Constitutional Norms, Their Necessity and Fragility[1]

Gerald J Postema, Professor of Philosophy, Emeritus

University of North Carolina, Chapel Hill

There is deep worry, expressed in the popular press and in a vast amount of recent scholarly writing, about the erosion or even the demise of democracy and the rule of law around the world. The worry is justified. One need look no further than the United States—and perhaps Brazil. Democratic institutions and the norms that give them life are openly, defiantly violated, with disastrous results for domestic and foreign policy and for democratic institutions themselves.

Yet, for those of us raised in the 1960s, talk of "norms" or "conventions" seems stuffy, old-fashioned, if not blatantly anti-egalitarian. Norms are for the "establishment." And everyone one knows that norms are meant to be broken, albeit discretely. One of the main characters in Graham Greene's novel expresses the view of the English upper class, and far beyond it. "Oh, it's not done, . . . but neither is adultery of theft or running away from the enemy's fire. The not done things are done every day, Henry. It's part of modern life."[2]

Adam Gopnik, writing in the *New Yorker* over three years ago, vigorously attacked what was already then a rising chorus of criticism of political leaders in the United States for their defiance of presidential and congressional norms. "Let us hear no more of norms," he wrote The challenges posed by the behavior of President Trump are not mere violations of decorum. It is not norms, but rather deep principles that are under attack.[3]

Gopnik is right that deep principles are threatened, fundamental values of the rule of law, democracy, and political equality are under attack. The challenge in the United States is as serious as I have seen in my life and arguably the most serious since we fought our Civil War over 150 years ago. Nevertheless, Gopnik is wrong to dismiss talk about norms in this connection. Concern about the sabotage of presidential and congressional norms

[1] Draft prepared for discussion in Thomas Bustamante's philosophy of law seminar. Please do not quote or cite without permission of the author. Portions of this text are drawn from "Failing Democracy," [ref]

[2] Graham Greene, *The End of the Affair* (New York: Penguin Books, 1962), 17.

[3] A. Gopnik, "Norms and Cliffs in Trump's America," *New Yorker*, Aug 3, 2017.

should be at the very heart of our worry about the viability of democracy. My aim here is to explain why.

Democracy and the Rule of Law

To begin, we must reclaim democracy from those who treat its institutions as sets of arbitrary rules to be manipulated for private gain, its norms and constraints as annoying obstacles in the way of achieving their goals, and commitment to them a strategy for suckers or a dispiriting confession of weakness. We must recover a deeper appreciation of the nature and moral demandingness of democracy. Several key features of democracy require our attention.

First, democracy is a species of what Aristotle called *constitutions*. The democratic *politeia* defines a mode of governance, a set of institutions by which power is constituted, exercised and constrained. But also, the democratic *politeia* is a certain kind of *polity,* an order of the public or common part of a community and an *ethos* widely practiced by its members. These two dimensions of the democratic *politeia* are intricately interwoven. It is for this reason that weakness in the political culture of a democratic polity, its ethos, saps the strength of the democratic constitution.

Second, democratic institutions are designed explicitly or purposed implicitly to serve certain values or principles. Democratic institutions can rightfully claim our allegiance only when it speaks for and seeks to carry out the demands of deeper principles of political morality. They must be judged fundamentally not in terms of the goods they promise to produce for their constituents, but in terms of the order they establish for citizens to relate to each other as co-members of the polity, that is, as equals.

Justice at its vital heart demands a political and social order in which people relate to each other as peers. Justice makes demands on the social and economic order, but it equally makes demands on the manner in which decisions aimed at securing conditions of just order are made and executed. Democracy is the mode of governance for citizens who seek a just community that they can share with other citizens, who also acknowledge the inescapable fact that in their polity there is a diversity of perspectives on matters of social and political justice. Deeply committed to justice themselves, democratic citizens recognize

that reasonable fellow citizens may be just as deeply committed to views of justice that diverge in fundamental ways from theirs. The principle of equality demands a public *politeia* in which citizens' diverse perspectives on justice can be uttered, heard, respected and in some meaningful way incorporated into the structure of the polity.

