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COVER IMAGE: Bronze statue of John Marshall by American sculptor William Wetmore Story. (Image courtesy of Shutterstock.com.)

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MARK A. GRABER[1]

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

1. Regents Professor, University of Maryland Carey School of Law. Much thanks to Howard Schweber, Gary Jacobsohn and Yaniv Roznai for their inspiration, and even more thanks to Krystyna Budd and Rebecca Anderson for their editing and patience.

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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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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.

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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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CONSTITUTIONAL REVOLUTIONS UNDER AUTOCRACY

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ABSTRACT

Gary Jacobsohn and Yaniv Roznai's (2020) book *Constitutional Revolution* offers a sophisticated conceptual framework with a fascinating description of empirical occurrences of substantive revolutions in the practice and understanding of constitutionalism in Germany, India, Hungary, and Israel. While the conceptualization in the book and its empirical illustration clearly draw from regime transformations or substantive changes within democratic regimes, we know little about the extent to which substantive constitutional reforms are possible and meaningful in autocratic regimes. As their concept of constitutional revolution is ambiguous and requires a substantive engagement with an individual case at hand, we cannot simply expect concept equivalence when expanding its use beyond a transitory or democratic context. Hence, in this contribution I ask, What constitutes a constitutional revolution in an autocratic regime? To shed light on this question, I rely on the expectation that we do not find important differences in the substance of autocratic constitutions compared to democratic constitutions. Autocratic elites, also, understand the possibilities of constitutional change and respond to them as they offer regime stability and simply more power, but that is not a revolution. Therefore, I argue that the substantive meaning of an amendment must be a departure from the inherent logic of the constitution, especially outside the standard procedures for autocratic ruling. Thus, in this paper I discuss the theoretical implications of a

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constitutional revolution under autocracy without a regime transition and provide empirical evidence from various constitutional amendments and de facto reforms in Russia. I show that a constitutional revolution is not always the most important or most discussed constitutional change—at least, not in an autocratic context. This discussion has important implications for understanding constitutionalism and autocratic stability and the largely overlooked relationship between substance and process in nondemocratic settings.

KEYWORDS: *constitutional revolution, autocracy, Russia, federalism*

I. A CONSTITUTIONAL REVOLUTION

What is a constitutional revolution in an autocratic regime without a transitory context? Jacobsohn and Roznai (2020) understand constitutional revolutions as a type of change that results in a substantial departure from constitutional practice and identity in any given country. By weaving theoretical argument, empirical observation, and critical reflection, the authors of *Constitutional* Revolution take us as reader through the development of a new theoretical concept and its real-life occurrences. By emphasizing the well-known flaws in the logic of *Rechtspositivismu*s, they do not differentiate between the legality or illegality of constitutional changes.[2] Instead, they show that "[c]hanging the substance of a constitutional trajectory through the amendment process may arouse legitimacy issues even in the absence of the irregularities" (Jacobsohn and Roznai 2020, 7). They rather point to an "amendment-induced constitutional transformation" (Jacobsohn and Roznai 2020, 8). Hence, they argue, that in order for constitutional changes to be understood as a constitutional revolution, researchers have to focus on substance over process. This argument is particularly convincing in the authors' case study on the Lisbon decision of the German Constitutional Court.

The key "engine driving such change" (Jacobsohn and Roznai 2020, 21) is a certain disharmony of the constitutional order. In his earlier work,

2. Yet there is the clear tension between proceduralist like Hans Kelsen or authors with a more substantivist approach toward constitutional amendments. Kelsen emphasized that a constitution is only "a certain legal form which may be filled with any legal content" (1999, 260), and he argues that "the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated" (1999, 117). Conversely, "it does not matter how fundamental changes in the substance of the legal norms are if they are performed in conformity with the provisions of the constitution" (Paczolay 1992, 563). See also Roznai (2017) for this discussion.

Jacobsohn (2010, 16) stresses that "disharmony" in constitutional design can be a valued asset in the necessary process of renegotiation and recalibration. His idea is that inconsistency, disharmony, or a "bricolage" (Tushnet 1999, 1287) in constitutional designs may be more helpful in the democratic development of countries than harmonious or consistent constitutional solutions. A harmonious constitutional design in this conceptualization matches its individual parts in a consistent way with "structural integrity" (Tushnet 1999, 1287) or parts that fit together (Horowitz 2000, 121). This is clearly related to an argument by Hanna Lerner, who recommends the inclusion of contrasting provisions in the constitution to allow the state to actively appreciate the societal differences that are at the core of its foundation (Lerner 2010). Yet, Lerner's assumption is that this applies only for "the constitution's symbolic and foundational facets" (Lerner 2010, 74) and explicitly emphasizes a consistent design when it comes to the institutional features. However, other research has pointed to the positive effect of inconsistency—for example, in the type of government—on liberal democracy, horizontal accountability, and the rule of law (Fruhstorfer 2019).

With the premise that constitutional revolutions are a type of change that results in substantial reorientation in constitutional practice and understanding, Jacobsohn and Roznai (2020) create a sufficient condition for a constitutional revolution. Because the authors do not emphasize a necessary condition for the concept of constitutional revolution, by default they choose a family resemblance approach to concept formation. So, while there are other possible characteristics that apply when we observe constitutional revolutions (e.g., disharmony or reference to the historical past), every constitutional change that substantively changes the core constitutional logic and identity is, in their approach, a constitutional revolution:

> All constitutions are crafted over time in the sense that their meanings and identities evolve gradually in ways determined by a dynamic fueled by their internal tensions and contradictions and by their confrontations with a social order over which they have limited influence. In time, a constitutional order is constructed and shaped, and the ambitions inscribed in, or attributed to, the constitution are realized or not—or more likely, approximated to a greater or lesser degree. And that is the moment for assessment of the constitutional revolution. (Jacobsohn and Roznai 2020, 58)

And while this concept inherits a certain ambiguity,[3] with the in-depth descriptions of individual cases, Jacobsohn and Roznai (2020) forestall much of

3. Something the authors readily admit and even cherish: "This ambiguity—inevitable, it should be said, in what is an essentially interpretative presentation" (Jacobsohn and Roznai 2020, 21).

the expected criticism. Therefore, when we want to expand and understand the concept of a constitutional revolution under autocracy, we rely on in-depth descriptions of individual cases and occurrences. This in-depth analysis has to consider the characteristics of individual autocratic regimes, the diversity within the autocratic regime types, and the substantive logic of the constitution in the respective country.

To do so, in the following sections I explain the logic of constitutional change and constitutionalism under autocracy.[4] Based on this description of the different roles constitutions might have under undemocratic conditions, I provide a comprehensive analysis of the reform of the Russian Constitution changing center-region relations. The literature on this subject often claims that the balance between center and region "is subjected to continual review, and almost every generation of politicians has found it necessary to re-shape relationships between the center and regions to a certain degree and in certain spheres to resolve pressing problems" (Busygina 2018, 196). Yet, I posit that the constitutional amendment in 2014 and the de facto constitutional amendments by ordinary law in 2000 and 2004 constitute not only a step in the continual review of center-region relations but also a constitutional revolution, a substantial reorientation in the constitutional practice, and understanding of federalism and regionalism in Russia.

II. CONSTITUTIONALISM UNDER AUTOCRACY

The role of constitutions under autocracy is an enduring puzzle for political scientists and legal scholars. Constitutions can create stability and guarantee the endurance of autocratic regimes (Albertus and Menaldo 2012; Isiksel 2013; Tombus 2020). In theocracies, constitutions have bounds and offer opportunities (Hirschl 2010; Meriéau 2018). Constitutions help to legalize democratic backsliding masked as autocratic legalism (Scheppele 2018; Uitz 2015), and they function differently when we move beyond a Westernized perspective on constitutionalism (Fruhstorfer and Frick 2019). While it is tempting to disregard the influence of constitutions in autocratic and hybrid regimes, and to treat them as shams (as described by Law and Versteeg 2013; Weber 1906), constitutions in these contexts cannot be dismissed so quickly. Researchers have taken enormous strides in the last years to establish this empirical fact. From a historical perspective, constitutions and more general law played a horrific role as devices to rule during the terrors of the Nazis. This experience of *legal positivism* drove a wave of scholars to work on ways to give law

4. "Autocracy" is here used as a term that includes several subtypes of authoritarian and hybrid regimes and that builds the opposite of a consolidated democracy.

a deeper meaning beyond a manual to organize societies. Yet, observing constitutionalism in current Turkey or Russia brings this logic of a described "semantic constitution" back to concrete assessment (Loewenstein 1969). In particular, Mark Tushnet (2013) and Ran Hirschl (2013) have argued that constitutionalism can be not only the limitation of power but also the opposite of arbitrary rule, as well as a way to increase the efficiency of politics. With this, they pluralize "the idea of constitutionalism" (Tushnet 2013, 39). Turkuler Isiksel (2013, 702) makes this explicit and formulates the concept of authoritarian constitutionalism "as a system in which the constitution rather than constraining the exercise of public power is coopted to sanction oppressive uses of it."[5] In this sense, constitutions are neither democratic nor autocratic; they legitimize and legalize the power of the ruling elite (Myerson 2008). Constitutions are certainly feasible and proper ways to organize modern societies and governance, even in settings that are not entirely democratic.

When we think about it, the shared commonality of all regime types is their urge to legitimize their rule. The work of Hirschl (2013) provides us with the insight that constitutions and constitutional amendments are primarily written by elites concerned about losing their power—in democratic as well as autocratic contexts. In line with the motivation to implement a constitution in the first place, by amending the constitution we expect that any autocratic leaders or leadership groups uses these amendments to legitimize their rule and strengthen the relation between leadership group and supporters (Albertus and Menaldo 2013, 55). Hence, a constitutional revolution should help elites to stabilize their rule. But what constitutional core needs to be changed, while remaining autocratic? A simple answer would be this: when we know who has access to power and how the authority it endows is exercised, we know what political regime we are observing (Kailitz 2013) and which constitutional core has to be changed, especially in a democracy-autocracy dichotomy. Yet, answers are seldom simple, even within a dichotomy. Instead, we find a world of regime types that can be distinguished along "the rules that identify the group from which leaders can come and determine who influences leadership choice and policy" (Geddes et al. 2014, 314). The formal and informal rules of decision-making in this setting derive from this logic and are largely influenced by the representation of specific interests (Geddes et al. 2014). Thus, changing this logic means we change the core function of this regime. And here, the book offers a straightforward answer for understanding this conundrum: "Revolutions can come in different shapes and sizes. Legal continuity must not be confused with regime

5. H. W. O. Okoth-Okendo (1972) describes constitutions along this line as power maps; for a similar description, see Albertus and Menaldo (2013).

continuity" (Jacobsohn and Roznai 2020, 98). Although the authors do not spell it out, in their understanding of a constitutional revolution it is possible to revolutionize an autocratic constitutional order— through amendment or interpretation— without a regime transition.[6] Yet, as I argue, in an autocratic context without a regime transition, a constitutional revolution is seldom the most important or most discussed constitutional change we find.

III. RUSSIA'S FEDERALISM

What usually attracts the most attention when it comes to constitutionalism under autocracy, and even more so in the case of Russia, is the expansion of presidential power or the extension of presidential term limits. But other amendments that are less prominent in the public or scientific discourse also change or threaten core principles of the constitutional logic. The constitutional amendments pursued by President Putin in 2020 are far-reaching and decrease judicial independence, bolster the status of ethnic Russians for the sake of ethnic equality, and constitutionalize a "patriotic conservatism" (Pomeranz 2020). In addition, the 2020 amendments create uncertainty about Vladimir Putin's future by pursuing different strategies. The amendment adopted in July 2020 resets the number of terms to zero for any current or former president of the Russian Federation and in Article 18 removes the word "*подряд*" (in a row), thus putting a halt on a possible repetition of the castling pursued between Putin and Dmitry Medvedev in 2008 and 2012. Establishing a different route forward (i.e., changing the presidential term years before the actual question of term limit compliance arises) while also proposing amendments guaranteeing him immunity for his time as prime minister is a perfect way for Putin to avoid the lame duck syndrome. These amendments are far-reaching and incredibly important for the future of the country and the future career trajectory of Vladimir Putin.

Yet, none of these amendments, as far-reaching as they may be, constitute a constitutional revolution, a change that substantially alters the inherent logic of the system. The extension of presidential term limits and the weakening of the Supreme and Lower Courts, as well as the increase of presidential influence over the composition of these courts, are a continuation of constitutional functions and a logic already present in the 1993 Constitution of the Russian Federation. As

6. This is conceptually different from a constitutional dismemberment (Albert 2019), an amendment that does not create a constitutional logic supporting the constitutional purpose but destroys the substantive core of a constitutional text.

William Pomeranz (2020) put it, President Putin "relied and expanded on certain longstanding principles and values, and reforged a unified, autocratic, centralized, and highly personalized state." Contrary to this, we see that other constitutional reforms that received much less attention constitute a constitutional revolution. The reforms of the central-regions relations in Russia under Putin offer a paradigmatic example of a constitutional revolution under autocracy. These reforms were a substantive departure from the constitutional core established in the 1993 Constitution of the Russian Federation, adjusting a salient issue in Putin's efforts to hegemonize and "streamline" his power over the governors and to improve governance in the regions.

A. Historic Legacies

A large part of the formal constitutional amendments to the Russian constitution, since its adoption in 1993, were devoted to central state relations and the federal subjects. Obviously, federal relations are an important element of political control for the world's largest country, stretching over nine time zones. Hence, it is no surprise that power and effective governance over the different parts of this country are a contested prize among its political elite. Part of the historic czarist (Russian) identity is rooted in the pursuit of territorial expansion, which culminated in the Soviet industrialization attempts of Siberia. But while this created a large empire with a high level of urbanization—in 2020, 74.8 percent of the total population (World Fact Book 2020)—these urban centers are scattered, obviously with a concentration in the western oblasts (e.g., Nizhny Novgorod, Astrakhan, or Penza). The Russian Federation, as the name implies, is a federal state of eighty-five subnational units (since 2014), most of which are ruled by a governor-type executive and a directly elected legislature.[7] Usually the legislative organs are a cross-section of regional elites sustaining the regime. O. J. Reuter and D. Szakonyi (2019, 557) describe them as "the most prominent regional figures—directors of large enterprises, representatives of state corporations, and the heads of major hospitals and research institutes." Control over and support within these elites is a substantive part of stabilizing the Russian autocratic regime. Yet, theoretically, "[f]ederative relationships are essentially an intertwining of mutual dependencies: Regional politicians are granted powers to act independently, at least in some areas, while they serve as dependent agents of the federal center in others" (Busygina 2018, 196).

7. The Constitution of the Russian Federation (Art. 5) distinguishes between territory, regions, autonomous areas, and federal cities (also named as *oblast*, republic, *krais*, and autonomous *okrugs*).

These mutual dependencies were, however, a significant challenge in post-Soviet constitutional development. Although the federal structure of Russia has a long de jure tradition (also legally the Union of Soviet Socialist Republics [USSR]), the last Soviet president Mikhail Gorbachev pointed to a discrepancy between the legal provisions in the Soviet Constitution and de facto experiences: "Up to now our state has existed as a centralized and unitary state and none of us has yet the experience of living in a federation" (Gorbachev 1989, quoted in S. Kux, "Soviet Federalism," *Problems of Communism* (March–April, 1990), 2). Alfred Stepan (2000, 169) summarizes this as follows: "In the early 1980s, most power in the USSR emanated from Moscow." Yet, this quickly changed in the course of the dissolution of the Soviet Union. In particular, in the last year of the Soviet Union the Russian provinces profited from the conflicts between the Soviet president Mikhail Gorbachev and the Russian president Boris Yeltsin and moved toward a confederation as an organizational model and more autonomy (Sharafutdinova 2013, 359). Yeltsin as Russian president urged the regional representatives "to take as much sovereignty as they could swallow" (Alexander 2004, 233) and initially profited from this conflict in winning independence for Russia. Yet, this strengthening of the regions came back to "haunt" him in the course of creating the new Russian Federation. The weakness of the executive and legislative center toward the federal units became even more apparent after the dissolution of the Soviet Union and under Yeltsin's presidency. Some authors point to the Kremlin's politics of "appeasement" toward the regions (Sharafutdinova 2013, 358), or even call it "anarchy" (Ross 2005, 355). This resulted in powerful regional elites with "personal fiefdoms" (Sharafutdinova 2013, 359; Ross 2005, 355) in a negotiated form of authoritarian federalism based on intimidation and human rights abuses. The conflicts before the adoption of the Russian Constitution of 1993 did not create a stable ground for a new federal logic; rather they emphasized the inherited Soviet form of "ethnoterritorial form of federalism" and the differences in the legal status and power of different regional subjects (Ross 2005, 350).

The 1993 Constitution was the first of many attempts to balance this asymmetry by declaring all regional subjects equal (Art. 5, 1993 Constitution of Russian Federation). Yet, the provision concerning the federal-center relations as well as the federation-subject relations did not establish a clear power distribution, offering ambiguous language instead. While Article 4, Section 2, and Article 15 stated the supremacy of the Federal Constitution over the laws on the regional level throughout the whole territory, Article 11 emphasized the applicability of the Federation Treaty and its inherent push for federal asymmetry, giving significantly more power to ethnic republics than to other regional subjects. When we follow Robert Dahl's definition of a federal state, "a system in which some matters are exclusively within

the competence of certain local units—cantons, states, provinces—and are constitutionally beyond the scope of the authority of the national government; and where certain other matters are constitutionally outside the scope of the authority of the smaller units" (Dahl, 1986, 114), Russia is not an ideal case. It is, however, a federation with eighty-nine elected officials, with control over their territory and its resources, and with substantial influence in the center as ex officio members of the Federation Council—and thus over budget (Stepan 2000, 169). This regional representation on the central level was constitutionalized; that is, the constitution stated that the Federation Council is constituted by two representatives from each constituent entity of the Russian Federation—one from the legislative and one from the executive state government body (Art. 95, Sec. 2). While the first election was nationwide, "[f]rom 1996 until 2000 the heads of the legislative and executive branches of government in each region were granted ex officio membership of the Council" (Ross 2003, 32). This provided the potential for power struggles between region and center. Even more important was the election of the regional heads/executives that was not constitutionalized and was pursued in different modes ranging from a model combining elections and appointment as well as universal elections under President Yeltsin to presidential appointments—after a constitutional revolution—under President Putin (Blakkisrud 2015).

