

HOW THE WRITTEN CONSTITUTION CROWDS OUT THE EXTRA-CONSTITUTIONAL RULE OF RECOGNITION

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I. Introduction

In the *Postscript to The Concept of Law*, H.L.A. Hart explains that the Rule of Recognition (“RoR”) “is in effect a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts.”¹ Yet many scholars read the main text of *The Concept of Law*² to imply that the practices of government officials generally, and not only judges, comprise the rule of recognition.³ Matthew

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¹ H.L.A. HART, *THE CONCEPT OF LAW* 256 (2d ed. 1994).

² *See id.* at 152.

³ *See* Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law*, 100 NW. U. L. REV. 719, 731–32 (2006) (“[Hart] is most straightforwardly read (and has generally been read by Hart interpreters) to say that this rule [of recognition] supervenes on official practice, nonjudicial as well as judicial.”); *see also* Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1700–02 (1996) (defining Hart’s recognitional community as “elites”); Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC’Y 149, 152–56 (2003) (“It is important to realize that judicial officials are not the only participants whose behavior and attitudes figure into determining the existence and content of the rule of recognition.”); Michael Steven Green, *Does Dworkin Commit Dworkin’s Fallacy?: A Reply to Justices in Robes*, 28 OXFORD J. LEGAL STUD. 33, 34 (“In H.L.A. Hart’s theory . . . [s]omething is the law of a jurisdiction if it satisfies the criteria that the jurisdiction’s officials

Adler uses this ambiguity in Hart’s theory to shed light on an important question in contemporary American constitutional theory: To what extent do and should the constitutional views of judges, elected officials, and the People themselves establish constitutional meaning?

The answer, no doubt, is complex. For purposes of this chapter, however, I will accept that, in cases of conflict, judicial practices and interpretations prevail over the practices of other actors. That view finds strong support in both the pronouncements of the Supreme Court and the conduct of elected officials and private parties who, however reluctantly, accept the supremacy of Supreme Court interpretation in contested cases.⁴

(judges, legislators, sheriffs and the like) have accepted for enforcing norms.”); Jeremy Waldron, *All We Like Sheep*, 12 CAN. J.L. & JURISPRUDENCE 180 (1999) (defining recognitional community to include “legislators, judges, senior bureaucrats, etc”).

⁴ Andrew Jackson is reported to have said, in response to the Supreme Court’s ruling in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), that “John Marshall has made his decision[;] now let him enforce it.” JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518 (1996) (suggesting the report is apocryphal), but in the most dramatic showdown in modern times, President Nixon accepted the Court’s ruling in *United States v. Nixon*, 418 U.S. 683 (1974), which rejected his claim of executive privilege in documents and taped conversations. See *White House Statement on Complying with Decision*, N.Y. TIMES, July 25, 1974, at A20 (“While I am, of course, disappointed in the result, I respect and accept the Court’s decision [in *United States v. Nixon*] and I have instructed [my chief counsel] to take whatever measures are necessary to comply with that decision in all respects.” (quoting President Nixon)). Likewise, Vice President Al Gore, acting in his capacity as Presidential candidate, strongly disagreed with the Supreme Court’s ruling in *Bush v. Gore*, 531 U.S. 98 (2000), but accepted its authority. See Richard L. Berke and Katharine Q. Seelye, *Bush Pledges to be President for ‘One Nation,’ Not One Party; Gore, Conceding, Urges Unity*, N.Y. TIMES, Dec. 14, 2000 at A1 (“[T]he United States Supreme Court has spoken. . . Let there be no doubt. While I strongly disagree with the court’s decision, I accept it.” (quoting Al Gore)).

Yet even if, as a descriptive matter, we accept at least this relatively weak form of judicial supremacy, we are left with puzzles about the RoR on matters that either present no justiciable case or controversy, or as to which the judicially enforceable constitutional rule leaves the political branches substantial freedom of movement. Consider two illustrative questions: (1) Can the President be impeached and removed from office based upon “mere” policy disagreements between Congress and the President? (2) Can a Congress in which the President’s party has a working majority in each house increase the size of the Supreme Court so as to allow the President to pack the Court with Justices in ideological sympathy with that party?

Although the issues are not entirely free of doubt, the courts probably would not interfere with such actions by Congress. As to question one, so long as Congress did not specifically *admit* that policy disagreements formed the basis for its action,⁵ the outcome of impeachment proceedings in the House and Senate could not be appealed to the courts, because it would be deemed a non-justiciable political question.⁶ As to question two, the essentially unquestioned acceptance of increases in the size of the Supreme

⁵ *Cf.* *Powell v. McCormick*, 395 U.S. 486, 549 (1969) (treating as justiciable question whether House member was entitled to his seat in Congress where House admitted that he had requisite qualifications under Article I).

⁶ *See* *Nixon v. United States*, 506 U.S. 224, 224 (1993) (finding that “[t]he language and structure of Art. I, § 3, cl. 6, demonstrate a textual commitment of impeachment to the Senate” and therefore challenge to procedures used in impeachment is nonjusticiable).

Court during the Nineteenth Century⁷ makes it extremely improbable that the Justices would invalidate a contemporary Court-packing plan, even if they found the issue justiciable. Indeed, in the one case in which the Justices ruled on the substantive validity of court reorganization, the Marshall Court acquiesced in a law eliminating lower federal court judgeships.⁸

In any event, because I use these examples merely as illustrative, I shall assume in the balance of this chapter that I have correctly predicted the judicial outcomes: (1) Congress can get away with impeaching and removing the President based on policy disagreements because such an action does not give rise to a justiciable case or controversy; and (2) Congress can get away with packing the Supreme Court because doing so does not violate the Constitution, as it has come to be understood.

How should we characterize the *de facto* freedom given to Congress by the courts' (presumed) non-interference in these two examples? If Congress equates the Constitution with the judicially enforceable Constitution and regards the RoR as dependent solely on the practices of the courts (as per Hart's Postscript), then it will consider itself free to engage in policy-based

⁷ See RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 35 (5th ed. 2003) (cataloging early changes in size of Court); Peter Nicolas, "Nine of Course": A Dialogue on Congressional Power to Set by Statute the Number of Justices on the Supreme Court, 2 N.Y.U. J. L. & LIB. 86, 89–90 n.10 (2006) (listing 19th Century laws that changed number of Justices).

⁸ See *Stuart v. Laird*, 5 U.S. 299, 309 (1803) (upholding repeal of Judiciary Act and resulting elimination of federal judgeships); see also Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, 26, 31 in CONSTITUTIONAL LAW STORIES, Michael C. Dorf, ed., 2004).

impeachment and Court-packing, limited only by prudential concerns. However, if Congress regards its own practices—where they do not conflict with any judicially-enforced limits—as constitutionally obligatory and/or constitutive of the RoR, then it may have additional reasons of principle to refrain from policy-based impeachment and/or Court-packing.

Consider the Clinton impeachment. In both the House and the Senate, arguments about whether President Clinton should be impeached and/or removed from office focused on whether his conduct amounted to one of the “other high crimes and misdemeanors”⁹ (besides treason and bribery) for which impeachment and removal are permitted.¹⁰ Admittedly, the ultimate vote closely tracked party lines,¹¹ but that may only show that in politics as in other realms, human beings suffer from confirmation bias.¹² It is not very plausible to suppose that the Republicans who sought to impeach President Clinton based on his testimony about the Lewinsky affair were thereby

⁹ U.S. CONST., art. II, § 4.

