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## Practice-Driven Changes to Constitutional Structures of Governance

James A. Gardner\*

*Among the methods of informal constitutional change, perhaps the least studied or understood is change resulting from alterations in the way governance is practiced. Such change, typically initiated by political actors in the executive and legislative branches, is probably the most common kind of constitutional change, and is almost certainly the most common source of informal change to structural provisions. In the United States, the best known instances of practice-driven changes to constitutional structure come from the federal level—the rise of a formal party system, for example, or the dramatic twentieth-century expansion of presidential power. Yet by far the most copious and dramatic examples of such change in the United States are to be found at the subnational level, in changes wrought by practice to the structural provisions of state constitutions. New York’s system of legislation by “three men in a room,” for example, or its replacement of competitive judicial elections with a democratically meaningless system of party cross-endorsement deals, bear no resemblance to either the provisions of the written state constitution regulating practices of governance, or to the conceptions of governance on which those provisions were founded. The sheer range of practice-driven deviation from constitutional schema in turn raises important questions about the ability of constitutions to stabilize official behavior at structural design points.*

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## I. INTRODUCTION

Constitutions perform two great functions. First and foremost, they create the state<sup>1</sup>—they establish institutions, assign powers,<sup>2</sup> and in general “define the structure of the ‘normally’ functioning state,”<sup>3</sup> all for the purpose of creating a government capable of achieving the polity’s most important, long-term, collective goals. That, in a sense, is the easy part, for the second great function of a constitution is, having created a state and identified its goals,<sup>4</sup> to control its behavior. As Madison remarked, “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”<sup>5</sup> The prime challenge of constitutional design, then, is to create a set of institutions and rules that will “control the state” and, in appropriate and desirable ways, “influence how the government acts.”<sup>6</sup>

Implicit in this account of constitutions is the proposition that design matters—that constitutions do in fact guide, shape, and, at the end of the day, control the practices of governments. Design, on this view, has

1. EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 2-3 (2006); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411-12 (2007); Jeremy Waldron, *Constitutionalism: A Skeptical View*, in CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 267, 273-74 (Thomas Christiano & John Christman eds., 2009).

2. Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 3, 6 (Denis J. Galligan & Mila Versteeg eds., 2013); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1855 (2013); Jeff King, *Constitutions as Mission Statements*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra*, at 73, 81; Young, *supra* note 1.

3. Peter C. Ordeshook, *Some Rules of Constitutional Design*, in LIBERALISM AND THE ECONOMIC ORDER 198, 205 (Ellen Frankel Paul et al. eds., 1993).

4. King, *supra* note 2.

5. THE FEDERALIST NO. 51 (James Madison).

6. Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 37, 40 (Sanford Levinson ed., 1995); *see also* GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 198 (1994) (“[C]onstitutions are, first and above all, instruments of government which limit, restrain and allow for the control of the exercise of political power....”).

consequences.<sup>7</sup> To live under a constitution that is *designed* means to live under a government that is bound by a constitutional plan. A commitment to this belief is, after all, the only explanation for why we bother to design a constitution in the first place, and to do so as deliberately, thoughtfully, and carefully as possible.<sup>8</sup> Indeed, the commitment to the belief that design matters furnishes the only possible basis for the practice, dating back at least to Aristotle, of normatively evaluating and critiquing constitutions and their features.<sup>9</sup>

Yet it has long been understood that constitutional design alone is, or at least may be, insufficient to place permanent, effective constraints on the exercise of state power. Some constitutional actors may not consider themselves bound by constitutional instructions. Others may view constitutional directives to require behavior that is outmoded, ineffective, or ill-suited to the successful pursuit of public goals. Still others may not deem it in their own private interest to observe constitutional limitations. Madison himself understood this problem well, acknowledging that constraints on power, no matter how specifically articulated or deeply entrenched in the constitutional text, might function as little more than “parchment barriers”<sup>10</sup> with a weak capacity to constrain uncooperative power holders.

If we can expect government officials from time to time to stretch, flout, or evade constitutional rules, then a difficult complication arises: the problem of informal constitutional change. Although there was of course no way the American founders could have known it, subsequent experience has shown that constitutions change over time, even without

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7. Denis J. Galligan, *The People, the Constitution, and the Idea of Representation*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS, *supra* note 2, at 134, 135; Tom Ginsburg, *Introduction*, in COMPARATIVE CONSTITUTIONAL DESIGN 1, 10 (Tom Ginsburg ed., 2012); Philip Pettit, *Institutional Design and Rational Choice*, in THE THEORY OF INSTITUTIONAL DESIGN 54, 55-57 (Robert E. Goodin ed., 1996); KATHLEEN THELEN, HOW INSTITUTIONS EVOLVE: THE POLITICAL ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES, AND JAPAN 31 (2004); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 211 (2000).

8. Ginsburg, *supra* note 7, at 4.

9. ARISTOTLE, POLITICS bk. III, ch. VII.

10. THE FEDERALIST NO. 48 (James Madison).

formal amendment. No government created by a constitution that has endured for any length of time goes about its business in the same way it did at its inception. Moreover, it is widely acknowledged that changes in official practice can in the right circumstances alter the constitution itself.<sup>11</sup> Although government actors most often dutifully exercise powers defined by the constitution, that is not always the case. Sometimes, invoking what Stephen Griffin calls “the latent power contained within roles created by the text,”<sup>12</sup> officials redefine their own authority, in effect changing the substance of the very constitutional rules to which they ought in principle to be subject. In the United States, widely cited examples of such “informal amendment” through “practice,”<sup>13</sup> or through “usage,” “custom,” or “convention,”<sup>14</sup> include the rise of a formal party system;<sup>15</sup> the dramatic twentieth-century expansion of presidential power;<sup>16</sup> the complete inversion of the Electoral College from an independent body of elites to a ministerial transmitter of mass political sentiment;<sup>17</sup> and the transformation of the Senate “from an institution that resembled, in many respects, the English House of Lords, to an institution that functioned quite similarly to the House of

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11. This contention has probably been put as strongly by Karl Llewellyn as by anyone: “Wherever there are today established practices ‘under’ or ‘in accordance with’ the [Constitution], it is only the practice which can legitimize the words as being still part of our going Constitution. It is not the words which legitimize the practice.” K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934). The power of practice to alter constitutions is well described in, for example, KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999), and STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920*, at ix, 10 (1982).

12. Stephen M. Griffin, *The United States of America*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 357, 373 (Dawn Oliver & Carlo Fusaro eds., 2011).

13. Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 643 (2014); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 333 (2007).

14. K.C. WHEARE, *FEDERAL GOVERNMENT* 223 (4th ed. 1964); Brandon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 198 (1997).

15. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order*, 94 B.U. L. REV. 611, 621 (2014).

16. Griffin, *supra* note 12, at 371; Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1065 (2014).

17. See Denning, *supra* note 14, at 212-14; Whittington, *supra* note 2, at 1857.

Representatives.”<sup>18</sup> On this view, not only does constitutional design enjoy limited capacity to control the behavior and practices of government officials, but even worse, the polarity of authority can at times reverse, so that innovations in official practice by constitutional actors can produce and entrench modifications to the original constitutional design.

Part II of this paper lays out a few salient basics of constitutional design. Part III discusses the limits of constitutional design, introducing the phenomenon of informal constitutional change. Part IV examines the phenomenon of informal constitutional change caused by changes in the practices of government officials. It does so by focusing on practice-driven change to the constitution of New York State, where such changes have been dramatic in scope and highly subversive of accountable democratic self-governance. Part V turns to some concluding—and skeptical—reflections about the possible limits of practice-driven constitutional change.

## II. BASICS OF CONSTITUTIONAL DESIGN

To speak of written constitutions is to speak by definition of design.<sup>19</sup> Because such constitutions are created at a single moment, in a deliberative act intended to establish an entirely new and complete constitutional order—a “*novus ordo seclorum*,” a new order for the ages<sup>20</sup>—their creation presupposes intentional design.

The process of intentional constitutional design necessarily begins with the identification of goals—“to form a more perfect Union,”<sup>21</sup> “to promote world peace,”<sup>22</sup> “to

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18. Graber, *supra* note 15, at 626.