All in all, the Yeltsin era can be characterized as one of decentralized politics with both de facto and de jure autonomy yielded by regional legislators and governors. This was in line with the logic of the 1993 Constitution of the Russian Federation. However, this changed under President Putin, who quickly established control over the regions and created a "top-down power pyramid [...] strengthened the Kremlin, and the central state vis-à-vis the regions" (Sharafutdinova 2010, 672).

B. Putin's Reforms

Despite a formal power distribution in the logic of mutual dependencies, the efforts to centralize power were already observable during Putin's first presidential term. After the terror attack on a school in Beslan, the revision of center-region relations intensified. Several ordinary laws with substantive impact on the constitution as well as formal constitutional amendments created a significant change in the logic of the federal system of Russia. The 2004 federal law on the "basic principles of the organization of legislative and executive branches of the government in the subjects of the Russian Federation" abolished the popular election of the governors; instead "legislative branches were to elect candidates proposed by the president" and allowed "the president to dismiss any governor if he or she lost his

trust" (Petersen and Levin 2016, 534). Helge Blakkisrud (2015, 105) describes the abolishment of elections for governor as a "critical juncture in the development of Russian center-regional executive relations." These de facto constitutional amendments through ordinary laws serve as a case allowing a "disintegration between form and substance" (Petersen and Levin 2016, 521). A change of this kind that Petrov et al. (2010, 3–4) describe as "overmanaged" governance, enabled the president to dictate the election of candidates for regional governor. While this gives the center enormous influence over the region and the Federation Council (as they in turn appoint its representatives), this overmanagement also had disadvantages, like the lack of a "reliable mechanism for selecting people appropriate for such crucial positions" (Sharafutdinova 2010, 673), and indeed, the rearrangement of the specifics of the election or appointment of regional governors continued. After protests in 2011, the broader participation of the regions in gubernatorial elections was reconsidered, reintroduced, and after the first round of elections in October 2012 quickly amended to guarantee centralized control. The constant in all of this was Putin's goal of remaining the "ultimate arbiter" over the selection of regional executives (Blakkisrud 2015, 115).

Another important step in rearranging center-subject relations was the reforms of the Federal Council. Darren Slider described the specific role of the Federation Council in the early 1990s as follows:

> The Federation Council has most often acted to disrupt the development of a normal federation by seeking to retain and expand regional powers far beyond that envisioned in any effective federal system. Moreover, the members of the Federation Council have purposely created gridlock in the legislative process in order to stall legislation that would encroach on their considerable powers. One feature of the Russian constitution encourages a strategy of delay and gridlock: in the absence of federal legislation, regions are allowed to pass their own laws on any given area of policy. Rather than attempting to create the legislative foundations of a well-defined federal system, the goal pursued by most regional leaders is to preserve an informal system which distributes power and resources on the basis of individual lobbying of central government officials. (Slider cited in Stepan 2000, 161)

Influence over the powerful Federation Council was and is important. The Federation Council has an important role to play in legislation (e.g., legislative initiative and the adoption of federal laws). It has to give approval to changes in borders between subjects of the Russian Federation. It must also give approval to the

decree of the president of the Russian Federation on the introduction of martial law, states of emergency, and the use of the armed forces abroad, as well as the appointment of judges to the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, and the Higher Arbitration Court of the Russian Federation (Arts. 102, 104, and 105 of the Constitution of the Russian Federation).

To rearrange the power distribution in this particular institution was especially important to Putin and his goal of creating a more centralized and center-focused mode of governance. Therefore, shortly after Putin became president, he pushed for the separation between governorship (or more generally regional leader) and being ex-officio senator in the council (Ross 2005, 357). While this reform was strongly opposed by the regional representatives—considering the perks of living in Moscow, immunity, and substantive influence—it was successfully implemented after the threat of overruling any legislative veto by the Russian Duma (i.e., the lower chamber). The composition of the Federation Council was again part of a constitutional amendment in 2014. This amendment was formally initiated by State Duma representatives from different parties and confirmed by the State Duma, the Federal Council, and the regional parliaments (Art. 136 of the Constitution of the Russian Federation). Since this confirmation, the president is allowed to nominate 17 out of 170 senators, in a political institution that otherwise resembles the federal representative logic of the US Senate, with two senators per region (one nominated by the regional parliament, one by the governor and confirmed by the regional parliament). The president has thus far not used his power to nominate Federation Council senators, possibly keeping it as a token, aimed at weakening regional representation.

IV. CONCLUSION: WHEN AUTOCRATIC CONSTITUTIONALISM DOES NOT RULE OUT CONSTITUTIONAL REVOLUTIONS

A constitutional revolution in Jacobsohn and Roznai's conceptualization is a substantial departure from constitutional practice and identity, and while various constitutional amendments or court decisions lead to a constitutional transformation, they do not all substantially alter the core of a nation's constitutional understanding. The concept of such a revolution is, thus, ambiguous, and in some cases only history can offer a sound interpretation of whether a constitutional event actually constitutes a constitutional revolution. The idea presented here, of a constitutional revolution under autocracy, follows the same logic as in a transitory context or under a democracy. Yet, key aspects are different, and

a constitutional revolution in an autocratic setting does not address problems that might arise in what we consider key to autocratic regimes (executive succession, for example). With the example of Russia, we see that the overhaul of the constitution to further strengthen the executive and Putin's rule this year does not constitute a constitutional revolution. These changes are extensive and mark the "transition to a Great Presidency," and they provide the basis for a "unified systems of public power" (Petrov et al. 2020; Greene 2020). But they do not substantively change the logic of this autocratic constitution and Russia's constitutional identity. Despite its novelty, the federal system in Russia was a key characteristic of the new system developed after the end of the Soviet Union. The subjects of the federation were able to resist the federal center for quite a while, and the constitution was framed in a way that supported this autonomy. Yet, after Vladimir Putin became president, the relationship between center and region changed completely. The combination of the 2004 ordinary law on the nomination/appointment or election of the regional governors and the 1999 ordinary law and 2014 constitutional amendment rearranging how the Federation Council is composed and how Putin can influence its membership changed "the essence of federalism [as] a constitutional principle" (Petersen and Levin 2016, 535). Therefore, this constitutes a constitutional revolution sustaining the dominance of the center in this autocratic regime.

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ON GARY JACOBSOHN AND YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION*

FRUZSINA GÁRDOS-OROSZ[1]

ABSTRACT

In constitutional democracies substantive constitutional change must be adopted through the proper procedures. The substance cannot be changed outside the constitutional procedure and must align with the constitutional rules. Substantive change and pre-set competence and procedure cannot be separated in this regard. The claim that Gary Jacobsohn and Yaniv Roznai make in their book *Constitutional Revolution* challenges this basic concept on empirical and normative grounds. I argue in this commentary that although this attempt to revise the classic standpoints is extremely inspiring, to contrast the normative requirements on constitutional change in a constitutional democracy with actual constitutional practice might serve as a good analytical framework to understand and evaluate constitutional revolution on a case by case basis.

KEYWORDS: *constitutional revolution, constitutional change, constitutional amendment*

I. INTRODUCTION

The claim that Gary Jacobsohn and Yaniv Roznai (2020) make in their book *Constitutional Revolution* is interesting, convincing, and troubling at the same time.

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They argue for a new theory of constitutional change, a theory that takes into consideration the constitutional reality. Descriptive conceptualization should, they believe, form the basis of normative claims—that is, theory building. After the first chapter, on theorizing constitutional revolution, their book provides a detailed analysis of the constitutional revolutions that took place in Hungary, Germany, India, and Israel. Beyond these examples, the authors provide us with an even more complex comparison of constitutional change in the world. After all this comes the basic theoretical question of how the constituent power is understood within the theoretical framework of the constitutional revolution.

In my contribution I explain why I find this approach debatable in the field of normative legal theory.[2] I see no need to explain why this work is interesting, rich, convincing, and challenging. Scholars will use it on a daily basis; indeed, constitutional revolutions in the world will be categorized in its light from now on. The phenomenon of the constitutional revolution is superbly described in the book.

Constitutional Revolution, however, makes a further claim in that it introduces a new theoretical approach to such major substantive constitutional change that its authors call THt change constitutional revolution. After summarizing my understanding of the normative concept, I submit it to the test of both theory and practice. The argument of Jacobsohn and Roznai's book follows a deductive logic. The authors observe the nature of constitutional change around the world and especially in certain countries, and they conclude that a new theoretical approach to constituent power and to constitutional amendment has become necessary. Complex, paradigmatic constitutional change that leads to a new constitutional identity (Jacobson 2010) requires a change in the theory of constitutional revolution.

This groundbreaking book contributes to the core discussion about legality and legitimacy, which is one of the most difficult topics in constitutional theory. *Constitutional Revolution* is an attempt to deny the rupture between procedure and substance and incorporate the procedure into the substantive assessment as one element of it. The new conceptualization and categorization are clear. Concerns, however, can be raised when the authors claim that this concept should redesign our normative understanding of substantive legal constitutional change with respect to the present, primarily procedural, institutional, and competence settlements in constitutional democracy. The authors' claim is, to put it simply, that we urgently need a new normative approach that acknowledges the legal nature of those substantive and paradigmatical constitutional changes that do not happen according to

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the established constitutional settings. We should regard substance primarily and assess the measure of the change accordingly. The authors aim at narrowing the gap between the empirical facts of the world's constitutionalism and the normative, aspirational imagination. The authors' observations on constitutional practice worldwide are extremely valuable, and this goal is fully legitimate, but the question is whether it is better to bring the theory closer to the constitutional practice or to advocate and enforce that the constitutional practice follow the aspirational requirements of rule-of-law constitutionalism.

II. PRELIMINARY REMARKS

The starting point is that although there is an continuing theoretical debate about constituent power, the constitution, and constitutional amendments, a certain practical consensus about these fundamentals characterizes the contemporary constitutional orders, mostly because of globalization, the migration of constitutional ideas, constitutional transplants, and constitutional bargaining and tailoring. Some debates in political philosophy and contemporarily constitutional theory are channeled this or that way into positive law and legal requirements. That is especially true concerning constitutional amendments and the adoption of a new constitution in case it is based on the provisions of a former constitution. Constitution-making usually happens legally in contemporary Europe (Szente 2020). But when we analyze and evaluate legal change, we make a clear distinction between Western constitutional democracies, such as those of Germany, France, or Spain, and young transitory democracies, hybrid regimes, illiberal democracies, or populist countries (Gárdos-Szente and Gárdos-Orosz 2018). In Spain, for example, the decision of the Spanish Constitutional Court on the Catalan succession implies that the constitution can be changed only by official procedure. The revolution occurs within the constitutional procedure.[3] But when two-thirds of the governing majority has exclusive influence on constitution-making and the constitution-amending process, while following completely the procedural rule set down in the country's constitution, as in Hungary, it is quite fair that the Constitutional Court rules in contradiction to the text of the Fundamental Law, doing so after its substantive review of the unconstitutional amendments with doctrinal reference to the constitution's coherence.[4] While it can be a legitimate claim to involve the judicial branch in

3. https://www.tribunalconstitucional.es/ResolucionesTraducidas/Ley%20transitoriedad%20ENGLISH.pdf.

4. Decision 45/2012 on Transitory Provisions of the Fundamental Law.

constitutional change in case the constitution-making and amending process is captured as it has been in Hungary (Gárdos-Orosz 2020), this claim may not apply to well-established constitutional regimes but rather to their opposite.

If the claim cannot be generalized, it cannot form a part of a general legal theory. In hybrid or authoritarian regimes, as the authors well recognize and describe, legal procedures are reinterpreted, and therefore the relation between the procedure and the substance becomes very different from that found in full-fledged democracies (Szente 2021). Given that the authors' idea heavily relies on the distinction between procedure and substance, I am not sure that we can define common elements of the notion of constitutional revolution for all states. It is difficult to understand how the notion of a constitutional revolution helps us in qualifying substantive major constitutional change as revolutionary in a legal sense if the elements of this legal inquiry cannot be generally identified as applicable to all constitutional regimes.

If we go one by one through the examples and group them as the book proposes, it is possible to detect the paradigmatical constitutional change that is happening without the observation of the applicable constitutional rules, many times by judicial constitutional interpretation. It is also possible to describe how in some cases even a new constitution is born without a change that would affect constitutional identity. Applying the classic theories of constitutional democracy, we usually regard these phenomena as misuses, abuses, functional problems or politically legitimate but nonlegal actions, observation of the law in action.

In constitutional democracies substantive constitutional change must be adopted through the proper procedures. The substance cannot be changed outside the constitutional procedure and must align with the constitutional rules. Substance and procedure cannot be separated.

It is very important to notice that in many cases a constitutional revolution happens as a result of the jurisprudence of a high court or political powers that do not change the constitution but do change the laws and disarm the high court, as happened in Poland in the case of the Constitutional Tribunal. It is also very important to notice when the constitutional amendment procedure is substantively misused, because if a constitution is flexible, parliaments like to change the constitution frequently without making any real attempt at a significant substantive constitutional change. The opposite might also occur, when a substantively new constitution is born through constitutional amendments.

The concept of constitutional revolution recognizes these phenomena and addresses them, but the question is whether we should, rather, choose to observe these changes but preserve the integrity of the constitutional idea by saying that

they remain illegal? My concern is that if we accept such informalities in the operations of constitutional states, even theoretically, we open a door that leads to another world of normativity where without clear standards we might easily get lost.

Nonconstitutional and hybrid regimes can be well described by the new concept of constitutional revolution, but for these regimes it is impossible to give a general normative legal framework for assessing paradigmatic constitutional change. Assessment works only case by case. However, while the concept can be well used to assess and categorize constitutional change in traditional constitutional democracies as well, the normative attempt to characterize substantive change that does not follow the proper procedure as revolutionary—a term that the authors intended to be neutral but one that remains nonneutral because legal recognition must be inherently positive in nature—might be a slippery slope, even if sympathetic and legitimate in some cases.

The legal system's democratic responsiveness is important and best supported by the involvement of all state institutions in the constitutional revolution process. So, why was political philosophy and constitutional theory originally so restrictive in its definition of constituent power and constitutional amendments?

III. A TRADITIONAL APPROACH TO CONSTITUTIONAL STABILITY: CONSTITUENT POWER, AMENDMENTS, AND INTERPRETATION

We should consider not only how far the definition of the constitution-making and -amending power can be broadened but also whether constitutional adjudication can be opened up the way suggested by Jacobsohn and Roznai's theory of constitutional revolution.

Constituent power as such is not a central element in positivist normative legal theories. An autonomous legal order with the constitution as the touchstone does not have to understand the notion of constituent power; this is left to decisionist legal theories or to political science. Consider the following:

> All constitutions—or at least some provisions of constitutions—contain values of choice. Parts of these are fundamental values define the identity of the constitution. Parts of these values are unamendable even if this prohibition is not incorporated explicitly in the text. These are unamendable because the source of the amending power is in the constitution, it is derived from it, therefore it is not empowered to eliminate essential parts of it. (Bragyova 2003, 65)

For ruining the constitution a revolution is needed when the old constitution dies. (Servai 1996 260ff.) The idea of inherent unamendability is mentioned not

only in often-cited case law but also in mainstream, well-known constitutional doctrine, even in Schmitt's writings: "Amending the constitution must stay within the constitutional framework, this competence is based on the constitution and it cannot override it. This competence cannot involve the adoption of a new constitution" (Schmitt 1928, 16).

In modern constitutions, stability is often guaranteed by eternity[5] or other entrenchment clauses. These provisions provide some sort of an obstacle to fundamental amendments to constitutions by stating, in their strictest form, that one or more provisions are unamendable. If the prohibition is final, we talk about eternity clauses (*Ewigkeitsklausel*)—and many jurisdictions show examples of eternity clauses.[6] In Europe, the constitutions of Germany, Italy, and France are typical models for other European constitutions, which explicitly limit or exclude amendments of certain provisions. The said states experienced the harm totalitarian regimes cause to the individual, society, and the state. The preventive function of such unamendability in these states and others copying them leaves no room for doubt.[7] Unamendable provisions in the republican form of government, in the protection of fundamental rights, or in territorial integrity give the impression of legal certainty and the inviolability of the basis of the constitutional order.[8] The Indian Supreme Court was the first to discover implicit unamendability rooted in the basic structure of the constitution. The doctrine of unconstitutional constitutional amendments has spread the world over and attracted promoters among constitutional judges of the world.[9]

The duration of a constitution—the death of the old one and the birth of the new one—cannot be explained without taking a stand on how the constitution is to be understood. I suggest understanding the constitution as the supreme law that defines the validity of all the norms of the legal system, the constitution itself included (Kelsen 1967, 35–50). Although adopting a constitution (the constitutional

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5. See all eternity clauses of the world in the appendix of Roznai (2016).

6. The most famous among them is Article 79 (3) of the German Basic Law.

7. This is also elaborated by the German Federal Constitutional Court in its Decision BVerfGE 30, 1. For the function of unamendable clauses within the broader context of constitutional change, see Albert (2010) or Roznai (2013).

8. Romania's constitution offers examples of all kinds of explicit unamendability. See a complex exemplification in Jacobsohn (2006).

9. Colombia and the Czech Republic, among others, are often points of reference in this discussion. See Roznai (2014) and Halmai (2015, 951). On the Colombian constitutional replacement doctrine, see Halmai (2015, 960–62); on his arguing with Roznai with regard to the Czech case, see p. 964. see also Albert (2009)

moment) is undoubtedly a political act (Lánczi 2012, 30–32), constitutional democracy is based on the concept of legal constitutionalism, and as I have argued, it results from a legal act in most cases, at least in Europe.[10] The Austrian-German heritage of public law had had a very strong effect on many central European countries as well (Halmai 2015). Amendments to a constitution are also part of this socially constructed normative order that carries out substantive change following preset procedures (von Wright 1963, 116ff., 189ff.).

A constitution as a special norm, therefore, contains provisions on the possibility and the limits of its own amendment and any other constitutional change.[11] These provisions are very special, and the creator of these rules, the constituent power, ceases to exist at the very moment of the adoption of a constitution. Agreeing with Alf Ross (1929, 309), one can suppose that from its birth the final source of law is the constitutional system itself.[12] Similarly, the source of the legitimacy of a constitutional state is neither with the people nor with the constituted state but rather in a balanced relation between the normative order, as the ideal of constitutionalism, and governmental action (Loughlin 2014, 222).