¹⁰ See, e.g., 145 CONG. REC. S1105–1106 (1999) (statement of Sen. Cleland) (explaining vote to dismiss impeachment on grounds that President’s conduct did not rise to level of high crimes and misdemeanors); 144 CONG. REC. H11785 (1998) (statement of Rep. Schumer) (“[L]ying about an extramarital affair, even under oath, does not rise to the level of high crimes and misdemeanors as spelled out in the Constitution.”); *id.* at H11796 (statement of Rep. Tom Campbell) (arguing that lying under oath “rises to the level of high crimes and misdemeanors”).

¹¹ See Alison Mitchell, *Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES, Feb. 13, 1999, at A1 (displaying chart of party-line impeachment vote, with no Democrats voting guilty).

¹² See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954) (describing now-classic study in which partisans of Princeton and Dartmouth viewed the officiating of a football game differently depending on school allegiance).

hoping to change any White House policy or were motivated by a desire to make Al Gore the President, as incumbency would have likely conferred advantages on Gore in the 2000 election. Nor is it plausible to suppose that they or the Democrats regarded their respective constitutional arguments as mere make-weights.¹³ No one thought to impeach Clinton or any other President based on an offense—such as jaywalking—that could not remotely be described as a high crime or misdemeanor.¹⁴ Then-Congressman Gerald Ford was wrong when he stated that an impeachable offense is whatever a majority of Congress says is an impeachable offense.¹⁵ Or if Ford was right, it was because a majority of Congress would never say that jaywalking is an impeachable offense.

To acknowledge that the Constitution can impose constraints on Congress and other political actors even in circumstances that give rise to no justiciable case or controversy is to believe in the possibility of what is sometimes called “the Constitution outside the courts.”¹⁶ We have good

¹³ *But see* Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 655 (1999) (arguing that in Clinton impeachment debate, “[c]onstitutional argument [was] principally a form of rhetoric deployed to enhance the status of those political values”).

¹⁴ *Cf. id.* (recognizing that even in extra-judicial setting, Constitution is not indeterminate, and providing as an example fact that in Clinton impeachment, “both sides adhered to the explicit textual requirement that Senate conviction be by two-thirds majority”).

¹⁵ *See* GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 415–16 (5th ed. 2005) (quoting Ford’s statement that “[a]n impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history”).

¹⁶ *See, e.g.,* James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377 (2005)

reasons to be interested in the question of whether to characterize our lawmaking system as one in which there is a substantial role for the Constitution outside the courts.

We also might be interested in a related question, however: To what extent is our system one in which there is a substantial role for the RoR outside of the courts? That is the question raised by Hart’s language in the Postscript, which indicates that Hart himself came to think that there is no substantial extra-judicial role for the RoR,¹⁷ but it is entirely possible that he misunderstood his own theory in so thinking.

If the RoR in the United States simply were the Constitution, then our answer to the Constitution-outside-the-Courts question would dictate our answer to the RoR-outside-the-courts question. However, as Kent Greenawalt argues persuasively, the relation between various parts of the Constitution and the RoR is complex.¹⁸ If one takes a certain austere view of the RoR, most provisions of the Constitution form no part of it; on such a view, the amendment clause of Article V and perhaps the ratification clause of Article VII are the only parts of the Constitution that are themselves part of the RoR in the United States. They are only *part* of the RoR, however,

(reviewing scholarship on “Constitution outside the courts”); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing that “the people” have responsibility to interpret and enforce Constitution); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 54—71 (1999).

¹⁷ See *supra* note 1 and accompanying text.

¹⁸ See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987), reprinted in part, *supra*, Ch. 1.

because one must look outside the Constitution itself for the rules and standards governing how amendments are recognized as having satisfied the criteria of Article V,¹⁹ for the authority of state law, and for the authority of judicial precedents, among other things.

Moreover, the austere view is not necessarily the best view. One might think that the original Constitution's ratification clause is no longer part of the RoR and that provisions of the Constitution that were enacted long ago no longer derive their authority from either the ratification clause or the amendment clause but directly from their acceptance by government officials²⁰—although this view then re-raises the crucial question of *which* government officials. Sorting out the precise relation between various bits of the Constitution and the RoR is thus a tricky business, and so we are justified in thinking that an answer to the questions of whether and, if so, to what extent, the Constitution operates outside the courts, does not fully answer the question of whether, and if so, to what extent, the RoR operates outside the courts.

¹⁹ See *Coleman v. Miller*, 307 U.S. 433, 450 (1939) (stating that “the efficacy of ratifications [of Constitutional Amendments] by state legislatures . . . should be regarded as a political question”).

²⁰ See Greenawalt, *supra* note 18, at 637–640 (arguing that “the legal authority of . . . the original Constitution is established by its continued acceptance and . . . the original ratification procedure is no longer directly relevant to tracing what counts as law”); Ernest Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 420–22 (2007) (arguing that “[t]he authority of [the Reconstruction] amendments . . . must stem from some combination of traditional acceptance and current agreement with the values they embody” rather than compliance with Article V).

One might wonder, nonetheless, why we care about the RoR outside the courts (or, for that matter, inside the courts). Hart's theory, though influential among scholars and students of jurisprudence, is not law. Once we have determined the scope, if any, of the Constitution outside the courts, what practical difference could it make what conclusion we draw about the scope, if any, of the RoR outside the courts?

We can see the practical significance of the RoR-outside-the-courts issue by focusing on my question 2: Can Congress and the President pack the Supreme Court? As I explore in greater detail below, we have excellent textual and historical reasons to think that the Constitution poses no obstacle, justiciable or non-justiciable, to Court packing. Nonetheless, we have very good reasons to think that Court packing is something that Congress and the President *just cannot do*. In other words, Court packing would violate a customary rule observed by Congress and the President. If the practices of government officials other than judges can contribute to the RoR, then the rule against Court packing is part of the RoR but not the Constitution.

To be clear, the crucial question here is not what we say about the RoR, or what Hart thought, or should have thought, but how we understand the system of government in the United States. To recognize that there are portions of the RoR that arise solely out of the practices of non-judicial actors, and that are not part of the written Constitution, is to see past the blinders

that the American love affair with our Constitution has placed upon us. It is to see that in addition to having a written Constitution, the United States also has a small-c “unwritten” constitution of the sort that figures in traditional accounts of the English constitution.²¹ For clarity (if not felicity of language), I shall refer to the latter as the extra-Constitutional Rule of Recognition (“eCRoR”).

We can then inquire into the effect of having a written Constitution on the eCRoR. Its effect, I argue later in this chapter, is substantial and not wholly positive. The written Constitution, I contend, can “crowd out” the eCRoR. Because of the widespread but mistaken belief that the Constitution alone grounds legal authority, political actors feel the need to search for a constitutional hook for arguments that customary rules should be obeyed.

²¹ The canonical text is A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915). I use quotation marks around “unwritten” to alert the reader to two possible confusions. First, I do not mean here to enter the debate about whether, in interpreting the written Constitution, judges should rely upon values outside the document’s text. See Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing that they do and should). Second, I acknowledge that provisions of what I mean by the “unwritten” constitution may in fact be written down. Cf. Young, *supra* note,20 at 415 (“the overwhelming bulk of the ‘constitution outside the Constitution’ is, in fact, written down in statutes and regulations.”). For example, the customary rule against Court packing is at least partly embodied in the statute currently fixing the number of Justices at nine. 28 U.S.C. § 1 (2000). Ernest Young accordingly prefers the term “extracanonical” to refer to provisions of the small-c constitution, but I shall use a distinct term to avoid the impression that Young and I are talking about the exact same set of norms. Although our projects are related, his extracanonical constitution necessarily includes much that I would regard as ordinary law, for Young is interested in identifying those extracanonical materials that play a role in constituting institutions of our government, even when they are not entrenched against amendment by ordinary democratic means. See Young, *supra*, at 413.

