷⁰ Rules “bind[] a decisionmaker to respond in a determinate way to the presence of delimited triggering facts,”²⁷¹ while standards “tend[] to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”²⁷² Speed limits and requirements that drivers stop at red lights are rules; prohibitions on reckless driving are standards. The choice between rules and standards implicates the “extent to which a given aspect of a legal command should be resolved in advance,” in the case of rules, “or left to an enforcement authority to consider,” in the case of standards.²⁷³

Constitutional norms can resemble either rules or standards, or they can lie on a continuum between the two.²⁷⁴ The norm that presidential candidates and Presidents release their personal income tax returns²⁷⁵ is rule-like: it sets out an unambiguous requirement, and it is consequently easy to determine whether the norm has been complied with. A norm that public officials speak honestly to the public is standard-like. Even if a set of core cases clearly violates the norm, there are significant ambiguities. Do exaggerations count as lies? What about reckless disregard for the truth? What about deception via omissions? The existence of these questions reveals how norms around honesty are more standard-like than rule-like.²⁷⁶

Rule- and standard-like norms often complement one another. A series of rule-like norms can help concretize a broader standard-like norm that would otherwise be ill-defined.²⁷⁷ By way of example, a standard-like norm dictates that presidential candidates not withhold from the public information relevant to their character, experience, or possible conflicts of interest. Multiple rule-like norms help implement this standard-like norm: norms that candidates give interviews with journalists, release their tax returns, and release certain health-related

270. One leading scholar described the distinction as “tediously familiar.” Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 804 (2005). Literature on the topic includes Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Kennedy, *supra* note 193; Schauer, *supra*; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

271. Sullivan, *supra* note 270, at 58.

272. *Id.*

273. Kaplow, *supra* note 270, at 562.

274. See, e.g., Vaughn P. Shannon, *Norms Are What States Make of Them: The Political Psychology of Norm Violation*, 44 INT’L STUD. Q. 293, 294 (2000) (“Due to the fuzzy nature of many norms and situations [in international relations], and due to the imperfect interpretation of such norms by human agency, oftentimes norms are what states (meaning, state leaders) make of them. Other norms have no such wiggle room . . .”).

275. See *supra* note 95 and accompanying text.

276. The standard-like character of prohibitions on lying is confirmed by the large body of judge-made law seeking to define the scope of the statute that criminalizes making materially false statements to the federal government, 18 U.S.C. § 1001(a) (2018). See *False Statements and False Claims*, 42 AM. CRIM. L. REV. 427, 429–44 (2005) (collecting and discussing cases on the application of § 1001(a)).

277. On this sort of “rulification of standards,” see generally Schauer, *supra* note 270.

information. Each of these rule-like norms exists to serve the broader, standard-like norm of candidate transparency. Though the rules–standards distinction may not be as clean a distinction as it appears at first glance, the distinction can nonetheless help inform codification of constitutional norms.

1. Compliance

A rule-like codification is more likely to lead to compliance than a standard-like codification, all else equal. Rules can provide political actors with ample notice as to what conduct is permitted and forbidden, deter violations, and provide voters and political actors with an easy criterion to use in imposing accountability on those who violate norms. Even without judicial enforcement, political actors might feel pressure to comply with norms that are codified in a rule-like manner.

The Twenty-Second Amendment demonstrates how a rule-like codification can promote compliance. The Amendment’s approach to term limits is rule-like, specifying precisely who is and is not eligible to be elected President.²⁷⁸ Even though courts have never been called upon to enforce presidential term limits, compliance with the codified term limit has been perfect. No President has sought a third term since the Amendment was ratified, even though one publicly criticized the Amendment²⁷⁹ and two publicly claimed that they could have won a third term had they been eligible to run.²⁸⁰

