WAS ABRAHAM LINCOLN A CONSTITUTIONAL REVOLUTIONARY?

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One of the easiest ways to trigger a debate among scholars is to ask whether a particular event of historic consequence was truly revolutionary. Even those celebrated happenings that are formally labeled as such are not immune from controversy over the accuracy of the officially certified designation. Thus, debates about the Glorious Revolution center mainly on the noun rather than the adjective, in that the English people's collective effort to reaffirm ancient constitutional rights rather than to assert new ones has led some to believe the revolutionary nomenclature to have resulted from the generosity of interpretive license. For someone like Hannah Arendt, who insisted that "the element of novelty is inherent in all revolution," the affirmation of old rights could be enough to question the revolutionary bona fides of the transformation (2006, 19). Yet, to the extent that "the whole attitude of and towards government altered drastically," it was, one could say, not only a glorious moment in English history but surely a revolutionary one as well (Speck 1989, 164).

And then, of course, the American Revolution has over the years been the occasion for robust and ongoing debate about its meaning. So, for example, Barrington Moore (1966, 112) said of the transformation that since it "did not result in any fundamental changes in the structure of society, then there are no grounds for asking whether it deserves to be called a revolution at all," a conclusion that evidently did not deter Gordon Wood (1992/1993) from writing his magisterial book, *The Radicalism of the American Revolution*.

One aspect of the Revolution's radicalism that appealed to the defenders of Southern secession after Abraham Lincoln's election was the precedent set in

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1776. As one of these supporters asked, were not "the men of 1776 who withdrew their allegiance from George III and set up for themselves . . . Secessionists?"[1] In likening their effort to the founders' exercise of a right to revolution, they often invoked the Northern threat to their right to property in slaves as an even greater justification for separation than the case made by their forefathers in the previous century. Needless to say, their arguments were deemed patent nonsense by many of the Union's defenders, who rejected the notion that the right of some men to hold others in human bondage was a legitimate part of the nation's revolutionary beginnings. This led them to see their opponents as advocates and practitioners of counterrevolution. As the historian James McPherson said of Lincoln, for him "the *Union*, not the Confederacy . . . was the true heir of the Revolution of 1776" (1990, 28).

This, then, brings me to the concerns of this essay. In his typically illuminating and provocative contribution to this symposium, Mark Graber asks us to consider another contested transformative development, the American post–Civil War amendments. How revolutionary these constitutional changes were is a question that has long preoccupied scholars, and Graber uses *Constitutional Revolution* as an opportunity to contribute to the debate. Although the amendments are only touched upon in the book and are not the subject of any of its featured case studies, the debate over their constitutive meaning has heuristic possibilities that deserve serious engagement. Specifically, Graber's reflections on how Lincoln fits within this larger sphere of scholarly disputation opens up space for elaboration and refinement of some of the principal themes in our book.

That the Reconstruction amendments were viewed as revolutionary at the time of their adoption is easily established, although *Constitutional Revolution* does not weigh in strongly on the accuracy of the characterization. At best it aligns itself with Sanford Levinson's depiction of these additions to the document of 1787 as "at least a limited constitutional revolution" (2011, 140). Other observers, most notably Eric Foner, are more unequivocal in their portrayal of these changes, which in their view could be summed up as "the constitutional revolution of Reconstruction (2019, 3)." More contemporaneously, the prominent Republican politician Carl Schurz, in what may be the first invocation of the term, referred to the amendments as a "constitutional revolution (Foner 2019, xx)." While he and all too many others did not pursue the implications of the transformation of which they were a part, that the Constitution as amended was a very different document than the one signed in Philadelphia is plainly evident. In Graber's account, "The constitutional

1. Quoted in McPherson (1990, 25).

order in the United States after the Civil War was radically different than the constitutional order before the Civil War." But this recognition presents a challenge to our conceptualization of constitutional revolutions, as personified by no less than Abraham Lincoln.