The search for such hooks has two lamentable consequences. First, for some customary rules, there is no readily available hook, and as a consequence, political actors may be tempted to violate them. The rule against Court-packing is a good example. President Roosevelt was emboldened to attempt his Court-packing plan because he could make an excellent argument that it breached no constitutional barrier. Although a Congress controlled by his own party, to its credit, rejected the plan, there is at least a plausible story to be told in which the plan succeeded in inducing the “switch in time” in the meantime.²² Periodically, other Presidents and members of Congress have attempted to interfere with judicial independence via means that violate no constitutional rule but arguably violate the eCRoR,²³ and these efforts can have similar *in terrorem* effects.

The written Constitution’s crowding out of the eCRoR has another negative effect: Even when there is a textual hook for some customary rule, the hook may not be a perfect one, but its very existence induces defenders of

²² See, e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 132–62 (1995) (describing court-packing plan and congressional, judicial, and popular reactions); Robert L. Stern, *The Commerce Clause and the National Economy, 1933–1946*, 59 HARV. L. REV. 645, 677–82 (1946) (arguing that court-packing plan “undoubtedly played a vital role” in inducing Justices to stop striking down New Deal measures); see also Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 201 n.1 (collecting sources attributing “switch in time” to court-packing plan). *But see id.* at 208--228 (1994) (arguing that the court packing plan “is unlikely to have been the proximate cause of the Constitutional Revolution of 1937”)

²³ See, e.g., Linda Greenhouse, *Judges as Political Issues*, N.Y. TIMES, March 23, 1996, at A1 (reporting Clinton Administration’s threat to seek resignation of judge after unpopular search-and-seizure opinion); Neil A. Lewis, *Impeach Those Liberal Judges! Where are They?*, N.Y. TIMES, May 18, 1997 at E5 (quoting Rep. Tom DeLay’s suggestion that judges be impeached for “usurping the legislative function”).

the customary rule to invoke the hook rather than the custom. The debate over *habeas corpus* is illustrative. *Ex Parte Bollman* established that the federal courts only have jurisdiction to grant writs of habeas corpus if that jurisdiction is granted by Congress²⁴ (which is a plausible reading of the Madisonian compromise and the limited original jurisdiction of the Supreme Court), while *Tarble's Case* held that state courts cannot grant writs of habeas corpus against federal officers²⁵ (which is a plausible reading of the Supremacy Clause). Taken together, these precedents appear to leave the decision whether to make habeas available to persons held by the federal Executive entirely within the hands of Congress—even if Congress does not suspend the writ according to the terms of Article I, Section 9. Thus, before the Supreme Court's decision in *Boumediene v. Bush*,²⁶ it was plausible to argue (at least if one disregarded *INS v. St. Cyr*²⁷), that, as Attorney General Gonzales testified to the Senate Judiciary Committee in January 2007, the Constitution contains no right to habeas corpus.²⁸ Plausible, that is, as a matter of interpretation of the written Constitution, but implausible as a

²⁴ 8 U.S. (4 Cranch) 75 , 83 (1807).

²⁵ 80 (13 Wall.) U.S. 397, 409 (1871).

²⁶ 128 S. Ct. 2229 (2008).

²⁷ 533 U.S. 289, 301 (2001) (“[A]t the absolute minimum, the Suspension Clause protects the writ [of habeas] ‘as it existed in 1789.’” (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)))

²⁸ *Department of Justice Oversight: Hearing Before the Sen. Committee on the Judiciary*, 110th Cong. 52 (2007) (statement of Attorney General Alberto Gonzales) (“[T]he Constitution does not say every individual in the United States or every citizen is hereby granted or assured the right to habeas.”).

matter of interpreting the customary rule that absent special circumstances such as the exigencies of battle, habeas must generally be available to test the legality of executive detention.

My claim that the existence of the written Constitution crowds out arguments rooted in the customs of nonjudicial government officials is an empirical claim. This chapter offers support for the existence of the phenomenon but nothing like what would be needed to measure its full scope. Nor do I examine whether the phenomenon occurs in other legal systems with written constitutions. For my present purposes, it shall suffice to call attention to the existence and some of the consequences of crowding out in the United States. Accordingly, this chapter should be understood as attempting to raise consciousness.

The balance of this chapter proceeds in three parts. Part II is the heart of the chapter. It introduces the concept of crowding out in other contexts and then provides three principal examples of constitutional crowding out of the eCRoR, involving Court packing, jurisdictional gerrymandering, and the right to vote in Presidential elections. Part III explores practical, normative, and theoretical questions: Within Hart's framework, can we develop workable standards for identifying customary rule-of-recognition norms, and should we even try? Finally, Part IV concludes by calling attention to an earlier effort along these lines by Karl

Llewellyn, asking whether my formulation of the issue has a chance of succeeding where his largely failed.

II. Constitutional “Crowding Out”

Behavioral scientists have shown how a formal system of external rewards and punishments can diminish intrinsic motivation to follow social norms. Formal incentives motivate people to act while they remain available, but they displace, or “crowd out,” social norms.²⁹ A person who would otherwise feel obliged to honor a contract will feel less bound to do so if the contract contains material incentive provisions.³⁰ This phenomenon of crowding out has led some legal scholars to caution that formalization of legal norms may be less effective than expected, or even counter-productive, as it displaces social norms that would otherwise operate.³¹

²⁹ See, e.g., Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 114 (1971) (when money is used as an external reward for some activity, the subjects lose intrinsic motivation for the activity); Bruno S. Frey, *Institutions and Morale: The Crowding-Out Effect*, in ECONOMICS, VALUES, AND ORGANIZATION 437 (Avner Ben-Ner & Louis Putterman eds., Cambridge Univ. Press 1998) (offering people compensation for living near a nuclear power plant increased their opposition to the plant); Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 5–8 (2000) (imposition of fine for late pickup from daycare resulted in more lateness, as parents came to see fine as price that displaced the prior social norm against late pickups).

³⁰ See Ernst Fehr & Simon Gächter, *Do Incentive Contracts Crowd Out Voluntary Cooperation?* (Univ. S. Cal. Cent. in Law, Econ. and Org., Research Paper No. C01-3, 2001), available at, <http://ssrn.com/abstract=229047>.

³¹ See Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001) (worrying that formal duty of loyalty can undermine social basis for trust); Mark A. Cohen, *Norms Versus Laws: Economic Theory and the Choice of Social Institutions*, in SOCIAL NORMS AND ECONOMIC INSTITUTIONS 95 (Kenneth J. Koford & Jeffrey B.

The crowding out literature thus suggests that critics of judicial review are right to worry that judicial enforcement of the Constitution reduces the likelihood that legislators will respect those aspects of the Constitution that are not judicially enforced. Judicial invalidation of legislation may come to be seen as a cost of doing business for legislators, and if the cost is high enough, legislators will not enact laws they believe the courts will invalidate, but unconstitutionality as such will come to be less of a concern for the legislature.

We can also expect judicial enforcement of the written Constitution to crowd out the eCRoR. Because the external sanction in the form of judicial invalidation only occurs for violating the justiciable portions of the Constitution, crowding-out theory tells us that political actors will lose their motivation to comply with non-justiciable portions of the Constitution as well as the eCRoR, which is also not subject to judicial enforcement.

Indeed, to the extent that the written Constitution itself—quite apart from its judicial enforcement—can be seen as a formalization of norms, it may crowd out the eCRoR. The empirical literature indicates that even symbolic rewards and punishments crowd out intrinsic motivation.³² The

Miller eds., 1991) (warning that formal laws may displace reputational rewards); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001) (arguing that formal norms can signal the absence of social norms, and thus erode such social norms); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 388–89 (2004) (explaining that formal contract terms crowd out informal norms of reciprocity).