Modern constitutions usually entitle the people or the nation to be the source of power.[13] But whichever it is, it is the constitution that normatively makes it so. Without a normative constitution, we cannot identify the source of state power and the limits of government, and we are also not capable of describing the limits of constitutional stability or change. The normative nature of the constitution implies that the rules on amending the constitution and the limits thereof are open to interpretation. This work is done by all state institutions, but with final force by the separate and independent courts. Interpretation, however, has its limits also within the constitution, as has the amending power, the legislative power, or the nonoriginal constitution-making power. The identity of the constitution cannot be changed without proper authorization from the people specifically for this constitutional revolution. The explicit authorization can be legal or nonlegal, but it is inevitable in a constitutional democracy—otherwise, we talk about a state capture.

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10. On the basic differences between the concept of legal and political constitution and constitutionalism, see Bellamy (2007).

11. This opinion is affirmed by the Constitutional Court in its decision on a referendum on Constitutional Amendment 25/1999. (Decision VII. 7. CC, ABH, 1999, 251, 261).

12. "Das System ist die letzte Rechtsquelle" (Ross 1929).

13. This double formula is found in both the French and the Spanish constitutions (Art. 3. ill. 1. (2).).

IV. WHAT IS THE ROLE OF CONSTITUTIONAL ADJUDICATION IN CONSTITUTIONAL CHANGE?

The 2014 decision of the Czech Constitutional Court to strike down the constitutional amendment on the election of the new House of Representatives was heavily criticized because the content of unamendability it referred to was undefined and open to interpretation, thus allowing judicial interpretation to define constitutional violations case by case (Roznai 2014; Preuss 2016). Is that necessarily a problem, or does this case show us, rather, how constitutional courts are able to meet the challenges of the day by their interpretation of the constitutional text adopted earlier?

The Hungarian Constitutional Court, when dealing with the adjudication of constitutional amendments, developed the coherent interpretation doctrine, similar to the Indian basic structure doctrine or the constitutional identity argument, with its Decision 22/2016 (XII. 5.). Constitutions cannot tell precisely in advance and *in abstracto* what will amount to a constitutional revolution if an eternity clause does not exist; but if we accept that all constitutions have core constitutional identities, the constitutional courts have the competence to defend the constitution. As it is, the constitution cannot be understood in all cases as a source of a paradigmatical constitutional change and the constitutional court as an acting player in the constitutional revolution. Otherwise, the constitutional court is sometimes not a defendant of the constitution and the interpreted constitutional order but an actor outside the existing constitutional order.

Within the concept of legal constitutionalism, when the constitution is part of the normative order, constitutional adjudication is perceived as a special pillar of the constitutional construction. Without judicial review, the constitution can be amended unlawfully without consequences, causing the entire normative construction to collapse. Without interpretation, it is not possible to define what the law is, but the interpretation cannot change the law.[14]

Similarly, as formal and informal constitutional amendments, interpretation remains within the existing constitutional framework and does not step outside it.[15] Constitutional revolution, though, if it happens, does not remain within the presettled constitutional framework (Ackerman 1998).

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14. Here I do not consider whether it is better to leave to parliaments the power to make a final interpretation by, for example, overruling the opinion born in a weak judicial review. For weak judicial review, see Gyorfi (2016).

15. Even Richard Albert (2015, 146–50) acknowledges this observation.

V. THE CONCEPTUAL RECONSIDERATION OF CONSTITUTIONAL REVOLUTION

The new theory of constitutional revolution offered in Jacobsohn and Roznai's book denies the preeminent role of the procedure in the assessment of constitutional change. The authors measure constitutional change that is so substantive and paradigmatical that it amounts to a change in the constitutional identity of the state (Jacobson). By rejecting the exclusively procedural approach, the authors claim, constitutional revolution is possible without a constitutional moment of the constituent power. Constituent power is no longer considered an exclusively original power, as it was conceptualized by Montesquieu or Carl Schmitt, but rather a derived power.

In constitutional theory, as Yaniv Roznai (2016) describes in detail in his book on constitutional amendments, the amendment power was thought of as a derived power in order to better understand its nature. This was a great step in theory toward understanding the nature of the change. In this respect, Jacobsohn and Roznai's book takes a step further: not only is the amendment power proved to be a derived power but likewise the constituent power loses its originalism. The book argues that if we accept that democracy is based on representation and that the state is the public's form of organization, it is difficult and perhaps useless to uphold a theoretical view that the constitutional revolution is based on an original, extralegal moment of the constituent power of the people, a power that ends something and creates something new by intended action. The authors argue that if the notion of the constituent power has anything to do with the people as imagined since the French Revolution and the establishment of the United States Constitution, the theory of constitutional change in democracy should recognize that the relation of the people and their constitution may have changed. To regard constitutional amendment as an original, unbounded step of the constituent looses popularity in contemporary thinking, although it is still present in mainstream constitutional tehory. Saying that amending power is derived from the constitution itself is rather popular in certain scholarly circles because the argument is based on comparative constitutional experience and an equally strong and convincing doctrinal argumentation, rather than the debating doctrinal claims on the unity and homogenous nature of constituent power. Constitutional revolution is an excellent expression that we like to use for fast and fundamental changes, but very often all state institutions are involved in this constitutional change, especially the constitutional courts or other high courts.

In *Constitutional Revolution*, Jacobsohn and Roznai, when analyzing constitutional experience, recognize that constituent power and constitutional change are

so diverse in the world that it is misleading to characterize constitutional revolution as it is preset in our minds and in literature. It is misleading to conclude, based on existing theoretical concepts, that no constitutional revolutions took place in Hungary, India, and Israel, among other countries. No doubt the world has had a rich experience of constitutional revolutions without constitutional moments and original constituent powers, where the people of a nation were clearly involved mostly through assisting and accepting these changes carried out by revolutionary institutions. The authors claim that we should adopt an all-encompassing concept of constitutional revolution that is able to endorse all these paradigmatical changes if institutional no matter how exactly they happened, because constitutional revolution might be made by a derived power that could also be an institutional balance, with the agreement of the people as the source of the constituent power. The authoritative consent should be designed alternatively to traditional theoretical claims.

The underlying question is, How far can the new theory be adapted, generally, to the constitutional experience? Can we conceptualize constituent power, as the authors suggest, as a derived, institutional power that may appear in the action of any constitutional cooperation and institutional interpretations and actions? That suggestion is appealing to me because it lies in the denial of absolute power. It is problematic, however, from the point of view of pure theory, as in the case of the creation of the separate and derived amending power. To understand that we can qualify a constitutional change as a constitutional revolution without a timely restricted constitutional moment, without the act of the constituent power, and without intended procedure might be a slippery slope on which we arrive at questioning a fundamental attribute of constitutional democracy. Construction, however, often follows destruction, and in their book the authors undoubtedly take steps toward a new construction.

VI. HUNGARY AND THE NEW ANALYTICAL FRAMEWORK

No doubt, the Hungarian example proves the validity of the thesis of Jacobsohn and Roznai's book. This approach really suits the two Hungarian constitutional revolutions and creates a good analytical framework to understand the revolutionary nature of the evolution of Hungarian constitutionalism.

Two of my earlier research projects will complete the analyses made by the authors in their book. Both projects form significant parts of the argumentation of the constitutional revolution in a descriptive sense. One is about the Constitutional Court's role when initiating informal constitutional amendments (Drinóczi et al.

2019), and the other is about its role in creating, by interpretation, new substantive concepts—such as the constitutional identity—that can finally, in their sum, form the bases of paradigmatic change (Gárdos-Orosz 2021).

In the case of Hungary—without aiming to repeat the excellent analysis of the book—one can say that both constitutional transformations of the past thirty years can be qualified as revolutionary (Tóth 2015). I fully agree with the Jacobsohn and Roznai's assessment that no part of either transformation was carried out according to the requirements. The 1989 democratic transition was made by a constitutional revision, and Act XX of 1949 remained in force in its amended version, certainly with a fully changed content. Everyone felt the necessity of adopting a new constitution, as in Germany after unification, but the constitution-making process failed. The amendment process became a procedural vehicle later to tailor the constitution when necessary. I believe that this flexible approach to constitutional change was inherited by the leaders of the new illiberal regime established in 2010. It might be a sociological observation to say—but it has relevance for my argument—that something became habitual in the operation of constitutionalism; and without regarding the substance of the two constitutions and the dozens of amendments, we can recognize that the preset substantive rules and procedures rarely stopped the ruling political elites in their planned, transformative constitutional change.

Hungary is a good example to legitimize Jacobsohn and Roznai's conceptual purposes. The tension between substance and procedure can be perfectly drawn. It is true that the major problem of Hungarian constitutional scholarship at the moment is that procedurally perfect legal changes, in the form of constitutional amendments, have changed the Hungarian constitutional identity smoothly in the past ten years. One question the book leaves open is methodological. We can describe step by step how the change that amounts to a constitutional revolution happened in Hungary. We can prove the revolutionary nature of the 1989 amendment of the Stalinist constitution. Is there, however, anything that can serve as a specific element of a new normative theory? Can general normative requirements be based on particular eventualities?

VII. CONCLUSION: THE NECESSITY OF A NEW THEORY OF CONSTITUTIONAL CHANGE

Although it is essential to think about analytical tools and normative theories, they should mirror reality or in some sense approach reality; in case a theory is so far from the reality that it is unable to catch it, it might be best to revisit the theoretical

concept in order to build one that might serve as a standard to measure and evaluate constitutional change. This is the goal aimed at and ultimately achieved by the authors. Given the reconceptualization of the constitutional revolution, their new model surely suits Hungary—and much better than the old one. The question is whether it fits everyone, and whether it is safe for the normative use in full-fledged constitutional regimes. I am very grateful to the authors for raising these fundamental questions in their rich book of scholarly excellence and fundamental importance.

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UNREVOLUTIONARY REVOLUTION?

YANIV ROZNAI*

I. THE OXYMORON OF CONSTITUTIONAL REVOLUTION

The definition of the term "revolution" in juridical studies, as very often understood, concerns a constitutional change not according to the existing legal rules of change. This derives from Hans Kelsen's approach to revolution that focused on the compatibility of legal changes with the formal constitutional procedure for change. According to Kelsen: "[A] revolution . . . is every not legitimate change of this constitution or its replacement by another constitution. . . . From the point of view of legal science. . . . Decisive is only that the valid constitution has been changed or replaced in a manner not prescribed by the constitution valid until then" (Kelsen 1967, 209). With this presupposition in mind, it is clear why the idea of a constitutional revolution may be regarded as an oxymoron. As Gary Jeffrey Jacobsohn and I highlight in our introduction to our book, *Constitutional Revolution*, "If a certain constitutional change is revolutionary, it must be unconstitutional. If it is a constitutional change—how can it be revolutionary?" The book is a conceptual and comparative journey in exploring this alleged oxymoron in order to explain how this term could and should be understood.

It might be useful to note that there could be similar variations to this oxymoron. Consider, for example, the concept of the *Partido Revolucionario Institucional* in

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Mexico. The Institutional Revolutionary Party that dominated Mexican political institutions from 1929 until the end of the twentieth century was originally called the National Revolutionary Party, or Partido Revolucionario Nacional. In 1946 the party changed its name to the current Institutional Revolutionary Party, which was considered by many to be the perfect oxymoron, as revolutions are usually associated with the destruction of institutions. How can there be such a thing as an institutional revolution? As Rubén Gallo explains, the idea behind this apparent paradox was to institutionalize the Mexican revolution (Jacobsohn and Roznai 2020, 5).

Alternatively, consider the Quiet Revolution (*Révolution tranquille*) in Québec during the early 1960s. After the election of Jean Lesage, his administration conducted dramatic reforms in almost all aspects of society. From the outset, in light of their significance and implications these reforms were described in newspapers as revolutionary, while various adjectives such as "peaceful," "legislative," or "democratic" were attached to it to clarify the meaning of this revolution (Warren 2016). While the precise origins of the expression "*Révolution tranquille*" remains questionable, clearly it was gradually integrated into the existing lexicon and became the prevailing description of the change experienced in Québec at that time.[1] Nevertheless, although becoming prevailing, the expression consists of two prima facie contradictory terms that caused confusion. As Dorval Brunelle wondered:

> [H]ow can a revolution be quiet? How can "tranquility" on a social or individual level constitute a revolutionary ferment? Are we not duped by these terms? The first difficulty raised by this expression is thus an interpretation of the events in question: we do not really know what we are talking about when we use the phrase "Quiet Revolution," except that, in one sense or another, it was both revolutionary and quiet. (Brunelle 1978, 3, cited in Warren 2016, n.4)

Or, consider the idea of "The Democratic Coup d'État." Traditionally, the image we have of military coups is that of military officials overthrowing the existing regime in order to concentrate power in their hands in an authoritarian manner, and so a threat to democracy. However, Ozan O. Varol has shown how democracy often emanates through a military coup (Varol 2017). Likewise, in his article "Democratic Revolutions," Richard Albert asked to abandon the procedural and mechanical theories of revolution – according to which revolution occurs suddenly

1. René Durocher**,** "Quiet Revolution," *The Canadian Encyclopedia*, http://www.thecanadianencyclopedia.ca/en/article/quiet-revolution/.

and with violence, commonly not through democratic procedures, and shift the focus to value-judgment of the revolution's merits and its outcomes (Albert 2011).

Similar confusions arise concerning the concept of the constitutional revolution. What makes the revolution constitutional? Is it the process—a revolutionary change through constitutional means? Or is it the outcome—a revolution that creates a constitutional regime? Such ambiguities have led to the concept of constitutional revolution to be used or described in different terms and contexts.

Claiming that modern Japan had experienced two constitutional revolutions, Lawrence W. Beer, for example, used the concept to describe "a long process in which a fundamental shift takes place in constitutional values diffused throughout society by means of law, administrative actions, judicial decisions, and education, both formal and informal" (Beer 1982). The Persian Revolution of 1906–1911 is often defined as a constitutional revolution (See, e.g., Afary 1996; Bonakdarian 2006; Ansari 2016;). In contrast with Beer's definition, Ervand Abrahamian describes it as a "true revolution," as it was "sharp, sudden, and violent" and "caused an immediate shift in the social location of power from the royal court ruled by the Qajar Shahs to a national parliament dominated initially by the urban middle classes" (Abrahamian 1979, 386). What, then, makes this revolution constitutional? Is it the result of a new constitution or the revolutionary claim to create a constitutional system of rule (For the latter approach see Sohrabi 1995)?

The ambiguity surrounding the term is also visible with regard to the transformation that occurred in Israel in the mid-1990s, which is commonly referred to as "the constitutional revolution," to which we dedicate a lengthy discussion in our book (Jacobsohn and Roznai 2020, chap. 6). Yet even now, a quarter of a century after the dramatic constitutional change, it remains unclear whether the term "revolution" refers to the process of transition—that is, to the chosen legal process—or to the outcome, which involves the new constitutional arrangement that followed the adoption of the new basic laws on human rights and the famous United Mizrahi Bank judgment (CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) P.D. 221 (1995)). According to our account, "[A] constitutional revolution can be said to exist when we are confronted with a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity" (Jacobsohn and Roznai 2020, 19). Our definition, which focuses on the substance rather than the process of the change, can encompass various constitutional transformations such as those that occurred in Iran, Japan, and Israel.

Our focus on substance provides, to my mind, a better description of constitutional revolutions than does Kelsen's somewhat formalistic definition. Consider

drastic constitutional changes that often take place while observing the formal constitutional change procedure—for example, the known transformation of democratic regimes to fascist or totalitarian regimes as occurred in Weimar or Vichy. Can these changes be described as "revolutionary"? After all, they occurred according to the prescribed procedures. Referring to Vichy and the July 1940 constitutional transformation, Andrew Shennan writes, "[I]t was . . . more a question of how, rather than whether, a constitutional revolution would occur" (Sherman 2017, 53). It seems inevitable to treat that constitutional change as revolutionary. The constitutional order was completely transformed. It has been completely modified. It was more than a mere amendment and perhaps even more than "a dismemberment";[2] it was a complete replacement of constitutional ordering. Indeed, as we demonstrate in the book, in various countries, such as in Hungary, certain constitutional transformations, even if compatible with the formal rules of change, should be regarded as revolutionary.

So, the term "constitutional revolution" seems to be, prima facie, an oxymoron. To make sense of the meaning of the constitutional revolution, we should release ourselves from our previous understanding of revolutions. Some revolutions are unrevolutionary.

II. CONSTITUTIONAL REVOLUTIONS IN SHAM OR AUTOCRATIC CONSTITUTIONS

Our conceptual account seeks to examine the change by which constitutionalism is experienced in a given polity. This, of course, raises difficult questions on sham constitutions or constitutions in nonconstitutionalist settings. Giovanni Sartori famously distinguished between "proper" constitutions, which "restrain the exercise of political power"; "nominal" constitutions, which "frankly," "describe a system of limitless, unchecked power"; and "façade" constitutions, which neither constrain the state nor provide "reliable information about the real governmental process" (Sartori 1962, 861). In his study on constitutions in the Arab world, Nathan Brown showed how constitutions there can be described as nonconstitutional in the sense that they "organize power without limiting it" (Brown 2002, 12).

There are two separate issues here: the first is whether a constitution restrains governmental power, and the second is whether the constitution actually applies in practice. David Law and Mila Versteeg rightly classify a constitution as a sham

2. Richard Albert distinguished between a constitutional amendment—a "correction made to better achieve the purpose of the existing constitution"—and constitutional dismemberment, which is a self-conscious effort "to repudiate the essential characteristics of the constitution and to destroy its foundations" (Albert 2018, 1–3).

because "its provisions are not upheld in practice" (Law and Versteeg, 2013, 880). For them, even if a constitution fails to incorporate certain rights or substantive values, or even if it describes a tyrannical government, but it is upheld in practice, it cannot be labeled a sham constitution . Using this definition, it would be easier to examine how the idea of constitutional revolution applies in sham constitutions or autocratic regimes.

