

INTERSECTING PUZZLES

JEFFREY K. TULIS

One of the most profound topics in constitutional theory is the problem of identity—the question of when change is so fundamental that it transforms one kind of polity into another. Gary Jeffrey Jacobsohn and Yaniv Roznai recently wrote the two most important books on this subject, *Constitutional Identity* (2010) by Jacobsohn and *Unconstitutional Constitutional Amendments* (2017) by Roznai. These authors have now teamed up to extend their analyses to an account of the mechanisms and meaning of fundamental constitutional change in their new coauthored book *Constitutional Revolution* (2020) that is the subject of this symposium.

Jacobsohn and Roznai both found the puzzle of unconstitutional constitutional amendments to be a fruitful way to understand the problem of identity. If a constitutional amendment is proposed that successfully satisfies the procedures of a constitution, is it automatically a legitimate amendment? Does it matter, for example, that some proposed amendment would alter a fundamental feature of the constitution? Jacobsohn and Roznai both argue that it matters a great deal. There can indeed be amendments so substantively at odds with fundamental features of the constitution to which they would be attached that they would be unconstitutional changes.

One can see the power of their insight from two examples, one abstract, one concrete. Imagine a pure procedural democrat who believes that anything that surmounts deliberate democratic procedures prescribed by a constitution for its amendment must, by that very fact, be legitimately constitutional. That position would certainly license all sorts of changes that might obliterate important features of the original design. But how could one endorse the proposition that all changes

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to the amendment process itself—for example, a change that would proscribe any future amendments—be legitimate? That prospect would be incoherent from a democratic point of view as a matter of theory and would be potentially political suicide as a matter of practice if the initial amendment replaced a democracy with an undemocratic alternative. Thus, all constitutions, no matter how democratic and open to revision, presuppose some limit to change in order to maintain the integrity of the constitutional design.

As a concrete example, consider the United States Constitution, which includes as part of its amendment clause two provisions that prohibit two potential amendments—one that would alter the proscription on any legislation banning the importation of slaves until 1808 and another precluding amendment to equal representatives from each state in the Senate. The entrenched provisions seemed to be required precisely because they were inconsistent with animating fundamental aspects of the constitutional design. These examples show that there can be unconstitutional constitutional amendments—because the Constitution explicitly says so. One can surmise that the Constitution had to be explicit in this way because without these entrenchments (necessary to secure ratification of the whole document), the logic of the design would have induced the polity to adopt these changes. But if the document needs to be explicit at its origin in protecting arguably anti-constitutional features, it is reasonable to infer that it always implicitly precludes proposed amendments that would undermine or contradict its fundamental attributes. For these reasons, Jacobsohn and Roznai rightly use the problem of unconstitutional constitutional amendments as a theoretical device to determine what the fundamental attributes are for any constitution. This device enables one to distinguish the fundamental from the peripheral attributes of any constitution.

Jacobsohn and Roznai are masterful in drawing out the theoretical significance of political identity. Let me highlight and underscore why their observations are vitally important for political practice as well. One can think of all proposed constitutional amendments, whatever their merits, as attempts to make a constitution a better version of itself. By contrast one can think of unconstitutional constitutional amendments, whatever their merits, as attempts to replace an existing constitution with a new one. Attempting to perfect a political identity is an excellent working definition of the idea of reform. Replacing one political identity with a different one is an excellent working definition of revolution. Theory is vital to practice because it matters that political actors understand which endeavor they are attempting to accomplish. If one wants to reform a polity, it would be counterproductive, perhaps dangerous, to revolutionize it. If a polity is rotten at its core, however, it would be counterproductive, perhaps dangerous, merely to attempt to reform it.

In their new book, Jacobsohn and Roznai usefully complicate the problem of reform and revolution. Like many great book titles, *Constitutional Revolution* carries multiple meanings. Most obviously it refers to the general topic or question, When and how do constitutions change in fundamental respects? They cover a large array of examples of constitutions and of accounts of them by others. One piece of the conventional wisdom they challenge is that fundamental change must come from outside existing constitutions, whether it be through war, conquest and colonization, and the imposition of new rule or by a recurrence to popular sovereignty or constituent power outside of an existing constitution arrangement. These well-known avenues of change are indeed the most common ones. Jacobsohn and Roznai give a good account of these well-known avenues. Their most original insight, however, unveils how constitutions sometimes provide their own resources, within them, for fundamental revolutionary change. These may be resources that are exploited against the tenor or core meaning of the original design (like unconstitutional constitutional amendments), or they might be aspects of a constitutional design that license legitimate change of fundamentals. This last idea—that constitutions themselves, in some instances, license fundamental change—is the third meaning of *Constitutional Revolution*, and it poses a conundrum or puzzle that appears the reverse, or mirror image, of the unconstitutional constitutional amendments puzzle.

I have a few observations regarding the last two categories of fundamental change—those that deploy the resources of an existing constitution against its fundamental commitments and those that find authorization in a constitution for fundamental change. Jacobsohn and Roznai offer a brief discussion of the movement of the Articles of Confederation to the United States Constitution in which they highlight James Madison’s insistence on continuity, on an idea that change was not fundamental despite the evident illegality of the transition. Without contesting the usefulness of the example and their interpretation of it for their purposes, it seems to me that the same example also is a fine illustration of an existing constitution whose resources are used to abandon it for something fundamentally new. In *The Federalist*, the Articles of Confederation is criticized for its fundamental inability to serve the collective purposes of the confederation. Because the so-called central government lacked coercive authority over individual states, *The Federalist* argues that the Constitution cannot be amended but must be replaced. This act of replacement violated the charge by the Continental Congress to the drafting convention, and the proposed new Constitution violated the terms of amendment within the Articles of Confederation. Thus, *The Federalist* was frank about both the discontinuity of the design proposed and the illegality of the proposal. The drafters of the Constitution did not pretend to amend the Articles but bluntly proposed a constitutional revolution.