³² See Bruno S. Frey and Reto Jegen, *Motivation Crowding Theory*, 15 J. ECON. SURV. 589, 596 (2001) (citing study reported in E.L. DECI & R. FLASTE, WHY WE DO

ability of legislators to say plausibly that some controversial bill violates the Constitution may count as a symbolic demerit, so that bills that do not earn this demerit are seen as acceptable, even if they violate customary norms that form part of the eCRoR.

Whether even the non-justiciable aspects of the Constitution crowd out customary norms in this way cannot, however, be answered by reference to the behavioral literature alone, because experimental evidence also shows that *verbal* rewards enhance rather than undermine intrinsic motivation.³³ If the ability to say that a bill satisfies or violates the Constitution only counts as a verbal reinforcement of legislative duty, it may not undermine legislators' incentives to abide by the eCRoR.

In any event, we need not speculate about how exactly the behavioral experiments bear on the relation between the Constitution and the eCRoR. We can instead look for direct evidence of constitutional crowding out in public debate.

The balance of this Part explores three examples of customary norms that are not clearly derived from the Constitution. These examples do double duty: First, they illustrate the proposition that such customary but extra-Constitutional norms exist; second, they make plausible the causal claim that conventional accounts of the American constitutional structure tend to

WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY (1995), in which awarding violin student gold stars for time spent practicing undermined her intrinsic motivation to learn new music).

³³ See *id.* at 598.

overlook them because conventional accounts tend to equate the RoR with the Constitution. Thus, the customary norms that comprise the eCRoR tend to be rendered invisible or to be shoehorned, sometimes awkwardly, into familiar constitutional categories. The formal Constitution (including judicial review) crowds out the eCRoR.

A. Court Packing

The written Constitution does not fix the size of the Supreme Court. Arguably, the guarantee to all Article III judges of life tenure and salary protection³⁴ forbids Congress from reducing the size of the Supreme Court by abolishing a seat on the Court that is occupied by an active Justice, although recent scholarship suggests that Congress could validly demote a Supreme Court Justice to a district or circuit court,³⁵ and having done that, Congress could then abolish the newly vacant Supreme Court seat. Whatever the Constitutional limits, if any, on *reductions* in the size of the Supreme Court, *increases* in the Supreme Court's size have occurred several times in the course of American history, and do not even arguably violate any specific constitutional rule.³⁶ If, say, Congress were to increase the size of the Supreme Court to eleven Justices, neither the Court itself, nor any member

³⁴ U.S. CONST. art. III, § 1.

³⁵ See, e.g., Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1333–34 (2007) (arguing that judge's life tenure "may include . . . successive service that started in the Supreme Court and moved to a lower court or vice versa").

³⁶ See *supra* note 7 and accompanying text.

of Congress, could plausibly claim that in so doing it was acting unconstitutionally. Nonetheless, if, in increasing the Court's size, the President and Congress were principally motivated by a desire to shape judicial outcomes, it would be engaged in Court packing in violation of a strong customary norm.

As I explain in the next Part, identifying the content and even the existence of a customary norm can be a difficult business. To borrow Hart's terminology, customary norms, no less than formal written norms, often have a core of settled meaning and an open-textured periphery.³⁷ The customary norm against Court packing is no exception. There might be circumstances in which expansion of the Supreme Court's size would not violate the norm. For example, a bipartisan effort to reorganize the judiciary as a whole, in which the number of Justices were thought necessary to match the number of circuits, could qualify as expansion of the Court without the tainted motive of changing constitutional law along with the Court's membership. However, Court *packing*—in the sense of expanding the Court's size to obtain different outcomes in contested cases—violates the norm's core, as the reaction to President Franklin D. Roosevelt's Court-packing plan illustrates.³⁸

In his March 9, 1937 Fireside Chat on Reorganization of the Judiciary, Roosevelt made no secret of his result-oriented motive, even as he offered the

³⁷ See HART, *supra* note 1, at 124–47.

³⁸ See *infra* notes 48--52 and accompanying text.

most transparent result-neutral fig leaf.³⁹ The Chat began with a warning that the progress the Administration had made in battling economic hard times was in jeopardy due to an intransigent Supreme Court, that “has been acting not as a judicial body, but as a policy-making body.”⁴⁰ Professing nonetheless to value “an independent judiciary,”⁴¹ and eschewing any desire to “pack the Court . . . with spineless puppets,”⁴² Roosevelt stated that even an independent judiciary lacks authority “to amend the Constitution by the arbitrary exercise of judicial power.”⁴³ Conceding that amending the Constitution to expressly validate the New Deal would remedy the problem, Roosevelt proposed instead to add one Justice to the Court for each Justice over the age of seventy who had already served ten years as a judge.⁴⁴ His core justification barely disguised the plan’s substantive aim:

By bringing into the judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic

³⁹ A transcript can be found among the documents of the Franklin D. Roosevelt Presidential Library, *available at* <http://www.fdrlibrary.marist.edu/030937.html>. Page citations below refer to the version reproduced as Address by the President of the United States, March 9, 1937, in 2 DOCUMENTS OF AMERICAN HISTORY 383 (Henry Steele Commager ed., 9th ed. 1973).

⁴⁰ *Id.* at 384.

⁴¹ *Id.* at 385.

⁴² *Id.* at 386.

⁴³ *Id.* at 385.

⁴⁴ *See id.*

problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.⁴⁵

However, the trope that relatively youthful Justices would bring a fresh perspective did not conceal Roosevelt's true aims, for no one imagined that Roosevelt would seek to fill one of the new seats with a youthful *critic* of the New Deal.

Accordingly, it is beyond serious argument that Roosevelt's scheme in fact sought to change the Court's jurisprudence by increasing its size. And understood in exactly that way, the Court-packing plan was forcefully rejected by a Congress controlled by the President's own party, in what has been characterized as "probably the most serious setback which the President suffered during his [first] eight years of office"⁴⁶ After explaining why the proposal would not achieve its stated neutral purpose,⁴⁷ the Senate Judiciary Committee Report proceeded to denounce it in language that both reflects and obscures the fact that the core vice of the proposal is its violation of the eCRoR.

⁴⁵ *Id.*

⁴⁶ Editor's Note on Reform of the Federal Judiciary 1937, in 2 DOCUMENTS OF AMERICAN HISTORY, supra note 39, at 382.

⁴⁷ See Adverse Report from the Committee on the Judiciary, in 2 DOCUMENTS OF AMERICAN HISTORY, supra note 39, at 387, 387–88.

The reaction to, and defeat of, Roosevelt’s Court-packing plan may thus be seen as an archetype of the eCRoR. By spinning the Midnight Judges bill of 1801, the Jeffersonian reaction of 1802, and subsequent changes in the Court’s size as motivated by administrative concerns,⁴⁸ the Report claimed that Roosevelt’s proposal was unprecedented. “This is the first time in the history of our country,” the Report stated, “that a proposal to alter the decisions of the court by enlarging its personnel has been so boldly made.”⁴⁹ In other words, what Roosevelt had proposed to do was *something that just isn’t done*. It violated a customary norm obligatory on Congress even though not formally part of the Constitution.

Court packing is archetypal too in how it illustrates the warping effect of the written Constitution on government officials’ recourse to the eCRoR. The Senate Judiciary Committee Report twice stated that the proposal was contrary to “the spirit of the” Constitution.⁵⁰ How so? By applying “force to the judiciary,”⁵¹ the Court-packing bill would undermine judicial independence, separation of powers, the Constitution’s grant of life tenure to the federal judiciary, and the difficulty of impeaching judges. The Report never quite stated that the Court-packing plan violated any particular

⁴⁸ *See id.* at 389–390 (“Neither the original act nor the repealer was an attempt to change the course of judicial decision.”); *id.* at 390 (“[I]n every instance after the Adams administration, save one, the changes were made for purely administrative purposes in aid of the Court, not to control it.”).