19. Ginsburg, *supra* note 7, at 1-2.

20. This phrase has since 1782 appeared on the reverse of the Great Seal of the United States. 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 339 (Worthington Chauncey Ford et al. eds., 1904-1937), [http://www.constitution.org/uslaw/cont-cong/22\\_journals\\_continental\\_congress.pdf](http://www.constitution.org/uslaw/cont-cong/22_journals_continental_congress.pdf) [<https://perma.cc/8UHL-QT-H4>]; see also Forrest McDonald, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 262 (1985).

21. U.S. CONST. pmbl.

22. GRUNDGESETZ [GG] [BASIC LAW], May 8, 1948, pmbl. (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0012](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0012) [<https://perma.cc/8DN7-WUNB>].

establish justice, liberty, and security."<sup>23</sup> The design enterprise cannot get off the ground if designers do not know what they are designing *for*, nor can a design be judged except in reference to how well it achieves its own goals.<sup>24</sup> Once a set of goals is identified, constitutional design may proceed to the task of creating the basic institutions of the state<sup>25</sup>—typically, in modern states, a legislature, an executive, a judiciary, perhaps a bureaucracy, and numerous other possible subsystems.

At this point, a basic choice constitutional designers must make concerns the allocation of powers and responsibilities among constitutional actors—which actors and institutions are authorized to exercise what powers and functions.<sup>26</sup> Resolution of this question requires deciding: (1) whether a power or function will be exercised at all by any government official, that is, whether the power will rest in private or public hands;<sup>27</sup> and (2) if allocated to the government, to which official any particular power will be assigned. This aspect of constitutional design thus raises familiar, bread-and-butter issues of constitutional jurisprudence such as who has the power to regulate commerce, levy taxes, initiate military conflict, define and prosecute crimes, enforce human rights, and so forth.

To assign powers, however, is to say little about how they may be used; power may be exercised in many different ways, under many different procedures. Accordingly, another class of decisions facing constitutional designers is whether to require constitutional actors to adhere to specific practices when wielding assigned powers, and if so, in what detail such instructions should be issued. In many cases, constitutional designers may be indifferent to the details of how government officials exercise their assigned powers. Merely assigning powers and providing adequate incentives for their appropriate use—electoral accountability, for example, or the possibility of impeachment—may be

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23. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, pmb. (Spain).

24. Robert E. Goodin, *Institutions and Their Design*, in THE THEORY OF INSTITUTIONAL DESIGN, *supra* note 7, at 1, 34-37; Ginsburg, *supra* note 7.

25. Galligan & Versteeg, *supra* note 2; Young, *supra* note 1, at 412.

26. See COOTER, *supra* note 7, at 2.

27. See, e.g., U.S. CONST. amends. IX, X.

thought sufficient to ensure that officials will use their powers in ways consistent with the constitution's long-term goals.

On the other hand, designers might now and again have reasons to prefer that officials adopt some forms of practice over others. This might be the case when designers believe that one set of practices will lead more reliably than others to the fulfillment of constitutional goals. For example, the U.S. Constitution establishes an elaborate, non-discretionary procedure for the enactment of legislation: Congress must enact a bill with the concurrence of both chambers, that bill must be presented to the President, the President may choose to sign or return it, and if he returns it, Congress may reconsider the bill and enact it into binding law upon a two-thirds vote of each chamber.<sup>28</sup> According to the Supreme Court, the Framers imposed this procedure because they thought it more likely than other possible procedures to "check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures."<sup>29</sup> They thought, in other words, that the practice of involving the President in lawmaking by requiring a series of official assents in a particular order demanding active relations and power-sharing between the two branches would be more likely than other practices to produce legislation advancing the Constitution's commitments to "establish Justice" and "promote the general Welfare."<sup>30</sup>

Finally for present purposes, constitutional designers must attend to the problem of "entrenchment"—the problem of making a constitution durable. What primarily distinguishes constitutional regimes from legislative ones is their aspiration to permanence;<sup>31</sup> as the U.S. Constitution prominently proclaims, "We the People" create the document so as to deliver its benefits "to ourselves and our

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28. U.S. CONST. art. I, § 7; *see also* *INS v. Chadha*, 462 U.S. 919, 945-46 (1983); *Clinton v. New York*, 524 U.S. 417, 438-41 (1998).

29. *Chadha*, 462 U.S. at 947-948.

30. U.S. CONST. pmbl.

31. It is sometimes said that a constitution is a "precommitment strategy" that facilitates long-term adherence to a preconceived plan of living. JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 88-89 (2000); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 97 (2001).



Posterity.”<sup>32</sup> Thus, a significant problem of constitutional design concerns how to construct constitutions that will last—that will retain their structure and substance in spite of the periodic “turbulence and contention”<sup>33</sup> that may be expected to excite any polity living under a constitution.

Assuming, of course, that citizens of a society are predisposed to obey their own constitution, designers have a number of strategies at their disposal to promote the entrenchment of constitutional rules and norms. Perhaps the most prominent and widespread strategy to make constitutions long-lasting is to make them difficult to change.<sup>34</sup> Accordingly, provisions governing the amendment of constitutions tend to make formal constitutional change comparatively difficult, typically by requiring a supermajority vote of the legislature, often coupled with a requirement of popular ratification.<sup>35</sup> Each of these steps requires demanding efforts of political mobilization, which typically are not only costly, but also risky in the sense that success is rarely guaranteed.<sup>36</sup>

Formal amendment, however, addresses only a small piece of the entrenchment puzzle. Even in a society in which most people believe that the constitution deserves obedience and attempt to live by that belief, not everyone will share this predisposition, and some of them may end up holding office<sup>37</sup>—as Madison put it, “Enlightened statesmen

32. U.S. CONST. pmbl.

33. THE FEDERALIST NO. 10 (James Madison).

34. COOTER, *supra* note 7, at 2; Justin Blount et al., *Does the Process of Constitution-Making Matter?*, in COMPARATIVE CONSTITUTIONAL DESIGN, *supra* note 7, at 31, 42; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 672, 697 (2011); Young, *supra* note 1, at 412.

35. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT, *supra* note 6, at 237, 237-40; Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty* 1-2 (Coase-Sandor Inst. For Law & Econ., Working Paper No. 682, 2014). Sometimes amendment rules can be even more difficult to satisfy; the New York constitution, for example, requires in addition that proposed constitutional amendments be enacted by two consecutive sessions of the state legislature. N.Y. CONST. art. XIX, § 1.

36. See Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in COMPARATIVE CONSTITUTIONAL DESIGN, *supra* note 7, at 195, 195.

37. As Brennan observes, social characteristics are not uniformly distributed among the population. Geoffrey Brennan, *Selection and the Currency of Reward*, in THE

will not always be at the helm.”<sup>38</sup> In addition, those who hold power in a constitutional regime may face special temptations to bend or undermine constitutional rules because of the possibility of personal gain.<sup>39</sup> And even when all relevant actors agree that the constitution must be obeyed, and endeavor to do so, ambiguities of constitutional meaning may give rise to disagreements about what compliance actually requires. Consequently, a sustainable entrenchment of constitutional rules generally is thought to require some mechanism of enforcement.<sup>40</sup>

The most obvious enforcement strategy is a regime of policing in which some actor or institution is charged with monitoring and enforcing compliance with constitutional rules by other actors. One possible mechanism of enforcement is democratic accountability; officials who fail to adhere to constitutional rules and instructions are voted out of office.<sup>41</sup> Another obvious candidate is a court authorized to undertake judicial review of official action.<sup>42</sup> Although such policing regimes are common, they are not necessarily highly effective. Most constitutional regimes employ many actors, each operating to some degree under constraints imposed by constitutional rules. As a practical matter, it is impossible effectively to police the compliance of every action taken by every constitutional actor. This is especially true when the institution assigned to perform the policing function is a largely passive one, such as an electorate or a court, which typically must wait for violations

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THEORY OF INSTITUTIONAL DESIGN, *supra* note 7, at 256, 257. Screening devices can help steer the right kinds of people toward public office, but these cannot possibly enjoy complete success. *Id.* at 262-72.

38. THE FEDERALIST NO. 10, *supra* note 33.

39. This is the quintessential problem of corruption, a problem that evidently much exercised the Framers of the U.S. Constitution. Zephyr Teachout, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014).

40. JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 11-12, 95-131 (2009).

41. This, for example, is the concept Justice Scalia articulates in *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (“[U]ltimately, there is the political check that the people will replace those in the political branches . . . who are guilty of abuse.”).

42. This has especially been the case since Kelsen advanced the idea of a specialized constitutional court. Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 85 (Keith E. Whittington et al. eds., 2008).

to be brought to its attention before taking enforcement action. Often, the only observers of non-compliant official action will be other officials, and those officials may have little incentive to report non-compliance since they are participants; this is precisely the difficulty posed by the well-known problem of agent shirking.<sup>43</sup>

### III. THE LIMITS OF DESIGN

#### A. The Phenomenon of Constitutional Change

The view of constitutional design sketched in the previous Part holds that design matters. The reason design matters, on this view, is because constitutions are entrenched regimes of foundational law that guide and control the actions of the state and its officials. The aspiration of constitutional designers to provide a permanent framework for collective life, alterable only by subsequent purposeful amendment, is thus treated as realistic. A well-designed document, according to this model, can meet the challenge posed by Alexander Hamilton in the opening sentences of *The Federalist*: "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."<sup>44</sup> A well-designed constitution, then, arises from a kind of socio-political Big Bang in which, out of the loose matter of the existing political universe, a new society both forms itself and establishes for its own governance a new and lasting legal order.<sup>45</sup>

There is, however, another view, one grounded less in democratic and positive political theory than in empirical observation. On this view, constitutions are far from immutable foundations of an unchanging state; on the contrary, constitutional regimes are changeable, even

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43. Roger G. Noll, *Economic Perspectives on the Politics of Regulation*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1253, 1277 (Richard Schmalensee & Robert D. Willig eds., 1990).

44. THE FEDERALIST NO. 1 (Alexander Hamilton).

45. This is the essence of the contractarian position. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., 1952); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

evanescent. Globally, the average lifespan of all constitutions adopted since 1789 is just nineteen years.<sup>46</sup> The authors of a recent, comprehensive study of constitutional endurance conclude that one of the key elements of constitutional longevity is a constitution's "flexibility," meaning its "ability to adjust to changing circumstances."<sup>47</sup> Flexibility—the ability to adapt and change—thus appears to be essential to constitutional survival.

Adherents of this view hold not only that constitutions must change; they hold that constitutions in fact do change, and frequently. "Constitutional change," according to Daryl Levinson, "is a constant."<sup>48</sup> Dawn Oliver and Carlo Fusaro write that "[a]ll constitutions change continuously."<sup>49</sup> Unlike the enterprise of constitutional design, Walter Murphy argues, the enterprise of "constitutional maintenance necessarily involves change. . . . A constitution that cannot change cannot endure."<sup>50</sup> Political scientists have observed and documented the phenomenon of "authority migration," in which there is "movement of power within a political system."<sup>51</sup> In Karl Llewellyn's account, constitutions are "institutions," and because "[a]n institution is in first instance a set of ways of living and doing," it is susceptible to change when ways of living and doing evolve, as they inevitably must.<sup>52</sup> In the language of contemporary institutional theory, "there is nothing automatic, self-perpetuating, or self-reinforcing about institutional arrangements. Rather, a dynamic component is built in. . . ."<sup>53</sup> Constitutions, on this account, adapt constantly,

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46. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 2 (2009).

47. *Id.* at 8, 81-83.

48. Levinson, *supra* note 34, at 745.

49. Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY*, *supra* note 12, at 405, 424.

50. MURPHY, *supra* note 13.

51. Elisabeth R. Gerber & Ken Kollman, *Authority Migration: Defining an Emerging Research Agenda*, 37 *POL. SCI. & POL.* 397, 397 (2004); see also Jenna Bednar, *Authority Migration in Federations: A Framework for Analysis*, 37 *POL. SCI. & POL.* 403, 403 (2004).

52. Llewellyn, *supra* note 11, at 17.

53. James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in *EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER* 1, 8 (James Mahoney & Kathleen Thelen eds., 2010).

and sometimes imperceptibly, to changes in the environment<sup>54</sup> or to changes in the interests and motivations of evolving coalitions of political actors.<sup>55</sup>

Knowing that constitutions change often, or even continuously, still leaves the question of how such change actually occurs. One common way to categorize methods of constitutional change is to distinguish between "formal" and "informal" change.<sup>56</sup> The term "formal" is generally reserved for changes made to the constitutional document through the process of amendment in compliance with constitutional rules.<sup>57</sup> Although formal constitutional change through amendment clearly alters constitutional grounds rules, and does so through a procedure that is by definition politically legitimate, formal amendment is not always possible. Amendment procedures can be demanding, often requiring assembly of a supermajority consensus in multiple institutions.<sup>58</sup> Moreover, those with settled interests under

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54. Gerhard Lehmbuch, *Constitution-making in Young and Aging Federal Systems*, in REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE 30, 30 (Keith G. Banting & Richard Simeon eds., 1985); Lutz, *supra* note 35, at 242; James D. Kellas, *The Politics of Constitution-making: The Experience of the United Kingdom*, in REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE 146, 146 (Keith G. Banting & Richard Simeon eds., 1985).

55. THELEN, *supra* note 7, at xiii, 8, 32, 291, 292-93; Mahoney & Thelen, *supra* note 53, at 4.

56. For present purposes, I will bracket an antecedent question that sometimes occupies constitutional theorists: what counts as constitutional "change" in the first place? Some theories, in an attempt to account for the observed fact of informal change in the rules that control government behavior, define narrowly what counts as a constitution so they can limit the concept of constitutional change to formal modes and assign the great mass of informal changes to non-constitutional or sub-constitutional practices or institutions. Thus, theorists sometimes distinguish between the "large-C," or formal constitution, and the "small-c," or informal constitution of everyday practice. See, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 116, 119-20 (2010); Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2155 (1996); Levinson, *supra* note 34, at 700. My own view is that this distinction tends toward the arbitrary and formalistic, and is invoked primarily as a consequence of an antecedent theoretical commitment to the idea that a constitution is a unique and especially powerful form of positive law that implements the expressed will of the popular sovereign. There is much to recommend this conception as an ideal, but it does not comport with the lived experience of constitutionalism. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1459, 1468 (2001).

57. See, e.g., Lutz, *supra* note 35, at 237; Ginsburg & Melton, *supra* note 35, at 3.

58. Article V of the U.S. Constitution may well be the archetype in this respect: it requires supermajority support in both chambers of Congress and among state legislatures. U.S. CONST. art. V.

the prevailing regime may have strong incentives to resist constitutional amendment,<sup>59</sup> and the difficulty of the procedures furnished by the constitution may make it relatively easy for defenders of the status quo to block reform. Indeed, it is frequently suggested that the difficulty of formal amendment under some constitutional regimes has generated demand for other, less arduous and less formal avenues of constitutional change.<sup>60</sup>

One common route to “informal” constitutional change is judicial reinterpretation of existing constitutional provisions.<sup>61</sup> In these circumstances, the text remains unchanged, but its meaning is authoritatively declared to differ from previously settled understandings. In the United States, for example, judicial reinterpretation of the scope of national regulatory power during the New Deal period dramatically altered the Constitution, expanding the power of the central government and shifting authority from the legislative to the executive branch,<sup>62</sup> despite the lack of any formal amendment to that effect. In Canada, a series of decisions by the Judicial Committee of the Privy Council, a British court that served as the highest judicial authority during Canada’s colonial period, transformed a constitution intended to establish a highly centralized state into one that today makes Canada perhaps the most decentralized of all federal states.<sup>63</sup> More recently, decisions of the German

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59. Alain C. Cairns, *The Politics of Constitutional Renewal in Canada*, in REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE, *supra* note 54, at 95, 96; Arthur Benz, *Unsuccessful Reform and Successful Non-Reform—Constitutional Policy in Germany and Canada 2* (Nov. 2008), <https://verfassungswandel.files.wordpress.com/2009/02/paper-osnabruck-arthur-benz.pdf>; Levinson, *supra* note 34, at 691.