In fully sham constitutions, even dramatic constitutional reforms cannot be considered as revolutionary because they do not affect how constitutionalism is experienced in the polity. Consider the Hungarian communist Constitution of 1949, which was modeled after the 1936 Constitution of the Soviet Union. In 1972, the Hungarian Constitution was broadly amended—for example, by recognizing private producers and guaranteeing fundamental rights for all citizens (instead of only for workers). Nonetheless, as we mention in our book, these constitutional changes "were in fact window dressing for foreign policy purposes and had no real practical influence; the 1949 Constitution was widely viewed as a sham" (Jacobsohn and Roznai 2020, 17). Of course, formal amendments even to sham constitutions can be considered revolutionary if they have an actual and practical effect on the constitutional order and how constitutionalism is experienced. And so, the formal constitutional amendment of 1989 and 1990, which thoroughly transformed the Hungarian constitutional order from communism to a liberal democracy, were revolutionary, as the nature of constitutionalism (and the Hungarian Constitution itself) has been completely transformed (Jacobsohn and Roznai 2020, 78–88).

But what if there is no transitory context, Anna Fruhstorfer asks? Can there be a constitutional revolution? (Fruhstorfer, in this volume). Indeed, a constitutional revolution can take place in an autocratic regime even without a complete regime transition. Constitutional identity is not just the form of government or the regime type but can include such other features of the constitutional order as the core values or structure.. Constitutions in autocratic regimes, as aforementioned, should not be considered as sham if they apply in practice; and even if they empower rather than limit governmental power, they are still constitutions.[3]

Fruhstorfer shows that in an autocratic context (which for her includes several subtypes of authoritarian and hybrid regimes that build the opposite of a consolidated democracy), amendments can be dramatic although they do not transform the authoritarian nature of the regime. Focusing on Russia, she claims that a series of reform laws concerning the central-region relations have created a "a substantial

3. On constitutions as "power maps" that reflect the political power distribution within the polity, see Duchacek (1973, 18).

reorientation in the constitutional practice, and understanding of federalism and regionalism in Russia" and "offer a paradigmatic example of a constitutional revolution under autocracy" (Fruhstrofer, in this volume). Federalism can certainly be considered—though not in every case—as an essential feature of the constitutional order. For example, federalism is considered as an unamendable feature in various constitutions, such as the Brazilian Constitution of 1988 (Art. 60.4) or the German Basic Law of 1949 (Art. 79.3). In India, judges of the Supreme Court have suggested that federalism is considered one of the unamendable features that make the Indian Constitution's basic structure (*Kesavananda Bharati v. State of Kerala* 1973), and likewise in Pakistan, Chief Justice of the Supreme Court Sajjad Ali Shah observed that federalism is among the salient features of the Constitution of Pakistan, features that are beyond the constitutional amendment power (*Mahmood Khan Achakzai v. Federation of Pakistan*, PLD 1997). And, in Austria, the Constitutional Court has declared federalism as a leading principle, and thus altering it should be regarded as a total revision of the constitution (Decision of Mar. 10, 2001, G 12/00, G 48-51/00). Accordingly, one can see why a paradigmatic shift in the federal structure can be regarded as revolutionary.

III. A GENERAL CONSTITUTIONAL THEORY?

So, constitutional revolution can occur in both constitutional democracies and autocracies. But is it a general constitutional theory? In her comment, Fruzsina Gárdos-Orosz challenges the idea by claiming that "it is difficult to understand how the notion of a constitutional revolution helps us in qualifying substantive major constitutional change as revolutionary in a legal sense if the steps and elements of this legal inquiry cannot be generally identified as applicable to all constitutional regimes." "If the claim cannot be generalised," she argues, "it cannot form a part of a general legal theory" (Gárdos-Orosz, in this volume).

In order to respond to this comment, it might be valuable to explain the type of theory we are proposing. Constitutional revolution is not a "grand theory" in the sense of "seeking to articulate the best general theory of the (liberal) constitution, the inquiry [of which] tends to take the form of a search for the 'good constitution'" (Poole 2007). Our theory is grand or general only in the sense that it refuses to reduce the constitutional discourse to a particular jurisdiction. It does not focus on any specific jurisdiction and confronts the inquiry from a general perspective, transcending any specific boundaries. It accommodates and embrace many and diverse constitutional systems, from diverse frameworks (global south, global north, democratic and nondemocratic, etc.). But, importantly, it does not seek some moral

universalism. It neither aims nor attempts to provide a normative scheme of an ideal character of political phenomena. As Martin Loughlin notes, "[C]onstitutional theory does not involve an inquiry into ideal forms, since otherwise it would be completely absorbed into political philosophy. If constitutional theory is to form a distinct inquiry, it must aim to identify the character of actually existing constitutional arrangements" (Loughlin 2005, 186). We aim to provide, what Ran Hirschl terms "concept formation through multiple descriptions of the same constitutional phenomena across countries" (Hirschl 2008, 26), conceptualizing what constitutional revolution is and exemplifying it by a careful comparative analysis of several case studies (Germany, Hungary, India and Israel), although the concept may surely be applicable beyond the case studies. Thus, while the term "constitutional revolution" appears widely and frequently concerning constitutional events taking place around the world, we fill it with content, explicating its meaning.

True, our abandonment of procedural legality for a more substantive examination makes our approach somewhat less mathematical or scientific; there is no clear binary answer, and the analysis may be open to a discussion or contestation—precisely the type of interpretative discussion we seek to invite and encourage in our work. Yet, as we highlight, while constitutional transformations according to our account are "more open to interpretative contestation," this does not make them "less revolutionary" (Jacobsohn and Roznai 2020, 20).

Gárdos-Orosz is worried that our theoretical approach may "open a door that leads to another world of normativity where we might get easily lost without clear standards" (Gárdos-Orosz, in this volume). Our conceptual account neither assumes nor provides clear standards of legality. Our claim is, as Jeffrey K. Tulis rightly puts it in his comment, that "some amendments are unconstitutional and some revolutions are constitutional" (Tulis in this volume, __). And this statement also provides the beginning of an answer to the question posed by Gárdos-Orosz, "[I]s there, however, anything that can serve a specific element of a new normative theory?" (Gárdos-Orosz in this volume, __). I believe the answer is yes. Our conceptual account may indeed serve some elementary basis for normative theories in at least two ways.

The first issue concerns the doctrine of unconstitutional constitutional amendments. And again, Tulis can serve as the reference point. He correctly notes that "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" (Tulis in this volume, __). The core of the of the constitutional identity is in many jurisdictions implicitly or explicitly protected from formal amendments (Roznai 2017; Jacobsohn 2010, chap. 2). The doctrine of unconstitutional constitutional

amendments prohibits constitutional changes that harm the core characteristics of the constitutional order and in fact replace its identity with a new one. But, as we show, constitutional revolutionary changes are often an incremental process over time. This poses a challenge to the doctrine, which is meant to oppose formal constitutional changes that basically abandon the fundamental principles of the constitutional order and replace them with new ones, not minor or delicate changes inherent in the disharmonic constitution (Jacobsohn 2010, chap. 1).

This challenge is exacerbated in the context of democratic erosion whose central element is incrementalism consisting of many small steps. As Tom Ginsburg and Aziz Huq show "democratic erosion is typically an aggregative process made up of many smaller increments. But those measures are rarely frontal assaults on one of the three institutional predicates of liberal constitutional democracy, of the kind that might be associated with an overly totalitarian or fascist regime" (Ginsburg and Huq 2018, 90–91). Nonetheless, when these measures are considered cumulatively, the effect is momentous. As they state, "[A] sufficient quantity of even incremental derogation from a democratic baseline . . . can precipitate a qualitative change that merits a shift in classification" (Ginsburg and Huq 2018, 45). Likewise, Wojciech Sadurski writes that in Poland the "broad assault upon liberal-democratic constitutionalism produces a cumulative effect, and the whole is greater than the sum of its parts" (Sadurski 2019, 58). This is the crucial point. Often, each constitutional change on its own does not transform the constitutional order or is not considered as a constitutional replacement, but when these incremental changes are examined cumulatively, they too may lead to a revolutionary constitutional change. Quantity turns into quality (see Roznai 2021).

It is this danger that the dissenting judges saw in the German *Klass* case, disagreeing with the majority that the unamendable provision prohibits only a "fundamental abandonment" of the protected values: "Art. 79, par. 3 means more," they held. "The constituent elements" protected by the unamendable provision "are also . . . to be protected against a gradual process of disintegration" (*Klass* 30 BVerfGE 1 (1970); see English translation in Murphy and Tanenhaus 1977, 662–64). Accordingly, to face the challenge of incrementalism, perhaps it is time to consider an aggregated examination when reviewing constitutional amendments.

The second issue concerns the formal constitutional replacement according to an explicit constitutional provision. Indeed, some constitutions regulate not only the process of their amendment but also their own replacement (Landau and Dixon 2015). Tulis writes that this 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" (Tulis in this volume, __). Here too, our book can provide the seeds for a normative theory. As we claim, when constitutional revolution take place by the exercise of constituted organs, such as courts, or even by constitutional amendments but without the popular inclusiveness that usually accompanies a new constitution-making process, democratic legitimacy suffers, which in turn strengthens counterrevolutionary voices and movements. Thus, we write that

> [t]o be successful and to endure, to become the very plenipotentiary imagination of the people's constituent power, constitutional revolutions should aim to include the people in a meaningfully inclusive, proactive, and deliberative way. Regardless of how historically accurate the story we tell ourselves about "the people" as constitution makers, facilitating the process of popular participation in the authorship of their constitution enhances the legitimacy of a constitutional revolution. (Jacobsohn and Roznai 2020, 260)

This notion should guide constitution-makers and amenders when they design mechanisms for constitutional replacements and fundamental revisions. One such recent attempt can be found in the work of Hélène Landemore, who suggested a model of 'open democracy' in which ordinary citizen have access to power and being able to deliberate and affect the agenda (Landemore 2020). This is particularly important in constitutional amendments (Colón-Ríos 2012; Contiades and Fotiado 2017) and a fortiori constitutional revolutions.

IV. CONSTITUTIONAL POLITICS AND POLITICAL MOVEMENTS

As I hinted in the previous section, when the democratic legitimacy of the constitutional revolution is weak, the claims for counterrevolution are strengthened. As we emphasize in our book:

> The characteristic of constitutions prevalent in all forms of constitutionalism is a condition of disharmony that functions as the engine for change, sometimes culminating in the radical displacement of constitutional norms and practices. This disharmonic condition remains a continuing source of potential counterrevolution, which may follow a constitutional revolution encumbered by a legitimacy deficit. (Jacobsohn and Roznai 2020, 15)

But what is the role of politics and political movements in this disharmony? In his comment, Mark Graber writes that "[c]onstitutional politics plays a greater role in constitutional disharmony than *Constitutional Revolution*'s conditions for constitutional disharmony might suggest. 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" (Graber in this volume, ___).

Graber is correct concerning the role of constitutional politics in constitutional revolutions. Constitutional politics is behind every constitutional revolution, as the engine of the revolutionary—or counterrevolutionary—call. This is visible even when one considers Israel, where constitutionalism generally centers around the judiciary (Bendor 2020). In our chapter on Israel's constitutional revolution, we explain how the constitutional revolution was originated by political actions—by the enactment of the Basic Laws on Human Rights initiated by Member of Knesset Amnon Rubinstein as private bills. It was thanks to his political actions and compromises, together with the chair of the Constitution, Law and Justice Committee Uriel Lynn, that enabled this partial bill of rights to be enacted. This political stage was crucial for the constitutional revolution. Indeed, it required the judicial daring in the Mizrahi Bank case for the constitutional revolution to be fulfilled; but without the constitutional politics, there would be no constitutional revolution.

And it is likewise in the context of the constitutional counterrevolution Israel is experiencing. "Constitutional revolutions," Graber writes, "are initiated when new political movements are empowered and seek to make their vision the official constitutional law of the land" (Graber in this volume, ___). In Israel, the right-wing and conservatives parties are pushing for a shift in the "Jewish-Democratic" formula, by which the former would prevail over the latter. This movement has begun to be extremely effective since 2015, by the government dominated by right-wing parties with no moderating influences. But more than just politicians are involved; the movement is strongly supported by the rise of conservative (and relatively new) nationalist civil society organizations, which support and fuel the political maneuvers and are themselves supported by politicians in the government (Kremntizer and Shany 2020; Roznai 2018; Mordechay and Roznai 2017). Rafi Reznik shows how right-wing civil society organizations promote conservative ideas and policies in various spheres and have become extremely powerful and influential in Israeli politics (Reznik 2020). The Kohelet Policy Forum, for example, a conservative right-wing organization that aims to influence policy makers in politics, was one of the main driving forces behind the enactment of

the controversial Basic Law on Israel as the Nation-State of the Jewish People (Slyomovics 2020), which represents a a significant achievement for the counter-constitutional movement and is intended "to restore the 'Jewish' in Israel's constitutional identity as 'Jewish and democratic,' or rather to strengthen Jewish elements that were perceived to have been diluted by the Court" (Shinar et al. 2020, 722). The political movement, importantly, is not completely external to the judiciary, as one of the aims of former minister of justice Ayelet Shaked was also to fill judicial vacancies with "conservative judges" who would influence rulings and counter the legacy of Aharon Barak (Reznik 2020, 440).

Two decades ago, Graber acknowledged that for constitutional theorists who advance "grand constitutional theories," constitutional politics is "an oxymoron. Politics is about interest. Constitutionalism is about principle" (Graber 2002, 323). In the "messy reality of lived experience" and "real world observation," this is clearly not the case (Issacharoff 2019, 5–6). Especially in the current era of populism and democratic erosion, the populist constitutional project intentionally blurs the distinction between everyday politics and constitutional politics and makes an instrumental and frequent use of formal and informal constitutional change mechanisms for narrow political interests (Blokker 2019, 545-47). Rather than being an oxymoron, constitutional politics became the prevailing form of governance. Returning to Israel, in his doctoral project, Nadiv Mordechay shows how in the years following the constitutional revolution, constitutional change has been politicized as political actors began to take ownership of it (Mordechay 2021). Compared to the past, there is greater political involvement in informal and formal constitutional change processes. Whereas the constitutional revolution was described mainly through the lenses of the judicialization of politics, constitutional change in the period after the constitutional revolution, Mordechay correctly agues, can be characterized as politicization of constitutionalism. Constitutional politics is surely crucial for analyzing and understanding constitutional revolutions.

V. CONCLUSION

We are grateful to Anna Fruhstorfer, Fruzsina Gárdos-Orosz, Jeffrey K. Tulis, and Mark Graber for engaging with our book, which is a natural combination of our previous studies on constitutional identity and unconstitutional constitutional amendments (Roznai 2017; Jacobsohn 2010). Graber gracefully, and with his famous humor, described *Constitutional Revolution* as "the Reese's Peanut Butter Cups of contemporary comparative constitutional theory," combining "the flavor of chocolate and peanut butter to make a delectable snack" (Graber in this volume, ___).

I am more than happy we have provided a food for thought to his liking and it is my hope that many more exciting studies—or flavors—will emanated from it.

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WAS ABRAHAM LINCOLN A CONSTITUTIONAL REVOLUTIONARY?

GARY JEFFREY JACOBSOHN

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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TRUMPISM AND THE CONTINUING CHALLENGES TO THREE POLITICAL-CONSTITUTIONALIST ORTHODOXIES

MIGUEL SCHOR[1]

ABSTRACT

Following Donald Trump's election, the 2016 British Brexit referendum, and the rise of populist authoritarianism around the globe, a wave of scholarship emerged that focused on democratic breakdown and erosion. Underpinning this literature is a fear that long-standing constitutional and democratic orthodoxies—ideas that are broadly accepted and therefore seldom questioned—are under considerable stress. This paper is a comparative constitutional study of democratic erosion in the United States.

Donald Trump's presidency was a gift to constitutionalists because it enabled them to observe the erosion of a long-standing, wealthy democracy. Prior to Donald Trump's election, constitutionalists faced a problem. The American constitutional order differs considerably from those of its peer democracies—those democracies continuously in operation since 1950—yet all those democracies appeared to function tolerably well. That claim is no longer sustainable. The United States elected a demagogue to the presidency of the United States. Consequently, it has gone

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farther down the path of democratic erosion than its peer democracies. Trumpism challenges three political-constitutionalist orthodoxies: (1) that wealthy, long-standing democracies are immune to breakdown and should resist erosion; (2) that presidentialism works well in the United States even though it has largely failed abroad; and (3) that the peculiar form constitutionalism took in the United States is the cure for the excesses of democracy.

KEYWORDS: *Democratic erosion, American free speech exceptionalism, electoral college, separation of powers, presidentialism, parliamentarism, constitutionalism, militant democracy.*

I. INTRODUCTION

Following Donald Trump's election, the 2016 British Brexit referendum, and the rise of populist authoritarianism around the globe, a wave of scholarly monographs emerged that focused on democratic breakdown and erosion (Balkin 2020, Ginsburg and Huq 2018; Graber et al. 2018; Howell and Moe 2020; Lepore 2018; Levitsky and Ziblatt 2018; Mettler and Lieberman 2020; Mounck 2018; Norris and Inglehart 2019; Posner 2020; Przeworski 2019; Runciman 2018; Sunstein 2018; and Weyland and Madrid 2019). Underpinning this literature is a fear that long-standing constitutional and democratic orthodoxies—ideas that are broadly accepted and therefore seldom questioned—are under considerable stress. This paper is a comparative constitutional study of democratic erosion in the United States.

The Trump presidency was a gift to constitutionalists, because it enabled them to observe the erosion of a long-standing, wealthy democracy. Prior to Donald Trump's election, constitutionalists faced a problem. The American constitutional order differs considerably from those of its peer democracies—those democracies continually in operation since 1950[2]—yet all those democracies appeared to function tolerably well. That claim is no longer sustainable.[3] The United States elected a demagogue to the presidency. Consequently, the United States has gone farther down the path of democratic erosion than any of its peer democracies. Trumpism challenges three political-constitutionalist orthodoxies: (1) that wealthy democracies

2. See Table 1: America's Peer Democracies. The United States is an outlier as it did not become fully democratic until the enactment of the Voting Rights Act in 1965, 79 Stat. 437.

3. That claim is, of course, contestable when it comes to race (Graber 2018). Historically, there have long been authoritarian subnational enclaves primarily located, not surprisingly, in the American South (Gardner 2020).

are immune to breakdown and should resist erosion, (2) that presidentialism works well in the United States even though it has largely failed abroad, and (3) that the peculiar form constitutionalism took in the United States is the cure for the excesses of democracy.