Concerns about unintended consequences for compliance—especially crowding out effects—are lower for a rule-like codification than for a standard-like codification. It is hard to argue that the codification of one rule or several rules would crowd out the wide range of norms that govern political life. The Twenty-Second Amendment’s codification of a two-term limit has not, for example, crowded out the many other factors that inform public debate over who should be elected President. So too, if Congress were to mandate that presidential candidates or sitting Presidents release their tax returns, it would hardly imply that candidates or Presidents have no duties of transparency other than tax return disclosure. For a standard-like codification, by contrast, concerns about crowding out are higher. A public official could plausibly claim that a standard-like codification spells out the full extent of their obligations. If, for instance, a standard-like transparency requirement was codified into law, one could imagine a candidate or elected official who met the statute’s requirements claiming that they have no further obligations of transparency. Concerns about crowding out therefore provide a reason to favor rule-like over standard-like codification.

278. U.S. CONST. amend. XXII, § 1 (“No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.”).

279. See Kettle, *supra* note 209.

280. See *id.* (President Clinton); Michael S. Schmidt, *Obama Says He Would Have Defeated Trump for a Third Term*, N.Y. TIMES (Dec. 26, 2016), <https://nytimes.com/2016/12/26/us/politics/obama-third-term-donald-trump.html> (President Obama).

2. Settlement and Flexibility

Codifying a norm in rule-like form can best achieve the goals of settlement.²⁸¹ A rule-like requirement provides political actors with clarity as to what behavior is and is not permissible.²⁸² A standard, by contrast, “ties the decisionmaker’s hand in the next case less than does a rule.”²⁸³ If constitutional norms were to be codified using the language of standards—with terms like “reasonable,” “sufficient,” or “due care”—codification would not provide settlement as to what is required of public officials. Instead, political debate would simply shift from debate over what the uncoded norm requires to debate over what the (standard-like) codification requires.²⁸⁴

The biggest risk of rule-like codification is ossification. When a norm is codified in rule-like fashion, it is harder for the norm to evolve organically. Recall the example of the former President who criticized the Twenty-Second Amendment in the context of rising lifespans. Because the Amendment sets out a rule-like rather than a standard-like requirement, it cannot easily evolve in light of changing circumstances. The prospective drawback of a rule-like codification failing to keep up with changing times will often pale in comparison to the benefits of stability and entrenchment that come from rule-like rather than standard-like codification. Loss of flexibility does, however, provide reason for caution before codifying a norm in a rule-like manner. Codifiers should take care to consider what kinds of future changes—political, social, economic, or even medical—might undermine whatever rule that they set out. If it is likely that future changes will weaken the justifications for a norm, codifiers should hesitate to codify the norm in rule-like form. Standard-like codification provides less of a settlement benefit. But, for that same reason, it carries a lower risk of ossification.

3. Decisionmaking Authority

A final difference between rule-like and standard-like codification is that each approach can empower different institutional actors. The political branches play

281. Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369, 374 (2003) (noting an affinity between rules and settlement, on the one hand, and standards and lack of settlement, on the other).

282. Kennedy, *supra* note 193, at 1688 (describing “certainty” as one of the “great social virtues of formally realizable rules”).

283. Sullivan, *supra* note 270, at 59.

284. Seana Shiffrin provides an optimistic account of this feature of standards in the context of law regulating private conduct, arguing that standards-like rather than rule-like legal provisions can induce deliberation, reflection, and development of moral agency among citizens. See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222–29 (2010). Shiffrin’s argument focuses on how ordinary citizens might be expected to respond to law that takes the form of standards as opposed to rules. *Id.* The analysis may not translate to the domain of constitutional norms, which regulate the behavior of public officials rather than that of ordinary citizens, given the distinctive reasons that public officials have to seek to skirt constitutional norms. Because norms can stand in the way of public officials accomplishing their policy goals and winning elections, standard-like codifications of constitutional norms are likely to induce noncompliance as opposed to deliberation.

the predominant role in defining a norm's content when they engage in rule-like codification. Standard-like codification can, by contrast, transfer power to the courts to fill in the details.