For Graber, the problem is this. To the extent that the amendments aligned American constitutional commitments with the principles underlying the Declaration of Independence, they also, as some abolitionists contended, represented an affirmation of the original Constitution's own strongest commitment, which properly understood was irreconcilable with the institution of slavery. If, as Lincoln held, the antebellum Constitution had placed human bondage on a course of "ultimate extinction," then how can we understand the adoption of the Thirteenth Amendment as a constitutional revolution, when arguably it was nothing more than "an effort to better secure the basic principles underlying the Constitution of 1787"?[2] Lincoln might very well have been The Great Emancipator, but a constitutional revolutionary he was not if the eradication of slavery did not result in a major change in constitutional identity. And so Graber presents us with this logical conundrum: "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."[3]

Of course, the fault here lies not with Lincoln but with Jacobsohn and Roznai. The former did not, as far as we know, call himself a constitutional revolutionary or even use this terminology. Where the latter two devotees of the concept fall short is in their old-fashioned embrace of an approach to constitutional development that emphasizes constitutional texts and the judicial elaboration of those texts, rather than the constitutional politics underlying court decisions and amendment acquisition.[4] What is required is a more resolute, politically penetrating application of the conceptual tools that *Constitutional Revolution* develops to understand the

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2. Graber, this volume.

3. The same assessment applies to other political actors of this time. Thus, the abolitionist senator Charles Sumner "was a constitutional revolutionary during the Civil War only if he was wrong about the constitution before the Civil War" (Graber, this volume, 10). Non-US examples can be similarly described. So, Justice Aharon Barak's ruling in the landmark *United Mizrahi Bank* (1995) case, in which the Israeli Supreme Court effectively transformed the polity's constitutional identity from one of parliamentary sovereignty to constitutional democracy, can mean only one thing: "Aharon Barak was wrong about the constitutional identity of Israel during the first forty years of that nation's existence" (ibid., 9).

4. Aside from the unsettling reminder of one's status as an elder in the guild of constitutional studies, Graber's assignment of the book's senior author to the circle of antediluvian scholarship is contestable, or at least so thinks this member of the older generation.

paradigmatic displacements in constitutional experience that culminate in the sort of transformation that is the object of the book's inquiry. Specifically, the key idea of constitutional disharmony, in which dissonance and contradiction play out in the development of constitutional identity, will, if exploited in a way that underscores the political dynamics undergirding the phenomenon, facilitate a more satisfactory rendering of the Lincoln problem. No longer will it be necessary to "referee" disputes over the constitutional identity of a regime, thereby avoiding questions of the rightness or wrongness of political actors such as Lincoln, who need not be tethered to the "value judgments" of constitutional scholars.

Graber's critique can be taken as a friendly amendment according to which some "minor alterations" in the analysis of constitutions as inevitably disharmonic and as sites of contestation will sharpen our understanding of constitutional revolutions. As is clear from their case studies, "Jacobsohn and Roznai are well aware that constitutional politics shapes constitutional revolutions."[5] If they built upon this insight by acknowledging that these revolutions are better understood through an emphasis on the political struggles that a nation's constitutional identity engender, rather than on a finding that identity and regime principles have in fact changed, then it is possible to avoid having to make the fraught scholarly determination of whether Lincoln was correct or incorrect in his evaluation of American constitutional identity in 1860 or 1863. In the next section I argue that an acceptance of the friendly amendment does not carry with it an incentive to elide the question of Lincoln's revolutionary credentials. Indeed, recognizing Lincoln's appreciation of the Constitution as a site of contestation means not having to accept Graber's false choice of "determin[ing] whether political actors have engaged in a distinctive constitutional revolution or merely implemented the commitments underlying the previous constitutional revolution."[6] As we will see, they can do both.

