THE POST–CIVIL WAR AMENDMENTS AS A CONSTITUTIONAL REVOLUTION?

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ABSTRACT

This essay uses *Constitutional Revolution* as a vehicle for thinking about what happened constitutionally in the United States during the Civil War and Reconstruction. Gary Jacobsohn and Yaniv Roznai correctly observe that a constitutional revolution took place in the 1860s, even though the Constitution of the United States was amended rather than replaced. The constitutional order in the United States after the Civil War was radically different than the constitutional order in the United States before the Civil War. The postbellum constitutional order was unambiguously antislavery and far more racially egalitarian than the antebellum regime. *Constitutional Revolution*'s brief discussion of that constitutional revolution is nevertheless problematic. Jacobsohn and Roznai emphasize developments in constitutional law when examining the changes in constitutional identity they believe constitute a constitutional revolution. This focus on constitutional texts and judicial decisions requires Jacobsohn and Roznai to referee previous conflicts over the constitutional identity of the ancient regime in order to determine whether political actors have engaged in a distinctive constitutional revolution or merely implemented the commitments underlying a previous constitutional revolution. Tinkering with *Constitutional Revolution*'s treatment of disharmonic constitutions avoids this incongruity and promises

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a fuller understanding of the constitutional politics underlying constitutional revolutions. Constitutional revolutions require a fundamental change in the structure or substance of political struggles to control the official constitutional law of the land. A constitutional revolution occurred during the Civil War and Reconstruction, from this perspective, because that era witnessed a revolutionary shift in the terrain on which political movements contested racial issues.

KEYWORDS: *Constitutional Revolution, Reconstruction, Civil War, Abraham Lincoln, Constitutional politics, Slavery, Racial equality*

THE POST–CIVIL WAR AMENDMENTS AS A CONSTITUTIONAL REVOLUTION?

A long-standing debate exists in American constitutionalism over whether a constitutional revolution took place during the Civil War and Reconstruction. The Supreme Court in the *Slaughter-House Cases* (1873, at 68–72, 77–78, 81) famously declared that the Thirteenth, Fourteenth, and Fifteenth Amendments were limited to freeing slaves, granting persons of color certain rights, and forbidding states from passing or implementing voting laws that discriminated against persons of color. Chief Justice John Roberts worked within this paradigm when in *Shelby County, Alabama v. Holder* (2013, at 542–45) he insisted that the post–Civil War amendments largely left American federalism intact. Michael W. McConnell, while acknowledging the "philosophical continuity as well as change," insists that "the Fourteenth Amendment was the logical culmination of the theory of the original Constitution" (McConnell 1991, 1160). Many constitutional commentators reject this narrow interpretation of what Republicans did during and immediately after the Civil War. Eric Foner (2019) refers to the post–Civil War amendments as "The Second Founding." Bruce Ackerman (1995) treats Reconstruction as a "constitutional moment" in which Americans fundamentally altered constitutional arrangements.[2] "While the Union survived the Civil War," Justice Thurgood Marshall asserted, "the Constitution did not." In his view, the Constitution of 1789 during Reconstruction was replaced by "a new, more promising basis for justice and equality, the fourteenth amendment" (Marshall 1987, 1340).

Gary Jacobsohn and Yaniv Roznai in *Constitutional Revolution* provide constitutionalists with the conceptual tools necessary for thinking about whether Americans

2. See Eisgruber (1995).

experienced a constitutional revolution between 1860 and 1876 and for thinking about constitutional change throughout the universe of constitutional democracy. Through meticulous case studies and sophisticated analysis, Jacobsohn and Roznai explain why scholars should look to substance rather than procedure when determining whether a constitutional revolution has taken place. What matters is whether core constitutional commitments have been altered, not the mechanism by which that alteration has taken place. "[T]o confine the meaning of [constitutional] revolutions to the specific occasion of a constitution-producing political revolution," *Constitutional Revolution* demonstrates, "conceals from view the richer possibilities that inhere in a more capacious rendering of the concept" (Jacobsohn and Roznai 2020, 5). Israel experienced a constitutional revolution in the late twentieth century when judicial majorities declared that courts had the power to declare laws unconstitutional, even though this step did not depend on the adoption of a new text clearly denoted as a constitution. Louisiana did not experience a constitutional revolution in the early twentieth century when state residents adopted a new state constitution that differed from the old largely in the way the maintenance of sewers was regulated.

This essay uses *Constitutional Revolution* as a vehicle for thinking about what happened constitutionally in the United States during the Civil War and Reconstruction. Jacobsohn and Roznai correctly observe that a constitutional revolution took place in the 1860s, even though the Constitution of the United States was amended rather than replaced (2020, 7). The constitutional order in the United States after the Civil War was radically different than the constitutional order in the United States before the Civil War. The postbellum constitutional order was unambiguously antislavery and far more racially egalitarian than the antebellum regime. *Constitutional Revolution*'s brief discussion of that constitutional revolution is nevertheless problematic. Jacobsohn and Roznai emphasize developments in constitutional law when examining the changes in constitutional identity they believe constitute a constitutional revolution. In their view, the Thirteenth and Fourteenth Amendments better aligned American constitutional commitments with the basic principles underlying the Declaration of Independence than the "disharmonic" Constitution of 1789, which incorporated conflicting commitments to human liberty and human bondage. This focus on constitutional texts and judicial decisions requires Jacobsohn and Roznai to referee previous conflicts over the constitutional identity of the ancient regime in order to determine whether political actors have engaged in a distinctive constitutional revolution or merely implemented the commitments underlying a previous constitutional revolution. They must treat as strategic abolitionist and antislavery advocates claims that the Constitution of 1789 committed

the United States to antislavery/egalitarian principles in order to conclude a constitutional revolution was necessary during the 1860s for the United States to became committed to those principles. Lincoln the president was a constitutional revolutionary when championing emancipation in 1863 only if Lincoln the candidate was wrong about American constitutional commitments in 1860.