Democratic institutions seek to approximate the demands of this ideal of equality. It is not possible faithfully to respect the fundamental equality of all members of the polity while enacting unilaterally just one of the competing conceptions of justice. Unilateral determinations of the social order are by that fact alone unjust. Mutual respect demands that members of a polity accord each other an equal and substantial role in determining the social and political order, shaping its policies and monitoring their execution. Democracy, so understood, represents not a sullen concession to political weakness, but a willing and morally compelling practice and process by which those who are committed to competing perspectives on justice and its realization combine efforts to achieve a workable, responsible, and justice-oriented public world in which they can participate on the basis of mutual respect.

Third, governing power exercised democratically is deliberate and deliberative. It must be exercised through law and subject to law's rule. Thus, democracy depends crucially on the rule of law, on providing protection and recourse against the arbitrary exercise of power. Democracy requires that officials exercise power only through law, that elected officials be held accountable to the law and to norms of democracy. Mechanisms for holding elected officials accountable to the law and to democratic ideals, and practices that give the mechanism tensile strength, are vital to democratic structures of governance. These mechanisms enable and structure "horizontal accountability"—mutually constraining institutions within government—and "vertical accountability"—formal and informal arrangements by which a democratic public constrains the day-to-day exercise of power by public officials.

Constitutional Norms

Formal constitutions seek to define, structure, vest and limit political power. Constitution-makers might like to think that they can accomplish this task through the

careful creation and diligent maintenance of a written text and the formal institutions established by it. But keen observers of law at work in political communities remind us that even wisely constructed constitutional restraints on political power can be distorted into tools of arbitrary power if formal constitutional institutes and institutions are not enmeshed in a rich and robust *ethos* of accountability-holding. This *ethos* is a complex combination of commitments and conventions, of informal norms and practices to which responsible participants hold themselves and others accountable. Constitutional conventions and norms are nodes or relatively stable points in this dynamic network.

Constitutional conventions are but a part, albeit a very significant part, of what some constitutional scholars call "the unwritten constitution."[4] Following Whittington, I limit the scope of my reflections to those elements of constitutional practice that do not themselves fix the meaning of the constitutional text, although they often determine the boundaries of appropriate or required behavior within the four corners of the text. Constitutional norms typically supplement the text and sometimes circumvent it.

A few examples of what I have in mind will focus our attention. The Dutch and Norwegian governments are bound to step down if they lose majorities in a national election or are defeated in a no-confidence vote; yet there is no formal provision in their constitutions requiring such behavior.[5] In the American context, with which I am more familiar, the Executive Branch is governed by strong conventions prohibiting the President interfering in the regular operations of the Depart of Justice (law enforcement) and CIA; the independence of key administrative agencies (e.g., the Federal Reserve, the Security and Exchange Commission) is secured by protection of tenure of key officers who are only dismissible for cause;[6] Inspectors General hold several agencies accountable to existing law and norms; norms prohibit presidential self-dealing and require the president to put his or

[4] Akil Reed Amar, *America's Unwritten Constitution* (New York: Basic Books, 2012). Keith E. Whittington, "The Status of Unwritten Constitutional Conventions in the United States," *University of Illinois Law Review* 2013, 1847-70 (2013). Lawrence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008).

[5] I rely on Jon Elster, "Unwritten Constitutional Norms" (unpublished MS), https://perma.cc/YPn8-764G.

[6] A. Vermuele, "Conventions of Agency Independence," 113 C*olumbia Law Review* (2013), 1163-1238.

her assets in a blind trust.[7] Various specific norms work to create a spirit of mutual tolerance and forbearance amongst elected officials in the legislative branch.[8] None of these norms can be found in the text of the American Constitution or case law interpreting it; nonetheless, they are widely regarded as binding. Actions or policies may be (perhaps insincerely) claimed to fall within the four corners of the constitutional text and hence not unconstitutional, may nevertheless be manifestly *anti-constitutional*,[9] violating essential, albeit informal, constitutional norms.