THE WEARINESS OPTION

In his message to Congress on July 4, 1861, President Lincoln said: "The right of revolution, is never a legal right. The very term implies the breaking, and not the abiding by, organic law. At most, it is but a moral right, when exercised for a morally justifiable cause. When exercised without a cause revolution is no right, but simply a wicked exercise of physical power" (Lincoln 1953, 434). In that same message Lincoln laid out the case for the use of extraordinary power to preserve the

5. Graber, this volume, 17.

6. Graber, this volume, 1.

Union, a case that required an unequivocal rejection of the idea that secession was a lawful act, even one consistent with the Constitution (1953, 435). That secession was not just an illegal act but immoral as well is made very clear toward the end of his remarks, when Lincoln says of his "adversaries" that they "have adopted some Declarations of Independence; in which, unlike the good old one, penned by Jefferson, they omit the words 'all men are created equal.'"

The "good old one" followed the secession of the American colonies from the British Empire, which, while blatantly illegal, was not the "wicked exercise of physical power" wielded by the states of the Confederacy. How lacking this latter exercise was in providing any semblance of "a morally justifiable cause" was manifest in a speech delivered that same year by the vice president of the Confederate States of America, Alexander Stephens. Declaring "fundamentally wrong" Jefferson's idea about equality, Stephens elaborated: "Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition" (2011, 80). To be sure, he added, the erroneous idea had "not [been] incorporated in the constitution," which explains why John C. Calhoun had justified severance from the Union because its policies were "inconsistent with the character of the Constitution and the ends for which it was established" (1851, 300).

Although Lincoln saw those ends differently, he could not deny what Stephens had said about the Constitution, that it did not explicitly include the Declaration's equality principle. Lincoln made it clear at Gettysburg that the nation's beginning was in one important sense tethered to that principle, but the nation's constitution was not so obviously attached to the self-evident proposition. Much as its silence on the question did not prevent advocates for human equality from using the document to pursue their goals, it enabled men such as Calhoun and Roger Taney to pursue a contrary agenda. Taney in the *Dred Scott* (1857) case authoritatively affirmed this agenda by putting the weight of the Supreme Court behind the anti-equality version of national constitutional identity, setting the stage for Lincoln's adoption of his role as America's foremost constitutional revolutionary.

But was this a role that Lincoln could comfortably and consistently fill in light of the views he espoused over the years? Or as Graber would have it, if he was a constitutional revolutionary in 1863, then would not his assumption of this role before the Civil War make sense only if he was wrong about antebellum constitutional identity?

An apt response rests upon two key features of constitutional revolutions that proceed within the parameters of legality. First, we must embrace the prospect

that radical change in the way constitutionalism is experienced will proceed incrementally, that a paradigm-altering transformation will not be evident within the confines of a discernible constitutional moment. Indeed, the aspirational character associated with this phenomenon necessarily entails a high degree of uncertainty in establishing its ultimate transformative impact. As Yaniv Roznai and I argue in our book, when constitutional development assumes a radical departure from previous experience, the transformative significance of what has transpired ought not to be minimized or negated by the extended period accompanying the consolidation of revolutionary ambitions (Khaitan 2018, 412).[7]

The second feature, disharmony, is given ample articulation in Graber's essay and is critical for understanding Lincoln. Thus, constitutional disharmony is endemic to the constitutional condition, even as it may make more challenging the task of establishing the specific substance of a constitutional identity at any given point in time. The disharmonies of constitutional law and politics ensure that a nation's constitution—a term that incorporates more than the specific document itself—may come to mean quite different things over the course of its development. In our conceptualization of constitutional revolution, it is the dissonance internal to a constitutional text or between the text and the social context in which it is situated that is the driving force behind a nation's evolving constitutional identity. A perfectly harmonious constitution is an illusion.

Lincoln's embodiment of our conceptualization of constitutional revolution is embedded in the nexus of these two attributes. Thus, the presence of disharmonic strands within a constitutional order effectively guarantees that the consolidation of transformational aspirations will encounter resistance, the magnitude of which will reflect the power balance in the ensuing competition that follows. Our case studies reveal the various ways in which the attainment of revolutionary goals may take an evolutionary path to fruition; hence, there is no disagreement with Graber's insistence that constitutional politics is inherent in the existence of constitutional disharmony. In India, for example, what Nehru referred to as a "step by step" progression of his nation's protracted revolutionary unfolding is not simply a manifestation of the cautious incrementalism that can be expected to accompany the societal implementation of massive reconstructive work; rather, it is the inevitable consequence