Tinkering with *Constitutional Revolution*'s treatment of disharmonic constitutions avoids this incongruity and promises a fuller understanding of the constitutional politics underlying constitutional revolutions. A crucial feature of constitutional disharmony is the presence of important political movements with divergent understandings of the constitution. Constitutional revolutions require a fundamental change in the structure or substance of political struggles to control the official constitutional law of the land. A constitutional revolution occurred during the Civil War and Reconstruction, from this perspective, because that era witnessed a revolutionary shift in the terrain on which political movements contested racial issues. Before the Civil War, political movements fought over the extent to which the Constitution of the United States was committed to slavery. After the Civil War, political movements fought over the extent to which the Constitution of the United States was committed to racial equality. Lincoln was a constitutional revolutionary because he and his political allies successfully settled the debates over the constitutional status of slavery that wracked the antebellum United States. Vital elements of Lincoln's contested constitutional vision in 1860 were uncontested by 1876. By that time, white supremacists fully abandoned the contests over slavery that structured antebellum constitutional politics for the perceived greener pastures of contests over white supremacy that would structure post-bellum constitutional politics.

The differences between this essay and *Constitutional Revolution* more often reflect generation differences in points of emphasis rather than substantive disputes over the nature of constitutional revolutions. An important school in constitutional development, of which Ran Hirschl, Keith Whittington, and Howard Gillman are important exemplars, focuses on the constitutional politics underlying judicial decision and constitutional amendments.[3] Hirschl's analysis of the constitutional revolutions that occurred at the turn of the century in Israel, New Zealand, South Africa, and Canada emphasizes how governing elites, fearful of losing power, empowered political allies in the judiciary to make neoliberal policies. "When their policy preferences have been, or are likely to be, increasingly challenged in majoritarian decision-making arenas," he writes, "elites that possess disproportionate access to,

3. See Hirschl (2004), Whittington (2007), and Gillman (2002). For an elaboration of the central concerns of that cohort of scholars, see Graber (2017).

and influence over, the legal arena may initiate a constitutional entrenchment of rights and judicial review in order to transfer power to supreme courts" (Hirschl 2004, 12).Younger constitutional scholars, of which Richard Albert, Yvonne Tew, and Yaniv Roznai are important exemplars, discuss legal questions at far greater length than many of their elders.[4] Albert's goal "is to bring formal amendment back to the center of the field of constitutional change" (2019, 2). His *Constitutional Amendments* discusses the constitutional processes for amending a constitution, the constitutional limits on amendments, whether and when courts may declare constitutional amendments unconstitutional, and where constitutional amendments should be placed in the constitutional text but does not elaborate at the same length on why political movements choose to embody their reforms in a constitutional amendment rather than attempt some other means of constitutional reform or revolution.[5] Jacobsohn and Roznai do not discount this constitutional politics or the political movements whose struggles structure the path of constitutional development. Still, more consistently with Roznai's generation of scholars than my generation of scholars,[6] the bulk of the analysis in *Constitutional Revolution* is devoted to constitutional texts and judicial elaboration of those texts rather than to the political struggles over creating those texts and gaining control over the branches of government responsible for elaborating those texts.

I. *CONSTITUTIONAL REVOLUTION* AS REESE'S PEANUT BUTTER CUPS

Constitutional Revolution is the Reese's Peanut Butter Cups of contemporary comparative constitutional theory. Reese's Peanut Butter Cups combine the flavor of chocolate and peanut butter to make a delectable snack. *Constitutional Revolution* combines the insights of an eminent senior scholar and an exciting younger scholar to make a pathbreaking volume. Jacobsohn, the winner of the Lifetime Achievement Award from the Law and Courts Section of the American

4. See, e.g., Albert (2019), Tew (2020), and Roznai (2017).

5. But see Albert (2019, 40-49), discussing some reasons why political amendments choose constitutional amendments. This discussion highlights why the generational difference concerns points of emphasis. Albert does have a ten-page discussion of the constitutional politics of amendment in *Constitutional Amendment*. Still, the bulk of the analysis is far more devoted to textual questions and judicial interpretation.

6. Jacobsohn's cohort in political science, which includes such scholars as Leslie Goldstein and Ron Kahn, are also far more focused on legal texts and legal decisions than my cohort. See Goldstein (1991) and Kahn (1994).

Political Science Association, has done pioneering work on constitutional identity. "[I]dentity," he wrote in *Constitutional Identity*, "emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past" (Jacobsohn, 2010, 7). Roznai, the winner of the Inaugural International Society for Public Law (ICON-S) Book Prize, has done as groundbreaking work on how the constitutive power and the basic structure doctrine determine the legitimate means of constitutional change. His *Unconstitutional Constitutional Amendments* insists that "the amendment power is not unlimited, rather, it does not include the power to abrogate or change the identity of the constitution of its basic features (Roznai 2017, 42–43). *Constitutional Revolution* integrates these insights as deftly as Reese's Peanut Butter Cups integrates peanut butter and chocolate.

The central theses of *Constitutional Revolution* combine the central insights of *Constitutional Identity* and *Unconstitutional Constitutional Amendments*. Constitutional revolutions upset preexisting constitutional identities, even when they do not replace entirely or at all preexisting constitutional text. "A constitutional revolution," Jacobsohn and Roznai write, "is accompanied by critical changes in constitutional identity" (2020, 15). Constitutional identities may not be altered by normal constitutional politics. *Constitutional Revolution* maintains that "the constitutional revolution may be brought about by constituted powers; yet to claim a mantle of legitimacy, the process that culminates in transformative constitutional change should aspire to approximate the people's constitutive power" (Jacobsohn and Roznai 2020, 14).