It is widely accepted amongst legal scholars that "beneath the [formal constitutional] text is a world of institutional settlement";[10] the written constitution is underwritten by an extensive unwritten constitution. We cannot understand the office of the Presidency in the United States, for example, apart from this informal infrastructure, scholar insist.[11] But they also agree that this informal network of norms and practices is essential to the proper functioning of the government and its branches. "Law is not enough," writes one scholar.[12] Constitutional and intra-branch conventions render the indeterminate, often very abstract, constitutional text more determinate, fill in gaps, and define, direct and limit discretion that the constitution grants or leaves entirely unspecified. Conventions limit the exercise of powers formally granted to various branches of government, powers which if exercised to their lawful extreme would bring the government to the point of collapse.[13] Other conventions keep partisanship within bounds so that democratic government can function; they polish the rough edges of majority rule giving minorities some voice or influence in governance and some hope of exercising governing power in future.

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[7] Daphna Renan, "Presidential Norms and Article II," 131 *Harvard Law Review* (2018), 2187-2282. Neil S Siegel, "Political Norms, Constitutional Conventions, and President Donald Trump," 93 *Indiana Law Journal* (2017), 000-000.

[8] Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown, 2018), [ref]

[9] Siegel, "Political Norms," 000.

[10] Samuel Issacharoff and Trevor Morrison, "Constitution by Convention," 000 *California Law Review* (2020), 000.

[11] Renan, "Presidential Norms," 000.

[12] N. Siegel, "Law is not Enough," 45 *Ohio Northern University Law Review* (2019), 197-232.

[13] Issacharoff, Morrison, "Constitution by Convention," 000.

When the relationship between formal and informal institutions is broadly functional, constitutional conventions and informal norms turn parchment and promise into practice. Serving a democratic constitution, conventions work to realize democratic values over the medium and long term, softening stark majoritarian elements of the formal institutions, and giving minorities a stake in the on-going success of the democratic process. In circumstances of intense competition and conflict, where the stakes often are high, they give structure to practices of mutual recognition, and make trust and trust-worthiness visible. In the service of the rule of law, they provide mechanisms for tempering the exercise power and holding accountable those who exercise it. The rule of law, as I understand it, promises protection and recourse against the arbitrary exercise of power.[14] Conventions provide an essential resource for such recourse.

American Constitutional scholar, Lawrence Tribe, characterized constitutional norms and conventions as "dark matter," that, unseen, exerts enormous force on "ordinary matter" of constitutional law.[15] This metaphor is unfortunate, since, as I shall argue presently, it is crucial to the proper functioning of constitutional norms that they be relatively open in the public discursive activities of participants. Nonetheless, the metaphor captures the important fact that formal and informal constitutional norms and institutions are interdependent in important ways. Informal constitutional norms operate in the environment of, and take their focus and meaning from, the network of formal constitutional norms and values they purport to serve. Likewise, formal constitutions depend on the thick networks of informal conventions for effective functioning. However, we should recognize also that it is possible for the informal environment to be hostile to the formal constitution and its fundamental aims. Informal norms can be dysfunctional, ineffectively serving deeper democratic and rule of law values, or even working against them. Thus, formal democratic institutions can do the work for which they are designed only when complemented by compatible informal practices that more or less effectively

[14] Gerald J Postema, "Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law," in *Bentham's Theory of Law and Public Opinion*, edited by Xiaobo Zhai and Michael Quinn, Cambridge University Press, 2014, 7-39.

[15] Tribe, *Invisible Constitution,* 38, 149-51; D. Carolina Nunez, "Dark Matter in the Law," 62 *Boston College Law Review* (2021), 000-000.

serve underlying democratic values to which the constitution is dedicated. Moreover, this interaction is dynamic; changes in one can prompt or retard changes in the other.

The Nature of Constitutional Norms

Conventions are informal, practiced norms of a community, members of which are engaged in extensive and robust modes of interaction. A key to understanding the nature, dynamics and both the fragility and the resilience of constitutional norms, I believe, lies in understanding the idea of a normative practice. I will provide an analysis of normative practices presently, but first I offer a few remarks to orient our thinking about norms in general.

First, conventions are *norms*, that is normative standards *for* members of a group or community; they govern their interactions. They purport to guide actions of members by providing reasons for their actions, grounds for their judgments, and standards for evaluating and criticizing their actions and judgments and those of other members.