For norms codified in a rule-like manner, courts play a minimal role in defining the norms' content. So long as a codified norm does not violate the Constitution as understood by the courts, rules that set out clear requirements leave judges with far less discretion than do open-ended standards. Judicial intervention into the political process typically results from courts interpreting open-ended legal provisions, such as the First Amendment,²⁸⁵ the Fourteenth Amendment,²⁸⁶ or anticorruption statutes.²⁸⁷ A rule-like codification, by contrast, provides precision as to what conduct is and is not permitted, thereby minimizing the role for courts in determining the statute's meaning.²⁸⁸

For standard-like codifications, by contrast, courts would frequently fill in details left unspecified by the codifiers. Standards "are essentially delegations to future decisionmakers to determine what really is just, fair, and reasonable."²⁸⁹ If a norm is codified in a standard-like manner, it will often fall to courts to determine what conduct is covered by the codification. In the constitutional domain, Richard Fallon has showed how the Supreme Court has developed "a complex, increasingly code-like sprawl of two-, three-, and four-part tests"²⁹⁰ to implement the Constitution's many standard-like provisions. The same holds for standard-like statutes, ranging from antitrust²⁹¹ to civil rights²⁹² statutes. Across substantive domains, courts tend to take it upon themselves to "rulify" standards.²⁹³

Consider the example of a hypothetical statute barring public officials from speech that "exposes the citizens of any race, color, creed or religion to contempt,

285. See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 383–608 (5th ed. 2016) (providing an overview of the Court's campaign finance jurisprudence).

286. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *Shaw v. Reno*, 509 U.S. 630 (1993).

287. See sources cited *supra* note 186.

288. Rule-like codification minimizes this risk but does not eliminate it. Courts sometimes create common law exceptions to seemingly clear rules. See, e.g., Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 312–15. And even seemingly precise legal language can give rise to interpretive controversies that the language's drafters did not anticipate. See, e.g., *Yates v. United States*, 574 U.S. 528 (2015) (considering whether fish are "tangible object[s]" within the meaning of 18 U.S.C. § 1519); *Smith v. United States*, 508 U.S. 223 (1993) (considering whether exchanging a firearm for drugs constitutes "us[ing]" the firearm within the meaning of 18 U.S.C. § 924(c)(1)).

289. Alexander, *supra* note 281.

290. Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997).

291. See Schauer, *supra* note 288, at 316–17 (discussing "per se rules" developed to implement the Sherman Antitrust Act).

292. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989) ("[S]ection 1983 is silent on many important questions, including available defenses, burdens of pleading and persuasion, and exhaustion requirements. Because of the textual silence, judges must fill the gaps. To this extent, the statute delegates power to make common law." (citation omitted)).

293. See Schauer, *supra* note 288, at 315–19; Schauer, *supra* note 270, at 807–08.

derision, or obloquy.”²⁹⁴ (Put aside, for the moment, that the statute would run afoul of current First Amendment doctrine.²⁹⁵) The language of “contempt, derision, or obloquy”²⁹⁶ is standard-like. Public discourse is filled with speech that some would view as encompassed by those terms but that others would view as not covered. Some judges might read the statute narrowly to prohibit only overt bigotry, while others might read it broadly to also prohibit “dog whistles.”²⁹⁷ A standard-like statute attempting to regulate public officials’ speech would result in enormous discretion for judges to decide what sorts of speech by public officials are covered by the statute. More generally, codifying a norm with a standard rather than a rule would often expand the judicial role in defining the content of a codified norm.

Whether a norm should be codified in a rule-like or standard-like manner can therefore turn on an evaluation of what role courts should play in determining the content of the norm, at least when the norm would be codified as judicially enforceable law. A judicial role in implementing and “rulifying” standards is common across areas of law.²⁹⁸ But the issue of judicial oversight of the democratic process implicates distinctive considerations. Some may view judicial involvement in the political process as generally salutary, perhaps on the grounds that the political branches are likely to engage in self-entrenchment or fail to give due weight to the interests and preferences of minority groups.²⁹⁹ Those who hold such optimism about the judicial role might be sympathetic to standard-like codifications on the ground that such codifications provide greater opportunities for judges to oversee the political process.