Two case studies in *Constitutional Revolution* demonstrate that constitutional revolutions do not require replacing a constitutional text. Hungary, Jacobsohn and Roznai point out, is "the archetype of a constitutional revolution occurring without the invocation of an extra constitutional constituent power" (2020, 8). Amendment is the preferred method of constitutional revolution in that polity. Hungarians adopted constitutional amendments in 1988–1989 and in the second decade of the twenty-first century that dramatically changed the constitutional identity of the regime, creating a constitutional democracy in the first instance and an illiberal constitutional order in the second. This Hungarian experience, the coauthors observe, highlights "how formal constitutional amendments, implemented in full compliance with prescribed procedure, can at once be profoundly transformative and potentially destabilizing" (2020, 7–8). Constitutional revolution occurs by adjudication. The case study of Israel points out how judges transform constitutional orders. Jacobsohn and Roznai note, "[I]n Israel the Supreme Court has performed the lead role in making the constitutional revolution in that nation a reality" (2020, 11).

That constitutional revolution occurred without any change in the constitutional text in a regime that many thought lacked any constitutional text or any other indicia of a national constitution. The Supreme Court of Israel in *United Mizrahi Bank Limited v. Migdal Collective Village* (1995) revolutionized the political order by holding that certain Basic Laws constituted the Constitution of Israel, that these Basic Laws were judicially enforceable, and that courts under the Basic Laws could strike down subsequent legislation deemed inconsistent with those more fundamental edicts. "[I]n deciding that the Basic Laws carry a supreme constitutional status, that the Knesset has only limited legislative powers, and that the judiciary possesses the authority to conduct judicial review of legislation," Jacobsohn and Roznai assert, "the justices of the Supreme Court reconstituted the Israeli political system" (2020, 12).

The other two case studies explore how constitutional revolutions unfold over time. *Constitutional Revolution* scorns "big bang theory" in favor of evolution. Jacobsohn and Roznai detail how "[a] substantial reorientation in constitutional practice and understanding often proceeds incrementally, without a decisive rupture or violent usurpation." They explain how "[c]onstitutionally driven change often occurs during an extended period when revolutionary aspirations are solidified" (2020, 15). The case study of India illustrates this "step by step progression toward the validation of the Constitution's identity." The 1949 Constitution of India, the authors assert, held open the possibility of fundamental societal transformation. Three decades elapsed before the Supreme Court of India took up that challenge of revolutionizing India society. *Constitutional Revolution* details how the Indian constitutional revolution ebbed and flowed, "taking steps backwards and forward as conflicting interests and constituencies struggled for ascendancy in light of divergent readings of the Constitution" (2020, 10). The German experience illustrates how constitutional revolutionaries over time may become too defensive. Jacobsohn and Roznai are troubled by the tendency of judicial decision makers in Germany to use the revolutionary Germany Constitution of 1949 as a shield against increased European integration. That resistance highlights how "a fundamental reorientation in constitutional essentials can have revolutionary consequences," (2020, 9). *Constitutional Revolution* nevertheless criticizes German constitutional decision makers for failing to acknowledge how a "preoccupation with identity" may be "impervious to the dynamic aspect of constitutional identity . . . that ignores its adaptive potential" (2020, 10).

Jacobsohn and Roznai might have included a case study of Louisiana or a regime with a similar constitutional history to illustrate why the mere replacement of a constitutional text cannot be the sine qua non of a constitutional

revolution. Louisiana has had eleven state constitutions.[7] As is the case in many states, Louisianans pass constitutional amendments and ratify new constitutional texts for reasons that would induce most regimes to pass statutes.[8] The Louisiana Constitution of 1913, for example, was proposed and ratified by citizens bent on improving sewers in New Orleans.[9] Describing that incident as a constitutional revolution drains revolution of almost all meaning.

The Louisiana experience partly reflects constitutional practice in subnational units or in civil society, where constitutions typically lack the venerated quality of national texts,[10] but state constitutional practice in the United States bears a greater resemblance to national practice in other countries than national practice in the United States.[11] The average national constitution lasts less than twenty years (Elkins et al. 2009, 129–31). This phenomenon suggests that theories identifying constitutional revolution with replacements of constitutional texts are likely to overcount substantially the instances in which what ordinary persons think of as revolutions are taking place. Just as the "amendment culture" of a particular regime, "a set of shared attitudes about the desirability of amendment independent of the substantive issue under consideration and the degree of pressure for change," may influence how often a fundamental text is altered, so a related if not identical "constitutional culture"[12] that concerns the degree to which a constitution is venerated is likely to explain some variance between regimes in how often a fundamental text is replaced (Ginsburg and Melton 2015; Albert 2019, 110–11). When in some constitutional cultures constitutional replacement takes place in ordinary politics, as in Louisiana, Jacobsohn and Roznai are clearly right to insist that no constitutional revolution occurs.

II. MARCHING BACKWARD INTO CONSTITUTIONAL REVOLUTIONS

Quentin Skinner's observation that "[a]ll revolutionaries are . . . obliged to march backwards into battle" poses a challenge to treating constitutional revolutions as creating new constitutional identities and basic structures (2002, 149–50). Skinner