Part II examines the global erosion of democracy. The scholars who write about democracy's current prospects are at once both overly and insufficiently alarmed. Democracies have overcome existential crises in the past, which provides grounds for cautious optimism. New information technologies present a different kind of threat than democracies have faced in the past, however, since they undermine the marketplace of ideas. The United States will find it more difficult to muddle through its current crisis than its peer democracies, because its speech environment is peculiarly susceptible to the harms flowing from new information technologies. Consequently, it increasingly looks like one of the flawed democracies once thought to be located only in the so-called developing world.

Parts III and IV examine how democratic erosion in the United States has been facilitated by two features of its constitutional order—presidentialism and constitutionalism—that differ markedly from global norms. The paradox of the American constitutional project is that these two features were designed to prevent, not facilitate, democratic erosion. The framers shared the concerns of contemporary democratic theorists, but they used different terminology to describe the ills that might flow from representative government. They feared demagogues and they feared the the violence of factions. Although wealthy, long-standing democracies around the globe are facing considerable headwinds, they are blowing stronger in the United States than elsewhere due to contingent political developments and political underdevelopments facilitated by its exceptional Constitution.

II. DEMOCRACY AND WEALTH

The first orthodoxy is global. It is the idea that wealthy, long-standing democracies are immune to democratic breakdown and should resist democratic erosion. Democratic theorists consider these to be superman democracies. After surveying the data on democratic collapse, Przeworski (2019, 33) concludes that long-standing democracies are "impregnable in economically developed countries." Democracy rests on two building blocks—elections and free speech—that are normatively superior to the alternatives. Wealth provides a deep reservoir of legitimacy and a buffer against bad times. A long pattern of democratic contestation habituates citizens to liberal norms and is thought to inoculate them from authoritarian appeals.

The presidency of Donald Trump and the rise of populism in the West, however, challenge this belief.

Thirty years ago, scholars were optimistic about democracy (Schor 2020b). The Berlin Wall fell in 1989. Scholars became busy writing about why democracy was spreading around the globe (Huntington 1991). Scholars disagreed over the processes of democratic emergence and how best to craft institutions, but they believed that democracy would ultimately prevail over authoritarianism (Fukuyama 1989). There were good reasons for that optimism. Democracies, at least in the past, functioned better than did dictatorships, as they were better able to muddle through crises. Constitutional orders that endure are flexible and adaptable (Elkins et al. 2009). Democracies make mistakes, but their susceptibility to popular pressure enables them to adapt. Runciman (2013) persuasively documents the fine long-term track record that democracies have in surviving crises such as war and economic depression by virtue of their flexibility and responsiveness. Elections and free speech, in short, are crucial to democratic survival.

Scholars today are pessimistic about democracy. They point to four exogenous shocks as the proximate cause of a global democratic recession: globalization, climate change, illegal immigration, and new information technologies (Mounk 2018). A fifth shock, a global pandemic, has recently emerged and has disrupted economies already under stress from globalization. Globalization and the robotization of work have led to the disappearance of many traditional forms of work and exacerbated income inequality (Howell and Moe 2020, 25–61). People in desperately poor countries are fleeing to wealthier ones to escape political mismanagement and the ravages of climate change. New information technologies have lowered the costs of spreading false information and extremist views while deepening political polarization.

These exogenous shocks created an opportunity structure that populist authoritarians exploited to attack and undermine institutions. Populist leaders have honed economic dislocation and immigration into effective ideological weapons with which to bludgeon governments and traditional parties for failing to protect the "true" people from "outside" threats. The playbook for populists around the globe is remarkably similar (Mudde and Kaltwasser 2017; Müller 2016). Charismatic leaders arise who claim that the true or real people are the sole source of legitimacy, that the people are being betrayed by elites, and that only strong leaders can fix the nation's ills. Once in power they undermine institutions by attacking policy and scientific expertise while staffing the bureaucracy with sycophants and loyalists. Getulio Vargas, who at different times served as dictator and democratically elected

president of Brazil, succinctly summed up the political program of populism: "for my friends everything, for my enemies the law."

New information technologies are the most worrisome of the exogenous shocks facing democracies because they undermine the advantages that democracies once enjoyed over authoritarianism. When the history of our era is written, 1991, which is when web servers first became publicly available, will turn out to be a more momentous date than 1989, which is when the Berlin Wall fell. Democracies have muddled through profound crises in the past, but they were able to count on a functioning marketplace of ideas (Rosenfield 2018). That may no longer be the case for two reasons.

First, new information technologies facilitate the transmission of false information (Vosoughi et al. 2018) while destroying the economic model that once sustained news reporting (Bazelon 2020a; Starr 2009; Sullivan 2020). False information spreads virally via social networks, as they lack the guardrails that print media employs to check the flow of information. Flooding tactics can be used to drown out democratic deliberation "through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots" (Wu 2020, 15). New information technologies, moreover, have cannibalized the revenue streams that once sustained newspapers. The nation was once dotted with thriving, locally owned newspapers that provided a breakwater to our tendency to divide into two opposing national teams. Opinion journalism designed to outrage and entertain is thriving on the corpse of the news.

Second, these new technologies facilitate and deepen political polarization. Social media has accelerated the conjoined processes of information commodification and political disagreement. The old public spaces created by print media, radio, and television have been displaced by the vast small-*d* democratic fora of the internet. Instead of consuming information from shared public spaces, political partisans can now obtain information from sources that echo their views (Sunstein 2017). Social media relies on algorithms to sort out user created content that rewards polarizing content. The polls during the Trump presidency, unlike the polls for previous presidents, have moved within a narrow band because the competing factions get their information from polarized "news" sources (Klein 2020). Cheap online speech, moreover, enables "mobs to harass or abuse other speakers with whom they disagree" (Wu 2020). Humans are wired to divide themselves into competing groups (Mason 2018). Social media has supercharged that wiring system.

These trends do not bode well for democracy. Nonetheless there is reason for guarded optimism. Democracies have a fine, long-term track record of muddling through crises. New information technologies undoubtedly provide a different

challenge than past crises, since they disrupt the marketplace of ideas. America's peer democracies, however, are better situated to deal with these disruptions than the United States. Democracies abroad do not have an absolutist view of speech and believe that "protecting the citizenry from demonstrably false speech and bad ideas" is not "inconsistent" with a "robust commitment" to free speech (Krotoszynski 2015, 661). Consequently they are experimenting with regulatory mechanisms to deal with the supply of disinformation.[4] In the United States, in contrast, courts have taken an absolutist position on speech, and it has been left up to social media companies, which are not limited by the First Amendment, to devise solutions to disinformation.

The challenge that new information technologies pose is particularly acute when it comes to speech-related electoral harms. Domestic and foreign political actors have powerful incentives to spread disinformation to sow electoral mistrust. America's peer democracies regulate hate speech and electoral disinformation while investing in public broadcasting stations that "score high in public trust and audience share" (Bazelon 2020b, 4). The United States Supreme Court, in contrast, employs strict scrutiny even when assessing regulations tangentially related to speech such as the flow of money into politics.[5] Consequently, the United States is awash in money used to influence elections (Mayer 2017, 279–94) and awash in electoral disinformation.[6] In the days leading up to the 2016 American presidential election, for example, "junk news was shared as widely" as "professional news" (Wu 2020, 30). The 2020 presidential election has been ceaselessly attacked by Donald Trump and his allies in the Republican Party who falsely claim that the election was fraudulent (Leonnig and Rucker 2021).

The problem the United States faces is that contemporary First Amendment doctrine is the functional equivalent of an overbuilt battleship constructed for the wrong war. America's speech protections were built to deal with the threat of government censorship. In the twenty-first century, the threat flows, however, from speech itself as it migrates to social media platforms (Pozen 2020). *United States v. Alvarez (2012)*[7] illustrates the poverty of American speech exceptionalism. The Supreme Court concluded that false statements of fact enjoyed the same protection as core political speech for fear that the government would otherwise be empowered

4. See, e.g., European Commission (2021), https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation.

5. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

6. Browning (2020).

7. 132 S. Ct. 2537 (2012).

to create an Orwellian ministry of truth. The Court stood Orwell on his head by broadly protecting lies. Under the Trump presidency, the United States enjoyed an official ministry of truth in the form of the president's bully pulpit, which Trump used to normalize lying.[8] Kellyanne Conway, Donald Trump's political adviser, has a surer grasp on how political speech operates than does the Supreme Court. When she injected the phrase "alternative facts" into the political lexicon in 2016, sales of George Orwell's *Nineteen Eighty-Four* took off.[9]

Orwell's exploration of how totalitarian regimes distort speech to maintain power requires two modifications to explain America's contemporary democratic dystopia. First, the government has not required that citizens watch propaganda on television screens located in every public space and in every home. Citizens voluntarily watch and listen to info-entertainment on a variety of fixed and portable devices. Freedom, in the form of an unregulated marketplace of ideas, is a necessary condition of democracy's collapse. Second, language has been debased, but not how Orwell imagined. Orwell's Newspeak, which was designed to effectuate totalitarianism, is embarrassingly rich in vocabulary compared to the language of populist autocrats. Populists around the globe employ the same rhetorical tropes. No new speak was required, moreover, to divide citizens into two camps each sincerely convinced that the other is the victim of an alternative reality. All that is required is a marketplace of ideas where businesses thrive by debasing and impoverishing the language of politics as a means of achieving market domination within a slice of the electorate.

Scholars have long divided the world's democracies into two categories. One category is reserved for democracies located in the "developing" world. These are known as flawed democracies or democracies with adjectives. These democracies have elections, but institutions are a poor check on power (O'Donnell 1994). Flawed democracies effectively operate along authoritarian pathways, since institutions offer few constraints and opposing political elites largely do not engage in bargaining. The second category is reserved for long-standing democracies located primarily in the "developed" world. These are called consolidated democracies. They have elections, a thick civil society, a free press, and robust institutions.

It turns out that speech has shrunk the constitutional and political distances that once separated the developing from the developed world, at least if the United States has something to teach the world. Flawed democracies share the following

8. As of August 27, 2020, when Trump accepted the Republican nomination for president, he had made 22,247 false or misleading statements since being sworn into office (Kessler et al. 2020).

9. Tamura (2017).

features: loyalty to the leader supplants loyalty to institutions;[10] clientelist policies are used to buy votes;[11] electoral rules are manipulated to protect incumbents; and emergencies are normalized as a means of cementing power by exhausting voters and thereby weakening civil society. These phenomena are all at work in the United States.

In the flawed democracies located in the developing world, income inequality coupled with a lack of education relative to wealthier nations greased the pathway to power for authoritarian populists. The epicenter for (white) populist authoritarianism in the United States has long been the former states of the Confederacy (Posner 2020, 178–89), which suffer from government malperformance, deep racial inequality, and higher levels of illiteracy than any other region.[12] The United States has the highest level of income inequality of any wealthy, long-standing democracy.[13] New information technologies coupled with an unregulated marketplace of ideas facilitate democratic erosion much like low levels of education have in the developing world. Political polarization and the normalization of falsehoods weaken accountability and provide an environment in which demagogues thrive. Speech, in short, has become a sort of kryptonite for at least one superman democracy.

III. UNITED STATES PRESIDENTIAL EXCEPTIONALISM

Presidentialism in the United States is exceptional. The democratic track record of presidentialism abroad is poor. (Norris 2008, 132–55). Among America's peer democracies that have been in operation since 1950, only Costa Rica has presidentialism, and it underwent a civil war in 1948.[14] Oddly, both supporters and critics

10. The only plank in the 2020 Republican Party platform is loyalty to Donald Trump. See https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf.

11. See Bump (2020).

12. See World Population Review, https://worldpopulationreview.com/state-rankings/us-literacy-rates-by-state.

13. See Table 1: America's Peer Democracies. The only long-standing democracy with a higher Gini coefficient than the United States is Costa Rica. Costa Rica, however, is not a wealthy nation. Unlike the United States, moreover, Costa Rica has a remarkably high level of electoral integrity, which is on par with the Nordic countries that are considered the gold standard in running elections (Norris 2017, 28).

14. Costa Rica's 1949 Constitution shows a remarkable degree of political learning from the root causes of its civil war. The Constitution outlaws the principal ant-democratic players—the Communist Party and the military—and creates a fourth branch of government, the Supreme Electoral Tribunal, to ensure clean elections (Booth 1998, 44–62). An amendment in 1975 removed the restrictions on the Communist Party.

of presidentialism agree that it works in the United States. Justice Scalia (2011), for example, argued, in a statement to the Senate on American exceptionalism, that what made the Constitution succeed was not the Bill of Rights, which in his estimation "every banana republic has," but separation of powers and that Americans needed to learn to love gridlock. The political scientist Juan Linz (1990) argued in a seminal article entitled "The Perils of Presidentialism" that separation of powers facilitates democratic breakdown, but the United States was the exception to the rule.

Although the debate between the supporters and critics of presidentialism largely occurred before Donald Trump's election, the terms of the debate, which revolve around phrases such as "presidentialism" and "separation of powers," highlight an important aspect of constitutional orders, which is that institutions tend to emerge in clusters and the success or failure of these institutions is linked (Skach 2005, 128). Our Constitution illustrates this phenomenon. *The Federalist* begins and ends with a warning that the American people should not turn to demagogues. The institutional cure for this problem, or so the framers argued, is found in a set of linked institutions: the electoral college, separation of powers, and presidentialism.

Evolutionary changes driven by political competition and technological change have transformed these institutions so that they now facilitate the election of a demagogue to the presidency of the United States. Parts A and B below discuss the transformation of the electoral college and separation of powers. These changes, however, do not explain the pathways along which democratic erosion occurs. Democracies rest on a complex ecosystem of political understandings, which British constitutionalists call conventions, that channel and limit conflict. Part C explains why presidentialism, on balance, does a poorer job than parliamentarism in sustaining the informal norms needed to make democracy work.

A. The Electoral College

Throughout the course of the convention, the delegates believed that the president would be elected by the Congress (Dahl 2001, 64–66). If that proposed electoral system had been adopted, the United States would have ended up with a republican version of parliamentarism. Parliamentarism, however, was not on the table as a viable option in 1787, as it did not emerge in England until the nineteenth century (Schor 2020a). The framers had reservations about legislative election, moreover, as they desired an executive sufficiently powerful to counter the legislature, which they feared as the most dangerous branch (Klarman 2016, 213–37). Near the end of the convention, the delegates hit upon the electoral college as an eleventh-hour

compromise, which, unlike congressional election, ensured the independence of the executive.

The electoral college reflects the dim view the framers had of interest-group politics. Political parties did not yet exist, nor did the idea of a legitimate opposition (Hofstadter 1970). The framers believed and hoped that the branches would engage in deliberation over the common good rather than wage battle over votes. The solution to the evils that were thought to flow from politics was to reduce the linkages between citizens and elected officials while multiplying the number of elections needed to gain control of the new government. The electoral college illustrates the strategy of reduction.[15] Hamilton in *Federalist* No. 68 (Wright 1788/1996, 441) argues that it is "desirable" that the "election should be made by men most capable of analyzing the qualities adapted to the situation, and acting under the circumstances favorable to deliberation." The United States is the only presidential government in the world to rely on indirect elections (Przeworski 2018, 25).

A design that seeks to remove politics from the job of selecting the most important office in the new republic would prove a fantasy. George Washington, of course, was the consensus choice as the nation's first president (Sloan 2004). Once he left office, party competition reduced the electoral college into a mechanism for vote counting.[16] The electoral college was the first of the national institutions created under the Constitution to collapse under the hydraulic pressure of political competition. The effects of this change were masked for much of American history because political parties took over the task of weeding out unfit candidates (Ceaser 2011; Gardbaum and Pildes 2018; Kamarck 2018). Party elites played a disproportionate role in presidential nominations for most of our nation's history. They have better knowledge of the candidates than do ordinary voters, and they tend to pick consensus candidates, as that is generally a winning strategy in a two-party political system. In the wake of the 1968 Democratic Convention, however, both parties weakened the power of party elites by making ordinary citizens the arbiter of who would be the party's presidential candidate in political primaries. None of our peer democracies and few, if any, democracies around the globe give citizens so much power over who should be the candidate for the chief executive of the nation (Gardbaum and Pildes 2018).

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15. The other institutions that reflect this strategy, of course, are the Senate, prior to the Seventeenth Amendment, and the Supreme Court.

16. *Chiafolo v. Washington*, 140 S. Ct. 2316, 2320 (2020).

B. Separation of Powers

If the electoral college reflects the strategy of reduction, separation of powers reflects that of multiplication, as different offices are selected during different moments in political time. The intended consequences of separation of powers, however, are shrouded in misinformation, none articulated more strongly than by Justice Scalia. In a speech on American exceptionalism given to the Senate Judiciary Committee, Scalia (2011) argued that separation of powers was intended to produce gridlock that Americans should learn to love, as this was the necessary price of freedom.

Justice Scalia was mistaken as to why the framers adopted separation of powers. The framers sought to constrain and channel democratic politics by separating the powers of government. They were not, however, fans of gridlock. The framers criticized the Articles of Confederation because "supermajority or unanimous support was required to enact many types of policy or constitutional change" (Binder 2003, 6). The framers believed that separation of powers would facilitate good government by preventing one branch of government from interfering with the other branches, as had occurred during the colonial period as well as under the Revolutionary state constitutions (Wood 1998, 446–53). Gridlock is the unintended consequence of a system of government designed to produce deliberation in the absence of national political parties.

Political polarization has normalized gridlock. Karol (2015, 208) observes that having "cohesive parties with divergent policy positions" has caused dysfunction in the United States but not in other "stable democracies." America experienced polarized parties in the past, but dysfunction did not matter much because the government performed relatively few functions in the nineteenth century (Karol 2015, 211). The government grew following the Great Depression, but parties were not ideologically polarized from roughly the 1930s until the 1980s. Presidents either had majority support in Congress or could bargain with members of the opposing party. The parties became significantly more polarized, however, beginning in the 1980s (Drutman 2020, 58-106). Mann and Ornstein (2012) bluntly conclude that contemporary American parties are ideologically coherent and polarized, which makes separation of powers unworkable. The United States is embarked on a great experiment as the Constitution requires bargaining, but the parties are increasingly incapable of doing so.