But there are reasons to worry that courts might undercut codified norms. Courts might hold different theories of democracy than do codifiers. Codifiers might not want to defer to courts on sensitive questions of what conduct should be permitted in democratic politics. This hesitancy may be warranted, because courts might focus on rights-related considerations to the exclusion of democracy-related considerations.³⁰⁰ More prosaically, courts might

294. I borrow this language from the state statute (not specific to public officials) upheld by the Supreme Court in *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (upholding Ill. Rev. Stat., 1949, c. 38, § 471).

295. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1044 (4th ed. 2011) (enumerating the “many reasons [why] it is questionable whether *Beauharnais* is still good law”).

296. *Beauharnais*, 343 U.S. at 251.

297. Cf. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014); TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001).

298. See *supra* notes 290–93 and accompanying text; see also Fallon, Jr., *supra* note 290 (“A crucial mission of the Court is to implement the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.” (emphasis omitted)).

299. The classic statement of this sort of optimism about the courts’ role in remedying flaws in democracy is JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

300. See *supra* notes 225–27 and accompanying text.

simply struggle to implement standard-like codifications in practice.³⁰¹ Those concerned about a judicial role in this area should prefer rule-like to standard-like approaches to codification.

* * *

The distinction between rule- and standard-like norms captures intuitions that policymakers seem to already hold. The Twenty-Second Amendment, the various post-Nixon statutes, and the proposed Trump-era codifications are mostly rule-like in character. It is more difficult to find real-world examples of standard-like codifications. Codifiers may recognize, even if only implicitly, the perils of codifications that do not take the form of clear rules.

There is an irony to the challenges of codifying standard-like norms: those are the norms that are least likely to be observed without codification. Political actors or voters can at times identify violations of rule-like norms and punish violators accordingly, while violations of standard-like norms are typically harder to identify with confidence. Standard-like norms are in this respect more in need of codification than rule-like norms, but there are considerable downsides to codifying standard-like norms.³⁰² In many instances, then, norms should either be codified as rules or not be codified at all.

C. INDIRECTLY PROTECTING NORMS

The questions of the best vehicle for codification and whether to codify a norm as a rule or as a standard each concern the prospect of directly codifying a norm. But norms can be protected in more indirect ways as well. Legal changes can empower institutional actors—such as legislators, subnational governments, and bureaucrats—to enforce constitutional norms or to raise the cost of violations even without granting anyone the ability to directly enforce the norms' content in court.³⁰³ For those looking to strengthen norms, this approach can provide an alternative to directly enacting norms' content into law.

Congress can seek to enforce constitutional norms in the face of threatened or actual violations by the Executive Branch. Congress can raise the political cost of Executive Branch norm violations through the use of its oversight powers.

301. The aftermath of Montana eliminating its numerical speed limit on daytime highway driving (a rule) in favor of a requirement of "reasonable and prudent" driving (a standard) provides a cautionary tale. See Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999). Under the new standard, law enforcement and judges struggled mightily to craft workable criteria for what conduct constituted a violation. See *id.* at 181–84.

302. It might seem that a solution to this problem is to codify a standard-like norm using rule-like language. This approach has intuitive appeal, in that it would provide the benefit of greater settlement and minimize the transfer of interpretive authority to the judiciary. But standard-like norms are standard-like for a reason: they do not lend themselves to being put in rule-like terms. If Congress were to seek to translate a standard-like norm into a rule-like statute, it would face immediate difficulties in doing so. Legislators might not be able to agree on a precise rule. Even if they could, any given rule might be overinclusive or underinclusive relative to the behavior that legislators wish to ban. The norm, in other words, could be lost in translation from uncoded standard to codified rule.

303. The ability of a political actor to address "perceived wrongdoing without recourse to a third-party decisionmaker," such as a court, sometimes goes under the name "self-help." Pozen, *supra* note 28, at 28 n.113.