7. See Dinan (2018, 24).

8. See Zackin (2013).

9. See Hargrave (1991, 12–13).

10. See Dinan (2018); Sutton (2018); Zackin (2013).

11. See Versteeg and Zackin (2014).

12. See Dinan (2018, 29–30).

points out that revolutionaries inevitably speak of inherited rights, insist on what they claim are long-standing regime principles, and employ the broadly understood justificatory rhetorics of their time when seeking to explain why they ought to be in power or why their newly obtained power is legitimate.[13] *Constitutional Revolution* recognizes the power the ancient regime holds over constitutional revolutionaries. Jacobsohn and Roznai write, "[T]he novelty of constitutional transformation draws on resources well entrenched in the historical past" (2020, 15). Two related problems result when integrating this insight about the relationships between past and present into a theory that insists a constitutional revolution marks a fundamental break from the past. Dating the constitutional revolution becomes a challenge. If the revolutionaries are right, then their success is not a constitutional revolution per se but a long overdue unlocking of the potential of the inherited constitution, whose ratification was the real constitutional revolution. All constitutional revolutionaries, in this account, imitate the Supreme Court of India by continuing and implementing a past revolutionary spirit rather than creating new constitutional identities. Jacobsohn and Roznai avoid this problem only by challenging the revolutionary self-understanding of the inherited constitution's identity. When providing conceptual tools for describing constitutional revolutions, *Constitutional Revolution* take sides in the political fights over the constitutional identity of the ancien regime. If *United Mizrahi Bank* and the Thirteenth Amendment were attempts to create new constitutional identities, then Aharon Barak was wrong about the constitutional identity of Israel during the first forty years of that nation's existence and Abraham Lincoln as wrong about the previous constitutional identity of the United States before the Civil War.

Constitutional Revolution's brief analysis of the Reconstruction as a constitutional revolution raises this question about when constitutional revolutions begin. Lincoln repeatedly insisted, as Jacobsohn and Roznai repeatedly acknowledge, that antebellum Americans were committed to the "ultimate extinction" of human bondage (Jacobsohn and Roznai 2020, 116).[14] Republicans advertised their program

13. Skinner notes that "however revolutionary such ideologists may be, they will nevertheless be committed, once they have accepted the need to legitimize their actions, to showing that some *existing* favorable terms can somehow be applied as apt descriptions of their behaviour" (2002, 149; emphasis in original).

14. See especially Abraham Lincoln's sixth debate with Stephen Douglas, in which Lincoln declares, "[W]hen the fathers of the government cut off the source of slavery by the abolition of the slave trade, and adopted a system of restricting it from the new Territories where it had not existed, I maintain that they placed it where they understood, and all sensible men understood, it was in the course of ultimate extinction" (Lincoln, "Sixth Debate"; see Basler 1953, 267).

as fulfilling the promise of the original Constitution, rather than offering Americans "a new birth of freedom."[15] Lincoln's speeches before the Civil War, from this perspective, more clearly resemble the jurisprudence of the Supreme Court of India that *Constitutional Revolution* interprets as implementing revolutionary principles entrenched in the past rather than as creating a new constitutional identity.[16] Jacobsohn and Roznai insist constitutional revolutions take place incrementally, often in ways not anticipated by their original sponsors.[17] Arguably, then, the Thirteenth Amendment was not a constitutional revolution but an effort to better secure the basic principles underlying the Constitution of 1787, which might be understood not as a constitutional revolution but as an American effort to better secure the basic principles underlying the English Revolution,[18] which in turn might be thought of as an effort to secure the basic principles of Magna Carta.[19] All we need is a few more clauses to get to the first book of Genesis and interpret all world history as a commentary on "[w]hen God began to create the heaven and the earth" (*The Torah: The Five Books of Moses* 1963, 3).

Jacobsohn and Roznai conclude that a partial constitutional revolution took place during Reconstruction because, they claim, Lincoln was right about the Declaration of Independence but wrong about the original Constitution. They write,

> This second document [the 1789 Constitution of the United States], with its tragic internal contradictions, most glaringly evident in its concessions to officially sanctioned human inequality, was itself only a partial and incomplete congealing of principles set out in the nation's revolutionary manifesto. In a strictly legal sense, those principles became constitutionally "frozen" only after the addition of the Civil War amendments. (2020, 56)

The Declaration, in this view, was antislavery, the Constitution of 1789 was not, but the Constitution of 1865 was. These assertions take sides in at least two antebellum constitutional debates. Chief Justice Roger Taney in *Dred Scott v. Sandford* (1856) insisted that slavery was consistent with the Declaration of Independence. Prominent slaveholders and their supporters agreed. Stephan Douglas in his fifth debate with Lincoln declared, "The signers of the Declaration of Independence never

15. See Foner (1970, 73–77).

16. See Jacobsohn and Roznai (2020, 143–82).

17. Jacobsohn and Roznai (2020,6).

18. See Jacobsohn and Roznai (2020, 39), quoting Jack P. Greene.

19. See Jacobsohn and Roznai (2020, 44), quoting J. G .A. Pocock.

dreamed of the negro when they were writing that document" (Douglas 1953, 406).[20] A prominent school of antislavery constitutional thought insisted the original Constitution was committed to abolition.[21] Charles Sumner was one of many more radical Republicans who maintained that slavery had never been strictly legal in the United States. "There is nothing in the Constitution," he informed Congress during the debates over the Thirteenth Amendment, "on which slavery can rest, or find any the least support" ("*Congressional Globe*" 1864, 1481).

Constitutional Revolution takes sides in antebellum constitutional debates over the constitutional status of racial equality. Before the Civil War, most jurists maintained constitutional equality was no more undermined by racial hierarchies than by gender hierarchies. Laws that singled out persons of color were constitutionally no different than laws that singled out bankers, taverns, women, or residents of E Street.[22] Judge William Gaston spoke for this consensus when upholding a state statute that permitted persons of color convicted of crimes to be hired out, even though white persons did not suffer this sanction. He declared, "His color and his poverty are the aggravating circumstances of his crime" (*State v. Manuel* 1838, at 35). To the extent that *State v. Manuel* was the uncontested law of the land, the post–Civil War Constitution's commitment to some version of racial equality was revolutionary.[23] Contestation, however, occurred in the antebellum United States. An important abolitionist/antislavery strand of constitutional thinking existed before the Civil War that challenged the dominant understanding of constitutional equality as consistent with racial hierarchy.[24] Constitutional commitments to equality, leading opponents of slavery insisted, entailed that "all mankind be allowed the same legal rights and protection without regard to color or other physical peculiarities" (Olcott 1838, 44). "According to the spirit of American institutions," Charles Sumner's argument in *Roberts v. City of Boston* (1849) declared, "all men, without distinction of color or race, are equal before the law."[25] If Sumner and his political allies were right, then the post–Civil War amendments implemented the constitutional