However, the Philadelphia drafting convention was a product of the Articles of Confederation and *their* product, frankly described as new and illegal, was returned to the Continental Congress as a proposal. In addition to offering a new constitution, it was also proposed that specially designed ratifying conventions be established in each state and that the agreement of only nine of these conventions, rather than of all the state legislatures as required by the Articles, be sufficient to abandon the Articles and ratify a new constitution. The Continental Congress could have declined to proceed as proposed. Or, the Continental Congress could have accepted part of the proposal but not the whole—for example, it could have retained a unanimity requirement for fundamental change. Instead, this is a striking example of an existing political order using institutions, practices, and, one might say, the civic culture attendant to the constitution to legitimately abandon itself.¹ In his recent book, *Constitutional Failure* (2014), Sotirios Barber describes this aspect of civic culture as a constitutional attitude and argues that it is more important for constitutional health than institutional efficiency or legal integrity. In his telling, the capability of a citizenry and its leadership to diagnose fundamental infirmities in a constitutional order is a mark of success. In other words, despite the utter failure of the Articles of Confederation to meet the basic tasks of governance, such as raising revenue, the ability of the polity to peacefully and deliberatively change is a mark of success for a political order usually marked as a failure. And one could say that a constitution that is revered but whose citizens and leaders are incapable of diagnosing and changing it—for example, the American Constitution today—marks it as on the cusp of failure (Barber 2014).

Thomas Jefferson famously proposed that the American Constitution be designed to make its revolutionary origin more central to its ongoing maintenance. Whether through an easier recurrence to the people to assess constitutional issues or a periodic requirement of re-ratification, the idea would be to make constitutional revolution viable and legitimate by the terms of the constitution itself. In *Federalist* No. 49, Madison famously opposes these suggestions. Madison argues that constitutions require habituation and reverence and that too frequent or required recurrence to the people over fundamental aspects of constitutional governance would be destabilizing and unworkable. Here again, as in the example of unauthorized constitutional transformation, the key issue is constitutional attitude.

1. Forrest McDonald (1989) insightfully observed, “When Congress and every state did as requested, they in effect amended the amending procedure prescribed by the Articles and thereby legitimated the whole enterprise” xi.

The problem of the attitude necessary for constitutional revision in the face of the need for constitutional habituation is reminiscent of the debate regarding the meaning and legitimacy of civil disobedience. The civil disobedient citizen claims that much of the existing political arrangement is praiseworthy but some important part of it is unjust and resistant to reform. Calling attention to a failure of the political order without abandoning the whole order, the civil disobedient pledges nonviolence and, as important, to accept the punishment for violating an unjust law. Accepting punishment testifies to a commitment to the rule of law and to constitutional aspirations while protesting a particular law. When Martin Luther King Jr. made this argument, some purported allies urged him not to break the law to improve it but to work through the usual methods of lobbying and election to change it. Their fear was that civil disobedience would encourage more general lawlessness. Others, who agreed with King that the normal legal practices had failed for decades and had no prospect of success, urged violent revolution outside and against the existing order. King urged that civil disobedience could induce the kind of constitutional attitudes that could bring about fundamental changes using the resources of the existing constitution. King sought to find a middle ground between habituation and violent revolution. One could call this a form of constitutional revolution.

I find the civil disobedience example instructive because the notion that a constitution could include provision for constituent power within it, as an ongoing possibility or institutional feature, presupposes a citizenry capable of the kind of education King tried to teach. It supposes, that is, that the threat to habituation and law abidingness that constitutionalizing constituent power would pose is not as important as the capacity for change that it makes possible.

By highlighting this possibility—the possibility of revolution from within an existing constitution—Jacobsohn and Roznai offer the outline of a solution to a fundamental problem of the United States Constitution. Years ago, I argued that the American Constitution simultaneously depends on popular sovereignty for its legitimacy and makes the requisite of legitimacy less viable over time (Tulis 2001). Born in revolution by an aroused, informed, and engaged citizenry, the Constitution intentionally depoliticizes normal life, turning public-spirited revolutionaries into self-interested citizens primarily devoted to private pursuits, the free exercise of their rights, and the pursuits of their personal aspirations for happiness. Both amendment and even revolution remain as potential last resorts for a people whose rights have been denigrated, denied, or abused. But how will an increasingly privatized people maintain the cognitive and psychological capacities to understand and vindicate their rights or the common good? Jacobson and Roznai range widely

across the worldwide landscape of constitutional projects and find that some polities have begun to solve this problem by making constitutional revolution an aspect of constitutional design.

Both unconstitutional constitutional amendments and constitutional revolutions appear to the untutored observer as an oxymoron. That is unfortunate because as used by conventional scholars, this label prevents these puzzles from coming into view, or it becomes an excuse not to examine them. Some amendments are unconstitutional and some revolutions are constitutional. Jacobsohn and Roznai are the first to examine the intersection of the puzzles that produce these surprising aspects of constitutionalism. The result is a work of constitutional theory that is unusually original, insightful, and generative.

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