7. The Indian case is a prominent example of how this plays out. In this regard, consider this comment by a prominent Indian constitutional theorist. "[I]ncrementalism is not in tension with transformative constitutionalism, it may even be the most efficient way of securing it. Indeed, the larger the scale of the transformation sought, the larger is the gap between the status quo and the end goal. The sheer impossibility of bridging this gap immediately would give reasons even to the staunchest advocates of the transformation to accept some deferral" Khaitan (2018, 412).

of the disharmony that was entrenched in the constitutional order from the earliest days of the regime. Indeed, the political moves Nehru took in the immediate aftermath of his newly independent nation were an implicit acknowledgment that his goal-oriented constitutional understanding entailed the taking of steps backward and forward, as conflicting interests and constituencies struggled for ascendancy in light of divergent readings of the Indian Constitution.

Which brings us back to Lincoln. On his trip from Illinois to Washington to assume the presidency, Lincoln delivered in Philadelphia's Independence Hall a brief speech in which he declared, "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence" (Lincoln 1953, 240). Those political feelings extended to the flawed constitutional document signed in that city, which was, as he famously wrote in a fragment on the Constitution, the "*picture* of *silver*" that framed the "apple of gold," the metaphor for the Declaration's "principle of liberty" (1953, 169). It has been surmised that Lincoln wrote this in preparation for his First Inaugural, an address clearly affirming, as was written in the earlier fragment, that the Constitution was meant to "preserve" the principle. But for the new president it was also a flawed document, in that an extended section of the Inaugural was devoted to "the reclaiming of what we call fugitive slaves," an obligation distinctly provided for in the Constitution.

Unlike others, Lincoln did not counsel disobedience to this provision; he rather saw it as a part of a disharmonic document that, contrary to Chief Justice Roger Taney's opinion in the *Dred Scott* case, would in time become congruent with the other arguably dominant and more liberty-friendly strand in the constitutional filament. As Lincoln said several years earlier in response to that decision, the men who wrote the Declaration of Independence "meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should permit" (1953, 406). Thus, Taney was wrong in thinking that "the authors of that instrument did not intend to include negroes, by the fact that they did not at once, actually place them on an equality with whites" (Lincoln 1953, 405). So wrong, in fact, that Lincoln allows himself to imagine that if the outcome in the case were somehow to attain settled status, by which he means "affirmed and re-affirmed through a course of years," then "to not acquiesce in it as a precedent" would be "revolutionary."

It would be revolutionary because of what it represents, a repudiation of the counterrevolutionary meaning embedded in *Dred Scott*'s rejection of the Declaration's revolutionary significance. That significance lay not in the specified reasons for the illegal severance from a colonial power but in the principles referenced in the document's opening paragraphs. "The assertion that 'all men are created equal' was of no practical use in effecting our separation from Great Britain; and it

was placed in the Declaration, not for that, but for future use" (Lincoln 1953, 406). As we argue in our book, the "future use" to which these words would be put was clearly a reference to the efforts succeeding generations would be morally bound to undertake in order to fulfill the promise of the constitutional experiment that had been made possible by violent rupture. Understood in this way, a revolutionary constitutional departure could be conceptualized in a way that did not require for its authentication a blatantly illegal break with a prior regime. It could simply portend the eventual attainment of a substantially different political or social reality made possible by the transposition of one constitutional trajectory for another.