60. ZACHARY ELKINS ET AL., *supra* note 46, at 74; Griffin, *supra* note 56, at 2166; Albert, *supra* note 16, at 1051.

61. Perhaps the best-known account of judicial reinterpretation as a source of constitutional change is BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); see also Albert, *supra* note 13, at 681-682; Denning, *supra* note 14, at 198, 201-02; Fusaro & Oliver, *supra* note 49, at 415; WHEARE, *supra* note 14, at 215-23.

62. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-32 (1937) (upholding the National Labor Relations Act); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding provisions of the Social Security Act); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act).

63. PETER W. HOGG, 1 *CONSTITUTIONAL LAW OF CANADA* 123-27 (5th ed. 2007); Gerald Baier, *Canada: Federal and Sub-national Constitutional Practices*, in

Constitutional Court expanded the power of *Länder* governments after a laboriously negotiated formal amendment did not produce the desired reallocation of authority.<sup>64</sup>

On the other hand, it is misleading to speak of courts as though they are exogenous drivers of constitutional change. Courts generally have few independent reasons to initiate constitutional reform.<sup>65</sup> Rather, judicial reinterpretation of constitutional provisions seems more often to follow, and in one way or another to respond to, changes in the governance environment instigated by other actors of constitutional rank. The U.S. Supreme Court, for example, did not simply decide on its own initiative that the power of the national government to regulate economic activity needed expanding. It reached that conclusion only after being presented with a powerful and persistent demonstration that Congress and the President—and by implication, the public—judged broader national power to be essential to meet new challenges.<sup>66</sup> In many circumstances, then, courts are better conceived not as initiators and drivers of constitutional change, but as facilitators and ratifiers of constitutional change sought by other constitutional actors.

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CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 174, 174 (Michael Burgess & G. Alan Tarr eds., 2012).

64. Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change Between Reform and Evolution*, 39 *PUBLIUS J. FEDERALISM* 213, 224-25 (2009); Arthur Benz, *German Dogmatism and Canadian Pragmatism? Stability and Constitutional Change in Federal Systems* 24-26 (Institut für Politikwissenschaft, FernUniversität in Hagen, Paper No. 65, 2008), [https://www.fernuni-hagen.de/polis/download/polis\\_nr\\_65-2008\\_benz.pdf](https://www.fernuni-hagen.de/polis/download/polis_nr_65-2008_benz.pdf).

65. The one noteworthy exception is that a court may have an incentive to do so on its own account, that is, as a player in a separation-of-powers contest. Thus, one might see the U.S. Supreme Court's opinion in *Marbury v. Madison*, 5 U.S. 137 (1803), in which it asserted for itself the power of judicial review, as an example of court-instituted constitutional reform that did not respond to external political or social forces, though of course, a contrary account is also possible.

66. In Bruce Ackerman's well-known account, the decision to expand national power was in fact made by the people themselves acting informally as the *pouvoir constituant*, and all branches of the federal government merely responded similarly to identical stimuli. ACKERMAN, *supra* note 61, at 266-90.

## B. Changes in Practice as Drivers of Constitutional Change

If this is correct, then several conclusions follow. First, the most common and significant source of informal constitutional change is not the judiciary, but other political actors, typically those in the executive and legislative branches.<sup>67</sup> As Stephen Griffin has bluntly argued, “The most significant source of constitutional change in the twentieth century has . . . been . . . changes initiated and carried out by the President and Congress.”<sup>68</sup> Similarly, the editors of a massive comparative study of constitutional change in fourteen nations and the European Union likewise conclude that legislatures, governments, and government leaders, in addition to courts, are among the most significant drivers of constitutional change.<sup>69</sup>

Second, the most common way in which executive and legislative actors precipitate constitutional change may be simply by changing their practices—how they go about their official business. Through their own actions, in Keith Whittington’s words, “political actors . . . alter their social and institutional environment.”<sup>70</sup> On this view, legislatures can precipitate informal constitutional change by altering their internal procedures,<sup>71</sup> or by enacting statutes that rely on new constructions of legislative authority.<sup>72</sup> Similarly, executive branch officials may initiate constitutional change by altering the way in which they conduct their offices. Contemporary presidential practices of assembling and relying on an official or a “kitchen” cabinet;<sup>73</sup> assuming unofficial leadership of political parties while in office;<sup>74</sup>

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67. Albert, *supra* note 13, at 642-43; Behnke & Benz, *supra* note 64, at 217; Fusaro & Oliver, *supra* note 49, at 415; Griffin, *supra* note 56, at 2134; STEFAN VOIGT, EXPLAINING CONSTITUTIONAL CHANGE: A POSITIVE ECONOMICS APPROACH 146 (1999); Young, *supra* note 1, at 454.

68. Griffin, *supra* note 56, at 2134.

69. Fusaro & Oliver, *supra* note 49, at 414-15.

70. WHITTINGTON, *supra* note 11, at 18.

71. Fusaro & Oliver, *supra* note 49, at 415.

72. Albert, *supra* note 13, at 642-43; Behnke & Benz, *supra* note 64, at 217; Young, *supra* note 1, at 454.

73. FRED I. GREENSTEIN, INVENTING THE JOB OF PRESIDENT: LEADERSHIP STYLE FROM GEORGE WASHINGTON TO ANDREW JACKSON 89 (2009).

74. Llewellyn, *supra* note 11, at 13-14.



exercising the veto power to block legislation on policy grounds rather than merely on grounds of unconstitutionality;<sup>75</sup> and bypassing the Senate when negotiating international agreements,<sup>76</sup> to name just a few, are all innovations in the reach of executive authority that are "the product of one branch... claiming power for itself."<sup>77</sup> At the end of the day, Stefan Voigt has argued, fostering informal constitutional change is within the power of "every government representative in any government branch who has any discretion in interpreting the constitution."<sup>78</sup>

Perhaps no one has made this point as strongly as Karl Llewellyn. In Llewellyn's view, it is not the constitution that legitimates government practice, but the reverse: practice legitimates the text—words in the constitution have force only insofar as they comport with the practices government actors actually find useful and employ in the everyday business of good governance, as they understand it.<sup>79</sup> As a result, Llewellyn contends, government officials not only are "the prime movers in preserving so much of the Constitution as is preserved," but also "arrange all amending of that Constitution."<sup>80</sup> "[T]he working Constitution," he goes on, "is amended whenever the basic ways of government are changed."<sup>81</sup>

Third, and perhaps most surprisingly, changes to the constitution may on this view be initiated—and ushered a great distance of the way toward permanence—through what amounts to unilateral action by constitutional actors. We normally think of constitutional amendments as implementing laboriously negotiated principles and compromises among the widest possible array of social

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75. GREENSTEIN, *supra* note 73, at 85, 99.

76. STRAUSS, *supra* note 56, at 121; Albert, *supra* note 16, at 1065.

77. Denning, *supra* note 14, at 211.

78. VOIGT, *supra* note 67.

79. Llewellyn, *supra* note 11, at 12.

80. *Id.* at 21.

81. *Id.* at 22 (emphasis omitted). Griffin has pointed out, correctly, that this overstates the power of practice to alter written constitutions: "In Llewellyn's theory, the working or unwritten constitution virtually swallowed the 'big C' Constitution whole. The unwritten constitution replaced the written and the Constitution became a set of practices without a clear relationship to supreme law." Griffin, *supra* note 12, at 367 (footnote omitted).

stakeholders.<sup>82</sup> In fact, informal constitutional change arising from alterations in official practice can occur when government officials simply begin to act in new ways that they happen to find desirable, and to do so without prior consultation or negotiation with other constitutional stakeholders. As Behnke and Benz argue, "Constitutional evolution is often initiated by unilateral action, by parliaments making laws in areas of contested responsibilities, by governments using their budgets to shift the allocation of resources or to intervene in competences of other governments."<sup>83</sup> In Denning's formulation, these kinds of actions may properly be understood as "claims of power" that constitute "'moves' made by the 'legislative and executive branches . . . that serve as precedents for future actions.'"<sup>84</sup> Changes in the constitutional allocation of power, in this process, are thus effected not through consultation and negotiation, albeit outside formal amendment processes, but by a process of unilateral seizure of new authority, followed by lack of resistance or by general acquiescence.