20. See also Tsesis (2012, 72–73, 117–18).

21. See, e.g., Spooner (1845) and Douglass (1857). See, generally, Zietlow (2012).

22. See Lundin (1999).

23. I am presently working on a manuscript which maintains that Republicans in 1865 and 1866 thought the Thirteenth Amendment, not the Fourteenth Amendment, was the primary vehicle for racial equality, that the purpose of the Fourteenth Amendment was to prevent a renaissance of the slave power. The precise details do not matter for purposes of this essay.

24. See TenBroek (1951); Graham (1950a, 1950b); Nelson (1988, 18–21).

25. *Roberts v. City of Boston*, at 201 (argument of Charles Sumner).

revolution of 1776 and 1789 and were not a distinctive constitutional revolution. Again, Jacobsohn and Roznai seem committed to the position that Sumner was a constitutional revolutionary during the Civil War only if he was wrong about the Constitution before the Civil War.

Constitutional scholarship cannot escape value judgments. Determining whether a judicial decision was based on law or politics requires making what may be a contestable interpretation of the law.[26] Determining whether constitutional amendments or judicial decisions have substantially changed the constitutional identity of a regime requires what may be a contestable interpretation of the previous constitutional identity of the regime. These value judgments are as central to descriptive analysis as jurisprudence analysis because legality and constitutionalism are essentially contested concepts whose meaning cannot be explicated without some reference to contested normative concepts.[27] That *Constitutional Revolution* must referee previous fights over the constitutional identity of a regime is, for this reason, to some degree inevitable. Nevertheless, by engaging constitutional politics as well as constitutional law, Jacobsohn and Roznai might avoid having to claim Lincoln was wrong in 1860 in order to proclaim him a constitutional revolutionary three years later. With some minor alterations, *Constitutional Revolution* provides the conceptual tools necessary to take Lincoln seriously in both 1860 and 1863.

III. DISHARMONIC CONSTITUTIONS REVISITED

The antebellum Constitution of the United States was severely disharmonic. Constitutions are internally disharmonic, Jacobsohn and Roznai maintain, when they contain conflicting imperatives. "[I]ncongruities" are "lodged within a constitution" (Jacobsohn and Roznai 2020, 265). The Constitution of the United States in 1789 provided protections for slavery while making rights commitments and announcing fundamental principles inconsistent with human bondage. Constitutions are externally disharmonic, Jacobsohn and Roznai maintain, when a divergence occurs between constitutional and societal commitments. There is a "gap between inscribed commitments and external realities" (2020, 265). The antebellum United States combined celebration of the Declaration of Independence with the maintenance of fierce racial hierarchies in the South and the North.

Constitutional politics plays a greater role in constitutional disharmony than *Constitutional Revolution*'s conditions for constitutional disharmony might suggest.

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26. See Gillman (2001).

27. See Gallie (1956).

Constitutional "incongruities" are created by the interaction of constitutional politics and constitutional law. They are never purely internal. Constitutional incongruities occur when during the creation, amendment, and interpretation of constitutional texts political actors, political movements, and political factions dispute fundamental constitutional principles. The Constitution of the United States provided protections for slaveholders while refusing to acknowledge explicitly the legality of human bondage because prominent framers disputed the extent to which the Constitution should support slavery.[28] The post–Civil War amendments reflect conflicting Republican commitments to racial equality and federalism (Griffin 2021; Summers 2014). The constitutional status of abortion at the turn of the twenty-first century was in part a consequence of Republican efforts to pack the judiciary with justices committed to ending judicial protection for reproductive choice and Democratic success in defeating the nomination of Robert Bork, who was committed to overruling *Roe v. Wade* (1973). Constitutional incongruities vanish when the underlying constitutional dispute is settled, even when that settlement does not take the form of a change in the constitutional text. As the United States became a more religiously diverse nation, overt clashing commitments to being antiestablishment and a Christian nation, evident in such decisions as *Holy Trinity Church v. United States* (1892),[29] disappeared in Supreme Court opinions, even as Americans continued to debate whether and when government should assist religion more generally.[30] Constitutional incongruities arise when disputes break out over fundamental constitutional questions, even when the dispute is not generated by a change in the constitutional text. Laurence Tribe (2005) maintains contemporary American constitutionalism became disharmonic when conservative political entrepreneurs and constitutional decision makers successfully challenged the hegemonic influence New Deal liberalism had previously held over American constitutionalism, even though Republicans were not able to pass any of their proposed constitutional amendments.

The constitutional status of slavery provides a poignant example of how constitutional disharmony is predicated on the interaction of constitutional politics and constitutional law. Slavery is not mentioned in the Constitution of the United States because, as is well known, crucial framers insisted that fundamental law in the United States not give explicit sanction to human bondage. Madison maintained

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28. See, e.g., Wilentz (2018) and Graber (2006a, 96–109).

29. See the *Holy Trinity* (1892) case at 471, where Justice David Brewer declared, "[T]his is a Christian nation."

30. See, e.g., *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

that the framers should not "admit in the Constitution the idea that there could be property in men" (Farrand 1911, 2:417). The Constitution was nevertheless disharmonic because while the absence of explicit sanction provided grounds for thinking that Constitution committed to emancipation, other constitutional provisions provided substantial protections for slavery. Still, that the Constitution gave no explicit sanction for slavery created the possibility of an unambiguously antislavery future with no change in the constitutional text if some framers had been correct in their assumption that slavery would shortly die a natural death.[31] Antislavery framers, Sean Wilentz (2018) details, imagined a constitutional order unambiguously committed to human freedom.[32] That order differed from the constitutional regime in 1789 because no political movement of any substance had any interest in giving the Constitution a proslavery interpretation, not because the more proslavery strands of American constitutional had been surgically removed from the constitutional text.