The Declaration's displacement was revolutionary in both its embrace of human equality and unalienable rights and its reconfiguration of the way we think about sovereign authority. However imperfect the constitutional design that framed these core ideas, what would come of their "future use" was bound up in the success or failure of the emerging constitutional order. As we show in our chapter on Israel, through an act of judicial interpretation a high court is capable of playing a critical role in the process through which a constitutional revolution is achieved. In this we see things differently than Graber. Thus, in using the *United Mizrahi Bank* case as the vehicle to instantiate a constitutional identity that would no longer be tethered to the doctrine of parliamentary sovereignty, Justice Aharon Barak, the leading player in that constitutional transformation, was not wrong about Israeli constitutional identity in its first forty years. As for the comparison to Lincoln, for the president the Thirteenth Amendment was ultimately required to make good (or at least important progress) on the revolutionary promise of the Declaration; a fundamental transformation in constitutional governance would be necessary for any consequential consolidation of revolutionary ambitions. Justice Barak, who also identified with one strand in a constitutional revolution whose future course was closely linked to the fate of its disharmonic rival, required a similar reordering of constitutional governance within the polity. There are fair criticisms to be made of Lincoln and Barak, but in both cases their eventual support of radical change in the way the conduct of government should proceed (for the American, centralizing power; for the Israeli, institutionalizing judicial review) does not render erroneous what they had earlier believed about their respective constitutional identities.

Lincoln understood that the Declaration of Independence was not a self-executing document, and so reliance on a constitution was essential for realizing its commitments. Still, whatever future use Lincoln might have imagined for them would require not just a receptive constitution but also a constitutional politics capable of making corrections—even radical ones—to advance strongly contested long-term revolutionary goals. It is with this in mind that we should consider

another of Lincoln's assertions in his First Inaugural: "This country, with its institutions, belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their CONSTITUTIONAL right of amending it, or their REVOLUTIONARY right to dismember or overthrow it." To exercise the latter option could of course culminate in another constitutional revolution. Such was the outcome of secession. Might the first as well?

Lincoln's "weariness option" incorporates an assumption at the core of the dominant legal theory as applied to generic revolutionary activity. As formulated by Hans Kelsen, a revolution occurs "whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way . . . not prescribed by the first legal order" (1949, 117). Yet as the choice detailed in Lincoln's address reminds us, the desire for a fundamental departure in constitutional development can be met in a mode prescribed *by* the legal order. Weary of the way things are? Then change them, through legal or illegal means. Indeed, as we detail in our book, many of the occasions that are sometimes identified as constitutional revolutions have followed the officially authorized path.

This comparative focus also illuminates the specific concern of this essay. The Lincolnian option of either amending a constitution to improve it or engaging in a revolution for the purpose of overthrowing it leaves out another possibility that speaks directly to the phenomenon of the constitutional revolution. For example, India's signature contribution to constitutional jurisprudence—the Basic Structure doctrine—in its evolution from a defensive canon of extraordinary politics to an affirmative dictate of ordinary politics, reveals that a constitutional amendment can become a redemptive instrument for the fulfillment of transformative change. Familiarity with the unconstitutional constitutional amendment issue, according to which a court can invalidate a duly adopted amendment on substantive grounds, may not prepare one for an identity-enforcing assertion of judicial power in *support* of paradigmatic constitutional change.[8] An amendment might be upheld on a finding of inoffensiveness to constitutional identity, or it might be invalidated for its presumed damage to constitutional identity, but we are not accustomed to seeing

8. *Constitutional Revolution* has an extended discussion of the 2011 Indian case *Indian Medical Association v. Union of India*, 7 SCC 179, in which the Supreme Court of India upheld the Ninety-Third Amendment, which had extended the scope of the Indian Constitution's affirmative action provisions to private as well as public institutions. In doing so, according to the court, the amendment advanced "the broad egalitarian objectives of the Constitution" and satisfied "the theory of basic structure [which] is based on the concept of constitutional identity" (par. 87). Upholding the amendment on basic structure grounds was a calculated effort to give fuller meaning to what was at best only an inscribed embrace of revolutionary constitutional identity.

an amendment sustained for being a salutary advancement of the revolutionary mission that lies at the core of constitutional identity. Indian jurisprudence demonstrates that a commitment to a core principle of constitutional identity will sustain an amendment that radically alters the role of government if that alteration is in the pursuit of the original revolutionary objectives.