⁴⁹ *Id.* at 390.

⁵⁰ *Id.* at 387; 389.

⁵¹ *Id.* at 388.

provision of the Constitution, or even some congeries of provisions. Nonetheless, it concluded that the plan amounted to “an abandonment of constitutional principle,” while “point[ing] the way to the evasion of the Constitution. . . . Under the form of the Constitution it seeks to do that which is unconstitutional.”⁵²

Thus, in the reaction to Roosevelt’s Court-packing scheme we see the strong assertion of a customary norm, along with an attempt to shoehorn that norm—however awkwardly—into the Constitution. The episode illustrates both the force of the eCRoR and the tendency in the United States to associate it with the written Constitution.

B. Jurisdiction Stripping

Under the “Madisonian Compromise” of Article III, Congress was under no obligation to create lower federal courts and because Congress would only “ordain and establish” such courts “from time to time,” presumably it could eliminate the lower federal courts as well.⁵³ Although Article III does require a Supreme Court and prescribes its original jurisdiction, it expressly authorizes Congress to make “such Exceptions” as it wishes.⁵⁴ Thus, under the most straightforward reading of the text of Article III, Congress could abolish the lower federal courts entirely, and eliminate all

⁵² *Id.* at 391.

⁵³ U.S. CONST. art. III, § 1.

⁵⁴ *Id.* art. III, § 3, cl. 2.

appellate jurisdiction of the Supreme Court⁵⁵—thereby ensuring that no federal court would have the authority to resolve federal questions except in the narrow category of cases that happened to fall within the high Court’s original jurisdiction. Or, if one thinks that the concept of an “exception” requires that there be some residuum not excepted, Congress would still be entitled to eliminate nearly all of the Supreme Court’s appellate jurisdiction, perhaps leaving only patent cases, or some subset of patent cases.⁵⁶

To be sure, it is possible to find support in other aspects of Article III—such as its extension of federal jurisdiction to “all Cases . . . arising under” federal law⁵⁷—for an obligation on Congress to compensate for limitations on the high Court’s appellate jurisdiction with grants to the lower federal courts of original jurisdiction. Justice Story advanced this theory in the early Nineteenth Century,⁵⁸ and a somewhat modified version of the theory has

⁵⁵ This is not the only possible reading. The Exceptions Clause might simply be read to mean that Congress can shift cases from the Supreme Court’s appellate to its original jurisdiction. See Steven G. Calabresi and Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1036–1042 (2007). However, that reading would require overruling *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and can thus be regarded as off the table. The Supreme Court came very close to accepting Congressional omnipotence under the Exceptions Clause in *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1869) (dismissing habeas claim for want of jurisdiction where Congress had revoked provision of habeas corpus act invoked by petitioner), although *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) (finding alternate source of jurisdiction over similar habeas claim), casts some doubt on that view.

⁵⁶ See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364 (1953) (offering the patent example).

⁵⁷ U.S. CONST. art. III, § 2.

⁵⁸ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 328–37 (1816).

been offered more recently by Akhil Amar,⁵⁹ but these readings must grapple with the fact that they would render invalid the actual jurisdictional scheme in place from the Founding through the abolition of the amount-in-controversy requirement for federal district court jurisdiction in 1980.⁶⁰

Accordingly, those who have argued that Congress could not strip the federal courts of jurisdiction to hear the most important federal cases have tended to make the point in ways that do not rely on any specific constitutional provision. For example, Henry Hart (not to be confused with H.L.A. Hart) argued that Congress could not wield its powers under the Exceptions Clause in a manner that “would destroy the essential role of the Supreme Court in the constitutional plan.”⁶¹ And what is that essential role? Relying on Founding Era sources as well as textual support such as the grant of life tenure and salary protection to federal judges, Lawrence Sager argues that Congress cannot eliminate the Supreme Court’s ability to invalidate unconstitutional action by the states,⁶² or, more tentatively, its ability to

⁵⁹ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 238--59 (1985) (arguing that constitutional text and original understanding show that some Article III court must have “last word on a federal question or admiralty issue”).

⁶⁰ See Federal Question Jurisdictional Amendments Act of 1980, Pub.L. 96-486, § 1, 94 Stat. 2369 (amending 28 U.S.C. § 1331 to eliminate amount-in-controversy requirement for federal question cases); FALLON, *supra* note 7, at 320 (noting historical limitations on federal court jurisdiction); Lawrence Gene Sager, *The Supreme Court 1980 Term, Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 53 n.105 (1981) (same).

⁶¹ Hart, *supra* note 56, at 1365.

⁶² See Sager, *supra* note 60 at 45—57.

invalidate unconstitutional federal action.⁶³ Sager is especially confident that Congress could not engage in what is sometimes called “jurisdictional gerrymandering,”⁶⁴—that is, directing the outcome of constitutional cases through the pretense of jurisdictional statutes.⁶⁵

Perhaps one or more of the restrictions on congressional power over federal court jurisdiction that Story, Amar, Hart, Sager, and others have inferred from Article III and other sources can indeed be said to be constitutional requirements, whether or not justiciable. But at the very least, limitations on extreme forms of jurisdiction stripping—complete elimination of the lower federal courts, severe curtailments of the Supreme Court’s appellate jurisdiction, and jurisdictional gerrymandering—would violate a very strong customary norm. Sager essentially says as much when he observes that “[a]lthough proposals to neuter the federal judiciary—and in particular, the Supreme Court—have been seriously advanced and debated throughout our constitutional history, Congress has almost always repudiated such efforts.”⁶⁶ Congress has, in other words, observed a customary norm forbidding jurisdiction stripping.

Consider a recent example. In response to bills that would engage in jurisdictional gerrymandering to prevent the federal courts from,

⁶³ *See id.* at 57–60.

⁶⁴ *See, e.g.,* Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C. R.-C.L. L. REV. 129 (1981).

⁶⁵ *See* Sager, *supra* note 60 at 68–80

⁶⁶ *Id.* at 20.

respectively, invalidating the Pledge of Allegiance and finding a constitutional right to same-sex marriage, Congressman Stark had this to say:

These bills threaten the foundation of American government by stifling productive discussion of social issues and undermining our system of checks and balances. [T]he function of the Judiciary is to review the constitutionality of laws. It is thus undemocratic and blatantly partisan to use a procedural trick to protect certain legislation from being questioned in court. Not only does this indirectly violate the Constitution by devaluing the Judicial Branch, it also renders the entire document meaningless since constitutionality is no longer a standard by which all laws must be judged.⁶⁷

Congressman Stark’s use of the phrase “the function of the Judiciary” could be taken to suggest agreement with the “essential functions” theory of Professor Hart, but the balance of these remarks show him—like his predecessors resisting Roosevelt’s Court-packing scheme nearly seventy years earlier—somewhat flummoxed by his inability to settle directly on a constitutional provision that the outrageous proposals violate. He is thus reduced to decrying jurisdictional gerrymandering as “undemocratic,”

⁶⁷ *Introducing a Concurrent Resolution Recognizing the Independence of the Courts of the United States*, 152 CONG. REC. E1707-01 (2006) (speech of Hon. Fortney Pete Stark of California).