Jacobsohn's (2010, 7) observation that "identity emerges dialogically" highlights the important role political movements play in determining constitutional disharmonies. The dialogue determines the extent and nature of constitutional disharmony. Constitutions are disharmonic in practice only when powerful political movements dispute the fundamental principles structuring the constitutional order. Remove one of those political movements, and the disharmony evaporates. The Constitution of 1789 would have been unambiguously antislavery had, as some framers anticipated, slavery in the early nineteenth-century expired of natural causes. As Lincoln observed, had Americans accepted the *Dred Scott* decision, the United States might have become committed to the legality of slavery without any change in the constitutional text.[33] In the absence of a political movement interested in emphasizing how the Constitution refused to acknowledge explicitly the legality of human bondage, the Constitution would have been unambiguously proslavery. Change the political movements or the structure of political competition, and the constitutional disharmony changes (Balkin and Siegel 2006). The tensions between the antiestablishment and Christian commitments of the American Constitution that racked the late nineteenth century were transformed into tensions between

31. As Farrand, reveals, Roger Sherman said that "the abolition of slavery seemed to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it," and Oliver Ellsworth declared, "Slavery in time will not be a speck in our Country" (1911, 2:369–70, 317).

32. Wilentz notes that by giving no legal sanction to human bondage, the Constitution "opened the prospect of a United States free of slavery" (2018, 3).

33. See, e.g., Abraham Lincoln, "'A House Divided' Speech at Springfield, Illinois," in Basler (1953, 2:467–68).

the secular and sectarian commitments of American constitutionalism that rack contemporary constitutional politics when cultural conflicts between Protestants and Catholics were transformed into conflicts between members of conservative religious sects and either members of liberal religious sects or thoroughgoing secularists (Gillman, Graber, and Whittington 2021, 502).

If the structure of political competition plays a substantial role in determining the existence and scope of a disharmonic constitution, and constitutional disharmony often "functions as the engine for change" in constitutional revolutions and counterrevolutions, then changes in the structure of political competition must play a central role in constitutional revolutions (Jacobsohn and Roznai 2020, 15). Constitutional revolutions occur when once-powerful political movements are decimated, politically neutered, persuaded, or conclude they should abandon one political field for politically greener pastures. The constitutional revolution responsible for the Basic Law in Germany took place in 1949 only after the Nazi Party and related fascist movements were destroyed as a political force. Constitutional revolutions are initiated when new political movements are empowered and seek to make their vision the official constitutional law of the land. The Hungarian constitutional revolution of the late twentieth century occurred after the end of Soviet domination enabled progressive forces to play substantial roles in national politics.[34] Revolutionary constitutional changes occur when political events scramble existing political movements. The collapse of the Congress Party in India led to substantial changes in governance and the rise of Hindu nationalism as a central cleavage in national politics.[35]

Constitutional scholarship that is as attentive to constitutional politics as to constitutional law is as attentive to the behavior of political losers as to the constitutional commitments of political winners. How political movements respond to a political defeat plays a major role in the fate of an attempted constitutional revolution.[36] They may stand their ground. American conservatives have been unable to consolidate gains made in the constitutional revolution of 1994 because Democrats committed to New Deal understandings of federal power remain a constitutionally consequential force.[37] Political movements that lose constitutional battles may

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34. See Jacobsohn and Roznai (2020: 78–79).

35. For more on revolutionary constitutional change in India, see Khaitan (2020) and Mate (2018).

36. For the importance of focusing on how political losers react when determining the course of constitutional revolutions and settlements, see Ackerman (1995); Tulis and Mellow (2018); Graber (2006b).

37. See *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); *2020 Democratic Party Platform*. 2020-Democratic-Party-Platform.pdf (democrats.org).

re-form their lines. Religious conservatives who once contested same-sex marriage have largely abandoned that struggle in favor of combat over whether conservative Christians must bake cakes, provide flowers, or shoot photographs for same-sex weddings.[38] Finally, political movements may fold their tents completely after political defeat. Prohibition is dead in the United States in part because the powerful movements for prohibition that once terrorized elected officials no longer exist.

This emphasis on constitutional politics and the behavior of political losers facilitates an understanding of the constitutional revolution that took place during Reconstruction that does not require settling debates over the meaning of the antebellum constitution From ratification to the Civil War, American constitutional politics was partly structured by debates over the extent to which the Constitution protected slavery. The Civil War, the Thirteenth Amendment, and Reconstruction settled that debate. Former proponents of slavery were slaughtered, stripped of political power, or, in the case of crucial Northern Democrats, persuaded that support for human bondage was no longer politically viable.[39] Constitutional efforts to revitalize slavery were abandoned by the 1870s, if not sooner, never again to stain American constitutionalism.

Americans who became constitutionally committed to free labor during Reconstruction did not entirely foreswear past commitments to white supremacy. The constitutional revolution that took place during the 1860s and 1870s transformed the disputes over race and American constitutional identity without firmly committing the United States to racial equality. Former proslavery advocates retreated rather than abandoned the field entirely. During the last third of the twentieth century, the political actors who had once defended slavery sought to entrench white supremacy and limit federal power to interfere with Jim Crow. The parties who debated the Lodge Enforcement Act of 1890 bore more than a passing resemblance to the parties who debated the Fugitive Slave Act of 1850 and the Thirteenth Amendment.[40] The difference was that the site of contestation had moved. The parties to the debate over the Lodge Enforcement Act conceded that one human being could not own the labor and issue of another. They disputed whether federal intervention was necessary to ensure African Americans were able to exercise their Fifteenth Amendment rights in the South.