Imagining such an amendment concentrates one's attention on the dynamic imperatives of constitutional revolutions. These imperatives are not limited to "align[ing] American constitutional commitments with the basic principles of the Declaration of Independence," as Graber suggests about our reflections on the United States. Yes, the Thirteenth Amendment's ban on slavery and involuntary servitude aligns the amendment with the core equality proposition of the nation's founding document, and in that sense the change can be seen as continuous with one strand in the Constitution's disharmonic makeup. Viewed in this way, Graber is not mistaken in saying that "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." But what *was* discontinuous in constitutional experience was subsumed in the words of the Thirteenth Amendment that were reprised in the two subsequent constitutional add-ons: "Congress shall have power to enforce this article by appropriate legislation." As Eric Foner has noted, this "redefinition of federalism" was "the first amendment in the nation's history to expand the power of the federal government rather than restraining it" (2019, 32). Indeed, for that very reason Democrats "condemned it as a revolution . . . which violated the original understanding that states should decide for themselves whether or not to establish slavery" (Foner 2019, 33).

To be sure, the revolutionary import of the post–Civil War amendments may be questioned. That the Supreme Court did so not long after their adoption is significant, as can be argued is the more recent effort of that tribunal hollowing out the landmark 1965 Voting Rights Act (*Shelby County v. Holder* 2013). Graber is in agreement with us that constitutions are "sites of contestation," and we agree with him that "[d]ifferent political movements gain temporary victories, but none successfully drives the other from the field." (this volume, 18).[9] Again, Nehru's

9. With one caveat. Graber says that Lincoln was wrong when he claimed, "A house divided against itself cannot stand." But this must be read in connection with the next sentence in that famous speech: "I believe this government cannot endure, permanently half *slave* and half *free*." And then two sentences later: "It will become *all* one thing, or *all* the other." So yes, constitutional regimes are inevitably disharmonic, and as Graber ably demonstrates in his essay, the triumph over slavery did not mean the legacy of that peculiar institution would fail to endure through Jim Crow and even to this day. But was he wrong to say that a *permanent* division over the fundamental question at the heart of the Declaration was unsustainable?

step-by-step approach to India's "long constitutional revolution" suggests that this is not a phenomenon unique to one nation's experience.

Also not an exclusive feature of one polity's constitutional experience is what is featured in our comparative case studies—namely, that the disharmonic condition exists as a continuing source of potential counterrevolution. Lincoln's constitutional revolutionary bona fides must be understood in that context. Recall his comment about the Declaration, that the self-evident truth concerning equality had "no practical use in effecting our separation from Great Britain." Lincoln was not alone in his thinking on this subject, nor was he the first to opine in this way. A similar sentiment can be found in remarks from an 1848 speech by John C. Calhoun. In it we learn that the assertion that "all men are created equal . . . was inserted in our Declaration of Independence without any necessity. It made no necessary part of our justification in separating from the parent country, and declaring ourselves independent" (2011, 59). The rest of the speech was devoted to "expos[ing[" Jefferson's "utterly false view" of the assertion as a "dangerous error." Of course, to rectify that error, Calhoun's followers created their own separation, pursuing Lincoln's revolutionary option to frame a constitution that expressly affirmed the centrality of their correction.

Lincoln and Calhoun were both accurate in their assessments of the practical value of the Declaration's more philosophical part. But their differing versions of its substance is what is really important. For Calhoun it was specious surplusage; for Lincoln it was the core of a constitutional revolution that was from the outset threatened by a coexisting reality that incorporated the contrary view. Perhaps, as Graber suggests, it is not necessary for "scholars to determine whether Lincoln was right about American constitutional identity in 1860." But for Lincoln, the most deeply entrenched disharmonic challenge of American politics, particularly after Roger Taney had adopted Calhoun's counterrevolutionary contention, left him no choice but to insist on the rightness of his story about constitutional identity.

What, then, to make of Lincoln and the Thirteenth Amendment? If he was right about antebellum identity, then can he be thought of as a constitutional revolutionary in connection with a postbellum amendment whose purpose it was to render more secure (as in "to secure these rights") that very same constitutional identity?