“blatantly partisan,” a “trick,” and most tellingly, an indirect violation of the Constitution. These remarks are typical of members of Congress who oppose jurisdictional gerrymandering. They weakly suggest that the practice may violate the Constitution, even as they struggle for the vocabulary to condemn the proposals for violating the eCRoR.⁶⁸

C. Voting in Presidential Elections

Under Article II and the Twelfth Amendment, the President is chosen by the Electoral College, a body selected by processes adopted by the States “in such Manner as the Legislature thereof may direct”⁶⁹ In the early Republic, state legislatures commonly chose the electors themselves,⁷⁰ but over time, more and more states came to use elections, either on a winner-take-all basis—as is the practice in 48 states today—or on a district-by-district basis—as is the current practice in Maine and Nebraska,⁷¹ and was apparently the method that James Madison thought most appropriate.⁷² Nevertheless, as the Supreme Court reaffirmed in the aftermath of the

⁶⁸ See, e.g., *Providing for Consideration of H.R. 2389, Pledge Protection Act Of 2005*, 152 CONG. REC. H5388-04, H5391 (2006) (statement of Hon. Steny Hoyer) (decrying proposed Pledge Protection Act as a “radical court-stripping bill” that is “unnecessary and . . . probably unconstitutional” because it would “intrude on the principles of separation of powers [and] degrade our independent Federal judiciary.”); *id.* (“If we are a Nation of laws, we must be committed to allowing courts to decide what the law is.”).

⁶⁹ U.S. CONST., art. II, § 1.

⁷⁰ See *McPherson v. Blacker*, 146 U.S. 1, 29–34 (1892) (elaborating on early methods of choosing electors).

⁷¹ See SAMUEL ISACHAROFF ET AL, *THE LAW OF DEMOCRACY* 244 (2d ed. 2001).

⁷² See *McPherson*, 146 U.S. at 29.

contested 2000 Presidential election, the Constitution does not require states to hold any popular elections to choose its Electors.⁷³ As the Court stated (without any dissent on this point) in *Bush v. Gore*⁷⁴: “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.”⁷⁵

Note that in so stating the Justices did not say that any constitutional right to vote in Presidential elections is protected only by the political process. In other words, a constitutional right to vote in Presidential elections is not protected by the Constitution outside the courts. It simply does not exist.

Yet we have good reason to think that a customary norm now protects a right to vote in Presidential elections. To confirm the existence of this norm, consider what would happen were some state legislature to replace popular elections with direct legislative selection of electors. We need not engage in much speculation, because the Florida legislature nearly attempted just that in 2000. Both the attempt and the reaction that ensued are instructive.

⁷³ See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) (quoting *McPherson*, 146 U.S. at 25).

⁷⁴ 531 U.S. 98 (2000) (*per curiam*).

⁷⁵ *Id.* at 104.

After the Florida Supreme Court had intervened in the Presidential election but before the U.S. Supreme Court had finally stopped the recount, Republican members of the Florida legislature were preparing a special legislative session to choose a set of delegates directly.⁷⁶ Even as sympathetic academics were assuring the country that the proposal was constitutional,⁷⁷ Florida Republicans tacitly acknowledged the customary norm that direct legislative selection of electors seemed to violate. Thus, rather than simply say that a state legislature has the unfettered prerogative to choose electors without popular elections—which is a true statement of constitutional law—Republicans defended the special session not as an alternative to voting but as a protection for it. As one Florida Republican state representative put the point: “Because there is no other way to protect our votes, I expect us to name our own delegates as soon as possible.”⁷⁸ Likewise, Florida Senate President John McKay characterized the special session as simply an effort to “ensure that the voters of Florida are not disenfranchised.”⁷⁹ Contending that George W. Bush had in fact won the state’s election, and that the state high court’s intervention was thus itself an effort to wrest control from the

⁷⁶ See Jeffrey Gettleman, *For Florida Legislature, It’s Full Speed Ahead to Name Electors*, L.A. TIMES, Nov. 29, 2001, at A25.

⁷⁷ See *id.* (noting the support for the plan from Harvard Law Professor Einer Elhauge and Boalt Hall Law Professor John Yoo).

⁷⁸ Gettleman, *supra* note 76 (quoting Republican state representative Johnnie Byrd).

⁷⁹ David Firestone, *Contesting the Vote: The Overview; With Court Set to Hear Appeal, Legislators Move on Electors*, N.Y. TIMES, Dec. 7, 2000 at A1.

voters, Republicans portrayed the proposed special session as fully consistent with the customary norm. Even then, Florida Republican legislators were arguably tentative throughout the post-election struggle, perhaps fearing that the public would judge them harshly if they appeared to take the election away from the voters.⁸⁰

Critics of the planned Florida special legislative session also spoke the language of customary norms, even as they struggled with the fact that the norm at issue here—a right to vote in Presidential elections—is not also a constitutional norm. For example, Georgetown Law Professor David Cole opined:

It would be seen as an entirely illegitimate move to short-circuit the process that was set forth in the law before the election. ... The important point is the election is supposed to be decided by popular vote. ... Only in the highly unusual circumstances of that process failing should the Legislature step in and only if Florida risks not having a voice in the Electoral College. People would understand if there was no other recourse.⁸¹

⁸⁰ See Howard Gillman, *Judicial Independence Through the Lens of Bush v. Gore: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 255–56 (2003) (“Republican legislators in Florida were being pressured by legislative leaders to take the controversial step of challenging the Florida courts by appointing a new slate of Bush electors, but there was some grumbling about the need to take this course of action, and there was a public expression of hope that the Washington justices would make it unnecessary for them to go on record with that vote.”).

⁸¹ Jay Weaver, *Dueling Electors? Race May Bring Unprecedented Legal Showdown: 2 Sets of Electors Could Emerge*, MIAMI HERALD, Nov. 30, 2000.

Note that Cole apparently agreed with the Florida Republicans who thought a special session would be appropriate to preserve a role for voting, that is, for Florida sending some electors to Washington. But unlike the Republicans, Cole did not begin with the assumption that Bush had won the popular vote in Florida, and thus he saw the proposed legislative session as “entirely illegitimate” because an “election is supposed to be decided by popular vote.” Supposed by whom or what? Cole did not say, but we can: A very firmly entrenched customary norm requires popular elections for the selection of a state’s electors.

But even as critics of the Florida special legislative session unwittingly spoke the language of customary norms, they were stymied by the poverty of our eCRoR vocabulary. In American legal and political culture, constitutionality is so frequently assumed to be the ultimate test of legitimacy, that those who would rely on the eCRoR are at a serious rhetorical disadvantage. The degree to which the Constitution crowds out the eCRoR leaves them either attempting to shoehorn the customary norm into constitutional arguments—as we saw in the cases of Court packing and jurisdiction stripping—or talking vaguely about fairness. Thus, Florida House Democratic leader Lois Frankel condemned the planned Florida special legislative session as “ultimately a partisan act that is unnecessary, unfair and unjust.”⁸² Even as she groped for a way to say that the special

⁸² Dana Canedy & David Barstow, *Contesting The Vote: The Legislature; Florida Lawmakers to Convene Special Session Tomorrow*, N.Y. TIMES, Dec. 7, 2000, at A35.

session would violate the customary norm requiring popular elections for President, Representative Frankel was reduced to making what sound like ordinary policy arguments.

D. The Extent and Causes of Constitutional Crowding Out

The foregoing examples vividly illustrate the characteristic features of constitutional crowding out: The existence of the written Constitution blinds judges, scholars, and, most importantly for my purposes, political actors, to the eCRoR; the central place of the written Constitution in American conceptions of government leads the relevant actors to try to fit customary norms onto the procrustean bed of the Constitution, but often awkwardly, and therefore in ways that undermine the customary norms' claim to fundamentality; and, where a practice that violates the eCRoR cannot plausibly be made to fit the Constitution, judges, scholars, and political actors lack the vocabulary to condemn the practice as repugnant to the eCRoR.