This process is not unfamiliar, but it is usually associated with the seemingly very different practice by which unwritten constitutions undergo change. In the British system, the constitution is comprised in part of "conventions"—"practices that supplement the constitutional text."<sup>85</sup> Because the content of the constitution is derived partly from practice, and practice may change, changes in practice can indirectly amend the constitution. Thus, constitutional amendment by convention can occur in this kind of regime when "a political practice is adopted and repeated, and gradually hardens over time."<sup>86</sup> Yet, as scholars such as David Strauss and Ernest Young have argued, a similar process can be observed within the U.S. constitutional regime either because constitutional meaning

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82. Again, this is a concept of constitutions rooted in the contractarian model. LOCKE, *supra* note 45; JOHN RAWLS, A THEORY OF JUSTICE 55-56 (1971).

83. Behnke & Benz, *supra* note 64, at 217; VOIGT, *supra* note 67, at 146.

84. Denning, *supra* note 14, at 211 (quoting JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995, at 92 (1996)).

85. Whittington, *supra* note 2, at 1850.

86. Albert, *supra* note 16, at 1069.

evolves in a continuous, incremental common law fashion,<sup>87</sup> or because what counts as "constitutional" in our system includes not just the constitutional text, but also "other legal materials" "outside the Constitution itself."<sup>88</sup>

Finally, if political actors are capable of precipitating informal constitutional amendment by changing their practices, they might do so in at least two different circumstances. One possibility is that official practice might undergo a process of evolution in which practices slowly change without any particular conscious direction.<sup>89</sup> This might occur when, for example, government officials respond to "changes to the environment within which the political system operates (including economics, technology, and demographics),"<sup>90</sup> or to large-scale shifts in social and political practices.<sup>91</sup> In these circumstances, Stephen Skowronek has observed, government officials attempt to adapt existing institutions and capacities to "an ever-changing environment."<sup>92</sup> Their goal, presumably, is not so much to alter the system as to keep it running and capable of achieving its original design goals in light of unforeseen changes in the operating environment. This process is in a sense the paradigm of common law evolution of constitutional meaning.

There is, however, a second possibility: political actors could alter their practices self-consciously<sup>93</sup> with the intention of deliberately changing the constitutional regime. Such actors might choose this route for entirely benign reasons; perhaps the existing constitutional regime provides tools to achieve its goals that are no longer adequate to the task, and officials wish self-consciously to introduce innovations or workarounds in the service of collective public goals that for some reason cannot feasibly be implemented through formal constitutional amendment. On

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87. STRAUSS, *supra* note 56, at 3.

88. Young, *supra* note 1, at 420, 456.

89. Pettit, *supra* note 7, at 24-25.

90. Lutz, *supra* note 35, at 242.

91. Levinson, *supra* note 34, at 699.

92. SKOWRONEK, *supra* note 11, at 10.

93. See Goodin, *supra* note 24, at 25 (observing that institutional change can arise by accident, by evolution, or by "intentional intervention" of "purposive, goal-seeking agents").

the other hand, political actors might also alter their practices opportunistically to achieve personal goals, or institutional ones that redound to their personal benefit. As Keith Whittington has argued, innovations of this nature (constitutional “constructions” in his terminology) “are made by explicit advocates, not by disinterested arbiters. Those who advocate a given construction expect to benefit from it.... Self-interest is an intrinsic part of the arguments.”<sup>94</sup>

#### IV. PRACTICE-DRIVEN CONSTITUTIONAL CHANGE IN THE AMERICAN STATES

Thus far, I have confined myself to illustrations and examples of constitutional change drawn from federal constitutional law because of their familiarity. Yet consideration of informal constitutional change on the federal level focuses on but a small and comparatively modest sample of often slow, incremental, and intermittent change. Broadening our view to include the subnational level reveals a very different picture: in the realm of American constitutional law, informal constitutional change of the practice-driven variety is commonplace, sometimes rapid, and in many cases dramatic in its scale and consequences.

Although examples could have been drawn from many states, I will focus here on New York, where practice-driven change to constitutional structures of governance has occurred on an astonishing scale. As we will see, practice-driven changes in New York have almost completely transformed the legislative process, substituting for a conventional scheme of open and accountable democratic representation one that is opaque, oligarchic, and almost entirely unaccountable. Practice-driven constitutional changes have also led to a remarkable transformation of the system of judicial selection contemplated by the New York constitution, at both the trial and appellate levels. This Part concludes with the story of how the governor of New York appropriated for himself the power to appoint his own successor, illustrating how a single, bold, unilateral change

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94. WHITTINGTON, *supra* note 11, at 210.

in executive practice quickly produced judicial ratification of the move, leading in turn to a rapid, dramatic alteration in received constitutional understandings.

A. Transformation of the Legislative Order: "Three Men in a Room" and the Expedient Message of Necessity

The current New York constitution was adopted in 1938.<sup>95</sup> Although it contains a few features that are distinctive among American state constitutions,<sup>96</sup> it is in its broad outlines a document that adheres to the conventional structural arrangements of American constitutional self-governance.<sup>97</sup> For example, it creates three branches of government, including a bicameral legislature whose members are elected from districts established throughout the state.<sup>98</sup> It also creates an independently elected governor, who exercises executive power, which, typical among the states, is shared with an independently elected attorney general and comptroller.<sup>99</sup>

The legislative process it establishes is thoroughly conventional and adheres to the standard American blueprint. Laws are to be made by the legislature. Proposed bills must be printed and placed "upon the desks of the members" for three days before enactment.<sup>100</sup> Legislative committees may be formed to study problems, craft responsive legislation, work out its details, and submit it for broader deliberative consideration within each chamber.<sup>101</sup> Either chamber may initiate legislation, and each may amend

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95. N.Y. CONST.

96. See, for example, the pioneering "forever wild" provision creating the Adirondack Preserve. N.Y. CONST. art. XIV, § 1.

97. By the late nineteenth century, American state constitutions largely converged on a common model for structuring the institutions of governance. James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31 (2014).

98. N.Y. CONST. arts. III-IV, VI.

99. N.Y. CONST. arts. IV-V. On the typicality of this arrangement, see G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTION* 121-122 (1998) and ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 303 (2009).

100. N.Y. CONST. art. III, § 14.

101. The New York constitution does not require committees, but mentions in the document show clearly that their existence is contemplated. See N.Y. CONST. art. VII, §§ 1, 3.

legislation proposed by the other.<sup>102</sup> Bills passed by the legislature are presented to the governor for signature or return, and in the latter case the legislature may repass the legislation by a two-thirds vote.<sup>103</sup> In short, the New York constitution contemplates a law-making procedure that shares the attributes conventionally associated with democratically representative government—namely, a process that is open, inclusive, and deliberative. In this procedure, the institution of legislative representation is designed to provide all the people of the state a voice and some agency in the formulation of state policies.

Actual practice, however, has deviated far from this model. Some time in the twentieth century, the power to study problems and formulate and enact legislation was transferred by changes in practice from the legislature as a body to three officials: the speaker of the Assembly, the majority leader of the Senate, and the governor. The degree of concentration of power is well described in a memoir written by a former legislator:

[A]lthough there are 212 legislators in Albany, just three men hold virtually all the cards; the Governor, the Speaker, and the Majority Leader, known as the Big Three. They determine the details of the budget.... They hire most of the staff, including those who draft most bills. The leaders also dispense committee chairs and membership assignments, assign office and office furniture, and run all the services that legislators rely on.... Should a member of one of the two houses author a piece of legislation, the leader decides which committee it goes to, whether it is passed in the committee, and when or even if it gets passed out for a (predetermined) vote on the floor.<sup>104</sup>

The phrase “three men in a room” is widely used in New York media coverage of the state capitol to describe the process by which all significant legislation, including the

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102. N.Y. CONST. art. III, § 12.