Gridlock has profound institutional consequences. Gridlock empowers political minorities with intense preferences who are better able to navigate an overly complex constitutional system while systematically disempowering majorities with

diffuse preferences, given the costs associated with collective action (Olson 1965). Gridlock weakens Congress and strengthens executives who are forced to rely on executive orders to put in motion the policies on which elections are fought (Posner and Vermeule 2010). Courts gain power because they police the interactions between the branches and because their statutory interpretations cannot, as a practical matter, be overruled by a dysfunctional government. Voter anger at dysfunctional government facilitates the election of demagogues who promise that they alone can fix the nation's problems.

C. Presidentialism

Political competition and technological change have transformed the presidency. Tulis (2016) explains that presidents, who rarely spoke directly to citizens in the nineteenth century, began to actively court public opinion by the beginning of the twentieth century. The framers believed that three barriers were obstacles to demagogic ambitions: the electoral college, separation of powers, and the size of the republic. The first two collapsed under the weight of politics, and the third under the weight of politics and technology. Ambitious presidents developed a source of soft power in the form of public support to add to their relatively slender institutional powers. Technological changes such as railroads and telegraphs made it possible for presidents to fashion linkages to citizens. Those technological changes, of course, have accelerated with the advent of new forms of social media. The United States, politically speaking, has been shrunk to the size of the Athenian city-state that gave birth to the terms "democracy" and "demagogue."

Although transformations in the electoral college, separation of powers, and executive soft power opened the door to Donald Trump's election, they do not explain the pathways along which democracies erode. There are two competing accounts of democratic erosion. One school of thought builds on ideas that have percolated since the founding of the American republic to argue that presidents act as tyrants when they overstep their constitutional bounds. James Madison provides the ur-text for this idea: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" (Wright 1788/1996, 336). Institutionally oriented accounts of executive autocracy weave stories based on the growth of domestic power following the New Deal and the growth of the national security state following World War II. The increasing complexity of the issues facing the United States coupled with ability of presidents to act with energy and dispatch has enabled them over time to displace Congress. The vehicles for this displacement have been delegation and emergency

(Buckley 2015; Posner and Vermeule 2010). On this account, Trump is simply the fortunate beneficiary of long-term, evolutionary changes in the presidency.

The competing account of democratic erosion focuses not on formal institutions but on the unwritten norms that underpin democracy. British constitutionalists pioneered the idea that unwritten norms, which they call conventions, are critical for democracy to function (Marshall 1984; McLean 2018). Unwritten norms act as a glue keeping the forces of political competition from tearing the nation apart. The political scientists Levitsky and Ziblatt (2018) identify the critical democracy-protecting norms as mutual toleration and forbearance. These two norms matter both in keeping democracies afloat and in the emergence of democracy. For democracy to emerge, political actors need to learn to compromise and accept the opposition as legitimate. During the early American republic, for example, separation of powers worked because the branches deliberated over their respective authorities (Casper 1997). In addition, the nascent political parties learned to accept the opposition as legitimate (Hofstadter 1970). Democratic erosion, and breakdown, in contrast, occurs when polarization destroys these norms (Bermeo 2003). Bargaining and toleration are, in short, democracy-sustaining norms.

The Trump presidency provides compelling evidence for why scholars should pay more attention to democracy-sustaining norms. Democratic erosion operates along different pathways in long-standing, wealthy democracies than it does in new democracies. In new democracies, institutions are weaker and so is citizen attachment to institutions. This enables elected leaders to retain the veneer of electoral democracy while hollowing out institutions (Bermeo 2016). "Abusive constitutionalism" and "authoritarian legalism" are democratic tools that elected leaders wield to cement their hold on power (Landau 2013; Scheppele 2018). The complexity and age of the American system of government make it difficult for Trump to make the sweeping legal changes we are witnessing in new democracies.[17] If one squints, American democracy under the Trump presidency bears a passing resemblance to American democracy under the Obama presidency.

The damage is occurring along the margins of institutions as informal norms or conventions are systematically eroded. American constitutionalists are learning a hard lesson long known to students of developing nations, which is that there is a political payoff to undermining government capacity (de Soto 1992). Populists thrive in an environment where government is unable to solve the nation's

17. The picture is more complex at the subnational level. There has been little formal constitutional change even in those states that have most fully embraced the authoritarian turn in American politics (Gardner 2020). Some states, however, have manipulated electoral rules, packed courts, and changed the respective powers of the different branches to disempower the opposition.

problems. The journalist Michael Lewis (2018) documents how the Trump administration systematically damaged the capacity of government to keep citizens safe from harm. The Trump administration benefited, until the advent of the pandemic, by simultaneously eroding the competence of government agencies and attacking their professionalism and commitment to the rule of law as a deep-state conspiracy. Although the administration bore a heavy political cost for its failure to deal with the pandemic, its failures are part and parcel of its governing philosophy, which is to sow chaos (Pozen and Scheppele 2020).

The story of how the Trump presidency eroded American democracy matters because it does not fit neatly into existing accounts of democratic decay. Scholars who emphasize the role of soft norms in democratic breakdown largely ignore why institutions matter. There is evidence for this view since all institutional arrangements are susceptible to political polarization. Scholars who emphasize the institutional roots of democratic erosion downplay the role of informal norms. There is evidence for this view, since presidentialism is more susceptible to democratic breakdown than parliamentarism (Linz 1990; Norris 2008). This paper argues that our existing theories of democratic decay need to be rebooted to incorporate the lessons of the Trump presidency.

Institutions matter because they play a crucial role in the emergence and destruction of democracy-sustaining norms. Institutions are the battlefield around which political forces array themselves. Democracy-sustaining norms are born, evolve, and die largely in the arena of the political constitution, where political actors, not courts, hold power. Presidentialism is relatively rich in pathways that allow actors to destroy democracy-sustaining norms, whereas on balance, parliamentarism does a better job of sustaining these norms. Three reasons explain why parliamentarism does a better job of sustaining political-constitutional conventions than does presidentialism.

(1) Presidentialism is susceptible to capture by candidates short on political experience but long on media exposure. Candidates do not need a political party to run for the presidency, and in any case, the connection between a presidential candidate and a political party may be purely opportunistic. Political candidates who have not been socialized by service in elected office are likely to lack basic democratic norms such as the need to compromise and accept elections (Carreras 2014). Peer review by the political class plays a larger role in selecting candidates for chief executive in parliamentary systems, which helps weed out unfit outsiders (Bagehot 1865/1986, 67–75; Gardbaum and Pildes 2018). Prime ministers, moreover, unlike presidents, are elected and fired by the legislature. Parliamentary government is not immune from capture by unfit outsiders, but the cost of a hostile takeover is higher

than in presidentialism, as outsiders will have to form a political party to advance their ambitions.[18]

(2) Presidentialism multiplies the number of actors with the power to destroy democracy-sustaining norms. Presidents are not the only actors with the power to erode these norms. The Senate majority leader, Mitch McConnell, for example, has played a crucial role in undermining the ability of the judicial branch to act as an honest broker between the parties by engineering its capture by judges ideologically united in pursuing policies favored by the Republican Party (Wheeler 2018). Ideologically conservative judges have also played a critical role in destroying democracy-sustaining norms by contending that the pluralistic forms of interpretation favored by moderate judges are illegitimate because there is only one correct way to interpret the Constitution. The monistic interpretive ideology espoused by conservative judges—originalism—has destroyed the idea of legitimate *constitutional* disagreement.

Parliamentary governments, in contrast, are efficient because they fuse the executive and legislative branches (Bagehot 1865/1986). This efficiency proved attractive to European state builders in the nineteenth century who, unlike their American counterparts in the eighteenth century, had to fashion an institution sufficiently powerful to challenge monarchs and large standing armies (Selinger 2020). All democracies have a political constitution sustained by informal norms that are seldom enforced by courts (Ahmed et al. 2019). These norms are sustained if political actors find it in their self-interest to effectuate them. The paucity of veto points in parliamentary government facilitates the logic of mutually assured destruction. Parliamentary leaders worry that their opponents will one day win power and turn the tables on them. Somewhat paradoxically parliamentary efficiency has a democratic payoff.

The fusion of the two branches means there is no constitutional impediment to having the prime minister and the Cabinet answer questions from the opposition in Parliament. The practice of question time has evolved over time, but it diminishes the bully pulpit exercised by chief executives by providing counter-speech and narratives that citizens can consider (Setty 2008). The deliberative aspects of parliamentary debates were long considered one of its more democratically attractive features (Selinger 2020). In the United States, in contrast, the House of Representatives has found it impossible to conduct oversight because of extreme stonewalling by the executive and a slow-moving judicial system that has largely allowed the administration to evade oversight.

18. This is precisely what Silvio Berlusconi did to become Italy's prime minister (Stille 2007).

(3) There is a pay-off to separating the head of government from the head of state. Bagehot (1865/1986) observed that the British government consisted of a dignified portion to which citizens were attached—the Crown—and an efficient portion—Parliament, the Cabinet, and the prime minister—which did the work of government. This division of executive power proved attractive to European nations, which modeled themselves after the British government and many of which are also constitutional monarchies (Selinger 2020).[19] The failure of separation of powers in the United States provides an important clue as to the advantage of dividing executive power in this fashion. Madison had hoped that separation of powers would work because elected officials would care more about their constitutional obligations than reelection. Party loyalty, however, has proved more powerful than institutional loyalty (Levinson and Pildes 2006). Heads of state, elected or nonelected, are tasked with the ceremonial aspects of governing and have incentives to care about conventions and unwritten norms. Heads of state represent the nation and typically are not members of a party. They can play the role of an honest broker when disputes arise between the parties (King 2017, 42-43) and speak to the better angels of our nature.[20] Elected heads of government, in contrast, have shorter time lines, which incentivizes them to demolish conventions when doing so serves their self-interest.

IV. CONSTITUTIONALISM

The root meaning of constitutionalism is that government power should be limited. The American colonists imbued this idea from the British, who were the first to operationalize it (Sartori 1962; Schor 2020a), but the idea has a long pedigree (McIlwain 1947). The break that the American revolutionaries made with the British constitutional tradition is that the people became the source of political

19. Each of the eighteen parliamentary regimes that been operating continuously since 1950 have a separate head of state and head of government. Each of those nations has a prime minister who is the head of government and either a constitutional monarch or an elected president who is the head of state.

20. Netflix's *The Crown* provides a charming example of this idea at work. When a young Queen Elizabeth was faced with her first major constitutional crisis, she directed her servants to find her school notes on Bagehot's *English Constitution*. She understood that her role was to remind political actors of the importance of abiding by conventions. A less literary but more practical example occurred when a now elderly Queen Elizabeth gave a rare and much praised speech to the nation on COVID-19 earlier this year. Courts could fill some of this gap in the United States but are unlikely to do so, since the dominant judicial ideology focuses on the meaning of words unmoored from how they operate to enhance or erode American democracy.

and constitutional legitimacy. Throughout the course of the twentieth century, near universal suffrage became the touchstone of democratic legitimacy around the globe, as has the role of the people in constitutional change. Even the United Kingdom now relies on ordinary citizens to vote on constitutional changes by increasingly relying on referenda to deal with knotty political-constitutional issues (Delaney 2018). Constitutionalism, in short, evolved into a political ideology that uneasily knits the idea of limits, typically found in written documents, and the *demos* together.

The global populist eruption suggests that the uneasy relationship between citizens and constitutions is coming apart at the seams. Democracies change more quickly than do constitutions which periodically gives rise to critical junctures that test existing institutions and may give rise to new ones (Schor 2018, 94). Democracies around the globe are facing considerable popular pressure to engage in fundamental change. Among wealthy, long-standing democracies, that problem is most acutely felt in the United States. The two big questions are (a) how to classify the mechanisms used by constitutions to put boundaries around the *demos* and (b) why the peculiar form American constitutionalism took is proving problematic.

A. Constitutional Checks on Democracy

Checks on democracy can be arranged along a spectrum. At one end of the spectrum is a political constitution that relies on conventions or political understandings reinforced by two layers of voting—the government's responsibility to Parliament and Parliament's to the electorate—to limit power. The bulk of contemporary democracies employ written bills of rights enforced by courts to limit majorities, but democracies abroad employ stronger checks and balances to limits national high courts than does the United States (Schor 2008).[21] Some polities, however, employ stronger medicine in checking popular forces. Constitution makers can craft a tutelary democracy by empowering the government to restrict antidemocratic speech and parties or by means of constitutional provisions that make it difficult for majorities to govern.

This stronger medicine is illustrated by two of the most important sources of contemporary constitutional theorizing—Germany and the United States—though they took different routes to solving the problem that the demos poses to the constitutional order. The German constitution makes it possible, as is the case for

21. Even the United Kingdom, New Zealand, and Canada have adopted a form of judicial review (Gardbaum 2013).

all parliamentary governments, for parties to govern while seeking to prevent antidemocratic parties and voices from obtaining power and doing away with democracy. The United States Constitution, in contrast, makes it exceptionally difficult for parties to govern but neither prevents citizens from amending democracy out of existence nor polices antidemocratic speech or parties.

Germany coined the phrase "militant democracy" to describe the path it took to resolving the tension inherent in constitutionalism. The "radical break" that Germany's Basic Law made with the past is that it privileged the constitution over democracy (Kommers 1991, 853). The architects of Germany's postwar order believed that the flaw of the Weimar Constitution was that it did not limit "political and legal change enacted by the legislature" (Müller 2012, 1257). Germany's Basic Law seeks to cure that deficiency by making the crucial components of the constitutional order unamendable via the so-called eternity clause of Article 79(3) and by empowering the government to adopt "illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime" (Müller 2012, 1253).[22] The tools of militant democracy no doubt can be abused but are seldom employed in Germany (Müller 2012, 1258–61). Militant democracy is better understood as a set of political rather than legal restraints. These political restraints remind political elites and ordinary citizens that the law cannot be used to dismantle democracy and facilitate mobilization, which is a potent tool against incipient and existing dictatorships.[23]

The framers of Germany's constitution, unlike the framers of the America's constitution, had actual experience in how citizens could use the tools of representative government to subvert it. The American framers, in contrast, were concerned that democratic majorities might enact laws to deal with economic dislocations such as those occasioned by the need to pay the debts of the Revolution. Klarman (2016, 606) concludes, "It is hard to overstate the extent to which the state crises over tax and debt relief in the 1780s influenced the agenda of the Philadelphia convention." The federal Constitution was a marked departure from the more democratic, contemporaneous state constitutions that enshrined the right of the people to "alter or abolish" their government (Fritz 2008). It was no easy matter to convince the voters gathered in state conventions to adopt the plan of the

22. Similar restrictions have become common in many democracies around the globe (Issacharoff 2015).

23. This view of how rights should be enforced has become a minority view among contemporary American constitutionalists, but it played a critical role in the thought of the framing generation (Kramer 2004).

Constitutional Convention, as it "dramatically expanded the powers of the federal government" while "insulating it far more from popular political influence than most Americans at the time would have anticipated or desired" (Klarman 2016, 6). The Federalists understood the importance of hardball in establishing a tutelary democracy that entrenched the power of elites (Roche 1961).

Although constitution makers employ a wide variety of techniques in limiting democracy, the United States is exceptional in the degree to which it places training wheels on democracy. All of our peer democracies continuously in operation since 1950 have "adopted a constitutional system" more democratic than ours (Dahl 2001, 4). The exceptional features of America's tutelary democracy include a political class that has the power to insulate itself from the electorate by gerrymandering and voter restrictions; staggered elections; strong bicameralism with two houses of equal strength; malapportionment in the Senate that privileges rural, small-population states; the electoral college; a Supreme Court poorly constrained by checks and balances; a federal government that may lack the power to solve national problems (at least according to a majority of the Supreme Court, given its current ideological makeup); and an extremely high bar to constitutional amendment. These undemocratic features, however, are generally considered a virtue rather than a problem since Americans tend to venerate their Constitution (Levinson 2008).

Germany adopted an eternity clause to protect the democratic features of its constitution. The United States has what amounts to an eternity clause that protects the undemocratic features of its political-constitutional order. Equal representation in the Senate, of course, is formally preserved against change in the Constitution. The other undemocratic features of the Constitution are protected by politics and the high bar to amendment. The rigidity that a broad eternity clause engenders was ameliorated in the wake of the Constitutional Revolution of 1937 when courts adopted two important principles. The first is that Congress should be afforded deference, or a margin of appreciation, when putting the structural features of the Constitution to work.[24] The second is the principle that heightened scrutiny should be employed when elected officials seek to manipulate electoral rules to entrench themselves in power.[25] The first principle was eroded by legal formalists on the Supreme Court, who began to undermine the ability of government to implement evolutionary innovations in the late twentieth century.[26] In the early twenty-first century, legal formalism has

24. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

25. *United States v. Carolene Products*, 304 U.S. 144, 152 fn. 4 (1938).

26. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Clinton v. N.Y.*, 524 U.S. (1998).

been put on steroids by an ideology shared by a majority of the justices currently on the Supreme Court that privileges a selective and tendentious reading of the framing era to narrowly construe the structural features of the Constitution.[27] The second principle has been overruled *sub silentio*, as the Court believes that allowing unfettered electoral manipulation by incumbents fulfills the expectations the framers had of how politics would operate.[28]

The exceptional degree to which the American Constitution is undemocratic and resistant to change should give anyone pause who thinks this design a virtue, since there is little evidence that Madison was right that a more democratic constitution would make the nation susceptible to the "violence of factions." Elkins et al.'s (2009, 65) seminal study of constitutional endurance likens the American Constitution to Jeanne Calment, who lived until she was 122 on a diet consisting largely of chocolate, olive oil, and cigarettes. The key to constitutional endurance, Elkins is flexibility and adaptability. The United States Constitution is the exception that proves the rule, but that exception is pressing hard on contemporary Americans unhappy with the state of their democracy.

B. The Problems of American Constitutionalism

In *Federalist* No. 10, Madison observes that the "violence of factions" is everywhere the cause of democratic breakdown (Wright 1788/1996, 129). Madison argued that constitution makers could seek to solve this problem either by limiting liberty or by designing institutions to blunt popular forces. He argued that limiting liberty would destroy constitutional government, whereas institutional checks on democracy would preserve it. It turns out that Madison got this backwards. Putting soft limits on liberty as Germany did helps preserve the constitutional order, whereas putting excessive limits on the ability of citizens to govern corrodes institutions.

America's exceptionally undemocratic Constitution is facilitating a severe problem of governmental legitimacy. Trust in America's institutions is at historic lows as majorities in both parties want the government to solve national

27. The crabbed reading given the commerce clause and the necessary and proper clause by a majority of the justices in *National Federation of Independent Business v. Sebelius*, 567 U.S. 579 (2012) is the opening salvo of a judicial counterrevolution aimed at ensuring that the federal government lacks the power to solve national problems.

28. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

problems such as health care.[29] The response to COVID-19 has helped unite citizens in America's peer democracies, but not in the United States, where 77 percent of her citizens believe that the pandemic has deepened polarization.[30] The extraordinary Black Lives Matter protests in America's cities demonstrate our failure to effectuate the promise of equality. It is not just Black Americans who feel estranged from their country's Constitution. In 2016, a clear and substantial majority of citizens voted for dramatic change by voting for either Donald Trump in the general election or Bernie Sanders in the Democratic primaries. In 2020, a recent Pew poll shows that 90 percent of Trump's voters think that if Biden were to win, lasting harm would occur. The same is true of Biden's voters, 90 percent of whom think lasting harm would occur were Trump to win.[31] Americans are learning what many citizens around the world know, which is that elections can be deeply unsettling affairs.

Madison, however, was right to seek to gauge the happiness of the citizens of a polity by examining their propensity to burn down institutional structures even if the answers he gave to that question have turned out to be empirically dubious. Citizen attachment to and disenchantment with institutions matter in assessing constitutions. The most durable cause of faction, Madison observed, is the unequal distribution of property. He feared that democratic majorities might enact legislation that would undermine the interests of wealthy elites. One of the key steps in democratic emergence around the globe occurs when wealthy and powerful elites cede power to institutions that provide security for their interests (Starr 2019, 109; Winters 2011). The United States Constitution blazed this trail around the globe.

It is becoming increasingly clear that democratic endurance in the twenty-first century turns on whether constitutional orders can provide security for ordinary citizens as well. If Americans are to muddle through the crisis of populism, they will need to deal with the economic insecurity that is one of its root causes. Franklin Delano Roosevelt, looking back on the Great Depression and the causes of World War II, argued in his 1944 State of the Union that the antidote for

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29. See "Americans' Views of Government: Low Trust, but Some Positive Performance Ratings," Pew Research Center, September 14, 2020, https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/.

30. See "Most Approve of COVID-19 Response in 14 Advanced Economies," Pew Research Center, August 27, 2020, https://www.pewresearch.org/global/2020/08/27/most-approve-of-national-response-to-covid-19-in-14-advanced-economies/.

31. See "Amid Campaign Turmoil, Biden Holds Wide Leads on Coronavirus, Unifying the Country," Pew Research Center, October 9, 2020, https://www.pewresearch.org/politics/2020/10/09/amid-campaign-turmoil-biden-holds-wide-leads-on-coronavirus-unifying-the-country/.

demagogues was a second Bill of Rights that would provide citizens with protection from many of the vicissitudes of life. Those rights are still lacking in the United States, as demonstrated by the struggle over realizing health care. It is as if the North Atlantic world were running a natural experiment on the virtues of inefficient versus efficient forms of government. The democracies of Western Europe have parliamentary governments that enable them to "take forceful, coherent policy actions" and, consequently, have "more comprehensive welfare states than the United States and are better able to buffer their citizens from the economic harms that populists feed on" (Howell and Moe 2020, 41). Populism is a problem in Western Europe as well as in the United States, but the United States is exceptional in turning toward a demagogue like Donald Trump as a means of fixing its ineffective government.

The framers imperfectly understood the promise and the danger of democracy. They understood that a demagogue might one day destroy the republic. *The Federalist* begins and ends by raising the specter of populism. The framers were mistaken, however, in their belief that the cure for republican ills was to weaken popular accountability by fashioning an overly complex machinery of government. Popular pressure is a two-edged sword. Popular anger can undermine democracy when charismatic leaders harness that energy to sweep away checks on their power. It can also cleanse representative government when citizen pressure turns into government reforms and outputs. A system of government that relies on formal structures rather than voting to deal with democratic erosion is dangerously unbalanced. The deep question Americans face as they address the exogenous shocks flowing from technological, economic, and climatic change is whether they will turn to demagogues or whether they will reclaim their authority to change their political-constitutional order when the government proves itself incapable of solving national problems.

V. CONCLUSIONS

Joe Biden defeated Trump in the 2020 presidential elections to become the forty-sixth president of the United States. The structural problems exposed by Trump's presidency, however, will not be swept away by one election. Leo Tolstoy's *Anna Karenina* famously begins with the observation that while all "happy families are alike; each unhappy family is unhappy in its own way." Populism, a form of democratic politics that stokes polarization and eschews institutions in favor of personalist rule, is a potential problem even for America's peer democracies, but it undoubtedly found a congenial home in Trump's America.

America's exceptional constitution played a role in constructing that home. Long-standing, wealthy democracies are highly resistant to democratic collapse

and erosion, but they are threatened if there are multiple sources of constitutional unhappiness. Such democracies are not destroyed in one fell swoop, but the cumulative weight of political changes can erode constitutional orders even in superman democracies. The Trump presidency demonstrates that America's constitutional order is peculiarly susceptible to democratic erosion.

America's constitution is showing its age. Elements of its constitutional order that worked tolerably well in the past are playing a role in undermining democracy in the twenty-first century. No constitution can dam up democratic politics forever, but some constitutional orders evolve formally or informally to deal with changed circumstances. Constitutional orders that do not evolve become increasingly divorced from political reality and a constant source of friction. They become sham documents that mask how power operates.

New speech technologies are a potential threat to all democracies. By dramatically lowering the cost of speech and removing the guardrails that once impeded the spread of false information, these technologies have transformed speech into a potent source of democratic instability. The problem is likely to be worse in the United States than in its peer democracies because the absolutist position taken by the Supreme Court makes it impossible for the government to regulate disinformation.

Presidentialism is peculiarly susceptible to demagogues, but the literature has failed to properly appreciate the sources of its weaknesses. The deep lesson of the Trump presidency is that the long-term success of a constitutional project rests on political actors internalizing democracy sustaining norms. The peril of presidentialism in a long-standing wealthy democracy is not that presidents become dictators, but that separation of powers can facilitate the destruction of the complex system of informal norms needed to sustain democracy for the long haul. Parliamentarism, on balance, does a better job of preserving these norms than presidentialism.

Constitutionalism is an ideology that bolts together two disparate ideas: written documents limiting power and democracy. Judicial review has become the near universal solution to the fear of democratic excess. Some constitutional orders, however, craft tutelary democracies that place guardrails around the power of the people to govern themselves. The American constitutional order is uniquely antidemocratic and it is consequently increasingly incapable of dealing with pressing, complex issues. When a polity relies on an exceptional number of veto points to place training wheels on democracy, however, the ability of ordinary citizens to vote for the outputs they need is stymied and demagogues such as Donald Trump may prove an appealing solution to large-scale exogenous shocks, some real and others imagined.

TABLE 1. America's Peer Democracies

The first column lists the twenty-two nations that have been democratic since 1950 (Dahl 2001, 164). The second column provides the IMF estimate of nominal GDP per capita.[32] The third provides the Gini index.[33] The fourth provides the form of government.

Polity	GDP per capita	Gini Index	Form of Government
Austria	13	30.5	Parliamentary
Australia	10	30.3	Parliamentary
Belgium	18	25.9	Parliamentary
Canada	17	32.1	Parliamentary
Costa Rica	58	48.5	Presidential
Denmark	9	29.0	Parliamentary
Finland	14	27.2	Parliamentary
France	20	29.3	Semi-presidential
Germany	16	27.0	Parliamentary
Iceland	6	28.0	Parliamentary
Ireland	4	31.3	Parliamentary
Israel	19	42.8	Parliamentary
Italy	26	31.9	Parliamentary
Japan	22	37.9	Parliamentary
Luxembourg	1	30.4	Parliamentary
Netherlands	11	30.3	Parliamentary
New Zealand	23	36.2	Parliamentary
Norway	3	26.8	Parliamentary
Sweden	12	24.9	Parliamentary
Switzerland	2	29.5	*Sui generis*
United Kingdom	21	32.4	Parliamentary
United States	7	45.0	Presidential

32. https://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal)_per_capita

33. https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html.

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THE HERMENEUTICS OF CONSTITUTIONAL AMENDMENT

HOWARD SCHWEBER

ABSTRACT

The practice of constitutional amendment raises numerous issues for understanding and interpreting a written constitution. Do amendments have the same authority as original textual provisions, or less or more authority by virtue of their "last in time" status? Should amendments be read to be consistent with the previously included elements of the text or should the earlier textual provisions be reinterpreted in light of the amendment? This article explores the implications of amendability for questions of constitutional hermeneutics. Three distinct approaches to the relationship between an amendment and the preceding text are described: "pastiche" (each amendment and the original text stand as separate, independently understood texts); "sacred text" (the amendment corrects an error in the earlier text or its understanding and thus restores the original whole); and "palimpsest" (the addition of an amendment and the consequent erasure of elements of the original text creates a new text to be interpreted as a whole). Each of these understandings, in turn, is associated with a particular heremeneutic model: the pastiche approach is associated with an epistemological model based on the work of Francis Lieber; the sacred text understanding is associated with an exegetical model grounded in religious practice based on the work of Jaroslav Pelikan; and the palimpsest version of the amended text is associated with a critical philosophical model of hermeneutics based on the work of Hans-Georg Gadamer and Jurgen Habermas among others. The conclusion is that only a

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palimpsest approach, informed by a critical philosophical hermeneutic of constitutional interpretation, is consistent with fundamental principles of constitutional legitimacy grounded in constituent power.

KEYWORDS: *Constitution, constitutional interpretation, hermeneutics, legal hermeneutics, constitutional hermeneutics, constituent power, democratic legitimacy, interpretation, textualism, exegesis, religious texts, amendment, constitutional legitimacy, constitutionalism, sacred text, palimpsest, pastiche, critical theory*

ARTICLE TEXT

This article explores a question of normative political theory applied to a problem of constitutionalism. The political theory in question is philosophical hermeneutics, a theory (or, rather, set of theories) about the ways in which the relationship between reader and text informs the exercise of critical self-reflection in its political context. The problem of constitutionalism is the problem—much discussed in current literature—of how to account for the phenomenon of constitutional amendment as an element of a larger theory of constitutional legitimacy, a topic that has been central to political theory since at least Aristotle.

The question that this article poses is, How does an occurrence of constitutional amendment cause us to understand the amended constitutional text? The argument of this article is that one can simplify the possible responses to this question into three possibilities:

- The amendment may be assimilated into the pre-amendment document, so the interpretation of the amendment becomes an exercise of fitting it within the constraints of the pre-amendment version (the "sacred text" approach).
- The amendment may be treated as effectively a separate document, so "the constitution" now comprises multiple texts (the "pastiche" approach).
- The pre-amendment document may be assimilated into the amendment, so the interpretation of the entire text becomes guided by some understanding of the amendment and its implications with the whole of the amended constitutional text reconsidered (the "palimpsest" approach).

The first approach, reconciling the amendment to the prior text, is referred to here as treating the amended constitution as a "sacred text." The phrase is deliberately evocative of the religious roots of hermeneutics. In Jaroslav Pelikan's phrase it is an approach in which the text is treated as something that "speaks to" the reader (see discussion, section I.B., below). In this view, the act of amendment is essentially

an act of correcting an erroneous recording of a supra-textual message.[1] One area where this approach appears in American constitutionalism is in judicial discussions of state sovereignty, as in the identification of core aspects of state sovereignty that limit the reach of the commerce clause—*National League of Cities v. Usery* (1976); *Printz v. United States* (1997)—or in interpretations of the Eleventh Amendment's guarantee of sovereign immunity. "[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms," wrote Justice Rehnquist in *Seminole Tribe of Florida v. Florida* (1996).

To be sure, in American constitutionalism the source of meaning is historical rather than divine, but hermeneutics is all about how one relates to history-as-text, particularly in a constitutional context. The point here is that Justice Rehnquist's comments reveal an approach that is fundamentally exegetical. The goal is to find the "true" meaning that the text was intended to record; the Eleventh Amendment is a correction to an error in that process of recording and a guide to correct exegesis based on first principles. Those first principles, moreover, are "historical" only by description. The approach is not so much justified as a method to accurately discover and veridically describe an historical event as it is treated as the only appropriate way to read a text that effectively stands outside historical time. Consider Justice Scalia's remarkable response to Justice Stevens in *District of Columbia v. Heller* (2008). Scalia declared that Stevens's view "relies on the proposition, unsupported by any evidence, that different people of the founding period had vastly different conceptions of the right to keep and bear arms. That simply does not comport with our longstanding view that the Bill of Rights codified venerable, widely understood liberties" (*Heller* 2008, at 32). The phrase "unsupported by any evidence" does no evident work here (as well as being demonstrably false). Justice Scalia was not asserting an (unsupportable) historiographical hypothesis; he was explicitly declaring an article of orthodox faith—"our longstanding view"—that he viewed as required of anyone who would undertake the project of interpreting the constitutional text. Scalia's appeal is to a normative standard of a deeper truth that posits the existence of a fixed and unalterable historical consensus and then reifies that construction into an axiomatic principle unconnected to the event of its

1. Pelikan's conception is rooted in Christian interpretive practices. Noam Zohar suggests that in the Jewish rabbinic tradition the use of *midrash*—instructive stories similar to parables—developed into a system of effective amendment. Fittingly, the most famous *midrash* is one in which a group of rabbis are having a debate, the voice of God is heard declaring the correct answer, and the rabbis reject the teaching on the ground that interpretation is a matter for human understanding rather than revelation (Zohar 1995); for an extended discussion of rabbinic practices of amendment to Jewish law (*Halakhah*), see Gross 2014.

imagined genesis. It is this normative commitment that makes sense of reading an amendment to make it consistent with the true understanding of the original text.

The second approach, treating amendments as freestanding and separate texts, views the amended constitution as a "pastiche." This approach separates the relationship of the people to one part of the text—the amendment under consideration—from the relationship of the people to the remainder of the text. In this approach the act of interpretation becomes a forensic exercise aimed at seeking the most veridical portrayal of the object as event, precisely what was (deliberately) omitted in the exegetical approach. What is sacrificed in the process is the ideal of consistency that Justice Scalia invoked. The result can be a single text that contains profoundly contradictory elements in ways that go beyond what Gary Jacobsohn (2010) calls constitutional "disharmony" to outright inconsistency. A good example in American constitutionalism appears, again, in the treatment of states and their sovereignty. This should not be surprising; no subject is more bound up in commitments to orthodoxy of one kind or another nor has any subject been more vigorously contested since literally before the adoption of the United States Constitution. The "pastiche" approach to this question appears in the different treatment of the limits of Congress's power with respect to states under Article 1 and the Fourteenth Amendment. When Congress is acting under its Article 1 powers, states are immune from regulation unless they have voluntarily waived their immunity. When Congress is acting under its Fourteenth Amendment powers, no such immunity exists. In practice, moreover, the distinction may often turn into "when Congress *says* it is acting" under one or another source of authority, as Article 1 and the Fourteenth Amendment overlap in many areas (as evidenced, for example, in the Civil Rights Act of 1964).

In this way, an embrace of formalistic textual positivism becomes the consequence of seeking epistemological accuracy. That outcome, of course, depends on a particular conception of how we relate to history; the "pastiche" approach relies on a "scientific" (or scientistic) style of historiography that treats historical materials as objects of analysis akin to natural objects in a laboratory. Techniques of forensic investigation, intellectual historical analysis, or linguistics may be brought to bear to force the text to reveal its secrets one piece at a time. Historically, this approach appears as far back as the mid-nineteenth century in Francis Lieber's studies of legal hermeneutics.

The "palimpsest" approach, finally, treats the amended constitutional text as a singular whole. The term "palimpsest" was carefully chosen. Palimpsests were pieces of parchment or vellum from which the entirety of a text had been washed off to make space for a new one. Quite often, however, traces of the earlier text

could still be seen and recovered. In a famous instance, the surviving fragments of Cicero's *On the Republic* were discovered in 1819, having been written over with works of Augustine. While the earlier text had been (literally) washed away, its traces remained.

In its more modern uses, the term "palimpsest" refers to a text—not necessarily a piece of writing but an object of interpretation—that bears layers of meaning and signification, as in a modern writer's description of the Louvre Museum in Paris: "Every king's reign involved expansion or demolition, modification or neglect, turning the building into an elaborate *palimpsest* of styles and functions" (Rothstein 2020). Applied to its original reference, a written text, this modern understanding associates the act of interpretation with the tradition of philosophical hermeneutics. Certainly a visitor may study the Louvre forensically, looking for traces of its historical construction, revision, and conceptualizations. Equally, a visitor may look to both the building and its priceless contents as sublime sources of inspiration. Ultimately, however, the "meaning" of the Louvre is a matter of the experience of the visit. The approach of philosophical hermeneutics treats history and historical texts as the same kinds of metaphorical palimpsests, a multilayered container of meaning to which the reader adds a new layer in the process of interpretation.

At this point, however, the concept of constituent power becomes critically important. Applied to a constitutional text, the acceptance of constituent power means that it is "the people" that stands in relation to the text in each of these different hermeneutic approaches. In an exegetical approach, "the people" stands in a relationship of contemplation of the text's deeply true meaning; in an epistemological approach, "the people" relates to the text as an object of analysis. Finally, in a philosophical hermeneutic approach, "the people" stands in relation to the text simultaneously as putative authors and readers, a relationship that defines the framework of understanding and makes that understanding itself the object of interpretation. In the same way that epistemological inquiries call on us to think about thinking, this ontologically informed hermeneutic calls on us to interpret interpretation, a self-reflective exercise that is inherently critical.[2]

2. Hans Lindahl describes the exercise of constituent power as "self-constitution," a process in which originary political authority is expressed in juridical systems of law. Engaging arguments of Hans Kelsen and Carl Schmitt, Lindahl argues that this approach resolves the apparent paradox of the mutual dependency of legal and political authority for legitimation (Lindahl 2007). For a similar argument in the specific context of the American founding, see Thomas Frank (2010). The idea of constituent power as a moment of self-authorship is directly connected to hermeneutic critique in a line of writing running from Alexandre Kojève to Jürgen Habermas (Kojève 2007; Habermas 1996). Bonnie Honig

These different hermeneutic approaches yield different solutions to the challenge of interpreting an amended constitutional text, characterized here as treatment of the amended constitution as "sacred text," "pastiche," or "palimpsest." The argument of this article is that from a hermeneutic perspective, the palimpsest approach to the interpretation of an amended constitution is the only one that is consistent with constituent power. To explain and develop this argument, the article proceeds in four parts. Part I examines the different hermeneutic approaches in more detail. Part II considers some historical debates from two key moments of American constitutional development—the founding era and the adoption of the Fourteenth Amendment—to illustrate the work these different theoretical approaches performed in the practices of constitutional argumentation. Part III comprises some reflections on the significance of constituent power for thinking about amendment and the character of an amended constitutional text. Part IV revisits the three approaches to interpreting constitutional amendments and presents the argument of the article. Finally, a brief concluding section presents some further thoughts on the relationship between "the people" and a constitutional text.