Second, they are norms *of* the community. They exist *as practiced* in that community. In this sense, they are distinct from universal moral norms, which may exist apart from their being practiced in any particular community. Conventions are observable in what I will call the "norm-responsive" conduct and attitudes of members. Norm responsive behavior involves conduct that is compliant with the norm (not merely consistent or in accord with it) and a range of responses to perceived compliant or deviant conduct. Norm-responsive behavior tends to generate norm-responsive behavior, affirming or challenging it. Manifest norm departures that meet with little or no response are at most departures from norms that are dying or already dead.

Third, the general convergence of behavior around the norm is not accidental. It is a critical condition of its existence. In addition, members comply not for their own part only, rather they see their conduct as something done in and by their community—something "we do," as they might say. Internalization of the norm is not a matter of an individual's private endorsement ("acceptance"), but rather it is a matter of participating in an activity characterized by a reciprocity of attitudes and actions.

Fourth, conventions are *informal* norms. Their standing ("validity"), content and force derive from being embedded in the practice of a group or community of actors, rather than in activities of formal institutions that create, change and enforce norms. For the most part,

constitutional conventions exist, thrive, or struggle for existence, apart from formal institutional endorsement and enforcement.

This lack of formal underwriting has led some theorists to regard conventions and norms as especially fragile. Breached norms burst like soap bubbles, Jon Elster maintained,[16] unlike legal rules that survive regular violations due to their incorporation in a formally recognized system.[17] But Elster is surely mistaken. Social norms generally, and constitutional norms in particular, are often resilient, resistant to deviations. Their existence, like their content and force, depend on the response of the norm-community to the deviations.

Finally, the natural habitat of conventions is a social context characterized by dense and meaningful webs of interaction among members of the community. Their actions and expectations, and thus their deliberations, are interdependent in significant ways. Conventions are not merely rules typically followed by members of a group; they are relatively stable nodes in a network of common normative activity. Moreover, conventions tend to be internally connected—they hunt in packs—and their meaning or content and their normative force depend on the relationships that exist among conventions in a more or less complex normative practice. This is especially true for constitutional norms, which exist in a complex network of informal and formal norms, informal practices and formal institutions.

This network dependence of norms is a source of strength and resilience, but also of potential weakness. Departures from specific norms in the network can have very different effects depending on the nature and circumstances of the departures and the role the norms play in the network. We can think of norm departures as endogenous shocks to the network equilibrium. If a relatively minor norm is violated, or the norm community responds adequately either to contain or to justify it, the equilibrium may not be disturbed at all. If the departure is more serious, but the network is relatively strong, the departure may destabilize the network somewhat but it can restore the equilibrium with only small changes or no change at all. However, departures from load-bearing norms, especially when repeated frequently, and with manifest disregard for the norms and the values they purport to serve can have a serious destabilizing effect, not just on the particular norm, but on the network in general, especially when the network itself is not robust. That is to say,

[16] Elster, "Unwritten Constitutional Norms," 000.

[17] Or so H.L.A. Hart argued in *The Concept of Law* [ref]

departures from norms do not necessarily portend death of the norm, let alone the system of which they are a part, but departures can undermine norms and can have an even wider effect on the (constitutional) system in general.

Normative Practices

The discussion thus far suggests that norm behavior contributes to and is subject to what seem to be broad empirical forces of some kind, but this is misleading, for the forces are in deep and important ways normative. This is because the kind of norms we have now in view are embedded in complex normative practices. To understand these norms, especially constitutional norms, we need to look more closely at the distinctive features of normative practices.[18]

Unlike formal rules or norms, conventions are concretely practical; they arise from and are accountable to conduct that is part of a normative practice. What is done—the convention *deed*—is open to assessment according to standards of competent performance. This conduct is common in the sense that it is oriented to other members of the community. Thus, what is done—what the behavior amount to—is a function of how it is taken up by others, how they understand it and respond to it. The relevant response is not a subjective attitude of the responder, but rather a matter of how the conduct, and the standard of performance by which it is assessed, figure in practical deliberation of the agent and other members of the community. That is, what is done is a function of how the conduct fits into a *network of reasons.*

Thus, the practice is essentially *discursive*; its standards can be given articulate expression. The nature of norm-responsive conduct—what is done and responses to it—take discursive form. The conduct has meaning in light of the norms and the reasons they give to the actor and those who observe it. Norm-responsive conduct is not merely resisted or applauded; it is assessed, challenged, criticized or justified. It is conduct for which an account can be given and for which an account may properly be demanded.