Congress can investigate practices, including Executive Branch practices, that violate norms—even if those practices do not violate any laws.³⁰⁴ Congressional committees can call witnesses and request (or, if necessary, subpoena) documents from public or private actors, including from the Executive Branch.³⁰⁵ Oversight powers also allow Congress—or a single chamber, party, committee, or member—to publicize issues or raise their salience before the public.³⁰⁶

The case of presidential tax returns illustrates how Congress's oversight authority can be deployed in an attempt to safeguard constitutional norms. No statute mandates that presidential candidates or Presidents proactively release their tax returns—the practice is strictly a norm. Its status as a norm does not, however, leave Congress without a remedy in the face of presidential noncompliance. In 2019, one House committee invoked a previously little-known provision of the Internal Revenue Code³⁰⁷ to seek to compel the Treasury Department to provide the House with President Trump's tax returns.³⁰⁸ Another House committee subpoenaed an accounting firm for documents related to President Trump's and his businesses' finances.³⁰⁹ If courts permit these attempts to access presidential tax returns,³¹⁰ the ability of Congress to enforce the norm will reduce the need for a new statute to codify the norm directly.³¹¹

304. See generally CHAFETZ, *supra* note 135 (closely examining the variety of nonlegislative tools that Congress can use to assert itself in separation of powers disputes). The Court has made clear that Congress's oversight power is not limited to investigating violations of law. See, e.g., *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations . . . includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”).

305. See RULES OF THE HOUSE OF REPRESENTATIVES r. XI(2)(m), H.R. DOC. NO. 113-181 (2015); STANDING RULES OF THE SENATE r. XXVI(1), S. DOC. NO. 113-18 (2013).

306. See generally Josh Chafetz, *Congressional Overspeech*, 89 *FORDHAM L. REV.* 529 (2020) (describing one tool of congressional oversight, “congressional overspeech,” meaning “the use of oversight mechanisms to communicate with the broader public”).

307. See 26 U.S.C. § 6103(f)(1) (2018).

308. See Nicholas Fandos, *House Democrat Demands Six Years of Trump Tax Returns from I.R.S.*, *N.Y. TIMES* (Apr. 3, 2019), <https://nytimes.com/2019/04/03/us/politics/mueller-report-subpoena-house.html>.

309. See Charlie Savage, *Congress Can Seek Trump's Financial Records, Appeals Court Rules*, *N.Y. TIMES* (July 9, 2020), <https://nytimes.com/2019/10/11/us/politics/mazars-trump-tax-returns.html>.

310. The Supreme Court's decision in *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), did not outright permit or deny legislative access to presidential documents, such as personal tax returns, but instead set out a new test for when such access is appropriate, *id.* at 2035–36. On why this result should be understood as a loss for Congress, see, for example, Josh Chafetz, *Don't Be Fooled, Trump Is a Winner in the Supreme Court Tax Case*, *N.Y. TIMES* (July 9, 2020), <https://nytimes.com/2020/07/09/opinion/trump-taxes-supreme-court-.html>; and Jonathan S. Gould & Olatunde C. A. Johnson, *SCOTUS Doesn't Trust Congress—And That's a Problem for American Government*, *ATLANTIC* (July 21, 2020), <https://theatlantic.com/ideas/archive/2020/07/scotus-congress-trust/614380>.

311. The need would lessen but not disappear: these sorts of mechanisms provide only a means of accessing presidential tax returns when Congress actively seeks to do so, but a codified norm could require that tax returns be released as a matter of course.

Statutes requiring Executive Branch disclosures to Congress can also raise the cost of norm violations or encourage congressional oversight of Executive Branch compliance with norms. Since 2002, federal law has required the Attorney General to notify Congress in writing whenever the Department of Justice challenges³¹² or declines to defend³¹³ a statute or regulation in court. These requirements can be understood as an indirect way of buttressing the norm that the Executive Branch generally defends federal statutes in court.³¹⁴ Rather than passing a law requiring the Department of Justice to defend every federal statute, Congress opted for a disclosure requirement. When a President declines to defend federal law, the disclosure requirement has ensured that Congress knows about the decision and can take action of its own in response.³¹⁵

Some proposed reforms follow this model. The proposed Abuse of the Pardon Prevention Act, for example, requires special disclosures to Congress for pardons relating to any investigation that involves the President or one of the President's family members.³¹⁶ A direct regulation on this subject matter, preventing the President from issuing certain pardons, would likely be struck down by the courts.³¹⁷ The proposed statute instead takes an indirect approach: it would not directly regulate the pardon power, but it would enable oversight efforts and raise the political cost of presidential self-dealing by requiring that certain materials be disclosed to Congress.