The principal examples I have given hardly exhaust the full range of customary limits on government action. We can readily imagine various actions that violate strong customary norms but not the Constitution. Suppose Congress were to repeal (rather than merely amend at the margins) the 1964 Civil Rights Act.⁸³ Or suppose that, absent any substantial new

⁸³ As Bruce Ackerman argues, the Civil Rights Act is “canonical” if not, strictly speaking, a constitutional requirement. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1788–89 (2007). Similarly, William Eskridge and John

change in circumstances, in an effort to revitalize the New Orleans economy, Congress decided to move the capital from Washington, D.C. to the French Quarter (after a cession by Louisiana). There may be disagreement about whether any particular custom has normative force, or about how much normative force it has, but acceptance of any single one is sufficient to establish the existence of the eCRoR.⁸⁴

Why do we so often fail to see the norms that comprise the eCRoR? My examples point to two culprits. First, the very writtenness of the Constitution distracts us from the eCRoR. Second, the practice of judicial review plays an important role in hiding the eCRoR.

These two effects reinforce one another. There was a brief time when it was possible for an American judge to argue that a duly enacted law, though inconsistent with no constitutional provision or doctrine, was

Ferejohn treat the 1964 Civil Rights Act as a “super-statute.” William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–42 (2001).

⁸⁴ For a list of candidate aspects of the eCRoR, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 12 (1999). Whittington lists examples of what he calls constitutional “construction,” an activity that, he says “elucidate[s] the text in the interstices of discoverable, interpretive meaning” *Id.* at 5. In principle, that definition could be narrower than the eCRoR, for eCRoR norms need have no relation whatsoever to the text (other than contradiction), but in practice it seems clear that Whittington’s examples of constitutional construction also need bear no relation to the text. *See id.* at 12 (listing, *inter alia*, the federal civil service, congressional committee system, and home rule for the District of Columbia). Some of Whittington’s examples of mere constitutional construction, however, would qualify as bona fide constitutional rules rather than extra-constitutional rules under both my view and the conventional view. *See, e.g., id.* (listing, *inter alia*, judicial review, judicial refusal to issue advisory opinions, and prohibition of racial exclusions from jury service as examples of construction).

nonetheless invalid as inconsistent with natural law.⁸⁵ But that time has long past, so that today the judicially enforceable limits on government are *constitutional* limits. And, I want to suggest, the judicialization of our constitutional discourse casts a shadow onto extra-judicial deliberations: The understandable judicial habit of shoehorning eCRoR claims into constitutional claims misleads political actors into thinking that they too—when seeking the limits on their authority—must find them only in the Constitution.

III. Practical, Normative, and Theoretical Implications

To recognize the existence in principle of merely customary norms that comprise the eCRoR is not to say that we can clearly identify criteria for distinguishing between such norms and other practices that lack this status. As Hart says of the RoR more generally, rules of recognition, like other legal rules, typically have a core of settled meaning and an open-textured periphery.⁸⁶ As I acknowledged above, there will be borderline cases—circumstances in which a customary norm appears to have developed but the eCRoR status of which may be plausibly contested.

Consider an example. Before 1940, was there really a customary norm forbidding Presidents from seeking a third term in office? Akhil Amar has

⁸⁵ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388--89 (1798) (arguing that “general principles of law and reason forbid” state laws interfering with certain individual rights).

⁸⁶ HART, *supra* note 1, at 147–48.

argued that there was not,⁸⁷ but even if there was such a norm, how should we understand President Roosevelt’s decision to seek a third term nonetheless? Did Roosevelt violate the norm? Did he—and the voters who returned him to the Presidency—change the norm? Did the very act of violating the norm also simultaneously change the norm? Did the adoption of the Twenty-Second Amendment convert what was previously a mere customary norm into part of the formal Constitution and thereby affirm that the pre-1940 practice was indeed normative? Or did it merely show that the pre-1940 pattern lacked the status of higher law? It is difficult to imagine good answers to such questions that are not largely stipulative—that is, answers that do not depend upon some set of controvertible definitions of the eCRoR, as well as changes to and violations thereof.

Accordingly, if we were interested in identifying aspects of the eCRoR that are enforceable by the courts, we would have good reason to doubt that judges possess the expertise and legitimacy to accomplish this task in the face of contrary decisions by elected officials. This is why Ernest Young worries that theories of constitutionalization without constitutional text face “rule of recognition” problems.”⁸⁸

However, if the eCRoR is not enforceable by the courts (except to the extent that it is embodied in enforceable statutes, treaties, and the like), then

⁸⁷ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 433–35 (2005) (noting ambiguities and exceptions to “two-term tradition”).

⁸⁸ *See* Young, *supra* note 20, at 454.

the issues of judicial legitimacy go away. Young renders the courts irrelevant by bracketing issues of entrenchment. He identifies what he calls “extracanonical” provisions of our small-c constitution as those materials that play a role in literally “constituting” institutions of our government, even when they are not entrenched against amendment by ordinary democratic means.⁸⁹ If, as Young concedes, Congress can eliminate extracanonical parts of our unwritten constitution by an ordinary statute—repealing the statutory authority for the Federal Reserve system, say—then we don’t need to worry about judicial legitimacy. The courts would have to accept congressional elimination of the Fed as an amendment to the small-c constitution accomplished by means appropriate to amending unentrenched but constitutive features of our constitutional system.

Young’s project is important but it is not exactly my project. I want to know what aspects of the American system of government are deemed by the relevant government officials to be fixed by customary norms that are not themselves embodied in upper-case-C Constitutional norms. If the relevant officials thought that even absent special circumstances, they could amend one of these norms—the norm against Court-packing, say—by ordinary legislation, that would mean that it was not in fact part of the eCRoR. So unlike Young, I cannot bracket the entrenchment question.

⁸⁹ *See id.* at 413 (aiming to “decouple the constitutive function of a constitution from the entrenchment function.”).

But neither do I have a rule-like answer to the entrenchment question. I cannot say, for example, that if a customary norm is part of the eCRoR, it can only be changed by a two-thirds vote of each house of Congress, or by a law that is warranted by the most pressing necessity. The imposition of such criteria would be both arbitrary and contrary to the very nature of a customary norm.⁹⁰

Nonetheless, my account of the eCRoR avoids the legitimacy worry because it is an account for elected officials, not for courts. By calling attention to the eCRoR, I aim to strengthen the hand of those who would resist rash calls for radically transformative laws by giving them a vocabulary for resistance. In short, I want to elevate the utterance “you just can’t do that” to a matter of principle.

To be sure, my aim here is principally descriptive. An account of American law that overlooks the eCRoR will not be a complete account. But the project also has normative content. It is conservative in the Burkean sense: Strengthening the hand of those who would resist changes to the eCRoR—even if only rhetorically—means erecting obstacles to fundamental

⁹⁰ The least convincing aspect of Bruce Ackerman’s magisterial account of constitutional change outside the formal requirements of Article V has always been Ackerman’s effort to identify formal criteria for distinguishing successful from failed constitutional moments. See BRUCE ACKERMAN, *1 WE THE PEOPLE: FOUNDATIONS* 266–90 (1991) (identifying a four-stage gauntlet that informal amendments must run). Cf. Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (arguing for permissibility of constitutional amendment by national referendum).

change. And one will only favor erecting such obstacles if one thinks that, *ceteris paribus*, fundamental change is likely to do more harm than good.

Space limitations prevent me from setting forth anything like a full defense of Burkeanism—or even Burkeanism in constitutionalism⁹¹—here. Instead, I shall simply point out that the same conservative impulse that drives my call for political actors to open their eyes to the eCRoR, typically underwrites fidelity to the written Constitution as well.