Participants in a normative practice undertake commitments to judge performances (as apt or correct, mistaken or wrong), to act according to those judgments, to challenge the conduct of themselves and others, and to recognize appeals to these judgments in vindication of their own or other member's conduct. These commitments are not a matter

[18] For a more general discussion, see Gerald J. Postema, "Custom, Normative Practice and the Law," *Duke Law Journal* 62 (2012), 707-38.

what some people say or think, the attitudes they take, but rather involve taking responsibility for their own actions and judgments and recognizing the standing of others to hold them to this responsibility. The practical meaning of the behavior, the status of the performance, and of the norm by which the performance is judged, is determined by that to which one is properly held accountable. Thus, the key to understanding the conditions of existence, the content and the normative force of conventions lies in recognizing the role they play in networks of practical deliberation and accountability.

Conventions claim normative force, that is, they claim to offer reasons for action. They not only identify eligible conduct, but also mark it as *to be done*. Sound conventions may be "arbitrary" in the limited sense that they are path-dependent and could have been otherwise, but they are not by that fact alone pointless. Their normative force depends a trio of factors: (1) the extent of compliance with the norm in the practice community, (2) the values they purport to serve, and (3) the effectiveness of their service. Thus, constitutional conventions may not be optimal, but they will be normatively strong if they adequately serve compelling democratic or rule of law values. The conventions may be, and be acknowledged to be, suboptimal such that other conceivable norms might better serve these values, *if they were established*. But conventions have the distinct virtue of practiced existence; conduct, deliberation and accountability are oriented by and to them. They may remain in place and still have normative force if no better arrangement is likely to secure enough conviction and compliance to do the work of serving their underlying value. This does not preclude reform of the conventions, but where the values to be served are compelling, reform must take the form of getting the practice community to coalesce around a new or revised norm.

Conventions are practice-dependent and the practice is characterized by mutuality. Mutual expectations of norm-responsive conduct, including compliant behavior, is a necessary condition of a convention's normative force. The grounds for conforming to them essentially include the fact that they are widely practiced. However, the mutuality characteristic of normative practices goes beyond expectations about the conduct of others; it also involves taking some responsibility for others' conduct as well as for one's own. That is to say, participants take responsibility for holding others accountable for their conduct. Apparent departures are not merely to be regretted, they must be resisted.

The normative force of a convention may be weakened or lost if it fails to serve its underlying value, does so ineffectively, or the value it purports to serve cannot be reasonably sustained. In addition to suboptimal conventions, it is possible for there to be

morally bad conventions. They may remain be in force—practiced in a community—but s lack genuine normative force. Their claim to normative force is empty.

If the above is playing on the right ball field, then determining the existence and content of a convention is a complex, inescapably normative and discursive matter. Conforming conduct is an important part, but, as we have seen, the norm-relative meaning of the conduct depends on uptake, and uptake is a matter of the role that the conduct plays in the relevant network of reasons and accountability. It is important to recognize that the normative practice, not any individual's, or collection of individuals', beliefs about the practice determine the existence or content of a convention. So, whether a convention has place in that network is settled by *argument* demonstrating that it has a proper place, and such arguments will involve assessments of compliance, proper and competent responses to apparently convention-relevant behavior and the relations the alleged convention may bear to other conventions. Empirical evidence of patterns of behavior will be included in the case for the existence and content of the convention, but it can never suffice.

Thus, determining the existence, meaning and normative force of constitutional conventions is a complex discursive matter. They will get their force, in part, from the role they play in the informal constitutional practice, its networks of practical deliberation and accountability, and that, in turn, is influenced by the broader constitutional norms and values—democratic values and norms of the rule of law—we expect of formal constitutional institutions to serve. Likewise, the effect of departures from constitutional norms will depend on (1) the seriousness with which participants take responsibility for their practice, (2) the extent to which others engage in the deviant conduct, (3) the nature and extent of the response of other practice participants, (4) the nature and plausibility to other participants of the claims deviators make in defense of their conduct, and (5) the values to which participants appeal when holding deviators accountable for their conduct.