State and local governments can similarly hold federal officials accountable for norm violations, at least in some domains. In a partisan age, subnational governments "controlled by one party [can] challenge the federal government when it is controlled by the other party."³¹⁸ Some states have, for instance, sought to enforce the norm of presidential disclosure of tax returns. States have "require[d] presidential candidates to release their tax returns before they're permitted to appear on the ballot, turning a formerly unbroken 40-year tradition into a legal necessity."³¹⁹ These efforts have been challenged in court and, in at least one

312. 28 U.S.C. § 530D(a)(1)(B)(i) (2018).

313. *Id.* § 530D(a)(1)(B)(ii).

314. On the history of the duty to defend and how the understanding of the duty has changed over time, see *Developments in the Law: Presidential Authority*, 125 HARV. L. REV. 2057, 2118–32 (2012) and Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 513–21 (2012).

315. See, e.g., Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471, 1509 (2020) (noting that, in response to the Trump Administration declining to defend the Affordable Care Act in litigation, the House of Representatives intervened in pending suits when Democrats regained control of the chamber after the 2018 midterm elections).

316. H.R. 1627, 116th Cong. § 2(a) (2019).

317. See *supra* notes 161–66 and accompanying text.

318. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1082 (2014).

319. Emily Bazelon, *How Do We Contend with Trump's Defiance of 'Norms'?*, N.Y. TIMES MAG. (July 11, 2017), <https://nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html>.

case, have not survived legal scrutiny.³²⁰ But they point toward the ways in which subnational governments can play a role in protecting constitutional norms.

Law can also enable or encourage civil servants to take actions that protect constitutional norms. Civil servants can sometimes serve as an internal check—within the Executive Branch—on actions by political appointees that threaten norms.³²¹ In doing so, civil servants have a number of tools at their disposal: they can seek to slow down or subvert the norm-violating actions, report violations to inspectors general, or leak information about violations to the press.³²² Those who take these actions have some legal protections. Civil service protections limit the ability of political appointees to fire career employees.³²³ Federal whistleblower law protects not only civil servants who report unlawful conduct but also those who report lawful behavior that may violate norms.³²⁴ The legal protections that civil servants possess can empower them to push back against norm violations.

Even so, there are limits to the degree to which whistleblowers can safeguard constitutional norms. Elected officials sometimes seek to remove potential whistleblowers from their positions³²⁵ or “out” them to the public.³²⁶ These efforts punish civil servants who have dissented from an administration’s violations of law or norms and deter future civil servants from coming forward. Strengthening protections for dissenting voices in government would be a powerful indirect means of strengthening constitutional norms.

A related reform would be to empower offices within the bureaucracy to defend norms. A variety of institutions could play a role in monitoring

320. California’s law requiring that presidential candidates disclose their federal income tax returns as a precondition to appearing on the state’s presidential primary ballot was enjoined by a federal district court for “likely violat[ing] the [U.S.] Constitution.” *Griffin v. Padilla*, 408 F. Supp. 3d 1169, 1177 (E.D. Cal. 2019). The California Supreme Court found that the statute violated the state constitution as well. *See Patterson v. Padilla*, 451 P.3d 1171, 1189–91 (Cal. 2019).

321. On civil servants as a check within the Executive Branch, see, for example, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006) and Jennifer Nou, *Civil Servant Disobedience*, 94 *CHL-KENT L. REV.* 349 (2019).