103. N.Y. CONST. art. IV, § 7.

104. SEYMOUR P. LACHMAN & ROBERT POLNER, *THREE MEN IN A ROOM: THE INSIDE STORY OF POWER AND BETRAYAL IN AN AMERICAN STATEHOUSE* 24 (2006).

state budget, is shaped and enacted by these three individuals.<sup>105</sup>

One might think that rank and file legislators have the inherent power to participate in the lawmaking process by simply behaving in the way that the state constitution contemplates they should behave—that is, by insisting on playing the participatory role that the constitution imagines, and by flexing their muscle to defend their role. This does not happen, however, apparently because generations of legislators have acquiesced in the reconstruction of the system: “When a leader sends a bill to the floor, legislators understand it is their job to pass it as is, without amendment or comment, and not a single bill goes down to defeat on the floor unless guided by the leader’s unmistakable hand.”<sup>106</sup>

The absolute control of the Big Three leaders has been strengthened by a longstanding and deeply entrenched practice severely distorting the constitutional tool of “messages of necessity.” The New York constitution provides:

No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage.<sup>107</sup>

The requirement that the text of bills be provided to legislators at least three days before a vote, like similar provisions added to many state constitutions adopted primarily during the nineteenth century,<sup>108</sup> “was aimed at preventing hasty, ill-considered, and one-sided

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105. See, e.g., Matthew Hamilton, “Three Men’ Deaf to Calls for Change, TIMES UNION (Mar. 6, 2015, 10:50 PM), <http://www.timesunion.com/tuplus-local/article/Three-men-deaf-to-calls-for-change-6120266.php> [<https://perma.cc/9V23-C5GS>].

106. LACHMAN & POLNER, *supra* note 104, at 45.

107. N.Y. CONST. art. III, § 14.

108. TARR, *supra* note 99, at 117-21; WILLIAMS, *supra* note 99, at 257-67.

legislation.”<sup>109</sup> The requirement of advance availability promotes legislative contemplation, deliberation, and participation, and is clearly intended to improve the quality of state legislation. At the same time, the inclusion of a bypass provision allowing faster consideration of urgent bills “enables the state government to respond quickly when extraordinary circumstances” make the usual period of delay unwise.<sup>110</sup>

In practice, however, the necessity exception has severely eroded the rule. By the early years of this century, upwards of ten percent of all legislation was enacted subject to a message of necessity.<sup>111</sup> The majority of these messages of necessity were issued in the waning days of the legislative session,<sup>112</sup> a time of year when the New York Legislature enacts much of its most important legislative agenda. Some of the most controversial legislation, which could most benefit from deliberative study and reflection, is rammed through during the closing hours of the session. The following account gives a sense of how this process unfolds:

On July 11, 1996, in the last days of the session, the Legislature printed a 541-page, \$18 billion bill covering Medicaid, mental health, and prisons—and passed it the very next day. It printed a 463-page, \$12 billion bill covering education and labor matters, and passed it on the same day. It printed Governor Pataki’s 53-page, \$1.75 billion Environmental Bond Act on July 12, and passed it on the thirteenth.<sup>113</sup>

More recently, in 2013, the NY SAFE Act—a significant piece of gun control legislation supported by the governor—was printed and laid on senators’ desks at eleven at night, accompanied by a message of necessity from the governor.<sup>114</sup> Twenty minutes later, the state senate approved the legislation.<sup>115</sup> The next day, the state assembly

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109. Peter J. Galie & Christopher Bopst, “It Ain’t Necessarily So”: The Governor’s “Message of Necessity” and the Legislative Process in New York, 76 ALB. L. REV. 2219, 2221 (2013).

110. *Id.*

111. *Id.* at 2234 tbl.1.

112. *Id.* at 2222.

113. LACHMAN & POLNER, *supra* note 104, at 45-46.

114. Galie & Bopst, *supra* note 109, at 2262.

115. *Id.* at 2263.



followed suit, though it did manage to reflect on and discuss the bill for a few hours before passing it.<sup>116</sup>

The effect of this practice is to further consolidate control of the state's legislative apparatus in the hands of the three leaders. By denying rank and file legislators access to the legislation they are asked to approve, the leaders make dissent difficult and disruptive to the orderly management of the chambers. Deals struck behind closed doors by the leaders are thus given the best possible chance to sail through the legislature without being questioned and without significant opposition from an uninformed and compliant body.

One might think that this practice might be thwarted by judicial review of the grounds offered by the governor to support his claims of necessity, but this has not happened. In 2005, the Court of Appeals, New York's highest court, put this possibility to rest by holding that "the sufficiency of the facts stated by the [g]overnor in a certificate of necessity is not subject to judicial review."<sup>117</sup> The withdrawal of the courts, then, makes this an instance where a change of constitutional practice initiated by government officials has, for all intents and purposes, altered the constitutional plan of governance.<sup>118</sup>

#### B. Alteration of the Constitutional Scheme of Judicial Selection

Until the mid-nineteenth century, judges in New York were selected by gubernatorial appointment. The constitution of 1846 ended this system in favor of popular elections for all judicial offices.<sup>119</sup> This change in practice occurred as part of a Jacksonian wave of reform that swept

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116. *Id.* at 2262-63.

117. *Maybee v. State*, 828 N.E.2d 975, 977 (N.Y. 2005).

118. See Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797, 800 (1987) ("[L]egislators often do not follow the legislative procedure requirements of the state constitution, particularly where the legislative proposal is controversial and the courts do not enforce the constitutional restriction . . .").

119. PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 128-29 (1991) [hereinafter GALIE, *THE NEW YORK STATE CONSTITUTION*]; PETER J. GALIE, *ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK* 105 (1996) [hereinafter GALIE, *ORDERED LIBERTY*].

the nation,<sup>120</sup> a movement embracing “a strident egalitarianism”<sup>121</sup> that professed “an appreciation of the common man”<sup>122</sup> and his capacity for intelligent and virtuous democratic self-rule.<sup>123</sup> In New York, however, the switch to an elective judiciary responded just as much to a belief that the state’s governors were dispensing judgeships as political patronage,<sup>124</sup> resulting in the appointment of judges who were either unduly beholden to the governor, or corrupt in that they had obtained their positions by performing service to the governor or his party to get their jobs.

Accordingly, the New York constitution provides that justices of the general state trial court, known as the New York Supreme Court, shall be elected.<sup>125</sup> Under the constitutional plan, supreme court justices are elected as any other officials are elected—they are “chosen by the electors of the judicial district in which they are to serve.”<sup>126</sup> The explicit reference to “choice” by “electors” affirms the obvious: judicial elections are meant to be competitive affairs in which the electorate is presented with a choice of candidates and then selects its judges by voting. The obvious purpose of such a system is the same as for any election: to permit the people to select from among the candidates the ones they deem, by whatever standards they choose to apply, to be best qualified.

Changes in practice, however, have made the system of judicial elections into something quite different. Elections in New York are partisan, and in New York, as in other states, an elaborate statewide party apparatus identifies, recruits, develops, and ultimately nominates and supports party candidates for elective office. For most offices, New York’s electoral system runs as might be expected: each party nominates a candidate for each office, and those candidates

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120. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714-25 (1995).

121. HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 5 (1st ed. 1990).

122. GLYNDON G. VAN DEUSEN, *THE JACKSONIAN ERA: 1828-1848*, at xi (1959).

123. ROBERT V. REMINI, *THE JACKSONIAN ERA* 26 (1989).

124. GALIE, *ORDERED LIBERTY*, *supra* note 119.

125. N.Y. CONST. art. VI, § 6(c).

126. N.Y. CONST. art. VI, § 6(c).

then compete for the office by campaigning, typically with the support of their party. In judicial elections, in contrast, a different system prevails. Instead of mounting competitive elections by choosing their own candidates and running them against one another, party leaders cut cross-endorsement deals across district lines.<sup>127</sup> As a result, many judicial candidates, perhaps most, run uncontested in their own districts, endorsed by both major parties (and often by some of the minor parties as well). As the editorial board of one metropolitan newspaper recently described the process:

[I]n New York, . . . voters have virtually no influence over the selection of judges. Leaders of the local Democratic and Republican parties decide between them who they want on the bench, often demand cash from the hopefuls, then crassly and openly agree to endorse the other party's candidates. . . . Yes, voters ultimately cast their ballots for judges, but the political manipulation of the system renders their efforts as little more than formality. The decision has been made for them.<sup>128</sup>

Thus, in New York, the system contemplated by the state constitution has been dramatically altered by changes in the practices of elite officials; a system of competitive democratic elections has been replaced by one in which the selection is performed by party officials who remain effectively insulated from democratic accountability.