Challenges of Responding to Norm Challengers

Social norms are always in flux; they are mortal. At some point in time they are born, over time they mature, later they die—they go out of existence or they lose their salience and fade into the horizons of practical deliberation. Typically, conventions emerge, mature, strengthen, change, and wither in the process of use of the conventions—through conduct meant to conform to or evade the conventions, to endorse, enforce, or challenge them; through criticism of the conduct, through acknowledgement and assessment of it and holding their authors accountable. Whether conduct is convention-conforming, convention-

deviating, or convention-changing does not depend only on the intentions of the agent, but it depends crucially on how that conduct it taken up.

Thus, persistent violations over time can bring about the death of norms. Yet, norms can survive violations, because their viability and normative force depend on more than compliance. They depend also on the critical engagement of participants in the practice in understanding, interpreting, and applying the norms; and on their willingness to hold violators accountable for their deviations. Norms change through a combination of altered expectations of compliance and changed understandings of the norms' content or scope, or of the values that they are meant to serve. Violations are cause for concern, but they alone do not weaken or destroy such norms. Whether they undermine norms depends on their reception and the critical response to them.

Thus, a key responsibility of participants in normative practices serving worthy values is to hold fellow participants accountable to the norms and conventions of the practice. A fundamental demand of practices committed to democracy and the rule of law is the mutual responsibility to hold those entrusted with political power accountable to the formal and informal norms and conventions of democratic practice. Well before clear signs of democratic deterioration emerge, responsible participants in democratic practices seek publicly to determine whether realized democratic norms are honored, defied or challenged, and if challenged, whether the direction of change is truly in the spirit of democracy and the rule of law.

Defiant or deliberate deviations from recognized norms provide further and more serious challenges to norm defenders. We can usefully distinguish three types of deliberate deviators from established norms: norm *infringers*, norm *entrepreneurs* and norm *saboteurs*. Norm infringers depart from the norm, but do not intentionally challenge it. Norm entrepreneurs challenge the norm in hopes of reforming it. Norm saboteurs either seek to deal a death blow to the norm or are indifferent to its continued existence.

Norm infringers are mindful that their conduct violates a norm, but seek to justify their deviation by appeal to other, weighty principles or values that, in the circumstances, override compliance with the norm. Since norms rarely command unconditional adherence, the behavior of norm infringers is not likely fundamentally to threaten the

violated norm, although it may change the norm community's understanding of its normative force. The norm community, in its quotidian activity of holding co-members accountable will assess the infringer's challenge.

Norm entrepreneurs pose a different set of challenges. Rarely are norms "created," but some actors may seek radically to alter a given norm in the hope of replacing it with a better model. *Ex iniuria* ***non*** *ius oritur* is sometimes said to be a principle of international law.[19] But norm entrepreneurs invoke its contrary, *ex iniuria* ***ius oritur****.* Although the violation itself will not change the conventional "*ius*," it can initiate a process of change. Again, much depends on the responsible, discursive uptake by other members of the norm community. Deviant behavior cannot itself unravel the convention let alone usher in a replacement; everything depends on the activity or inactivity of other members of the community.

The conduct of norm entrepreneurs poses a set of complex challenges to responsible members of the norm community of a democratic polity. Responsible members recognize that existing democratic institutions, both formal and informal, are imperfect and often gravely so. So, they are not in principle opposed to reform and improvement of those institutions. However, it is difficult to determine in real time when changes amount to welcome reform of imperfect democratic practices. Moreover, not every change that appears to be an improvement moves the practice toward its ideal; neither does every apparent movement away from the ideal actually cause a weakening of the practice.[20]

Yet, fidelity to democratic institutions and values—faithful participation in democratic practices—involves critical engagement, not uncritical submission or merely reflexive sanctioning of perceived violations. Existing norms often fall short of effectively realizing

[19] See Antonio Cassese, "*Ex iniuria ius oritur*: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of International Law* 10 (1999), 23-30; Sherman L. Cohn, "Ex Injuria Non Jus Oritur: A Principle Misapplied," *Santa Clara Lawyer* 3 (1962), 23-42.