322. *See* Jennifer Nou, *Bureaucratic Resistance from Below*, *YALE J. REG.: NOTICE & COMMENT* (Nov. 16, 2016), <https://www.yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou> [<https://perma.cc/XP67-QFYF>] (describing these and other tools).

323. *See, e.g.*, 5 U.S.C. § 2301(b) (2018) (listing principles of a merit system for federal employees, including that such employees be “protected against arbitrary action, personal favoritism, or coercion for partisan political purposes”).

324. *See id.* § 2302(b)(8) (twice referring to whistleblowers disclosing “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,” and in both instances expressly distinguishing disclosure of these types of misconduct from disclosure of lawbreaking, which is covered by separate provisions).

325. *See, e.g.*, Ryan Goodman & Joshua A. Geltzer, *Trump’s Friday Night Massacre Places Him Firmly in Autocrat Territory*, *SLATE* (Feb. 10, 2020, 11:54 AM), <https://slate.com/news-and-politics/2020/02/trump-friday-night-massacre-alex-vindman-autocrat.html>.

326. *See, e.g.*, Joanne Freeman, Opinion, *Who’s Really Shredding Standards on Capitol Hill?*, *N.Y. TIMES* (Feb. 9, 2020), <https://nytimes.com/2020/02/09/opinion/rand-paul-whistleblower.html> (discussing Senator Rand Paul (R-KY) publicly identifying a whistleblower, and characterizing that outing as a norm violation).

compliance with norms: inspectors general offices,³²⁷ ombudsman offices,³²⁸ ethics offices,³²⁹ and civil rights and compliance offices.³³⁰ Some scholars have proposed new oversight or factfinding entities that would include norm violations within their ambit.³³¹ These sorts of offices are most associated with monitoring, publicizing, and acting to redress legal violations. Their responses to norm violations would look different than their responses to legal violations. And care would have to be taken to safeguard norm-protecting offices from capture by norm violators themselves.³³² But one could imagine reforms giving these good governance offices roles in at least monitoring compliance with norms and publicizing violations. Changes in law, for example, could give inspectors general a role in safeguarding norms that protect the press from harassment or intimidation by government officials.³³³

Finally, an active and diligent press can raise the cost of certain violations of norms. The press can play a particularly important role in uncovering and publicizing violations of norms that occur behind closed doors. Law can enable or hinder the press in fulfilling this function. A small sampling of areas of law bearing on the ability of the press to hold government accountable—including for norm violations—includes First Amendment doctrine, laws granting the press access to certain public records, and shield laws projecting journalists from being compelled to reveal their sources, among others.³³⁴ No area of law focuses specifically on the press's ability to police violations of norms. But greater protection for the press as a general matter also strengthens the press's ability to discover and publicize violations of norms.

327. See, e.g., PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

328. See, e.g., OFFICE OF THE CHAIRMAN, ADMIN. CONFERENCE OF THE U.S., *THE OMBUDSMAN: A PRIMER FOR FEDERAL AGENCIES* (1991). The classic work on the topic is WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966).

329. On the Executive Branch's Office of Government Ethics, see BAUER & GOLDSMITH, *supra* note 2, at 57, 68–71 and BHARARA ET AL., *supra* note 90, at 12–15. On ethics enforcement in Congress, see JACOB R. STRAUS, CONG. RESEARCH SERV., RL30764, *ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: AN HISTORICAL OVERVIEW* (2011), <https://fas.org/sgp/crs/misc/RL30764.pdf> [<https://perma.cc/WR3J-KDER>].

330. See, e.g., Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (providing a case study of the Department of Homeland Security's Office for Civil Rights and Civil Liberties).

331. See, e.g., Mark Tushnet, *A Barr-Trump Commission of Inquiry?*, BALKINIZATION (June 20, 2020, 11:12 AM), <https://balkin.blogspot.com/2020/06/a-barr-trump-commission-of-inquiry.html> [<https://perma.cc/FK54-RF5A>] (suggesting the establishment of a commission of inquiry to engage in factfinding on abuses at the Department of Justice during the Trump Administration).