Constitutionalism, as a restraint on legislative action, is almost necessarily conservative in the Burkean sense. It prevents legislators from changing the status quo in ways that they would otherwise prefer. We can see this point most clearly in debates about the Constitution outside the courts. When House member A resists House member B’s call for some measure—the impeachment of a President for lying about sex on the ground that, in A’s view, this is not a high crime or misdemeanor, say—A asserts a limit on the House’s freedom of action. In this instance, A will point to the written Constitution as the source of the limit, but by now we understand that, with the exception of very recently enacted amendments, the underlying warrant for the authority of the Constitution itself is customary acceptance.⁹²

⁹¹ See Thomas Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 511 (1996) (presenting case for Burkean conventionalist approach to interpretation, which “seeks out . . . [the] consensus view about the meaning in the legal community of today”).

⁹² See *supra* note 20 and accompanying text.

Matters are somewhat more complicated with respect to the judicially enforceable Constitution. The Supreme Court sometimes invokes the Constitution to invalidate long-established practices, such as laws mandating racial segregation in public schools⁹³ or laws forbidding sodomy between consenting persons of the same sex.⁹⁴ In such cases, rather than impeding change, the Constitution itself acts as the agent of change. Constitutionalism in such cases cannot plausibly be described as conservative in the Burkean sense—which is not to say that the results in such cases cannot be defended on other grounds.

In any event, in focusing on the RoR outside the courts, I aim here to sidestep the contentious and longstanding debates about the proper methods of constitutional interpretation by the courts. With respect to legislative action, the argument for adherence to the eCRoR is as strong as the argument for adherence by legislators to the large-C Constitution, even when the latter is non-justiciable. Indeed, the arguments are not only of equal strength; given the source of the large-C Constitution's authority, they are the *same* arguments.

Before concluding, it is worth pausing over what, from the Hartian perspective, might count as an oddity of the American legal system. According to Hart, the validity of a legal norm is either established by deriving it from other valid norms or is directly accepted by government

⁹³ See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹⁴ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

officials as ultimate. In the United States, however, government officials typically act under a kind of double false consciousness about which norms are derived and which are ultimate.

First, many government officials think that operative provisions of the original Constitution are valid because the document was ratified in 1789, and that amendments are valid because they were adopted in conformity with the procedure described in Article V. They thereby treat such provisions as non-ultimate, instead treating the ratification clause of Article VII (which also validated Article V) as the ultimate RoR. But as Greenawalt and others have shown, this is a mistake. With the exception of recent amendments, operative provisions of the original Constitution are ultimate, deriving their authority directly from acceptance by government officials.

Second, as I have illustrated in this chapter, government officials sometimes regard provisions of the eCRoR as either not truly binding or as interpretations of various constitutional provisions (themselves ultimately validated via Article VII). This too appears to be a mistake. The norms against Court packing, jurisdiction stripping, and eliminating the right to vote in Presidential elections are valid (if I am right that they are valid) because they are ultimate norms directly accepted by government officials.

It is not entirely clear whether Hart's theory, as articulated by Hart himself, has room for the sorts of mistakes about ultimate authority that run rampant in the American legal system. But certainly nothing of importance

in Hart's theory would be lost by admitting the possibility that government officials can be mistaken about the reasons why they accept any particular norm. Hart gives the example of a simple legal system in which Rex I and his successors legislate.⁹⁵ Certainly the example works equally well if, instead of assuming that acceptance of the Rex dynasty is an ultimate rule, we assume that the Rex dynasty and their subjects believe that Rex I was authorized to rule in virtue of what they mistakenly take to be his Divine origins.

Likewise, we can give a descriptive account of the American legal system that is largely true to Hart's project even though many—probably most—government officials and ordinary citizens are mistaken about what rules are ultimate. That is not to say, however, that it makes no difference whether Americans hold erroneous views about ultimate authority. Dispelling the mistaken belief that Article VII validates most constitutional norms would weaken the case for originalism in constitutional interpretation. Dispelling the mistaken belief that strong customary norms only have force if traceable to the Constitution would provide members of Congress and other political actors with the tools to resist radical change.

IV. Conclusion

I am hardly the first scholar to note the existence of the eCRoR. In one of Karl Llewellyn's few forays into public law, he argued that most of what he

⁹⁵ HART, *supra* note 1, at 52—66.

called the “working Constitution” “is hardly adumbrated in the Document.”⁹⁶ In *The Constitution as an Institution*, Llewellyn gave as good an account as I can imagine of what makes some norm part of the RoR:

The actors, and any non-actors in a position to block or modify action, must *feel* that the way or institution is not subject to abrogation or material alteration. They need not feel that it is right or wise . . . if they are clear that it is permanent. But in the normal case the two feelings coincide. This is intended to exclude . . . practices which, even though long-established, have not acquired in the relevant minds the intangible atmosphere of unquestioned rightness or of course of nature.⁹⁷

If I am right that our elected officials continue to lack a vocabulary with which to invoke the eCRoR, then Llewellyn failed in his effort to call attention to our unwritten constitution over seventy years ago. Why would a contemporary effort fare better? It may not, but my account has a key tactical advantage over Llewellyn’s. His conception of the working Constitution drew no distinctions between the written Constitution and the eCRoR, or between judicial and extra-judicial practice.

Throughout his article, Llewellyn equates the working Constitution with the written Constitution. He provides a nice example of a proposition

⁹⁶ K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 15 (1934).

⁹⁷ *Id.* at 29.

that I would regard as a customary norm necessary to implement the customary right to vote in Presidential elections: That Electors must vote their ticket, not their conscience. Llewellyn asks rhetorically: “can any doubt that if [the Electoral C]ollege should today disregard their mandate, such action would be contrary to the Constitution?”⁹⁸ The short answer is of course we can doubt this. As a matter of the judicially enforceable large-C Constitution, there is a very good argument that voters have no direct recourse against faithless electors.⁹⁹ By failing to distinguish the Constitution from the eCRoR, Llewellyn stokes fears that acceptance of the latter would authorize judicialization of a wide swath of action that we now regard as committed to political actors.

Llewellyn compounds that impression by the way he talks about Supreme Court adjudication of cases arising under the Constitution. As a legal realist, Llewellyn sometimes affirmed the proposition that rules do not decide contested cases, and in *The Constitution as an Institution* he applies the point to constitutional jurisprudence.¹⁰⁰ He writes that “a sane theory would utterly disregard a Documentary text *if any relevant practices existed*

⁹⁸ *Id.* at 12.

⁹⁹ See *Ray v. Blair*, 343 U.S. 214, 230 (1952) (assuming, *arguendo*, that there exists a “constitutional freedom of the elector . . . to vote as he may choose in the electoral college”). See also Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121, 122 n.10 (2006) (citing scholarship supporting the constitutional freedom of electors to cast votes as they see fit).

¹⁰⁰ See Llewellyn, *supra* note 96, at 6–10.

to offer a firmer, more living basis for the ideal picture.”¹⁰¹ Legislators, lawyers, judges, and scholars who did not share this strongly legal realist view would have understandably balked at the notion that judges are warranted in disregarding the text in favor of their understanding of customary norms.¹⁰² Llewellyn claimed that he was only putting into words what the Supreme Court already practiced,¹⁰³ but for those who disagreed as a descriptive matter, his prescriptions would have been too radical.

Resistors to radical legal realism would have dismissed Llewellyn’s account entirely, and in doing so would have overlooked the very real phenomenon of the eCRoR to which *The Constitution as an Institution* attempted to draw attention. An account that builds on Llewellyn’s astute observations about customary norms but jettisons his extreme rule-skepticism might fare better. That, at any rate, is the ambition of this chapter.

¹⁰¹ *Id.* at 31.

¹⁰² *See, e.g., id.* at 33 (“To my mind, the judge who builds his decision to conform with his conception of what our institutions must be if we are to continue, roots in the deepest wisdom.”).

¹⁰³ *See id.* at 40.