[20] Gerald Gaus, *The Tyranny of the Ideal* (Princeton: Princeton University Press, 2016), 61-74. Gaus perceptively discusses "smooth" versus "rugged" reform landscapes . Lust and Waldner, ("Unwelcome Change," 6) give examples to suggest that the improvement landscape for democracies may be rugged in Gaus's sense.

democratic values. Aware of this shortfall, citizens may even be inclined to cheer rather than oppose breaches of constitutional norms, especially when the violations are public and unapologetic. Committed to faithful participation in democratic practices, they may reasonably see such public challenges as creating opportunities for renegotiating imperfect constitutional norms. Fidelity demands of them a subtle understanding of democratic practice, of the values of democracy and the rule of law, of effective means of serving them. But they will also be mindful of rallying a sufficient number of other norm community members around an alternative norm that promises to serve these values more faithfully. They recognize that undermining an existing norm without a viable alternative in the wings threatens the very values they wish to serve.

They must also recognize that constitutional norms hunt in packs. Norms work because they work together; or they fail because they work against each other. In some respects, this gives constitutional norms tensile strength, but challenges to one such norm can also reverberate throughout the system, causing unexpected and potentially unwelcome adjustments. Reform-minded challenges to constitutional norms that fail to give serious attention to replacing them with revised norms can open the door to practices poisonous to democracy. The calculus is complex; the constructive project is difficult; both are vital to success of the norm entrepreneur's vision.

Our constitutional practice needs one further convention. We need a way of publicly distinguishing the activities of norm infringers and norm entrepreneurs from the more radical and potentially far more destructive norm saboteurs. The former support democratic institutions, albeit perhaps reformed in some way; the latter seek the demise of these institutions. Norm saboteurs threaten democratic institutions, but they also threaten the democratic polity. Many find the actions of norm saboteurs not just harmful, but morally offensive, indeed morally outrageous. Saboteurs not only disrespect law or the constitution; they parade in bright colors their disrespect for partners in the norm community. They spit in the face of those who have joined together to produce and reproduce the infrastructure of democratic constitutional and rule-of-law values. They scoff at the trust the norms enabled and expressed. Norm entrepreneurs, despite their manifest violations of norms, adopt a different orientation. They still regard themselves as

partners in the pursuit of democratic values; they challenge specific norms but not the recognition, respect and trust that those norms enable and express. It is important for the long-term health of the democratic polity and the democratic institutions to which it is devoted that the aims and orientations of norm entrepreneurs and norm saboteurs be publicly distinguishable.

Here, the publicly discursive nature of normative practice offers some aid. We can demand that the reasons articulated in defense of norm-defying conduct be of a kind that the norm community, perhaps the entire polity, can recognize as publicly reasonable, albeit perhaps misguided or insufficient. We also need something to enable the relevant public to resist the judgment that the defenses offered are merely a matter of pretext. This would require some way for actors to demonstrate the principled consistency of their conduct and rationale, a way to mark the history of their integrity, and a way to demonstrate their commitment to values purportedly served by the violated norms. In short, our democratic practices need conventions to which actors can appeal to certify their *bone fides*.

Norm saboteurs pose most serious challenge to those who seeks to defend constitutional democracy and the institutions and norms on which it depends. The class of norm challengers includes those who engage in what Mark Tushnet called "constitutional hardball."[21] They defiantly violate norms because they oppose democratic or rule of law constraints on their exercise of political power, or because the norms seek to empower a diverse citizenry on an equal basis, or because they sense an opportunity to achieve partisan political goals, even at the cost of hollowed out democratic institutions. They may deploy the rhetoric of democracy of the rule of law, but their behavior evidences no deep commitment to them. How is a defender of democratic institutions to respond to the norm saboteurs' challenge? How should participants respond to defiance of constitutional norms they regard as binding and important.