For its highest court, the Court of Appeals, New York employs a different system—one of merit selection—yet this system, too, has wandered far from its original premises following changes in official practice. For many years Court of Appeals judges, like other state judges, were elected. By 1977, however, dissatisfaction with the “unseemly spectacle of expensive, bitterly contested, partisan elections for seats

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127. Opinion, *Party Leaders Are Once More Conniving to Deprive Voters of a Choice for Judge*, BUFFALO NEWS (Sept. 1, 2015, 12:01 AM), <http://www.buffalonews.com/opinion/buffalo-news-editorials/party-leaders-are-once-more-conniving-to-deprive-voters-of-a-choice-for-judge-20150901> [https://perma.cc/R4PX-WE DV].

128. *Id.*; see also Joseph Popiolkowski & Robert J. McCarthy, *Sedita, Colaiacovo Rubber-Stamped for State Supreme Court Judgeships*, BUFFALO NEWS (Sept. 28, 2015, 9:09 PM), <http://www.buffalonews.com/city-region/sedita-colaiacovo-rubber-stamped-for-state-supreme-court-judgeships-20150928> [https://perma.cc/5D9M-WG29].

on the highest court in the state”<sup>129</sup> led to amendment of the New York constitution to implement a new system for selecting judges of the Court of Appeals, one based on merit. This amendment provided the current system, in which judges are appointed to the Court of Appeals by the governor, but the governor is restricted in his possible appointments to candidates forwarded by a newly created governmental agency, the Commission on Judicial Nomination. As in systems of lower-level civil service employment, the Commission’s role is to serve as an impartial filter to identify from among New York’s thousands of lawyers, public officials, and public figures the very best candidates. By this method, the New York constitution attempts to avoid burdening nominees with the obligation to campaign for office, while simultaneously blocking the patronage abuses of the early nineteenth century and ensuring that the governor appoints only judges of the highest ability and integrity.<sup>130</sup>

It seems clear, in this system, that the function of the Judicial Nominating Commission is to scour the state for the best possible talent in order to ensure that New York’s highest court is populated exclusively by the most capable lawyers in a state with an enormous depth of legal talent. Yet the actual nominating practices of the Commission and appointment practices of a series of governors have, at least until very recently, converted the system into something rather different. Between 1979 and 2010, the Commission forwarded 160 nominations for twenty-four vacancies.<sup>131</sup> Of the nominees, 112 (70%) were former or sitting New York judges.<sup>132</sup> On twenty-one of these twenty-four occasions (87.5%), governors appointed a sitting judge to the state’s highest court.<sup>133</sup> Thus, although the current method of selecting Court of Appeals judges was designed to be wide

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129. GALIE, *THE NEW YORK STATE CONSTITUTION*, *supra* note 119, at 339.

130. James A. Gardner, *New York’s Inbred Judiciary: Pathologies of Nomination and Appointment of Court of Appeals Judges*, 58 BUFFALO L. REV. DOCKET 15, 20 (2010).

131. STATE OF N.Y. COMM’N ON JUDICIAL NOMINATION, CANDIDATES NOMINATED FOR APPOINTMENT TO THE NEW YORK STATE COURT OF APPEALS: 1979 TO PRESENT (2015), <http://www.nysegov.com/cjn/assets/documents/CJN%20Nominees%20for%20Court%201979%20to%20present.pdf> [https://perma.cc/D5AW-L6CZ].

132. *Id.*

133. *Id.*

open and based on merit, the selection process as it has actually evolved in practice is neither. It has instead degenerated into a fundamentally closed competition among a very small number of sitting, experienced lower court judges. It has become, in other words, a process not of judicial appointment, but of judicial promotion.

In the last few years, it must be said, the Nominating Commission appears to have widened its net, and the present governor has shown himself willing to broaden the court's membership to include individuals with a wider variety of backgrounds. In 2013, the Commission nominated and the governor appointed a law professor without significant prior judicial experience.<sup>134</sup> And in 2015, the Judicial Nominating Commission reported out a list of nominees to fill a vacancy in the chief judgeship that, remarkably, did not include a single sitting state judge.<sup>135</sup> Thus, practice seems to be changing again, this time to bring the process more into line with what appears to have been its founding intentions. . This shows not that practice changes moving a constitution away from its starting point are subject to some kind of inherent gravitational pull bringing them back to their roots; rather, it shows only that constitutional change effectuated by alterations in official practice may be both continual and lacking in long-term stability.

### C. Changes in Practice Eliciting Judicial Ratification: Appointment of the Lieutenant Governor

In 2008, New York Governor Eliot Spitzer resigned from office.<sup>136</sup> Pursuant to the New York constitution, the Lieutenant Governor, David Paterson, assumed the

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134. Although Judge Jenny Rivera was not appointed directly from the state's lower courts, she did serve for one year as an administrative law judge for the New York State Division of Human Rights. *Honorable Jenny Rivera*, ST. N.Y. CT. APPEALS, <http://www.nycourts.gov/ctapps/jrivera.htm> [<https://perma.cc/QT5S-HTTM>] (last visited Apr. 10, 2016).

135. *The Commission on Judicial Nomination Releases List of Seven Nominees In Connection With Upcoming Vacany*, ST. N.Y. COMMISSION JUD. NOMINATION (Oct. 15, 2005), <http://nysegov.com/cjn/assets/documents/PR010116.pdf> [<https://perma.cc/7UVV-UVK2>].

136. *Skelos v. Paterson*, 915 N.E.2d 1141, 1142 (N.Y. 2009).

governorship, leaving the lieutenant governorship vacant.<sup>137</sup> In those circumstances, the constitution provides:

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.<sup>138</sup>

Because the state senate was at the time deadlocked 31-31, it had been unable for some time to name a president pro tempore.<sup>139</sup> Indeed, the senate had been paralyzed for fifteen months and unable to pass any of the governor's legislative agenda.<sup>140</sup> Governor Paterson, eventually growing impatient with the deadlock and seeking an ally to cast tie-breaking votes in the senate, in 2009 announced he was appointing Richard Ravitch, a private citizen with a long history of valuable government service, to the office of lieutenant governor.<sup>141</sup> The governor sought neither electoral ratification nor senatorial confirmation of this appointment.<sup>142</sup> This marked the first time in New York history, under a succession of constitutions dating back to 1777, that a governor ever claimed this power.<sup>143</sup> Ten previous vacancies in the lieutenant governorship had been filled by various means, but never by gubernatorial appointment.<sup>144</sup>

The reasons for this tradition seem obvious. Those who hold significant power in representative democracies are generally thought to require at least some form of democratic pedigree, and the more power they exercise, and the more independently, the stronger the required pedigree. Most typically, holders of high office in the United States are either directly elected or must be confirmed by vote of a

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137. N.Y. CONST. art. IV, § 5.

138. N.Y. CONST. art. IV, § 6.

139. *Skelos*, 915 N.E.2d at 1142.

140. *Id.* at 1147.

141. *Id.* at 1142.

142. *Id.* at 1146.

143. *Id.* at 1152 (Pigott, J., dissenting).

144. *Skelos*, 915 N.E.2d at 1152.

democratically elected legislature or legislative chamber.<sup>145</sup> This is especially true in the American states, where high executive officials other than the governor and lieutenant governor generally are directly elected. Governor Paterson's departure from this pattern was especially surprising in that the lieutenant governor could eventually have gone on to assume the governorship, meaning that the governor could not only have chosen his own successor, but have chosen a successor who had never been approved by either the people or their elected legislators.

The governor's decision was challenged in court, but in a surprising 4-3 decision, the Court of Appeals upheld the appointment, ruling that a state statute permitting the governor unilaterally to fill vacancies in executive offices applied to vacancies in the lieutenant governorship.<sup>146</sup> In a forceful dissent by Judge Eugene Pigott, three judges thoroughly rejected these arguments, holding that succession to the lieutenant governorship was regulated by the constitution, not by statute, and complaining that "neither the Governor nor this Court can amend the Constitution."<sup>147</sup> Yet that is probably the best explanation for what actually happened. A government official, faced with new and unusual circumstances that in his judgment impaired his ability to do his job adequately, responded by unilaterally deviating from longstanding practice. Other officials resisted, and counter-moved by going to court, but the court rejected the challenge. As a result, a change in practice produced not just a change in the meaning of the constitution as interpreted privately by one official and his allies, but also a change in the document's public meaning.