Changes in the structure of constitutional politics during the late nineteenth century determined the course of the constitutional revolution initiated during the

38. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

39. for more on the fight over the Thirteenth Amendment, see Richards (2015).

40. For those debates, see Hirshson (1962, 200–46).

Civil War and Reconstruction. Crucial Republicans lost interest in protecting persons of color in the South (Hirshson 1962). The party system depolarized as disputes over the currency and political reform pushed racial issues aside in national politics (Sundquist 1983, 106–69). The absence of a strong national movement committed to the more radical strands of the post–Civil War Constitution freed political elites in the South to interpret the new Constitution as mandating only a very formal legal equality consistent with white supremacy and Jim Crow.[41] A federal judiciary increasingly staffed by railroad lawyers exhibited little interest in pursuing the more revolutionary impulses of Reconstruction.[42]

Jacobsohn and Roznai are well aware that constitutional politics shapes constitutional revolutions. Their case studies point to the political forces that create, maintain and resist constitutional revolutions. They observe, for example, that "Israel is experiencing a counterrevolution to the constitutional revolution, with the Supreme Court absorbing the most sustained political attack in its history" (2020, 217). Still, the emphasis in the chapter on Israel is on the jurisprudence of former chief justice Aharon Barak and his main judicial critic, Justice Mishael Cheskin. The rise and fall of the Ashkenazi elite and Labor Party is far less prominent in Jacobsohn and Roznai's *Constitutional Revolution* than in Hirschl's *Toward Juristocracy*.[43] If *Constitutional Revolution* reminds my generation that what constitutional actors can do when initiating, maintaining, and resisting constitutional revolutions is shaped by legality, this essay may be an instance of my generation reminding other generations that the path of legality is always shaped by constitutional politics.

IV. CONSTITUTIONS AS SITES OF CONTESTATION

Understanding constitutions as sites of contestation enables us to build on Jacobsohn and Roznai's pathbreaking insights in *Constitutional Revolution*. Scholars who focus on relatively enduring changes in political contestation over the language, interpretation, and implementation of constitutions are better positioned to describe constitutional revolutions and lesser constitutional developments without taking sides in the substantive constitutional debates that rack constitutional democracies. An emphasis on relatively enduring changes in constitutional contestation provides

41. See Klarman (2004, 8–60).

42. See *The Civil Rights Cases*, 109 U.S. 3 (1883); *Pace v. Alabama*, 106 U.S. 583 (1883); *Plessey v. Ferguson*, 163 U.S. 537 (1896); *Giles v. Harris*, 189 U.S. 475 (1903). For staffing of the Supreme Court during the late nineteenth century, see Abraham (2008).

43. See discussion in Hirschl (2004, 53–65).

a standard for distinguishing when a political party or movement has achieved merely a temporary gain and when the constitutional identity or basic structure of a regime has been fundamentally altered. Finally, by focusing on what is being contested in constitutional politics, students of constitutional politics will be better able to identify when regimes have made progress toward achieving certain constitutional ideals, are backsliding, or are in a cycle.

Constitutional regimes are disharmonic. Every constitutional democracy is divided into factions that dispute fundamental regime principles. These disputes range over whether to adopt a new constitution, whether to modify an existing constitution, or whether to interpret that existing constitution in different ways. Constitutional revolutions change the site of contestation without achieving harmonic convergence. The constitutional politics responsible for settling some fundamental constitutional dispute inevitably unsettles some other constitutional matter or generates entirely new constitutional questions on which no social consensus exists. The American constitutional commitment to emancipation raised new questions about whether white supremacy and racial equality were compatible. When Americans in the late twentieth century acknowledged that racial equality and white supremacy were incompatible, bitter disputes broke out over what was entailed by a commitment to racial equality. The history of racial politics in the United States and every case study in *Constitutional Revolution* suggest that Lincoln was wrong when he claimed that "a house divided against itself cannot stand."[44] Constitutional democracies are always "houses divided against themselves" that when confronting what might be considered "eternally contested concepts" must find ways to stand despite never-ending conflicts over constitutional identity and basic principles.

If constitutional regimes are inevitably disharmonic, then constitutional revolutions are better thought of as significantly transforming than as settling disputes over constitutional identity. Whether and when fundamental changes in constitutional identity occur is a matter of perspective. If, as Jacobsohn and Roznai (2020, 21-22) correctly note, all parties to constitutional disputes claim their constitutional commitments are rooted in the constitutional identity of the regime, then the victors in constitutional controversies are likely to claim that nothing very revolutionary has occurred. Long-standing commitments have been restored, the constitution has been purified, or the constitution is now being correctly interpreted. Constitutional revolutions are for this reason better identified by looking at changes in political struggles over a nation's constitutional identity and basic regime principles than by determining whether a nation's constitutional identity and basic regime

44. See Lincoln, "A House Divided" speech, in Basler (1953, 461).

principles have been changed. From 1789 until 1865ish, Americans disputed the extent to which the Constitution was proslavery. During the Civil War and Reconstruction, Republicans who regarded the Constitution of 1789 as committed to the ultimate extinction of human bondage emerged victorious. Former slaveholders, white supremacists, and Democrats over the next few years abandoned claims that the Constitution was committed to slavery in favor of claims that the Constitution remained committed to white supremacy. That decision to convert fights over slavery into fights over white supremacy established the parameters of the constitutional revolution that took place during the Civil War and Reconstruction. Determining the existence of this revolution does not require scholars to determine whether Lincoln was right about American constitutional identity in 1860. What matters is that a fundamental and relatively enduring change took place between 1860 and 1870 concerning what was being contested when Americans struggled over the place of race in American constitutionalism.