The stakes in this interaction are likely to be high, because constitutional norms shape democratic processes by which important policies are determined. In addition, often the

[21] Mark Tushnet, "Constitutional Hardball," *John Marshall Law Review*, 37 (2004), 523-53. Hardball tactics involve deliberate violations of established norms of fair play for political advantage.

very norms that constrain political activity in the name of democratic values are under fire. The temptation to respond to "constitutional hardball" with equally harsh, norm-defying measures may be strong. Because constitutional norms are effective and binding only if participants can reasonably expect a degree of mutual compliance, it is likely that "taking the high road" will not be a compelling tactic. In their private lives, individuals do not wish to be "cullies of their own integrity,"[22] as David Hume put it. Even more so, in the public domain, playing by the rules will look like unilateral disarmament, the response of a "sucker." However, playing hardball is to play the norm saboteurs' game, and that is a game democracy defenders are not likely to be skilled at. What is more it is likely to hasten the saboteurs' objective. For likely outcome is not a revitalized democracy, but a weakened democracy on life-support.

No clear algorithm is available to guide this decision, but the following considerations must shape deliberations of participants in democratic practices. First and foremost, the guiding star must be fidelity to underlying democratic and rule-of-law values—commitment to the role of democracy in constituting and nurturing a community of equals. This requires resisting short-term partisan gains when they threaten to weaken democratic institutions. Tit-for-tat "hardball" responses may in some cases increase the costs of violations of constitutional norms for opponents enough to encourage their future compliance, but retaliation unjustifiably risks further erosion of democratic norms. Retaliation can also further weaken public trust in the willingness of governmental institutions and officials to live up to democratic values. Embattled opponents must also keep in mind the interdependence of constitutional norms. The most effective democracy-sustaining response to opposition hardball may be to work to strengthen supporting norms that are not explicitly under attack and seek to engage opponents in incremental trust-building measures, and wherever possible engage the wider public in these efforts.

Yet we must acknowledge that certain broad features of a polity can undermine the point and effectiveness of critical engagement in democratic practices. Respected media and effective organizations of civil society sustain the public domain in which such

[22] D Hume, *Enquiry Concerning the Principles of Morals* [ref] 282.

engagement can thrive. However, media can be compromised, co-opted for strictly partisan purposes and the public domain can be fragmented, its segments mutually alienated. Where there is no common body of facts, alleged facts exist only as partisan products, and there may be no common space for fruitful interaction; discursive engagement across partisan divides may prove impossible. Hyper-polarization of the polity that is reflected and reinforced by like polarization in the wider society exacerbates this condition. In communities where disagreements on matters of policy and principle are crosscutting such that adversaries on one issue find themselves allies on another, it is possible for parties to engage each other, even when disagreements on some issues go very deep. However, in highly polarized societies, groups tightly align themselves along multiple dimensions and the perceived need to maintain tribal loyalty obscures or overwhelms the potential for serious engagement on any one issue.[23] In many cases, *identity* replaces *ideology* and partisan conflict becomes existential. This feeds the perception, poisonous to democracy, that any political loss is unrecoverable, any challenge represents an existential threat, and every adversary is a mortal enemy. Democratic engagement requires that parties believe that losers can return to fight another day. But in such straightened conditions, there appears to be no long-term; in the eyes of such combatants, loss in the near term is fatal to the group and every value it holds sacred.

These three conditions reinforce each other. They are increasingly evident in several modern, established democracies and they pose enormous obstacles to vital critical engagement in democratic practices. Yet, they are remediable. In mid-1970s, Indira Gandhi sought "emergency" authoritarian rule in India. Justice Khanna of India's Supreme Court refused to overrule decision of seven state courts to grant habeas corpus to forty-three persons detained without trial. Defending his action he wrote, "There can, indeed, no greater indication of decay in the rule of law than a docile bar, a subservient judiciary, and a society with a choked or coarsened conscience."[24] A similar assessment may be given for the prospects of democracy. Thus, another important task of committed democrats,

[23] Jennifer Hochshild, "What's New? What's Next? Threats to the American Constitutional Order," in Mark A. Graber *et al. Constitutional Democracy in Crisis?* 96.

[24] Quoted in Geoffrey deQ Walker, *The Rule of Law: Foundation of Constitutional Democracy* (University of Melbourne Press 1988) 18.

alongside holding officials accountable to valuable constitutional norms, is seeking ways to reverse trends of hyper-polarization and corruption of the informational environment of the public domain. The task is not merely to defend or reform democratic institutions, but to revitalize the democratic polity. That is a topic for another time and for another person, one who is wiser than me.