332. See Bauer, *supra* note 59 (noting that a chief executive could “devote careful attention to appointments to limit his or her legal or political exposure in operation of this norm-enforcement machinery”).

333. See BAUER & GOLDSMITH, *supra* note 2, at 102–05 (proposing an amendment to the Inspector General Act of 1978 that would define “abuse” under the Act to include “reprisal against or an attempt to harass or intimidate” the press).

334. See, e.g., David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 482–505 (2002) (discussing both constitutional and nonconstitutional legal protections for the press).

This analysis shows how a variety of actors can all seek to protect constitutional norms. None of these actors can be a perfectly effective check on norm violations. Even if the law empowers various actors to monitor or punish violations of norms, violations will continue so long as some perceive there to be a political advantage in violating norms. Those looking to safeguard constitutional norms should nonetheless recognize that many different types of actors can be pressed into service to protect those norms. Rather than codifying a norm directly, indirect approaches, such as expanding Congress's oversight power or strengthening whistleblower protections, can be an attractive means of protecting norms without resorting to direct judicial enforcement.

* * *

Determining whether and how to codify constitutional norms implicates a distinctive set of questions without direct parallels in other contexts. This Part has sought to provide a way forward. Sometimes it will be possible and advisable to simply enact a norm's content into law through passing a new statute. Yet would-be codifiers should also recognize the virtues of soft-law and intrabranched law, should prefer rule-like rather than standard-like codifications, and should consider empowering governmental and nongovernmental actors as a means of protecting norms. These approaches hold the promise of strengthening threatened norms while minimizing the costs of codification.

CONCLUSION

Constitutional norms in the United States are weaker now than they were a decade ago. The stakes of these recent changes are high, given that some norm erosion may be linked to prospects of democratic deconsolidation or backsliding.³³⁵ The recent wave of interest in safeguarding constitutional norms has led to a range of proposed interventions, including proposals to codify norms.

This Article has shown that the verdict on codifying constitutional norms is mixed. At times, codification will be desirable, but each norm has to be evaluated individually to determine whether the benefits of codification outweigh the costs. Even when codification is desirable, political and legal hurdles can make it extremely difficult to achieve. Codification can be a potent tool for those concerned about constitutional norms, but it is not a panacea. Much as direct efforts at codification can garner a great deal of public attention, indirect routes to strengthening norms will sometimes be preferable.

Codification efforts are also important signals about the current state of U.S. politics. Codification proposals are themselves a signal that norms are under threat. "The move from informal practice and expectation to the command of law," one former White House counsel has argued, "is as much an acknowledgment that the norms have collapsed as it is a bid to somehow reinvigorate them."³³⁶ Throughout U.S. history, including in the examples highlighted in this

335. See, e.g., LEVITSKY & ZIBLATT, *supra* note 4.

336. Bauer, *supra* note 59.

Article, codification proposals have emerged only in the face of threats to or violations of norms. The proliferation of codification proposals today provides one signal (of many) that ours is an era in which constitutional norms are unusually weak.

Calls for codification are also closely linked to the state of trust in contemporary U.S. politics. Scholars have long argued that there is a link between law and mistrust, with law stepping in to fill a void when social trust is low and perhaps even further eroding whatever trust exists.³³⁷ Efforts to codify constitutional norms seem to be most prominent when trust—both the citizenry’s trust in government and the parties’ trust of each other—is low. The low levels of trust that characterize our politics may make codification seem appealing. Codification alone, however, cannot create a more trust-filled politics.

Finally, calls for codification reflect an elevation of legalistic values above political ones. For those of us who are trained in the law, political problems sometimes appear more legal in character than they in fact are. Law can certainly help strengthen constitutional norms, including through enabling enforcement of those norms in court and in the political realm. But constitutional norms depend on more than just better laws. Better politics are required as well.

337. *See, e.g.*, ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 147 (2000) (describing the expansion of the American legal profession, and arguing that “the amount that we spend on getting lawyers to anticipate and manage our disputes . . . may be one of the most revealing indicators of the fraying of our social fabric”).