Treating constitutional revolutions as "durable shifts"[45] in contestation over constitutional identify and basic regime principles avoids conflating temporary disruptions with more permanent transformations. Consider the case of Thailand. David Law and Chien-Chih Lin (2018) details how over the past fifty years, that regime has oscillated between constitutional democracy and military rule. From one perspective, Thailand experiences a constitutional revolution every decade or so. The basic regime principles underlying military rule differ from those of a constitutional democracy. The better view may be that no constitutional revolution has occurred in Thailand for more than a half century. The virtues of constitutional democracy have been and remain the primary subject of contestation in that polity. Constitutional law changes on a regular basis, but not constitutional politics. Different political movements gain temporary victories, but none successfully drives the other from the field. Political losers do not fold their tents or concede some terrain to their opponents; they continue to fight over the same issues they have fought over for several generations. A constitutional revolution will take place in Thailand only when proponents of either military rule or constitutional democracy are slaughtered, politically neutered, persuaded, or otherwise choose to abandon their conception of the constitutional order.

From the more integrative perspective of constitutional law and constitutional politics, Americans during the Civil War and Reconstruction experienced an abortive constitutional revolution, several forms of actual constitutional revolution, and

45. See Orren and Skowronek (2004, 123) on defining political development in terms of "durable shifts in governing authority."

what might be described as a constitutional abnormality. The abortive constitutional revolution was the failed secession attempt of eleven Confederate states. That failure had at least two enduring constitutional consequences. First, the Civil War settled questions of secession, the advocacy of which would be confined to fringe groups for the next one hundred fifty years.[46] Second, the Civil War permanently changed the site of constitutional contestation by forcing former proponents of human bondage to abandon defenses of slavery in favor of championing a constitutional identity rooted in white supremacy. In other instances, the departures from the constitutional status quo during the Civil War had no lasting consequences. The Civil War proved a blip on presidential power. Lincoln's actions as president may have been unprecedented, but they were not repeated by other late-nineteenth-century presidents.[47]

Changes in the sites of constitutional contestation highlights the role eternally contested concepts play in constitutional revolution. Prominent legal thinkers speak of the "Law of Racial Thermodynamics"[48] and "preservation through transformation" (Delgado 1990, 95–106; Siegal 1996, 2117–19).[49] These theses capture how multicultural and pluralist constitutional democracies are never free from debates over what constitutes a status hierarchy and what status hierarchies are legitimate. Debates over whether same-sex couples should have the right to marry give way to whether government officials should be compelled to marry same-sex couples, but constitutional disputes over the role of race, gender, sexual orientation, and religion in a nation's constitutional identity are always transformed rather than settled. Nevertheless, too facile an interpretation of the "Law of Racial Thermodynamics" or "preservation through transformation" risks confusing progress or backsliding with stasis. Constitutional revolutions substantially change societal debates over what constitute acceptable status hierarchies without making such controversies historical artifacts.

Constitutional revolutions in the United States and elsewhere often substantially change the site of constitutional contestation without settling more

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46. For the contemporary status of secession, nullification, and variations on those themes, see Levinson (2016).

47. See Whittington (1999, 157).

48. Delgado (1990, 106) posits, "There is change from one era to another, but the net quantum of racism remains exactly the same, obeying a melancholy Law of Racial Thermodynamics."

49. Siegel (1996, 2119) claims, "When the legitimacy of a status regime is successfully contested, lawmakers and jurists will both cede and defend status privileges, . . . finding new rules and reasons to protect such status privileges as they choose to defend. . . . I call this change in the rules and rhetoric of a status regime "preservation through transformation."

enduring controversies. The constitutional revolution that took place during the Civil War, as noted frequently, substituted controversy over the place of white supremacy in the constitutional order for controversy over the place of slavery in the constitutional order. Americans continued to debate the nature or racial status hierarchies. What changed were the stakes in the debate. Revolutionary changes in religious freedom occurred in the West when debates over whether to burn heretics at the stake were transformed into debates over the condition under which public money could go to sectarian schools. Sometimes, the progress or backsliding is obvious. A society in which Jewish taxpayers subsidize Catholic schools is better than a society in which Jewish children are taken from their parents to attend Catholic schools. In other instances, whether societal changes constitute progress, backsliding, or stasis is controversial. The condition of formers slaves in the 1890 South strikes me as dimensionally better than the condition of slaves in 1850, but prominent scholars disagree.[50] As noted previously, there is no escape from value judgments.

From this perspective, at least two fundamental, revolutionary changes have taken place in race relations in the United States. The first was the change from a regime in which the debates were over the extent to which the United States was constitutionally committed to slavery to a regime in which the debates were over the extent to which the United States was constitutionally committed to white supremacy. The second was the change from a regime in which the debates were over the extent to which the United States was constitutionally committed to white supremacy to a regime in which the debates were over the meaning of racial equality. Should some of these debates be settled, the end result is not likely to be a regime in which racial politics vanishes. Rather, racial debates will move to a different terrain with, perhaps, a different set of arrayed forces.

Constitutional Revolution provides scholars with the tools to understand and evaluate these constitutional revolutions. By insisting we look at the substance of constitutional practice rather than at mere forms, Jacobsohn and Roznai highlight how constitutional revolutions often occur even when one fundamental text does not replace another (and may not even occur when one fundamental text replaces another). By insisting we understand constitutions as inevitably disharmonic and as sites of contestation, they place at the center of constitutional inquiry the political struggles over a nation's constitutional identity and fundamental regime principles. This essay attempts to refine their analysis by focusing attention on the changes in constitutional politics, rather than the changes in constitutional law or in a

50. See, e.g., Oshinsky (1996) on the ordeal of Jim Crow justice.

constitutional text, that shape constitutional revolutions. That attempt, however, is merely an attempt to further refine a remarkable product that will influence how scholars understand constitutions and constitutional revolutions for years to come.

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