To see how an affirmative response makes sense without denying the premise of the question—in other words, that identity continuity is very much in play—a more textured account of constitutional identity is required than is obtainable through a narrow focus on core values or principles. As we argue in our book, a constitutional revolution occurs when there is a paradigmatic displacement in the

way constitutionalism is experienced in a given polity. That experience encompasses sociological and institutional dimensions, either or both of which may be involved in transformational constitutional change.[10] Brexit is an example of the latter; while the decision to withdraw from the European Union is fraught with value-based implications, the reorientation away from the governing authority of a supranational body is in itself an arguably revolutionary shift in the way constitutionalism is henceforth to be experienced in the United Kingdom. The Turkish amendment of 2017 that converted the state from a parliamentary to a presidential system may be another example of this phenomenon, as is the earlier mentioned Israeli constitutional revolution engineered by Justice Barak.

Of course, the revolutionary designation is less problematically applied when an institutional transformation is explicitly intended to achieve a displacement in the foundational beliefs that should govern a society. The losing side in the Civil War doubtless thought the amendments that followed their loss in that war was such an instance. Still, the leader of the other side, the side whose triumph made possible, through a centralization in the regime's governing authority, the viability of a disputed constitutional identity, should also be seen as a constitutional revolutionary.

CODA: ON PROMISSORY NOTES AND REVOLUTION

If Lincoln's Gettysburg Address tops the list of America's most famous speeches, not far behind is Martin Luther King Jr.'s "I Have a Dream" speech, delivered exactly one hundred years later in the shadow of the national memorial to the president. The two speeches are inextricably linked, perhaps nowhere more so than in the King passage that so clearly connects with this line from Lincoln's address: "It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced." As King proclaimed:

> When the architects of our great republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men, yes, black men as well as white men, would be guaranteed the inalienable rights of life liberty and the pursuit of happiness.

10. I am grateful to Joseph Cozza for articulating this distinction in a dissertation that is well along toward completion.

The huge 1963 gathering in Washington was a testament to the still unrealized promise of those documents.

King's invocation of the "architects" of the regime and their "promissory note" connects not only to the "unfinished work" referenced at Gettysburg but also to what Lincoln had earlier said about the Declaration's "future use." Thus, fulfillment of the nation's promise would require time; the violent separation that created the opportunity for its realization could not, Lincoln understood, coincide with a broad-based embrace of the Revolution's revolutionary declaration.

By 1963 payment on that promissory note was long overdue, and King was not content passively to await its appearance. "We have also come to this hallowed spot to remind America of the fierce urgency of Now." The challenge for King, much as it was for Lincoln, entailed reconciling a fervent rejection of wrongs that had long subsisted within a compliant constitutional order with a passionate defense of that very same constitutional order. In the latter's case the effort was castigated most memorably by Stephen Douglas, who charged Lincoln with counseling disobedience to the Constitution.[11] For King, as Jeffrey Tulis discusses in his insightful contribution to this symposium, the solution to this tension was civil disobedience. "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."[12] The civil disobedient, Tulis points out, calls attention to the failures of the political system without calling into question the legitimacy of that system. Indeed, the specific exercise of disobedience, performed in the principled nonviolent way that King expounded, can be understood as an act that "constitutionalizes constituent power," which as we argue in our book is compatible with "a shift in modern constitutional design towards more inclusive and participatory mechanisms, whereby the people can assume (or reassume) their constituent role and be actively involved in constitutional change" (Jacobsohn and Roznai 2020, 257).

King's civilly disobedient efforts to make good on the nation's promissory note may, then, be likened to Lincoln's weariness option in that, in Tulis's apt phrase, both serve to "mak[e] constitutional revolution an aspect of constitutional design."[13] Both sought fundamental change in the political order without "dismember[ing]

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11. Douglas's evidence was Lincoln's critique of the *Dred Scott* decision, in which the argument was made that the ruling need not be followed as a political rule. See the fifth debate (Douglass 1953).

12. Jeffrey K. Tulis, "Intersecting Puzzles," p 31 this volume.

13. Tulis, p 32 this volume.

or overthrow[ing]" the existing constitutional order. Both were, in their own way, constitutional revolutionaries.

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