## V. CONCLUDING REFLECTIONS: ARE THERE LIMITS?

The magnitude of the changes discussed in the previous part, and their stark incompatibility in some cases with any reasonable account of the state constitutional plan, raise

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145. The one great exception that proves the rule—the office of president—is filled by indirect election by what was intended to be essentially a kind of constituent assembly, itself having a pedigree deemed democratically sufficient by the states. U.S. CONST. art. II, § 1, cl. 2.

146. *Skelos*, 915 N.E.2d at 1142.

147. *Id.* at 1157 (Pigott, J., dissenting).

important questions about whether practice-driven constitutional change can be limited, and if so, by what means and to what extent. In principle, the most obvious potential constraint on practice-driven change is judicial review. Most constitutional democracies today employ some kind of constitutional court to police the boundaries of the state's constitution.<sup>148</sup> Yet reliance on courts to constrain practice-driven changes to the constitution may well be misplaced. Judges, after all, are also government officials who owe their offices to the same constitutional regime as executive and legislative officials, and who must pursue the same set of constitutionally prescribed goals, under the same circumstances, as their colleagues in other branches. This means that courts are subject, and may well respond, to the same trends and conditions that induce officials in other branches to alter their practices. Constitutional innovation by executive and legislative officials aimed at more effectively pursuing universally acknowledged goals of the constitutional regime may thus be the kind of innovation that constitutional courts are least likely to impede.

Moreover, experience suggests that courts may be susceptible to being worn down over time by their counterparts in the executive and legislative branches. When conditions change in ways that really do make certain aspects of the extant constitutional regime obsolete or maladaptive, executive and legislative officials may attempt innovative alterations in long-settled constitutional practice. Courts may initially resist such changes. But when these officials do so repeatedly, and especially collaboratively, over long periods of time, emphatically insisting over and over that constitutional practice must change to meet current exigencies, courts may well capitulate. The U.S. Supreme Court, to take a prominent example, for a time resisted efforts by Congress and the President during the New Deal period to enact expansive new federal regulatory and spending programs.<sup>149</sup> But when Congress and the

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148. Ran Hirschl, *The Strategic Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS*, *supra* note 2, at 157, 157.

149. See, e.g., *R.R. Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalidating provisions of the Railroad Retirement Act of 1934); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating portions of the National



president continued to pass similar legislation year after year, making increasingly clear their belief in the urgency of the situation facing the nation, the Court eventually capitulated. The famous "Switch in Time" was not the result merely of a change of heart among some of the Justices, nor was it a purely defensive response to President Roosevelt's aggressive threat to pack the Court. It was also to a great extent an awakening to the fact that what other elected officials had been saying for years was true, and that a reconsideration of the scope of national power truly was required if the nation was to survive the crisis presented by the Great Depression.

Another possible source of constraint on the scope of practice-driven constitutional change is a popular check. Elected officials who alter constitutionally grounded practices too far or too freely—or who tolerate excessive alterations by their lower-level subordinates—could be held accountable at the polls.<sup>150</sup> Yet this seems unlikely. Subnational politics is of notoriously low salience in the United States; voters are uninformed and indifferent, and they turn out in low numbers for state and local elections.<sup>151</sup> If voters largely hold themselves aloof from subnational politics even when substantive policy is at stake, it may be too much to ask that they regularly and carefully monitor and police the official practices employed by state government officials. Moreover, unlike perhaps the nineteenth-century electorate,<sup>152</sup> the twenty-first-century electorate does not seem to care much about the niceties of constitutional structure and procedure. For today's voters, outcomes seem to be the important thing, and how officials

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Industrial Recovery Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating portions of the Bituminous Coal Conservation Act of 1935 regulating wages and hours of mine workers).

150. As Madison put it, "A dependence on the people is, no doubt, the primary control on the government." *THE FEDERALIST* No. 51, *supra* note 5.

151. See, e.g., Voter Turnout, FAIRVOTE, [http://www.fairvote.org/voter\\_turnout#voter\\_turnout\\_101](http://www.fairvote.org/voter_turnout#voter_turnout_101) [<https://perma.cc/3FT2-7NYL>] (last visited June 11, 2016).

152. One of the signature characteristics of nineteenth-century American state constitutionalism is the repeated insertion into state constitutions of procedural limits on state lawmaking. TARR, *supra* note 99, at 121-22. WILLIAMS, *supra* note 99, at 303-04.

produce them seems to strike voters as of considerably less interest, if any.<sup>153</sup>

This analysis brings us back to Llewellyn, who, it will be recalled, claimed in the strongest possible terms that official practice controls and legitimizes the constitution rather than the other way around.<sup>154</sup> On this view, the only limit to practice-driven constitutional change would appear to be social: officials cannot unilaterally claim a constitutional warrant for behavior that exceeds the bounds of what society is willing to tolerate—that transgresses, one might say, the social constitution that undergirds the political one. Perhaps any practice that stands no possible chance of adoption by formal constitutional amendment also cannot successfully be smuggled into the constitution by informal means. But even if this proposition is correct, it would not necessarily point to an especially constraining limit on the scope of practice-driven constitutional change. What the citizenry is willing to tolerate may change considerably over time, and to the extent that officials seek to change their practices so as to pursue widely shared public goals, public opposition need not be expected.

If the standard mechanisms of constitutional policing do not seem promising for constraining practice-driven constitutional change, a final possibility is that limits might be achieved through structural constitutional design. One device that has long been claimed to stabilize constitutions at their design points is contestation—the deliberate introduction into the constitutional scheme of competition among holders of official power. In this arrangement, characteristic of separation of powers and federalism, “[a]mbition must be made to counteract ambition.”<sup>155</sup> The result is said to be a system in which the constraints of constitutional design are enforced not through a static process of promulgation followed by an expectation of compliance supplemented by third-party policing, but through a dynamic process in which a permanent struggle among government power centers produces a durable

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153. Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 137 (2004).

154. Llewellyn, *supra* note 11, at 12, 21-22.

155. THE FEDERALIST NO. 51, *supra* note 5.

stalemate at the desired equilibrium point.<sup>156</sup> In these contestatory systems, the scope of practice-driven constitutional change caused by any one actor could in theory be confined not by any inherent or socially imposed limitation, but by competitive resistance from other constitutional actors. Practice in such a system would change, but a kind of stability might be achieved if change were constantly driven back toward the constitutionally contemplated design point. In these circumstances, practice might still alter the constitution, and such change might be frequent or even constant, but it would in principle orbit permanently around a constant, constitutionally defined center of gravity.

The challenges of successfully executing such a plan are obvious merely as a matter of design, but they seem to be exacerbated by the possibility that changes in constitutional practice might erode the underpinnings of the system's own design foundations—they might, that is, undermine the incentives of officials to engage in the required contestation. It has often been observed that the competition between branches of the federal government contemplated by the constitutional scheme of horizontal separation of powers never really materialized.<sup>157</sup> Instead, competition was quickly supplanted by cooperation among the branches, particularly as a result of the unforeseen coordinating effects of party politics.<sup>158</sup>

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156. Thomas Schwartz, *Publius and Public Choice*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 31, 35 (Bernard Grofman & Donald Wittman eds., 1989); Ordeshook, *supra* note 3, at 204-05; ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 3 (2011).

157. LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* xi (4th ed. 1998). For a description of late twentieth century "norms of inter-branch cooperation within the national government," see Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups"*, 12 CORNELL J.L. & PUB. POL'Y 503, 505-13 (2003). For additional discussion, see James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN'S L. REV. 293 (2005) (discussing how democratic norms have altered the operation and effectiveness of the U.S. Constitution's structural backup systems).

158. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 268-70 (2000); E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 12 (1942).

These considerations suggest the conclusion—highly provisional to be sure—that practice-driven constitutional change is a significant force behind the evolution of constitutional substance; that it can be dramatic in its scope; and that mechanisms to confine it are difficult to design and unlikely to be very successful, especially over the long term.

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