I. HERMENEUTICS AND CONSTITUTIONAL INTERPRETATION

The term "hermeneutics" has ancient Greek roots, but in its more modern usage, beginning in approximately the seventeenth century, it refers to religious and specifically Christian principles of textual interpretation. The idea that there may be analogous principles of interpretations appropriate for legal and constitutional texts is not new; one important articulation of the idea appears in Francis Lieber's *Legal and Political Hermeneutics* (1839). Lieber drew less on specific religious practices of interpretation and more on general theories of language, but the great religious scholar Jaroslav Pelikan drew a more direct analogy in *Interpreting the Bible and the Constitution* (2004). This classical tradition of hermeneutics was supplemented in the long twentieth century by a series of writers who explored the relationship between reader and text in less structuralist, more critical terms, a process that explicitly invoked "hermeneutics" with Hans-Georg Gadamer's *Truth and Method* and was then built upon and critiqued by subsequent writers. That critical tradition, too, has been fruitfully applied to legal and constitutional interpretation.

explores the particular significance of the performative/constative distinction in her intervention into Hannah Arendt and Jacques Derrida's discussions of the American Declaration of Independence (Honig 1991; Derrida 1986). These debates are central to current thinking about the problem of constituent power from a critical theoretic perspective.

A brief look at each of these conceptions of hermeneutics serves to introduce the argument of this paper.

A. Interpretation as Epistemology: Francis Lieber's *Legal and Political Hermeneutics*

Lieber began with an understanding of the role of language in human communication that goes back at least to Locke's *Essay Concerning Human Understanding*: the idea that communication occurs by way of signs. "[W]e cannot obtain our object without resorting to the outward manifestation of that which moves us inwardly, that.is, to signs" (Lieber 1839, 13). Words are one particular subcategory of signs, and written words are a further subcategory with certain specific properties. Interpretation of signs was a matter of discerning the "true meaning" of an expression. At this point, however, a complication appears, as "true meaning" seems to sometimes refer to the speaker's intention and at other times to refer to an objective, fundamentally structuralist understanding of language. So, early on Lieber refers to the speaker's intention as the essential test. "Interpretation, in its widest meaning, is the discovery and representation of the true meaning of any signs, used to convey ideas. The 'true meaning' of any signs is that meaning which those who used them were desirous of expressing (Lieber 1839, 17). Elsewhere, however, Lieber recognized that the intended meaning and the "actual" meaning might differ. "Thus a teacher will say to his pupil, who has unskillfully expressed himself: 'you meant to say such a thing, but the true meaning of your period is quite a different one'" (Lieber 1839, 22). One reason was what I have described as Lieber's structuralist understanding of language, one with clear connections to Saussure's later description of synchronic linguistic structuralism. "Terms receive a meaning, distinct indeed as to some points, but indistinct as to others, or, to use a simile, they may be distinct as to the central point of the space they cover, but become less so the farther we remove from that center, somewhat like certain territories of civilized people bordering on wild regions" (Lieber 1839, 27).

This ambiguity in the meaning of "true meaning" aside, the goal was a normative set of principles describing *correct* interpretation. "Hermeneutics" referred to "the art which teaches us the principles according to which we ought to proceed in order to find the true sense," a definition he took directly from a text on biblical hermeneutics (Lieber 1839, 23–24).

Further ambiguity arises from social context and practice. Applied in a legal context, in particular, both social and legal conventions of understanding apply. "In the case of a compact, for instance, a treaty, a contract, or any act of the

nature of an agreement, the party, who avowedly adopts the contract, treaty, &c., or gives his tacit assent to it, makes as much use of the signs declaratory of the agreement, as the party who originated them. Forced silence, or the impossibility of expressing dissent, is, of course not comprehended within the term 'tacit assent.'" By way of illustration, Lieber provides a lengthy deconstruction of the imagined instruction "go and buy some soupmeat," including various possible implied elements such as "leave immediately, the money given is intended for that purpose, he should buy meat appropriate for making soup according to the understanding of the household, he should buy the best such meat he can, he should go to the usual butcher, he should return any change left over" and so on (Lieber 1839, 28-9).

A recurring concern for Lieber was how to deal with contradictions in a text. He used the term "construction" to describe a form of interpretation that could deal with the appearance of such contradiction or the need to extrapolate and apply principles to circumstances not described in the source. "[I]t happens that a part of a writing or declaration contradicts the rest. . . . When this is the case, and the nature of the document . . . is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, we must resort to construction. Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by the framers of those rules by which we are nevertheless obliged" In either of those circumstances, what is required is "the drawing of conclusions . . . from elements known from and given in the text—conclusions which are in the spirit, though not within the letter or the text." "It is . . . construction alone which saves us, in many instances, from sacrificing the spirit of a text or the object, to the letter of the text, or the means by which that object was to be obtained; and without construction, written laws . . . would, in many cases, become fearfully destructive to the best and wisest intentions, nay, frequently, produce the very opposite of what it was purposed to effect" (Lieber 1839, 56–58).

Applied to written texts, Lieber notes a further complication that may arise. "If, for instance, an individual were to say, 'I neither believe nor disbelieve the bible, but intend to find out its true sense, and then to be determined whether I shall believe in it or not,' it would be un restricted interpretation. If, however, the inquirer has already come to the conclusion, that the scriptures were written by inspired men, that, therefore, no real contradiction can exist in the bible, and he interprets certain passages accordingly, which *prima facie* may appear to involve a contradiction, it would be limited interpretation" (Lieber 1839, 71).

Lieber thus presents an approach to constitutional hermeneutics by which we are bound to find the "true sense" of the text, with the caveat that the writer's

intention may express that intended sense only imperfectly. In areas in which there are established norms of expression and understanding—what today might be called "epistemic communities," of which constitutional lawyers and academics are unquestionably an example—those norms must be taken into account in the practice of interpretation. And where the interpretation of a written text "and the nature of the document is such as not to allow us to consider the whole as being invalidated by a partial . . . contradiction," then practices of construction are required (Lieber 1839, 56).

B. Interpretation as Exegesis: Jaroslav Pelikan

In 2004 Jaroslav Pelikan published *Interpreting the Bible and the Constitution*. Pelikan's concern was to bring the insights of a long and extremely distinguished career as a scholar of religion to bear on an understanding of the practice of American constitutionalism.[3] To begin with, responding to Pauline Maier, Pelikan asserts that only the Constitution is properly considered an American sacred text on the grounds that it is the only one of the usual contenders (Declaration of Independence, Gettysburg Address) that is regularly treated as a subject of exegesis (Pelikan 2004, 21–22). Pelikan provides an interesting take on John Marshall's famous comment in *McCulloch v. Maryland* (1819): "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

For Pelikan, the key point of this quotation is not "prolixity" but the expectation that the Constitution should be understood by the public. That element, for Pelikan, identifies a fundamental similarity with Protestantism, as in the declaration of the Westminster Confession of 1647: "Those things which are necessary to be known, believed, and observed for salvation, are so clearly propounded and opened in some place of Scripture or other, that not only the learned, but the unlearned, in a due use of the ordinary means, may attain unto a sufficient understanding of them." Other Protestant statements define specific canons of interpretation, as in the 1566

3. For a different comparison between the United States Constitution and religious texts, see Michael Perry (1985).

Second Helvetic Confession: "We hold that interpretation of the Scriptures to be orthodox and genuine which is gleaned from the Scriptures themselves [1] from the nature of the language in which they were written, [2] likewise according to the circumstances in which they were set down, and [3] expounded in the light of like and unlike passages and of many and clearer passages and [4] which agrees with the rule of faith and love, and [5] contributes much to the glory of God and man's salvation." Pelikan identifies these and other examples as indicia of sixteenth-century Reformation writers' introduction of a full-fledged study of hermeneutics (Pelikan 2004, 47–48). One particularly interesting example he offers is John Henry Neuman's account of "the puzzling, or even (to him, at any rate) troubling discovery 'that there was no formal acknowledgement on the part of the Church of the doctrine of the Holy Trinity till the fourth [century],' namely at the First Council of Nicea in 325, in response to which "Neuman formulated the axiom: 'No doctrine is defined till it is violated'" (Pelikan 2004, 55). The implications of Neuman's formula are that the meaning to be sought lies outside the text itself, which is merely an indicator or partial representation of a prior reality. Neuman's approach to textual interpretation is not unknown in modern constitutionalism.[4] For Pelikan, the more important point of connection between the Constitution and the Bible as sacred texts was that each stood as a test that "speaks" to readers—that is, that these are texts possessed of independent meaning separate from the act of their writing.

C. Interpretation as Critical Reflection: Philosophical Hermeneutics

Pelikan is interested in demonstrating similarities between the hermeneutic approaches of constitutional and (Protestant) Christian religious readers. In Continental philosophy, however, a different hermeneutic tradition developed. In its early form among late-nineteenth-century *Lebensphilosophen* (e.g., Wilhelm Dilthey, Georges Simmel), the idea remained a project of finding the scientifically "true" meaning of a text by situating it within a historical worldview and by iteratively reading the part and the whole—of the text itself, of the text in relation to its

4. The most obvious example in American constitutional discourse arises in the judicial explanations for the doctrine of sovereign immunity, which reach far beyond the textual requirements of the Constitution (in the Eleventh Amendment). As Justice Kennedy put it in *Alden v. Maine* (1999), "[T]he scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."

context, of the text in relation to its author—to arrive at a unified understanding through a process known as the "hermeneutic circle."

In twentieth-century understandings, however, this epistemological approach took on an ontological character as hermeneutics came to be seen as an exercise in self-understanding, and the reader's relation to the text as a form of dialogue. The starting point for this later approach is Hans-Georg Gadamer's *Truth and Method* (1972). Gadamer deployed the concept of hermeneutic "horizons," boundaries on the capacity of readers to understand concepts. Since each reader or generation of readers works within its own horizons, the understanding of historical texts that emerges reflects the limitations of that perspective. "[T]he idea of an absolute reason is impossible for historical humanity. Reason exists for us only in concrete, historical terms, i.e., it is not its own master, but remains constantly dependent on the given circumstances in which it operates. . . . In fact history does not belong to us, but we to it (Gadamer 1972, 245). By this understanding, when I interpret Leo Tolstoy's *War and Peace*, what I am really asking is, "What meaning can be derived from *War and Peace* from a position within my hermeneutic horizons?" Whatever capacity for critical self-dislocation I might possess—the ability to recognize the role of race, class, or gender in my interpretations and to articulate alternatives—necessarily takes place within those horizons. As Benjamin Cardozo says, "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own" (1921, 13).

Hermeneutic analysis asks not what is said but what can be said from the position of an historically specific subjectivity. In Gadamer's metaphor, since both text and reader are bound by horizons of understanding, a reader's engagement with a text takes the form of a dialogue in which a "fusion" of horizons occurs.

As an element of critical theory, the idea of horizons takes on a reflexively critical (*Selbstcritik*) element. The experience of a text, with its different and unfamiliar landscape of meaning, provides a moment of insight into our own, previously unexamined horizons. The dialogue between reader and text becomes an exercise of self-understanding rather than a method for scientifically ascertaining the text's "true meaning" (it is in this sense that Gadamer's approach is described as ontological rather than epistemological). Writers such as Jürgen Habermas and Paul Ricouer, in particular, extended both the ethical and the social scientific implications of this idea of self-critical engagement, specifically with respect to historical sources. Ricouer, for example, draws a distinction between "understanding" versus "interpretation," in which "understanding" reflects a recognition that written texts stand outside their authors' *epoche* and are subject to being interpreted within the

readers' own hermeneutic horizons (1981, 22), while Habermas focuses primarily on the idea of dialogue and the conditions of productive discourse for which textual engagement stands as an ideal form. (The focus on texts is particularly important in Habermas's less read early works such as the 1972 (first English edition) *Knowledge and Human Interests*).

Gregory Leyh specifically applies the implications of modern philosophical hermeneutics for American constitutional understanding, emphasizing the extent to which the critical turn in philosophical hermeneutics undermines claims to discover "original" understandings. More important, Leyh explores the ways in which philosophical hermeneutics provides a basis for critique of interpretive approaches generally. "To the degree an interpretation is inconsistent with the background conditions of human understanding, we may adjudge such an interpretation to be lacking a sufficient justification for itself. Thus philosophical hermeneutics does not pose as a methodology for accurately reading texts, but instead offers a standard for the evaluation of all methodological practices whose aim is the understanding of textual meaning. Constitutional hermeneutics furnishes us with necessary materials for judging arguments for the constitutionality of any given interpretation of our foundational law" (Leyh 1988, 380). Leyh's call for a theory of constitutionally acceptable modes of constitutional interpretation is the critical hermeneutic project in a nutshell. This approach reveals the inescapably political nature of a hermeneutic choice. Just as Leyh asks what modes of interpretation are consistent with our constitutional commitments, one might ask whether there is a particular theory of hermeneutics or prescribable hermeneutic practices that follow necessarily from, say, a commitment to Lockean liberalism.

We are thus confronted with three different and distinct approaches to constitutional hermeneutics: the search for the "true meaning" of the language as it appears in the text; principles for hearing the text "speak to us" in its own authentic voice that exists separate and independent of our interpretation; and self-critical evaluation of our textual readings to inform our understandings of our own hermeneutic horizons in the exercise of translation of language generated within the constraints of a different and potentially incommensurate worldview.

These three different approaches to hermeneutics have cognates in different approaches to constitutional interpretation, which the authors explicitly explore in their discussions. For purposes of this paper, however, it is sufficient to note the range of possibilities as starting points rather than as possible outcomes and to consider the implications of starting from one or another position in the specific context of constitutional amendments.

II. CONSTITUTIONAL HERMENEUTICS AND QUESTIONS OF AMENDMENT: HISTORICAL DEBATES

A. The Debate over Amendment in the Founding Era

In *The Second Creation: Fixing the American Constitution in the Founding Era* (2018), Jonathan Gienapp focuses on the move toward a "fixed" understanding of the Constitution as an authoritative text as opposed to a record of an ongoing experiment. In the debates that led to that development the nature and significance of amendments played an important role.

Differences in hermeneutic approach show up clearly in discussions of amendment and the differing approaches of Federalists and Anti-Federalists in the 1790s. Federalists conceived of the new Constitution as an inherently temporary, improvable, and incomplete. This way of thinking received an early articulation in John Adams's influential and controversial pamphlet "Thoughts on Government" (1776). Having described in considerable detail a system of branches of government and national officials, Adams (1776) added a caveat: "This mode of constituting the great offices of state will answer very well for the present, but if, by experiment, it should be found inconvenient, the legislature may at its leisure devise other methods of creating them, by elections of the people at large, as in Connecticut, or it may enlarge the term for which they shall be chosen to seven years, or three years, or for life." (It is interesting that in the introduction to *Legal and Political Hermeneutics*, Lieber says he was driven to his project in response to a critical evaluation of Adams's pamphlet.) Federalists in the Congress that considered the Constitution took a similar "ongoing experiment" approach. For example, Benjamin Rush asked, "[W]ho ever saw any thing perfect come from the hands of man?" Edward Carrington pointed to the possibility of amendment as the remedy for human imperfection: "The system yet requires much to make it perfect, and I hope experience will be our guide in taking from or adding to it." Tenche Coxe, echoing Adams, said, "[L]et us give it a trial" (quoted at Gienapp 2018, 78–79).

Anti-Federalists, by contrast, insisted that the Constitution be "understood so as" to avoid the boundless possibilities of interpretation, especially by the judiciary. Robert Yates, writing as "Brutus," articulated his objection to the idea of broad judicial review that he saw as intrinsic to the proposed text. "The judicial are not only to decide question arising upon the meaning of the constitution in law, but also in equity. By this they are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter" (Brutus [1788] 1981, 439). Consistent with the view that the text should be written in a way that would limit the scope of possible interpretation, Anti-Federalists also denied

the acceptability of amendment. Both of these views partake of the idea of the Constitution as a "sacred text" subject to exegesis. The objection to amendment, then, was that it meant reshaping the reference text rather than interpreting it. In this way the Anti-Federalists were asserting the supremacy of the text over its readers.

Beyond the question of whether amendments would be permitted, Gienapp points to a remarkable debate about how amendments should be recorded in relation to the prior text, a debate with immediate implications for constitutional hermeneutics. The most important question was whether amendments should be "incorporated"—that is, recorded as changes to the constitutional text, thus resulting in a new version of the whole—or added in the form of appendices to a basic document.[5] Roger Sherman insisted that only the latter approach could avoid the possibility of a Constitution containing self-contradictions: "We might as well endeavor to mix brass, iron and clay, as to incorporate such heterogenous articles, the one contradictory to the other." John Laurence of New York declared that one possible answer—rereading the entire text in the understanding of its most recent addition—would destroy the essential meaning of the text. He declared that he "could not conceive how gentlemen meant to ingraft the amendments into the constitution . . . the original lodged in the archives of the late congress, it was impossible for this house to take and correct and interpolate that without making it speak a different language" (quoted at Gienapp 2018, 180, 181–82). As Gienapp observes, the Anti-Federalists' fundamental concern being expressed in these comments was ontological rather than epistemological. "Forget what the Constitution meant or what language it spoke, its basic ontological makeup would remain forever in flux. . . . [O]pponents of incorporation were fully reducing the Constitution to a textual artifact . . . [and] were limning the Constitution's boundaries, defining its essence, and conceptualizing its core attributes" (Gienapp 2018, 182). Those "linguistic terms" were understood to articulate a historically fixed, essentialist identity; in the Anti-Federalist view the constitutional text was a safeguard of a conservative ontology that protected the national identity against experimentation by future generations.

On the Federalist side, defenders of the incorporation approach to amendment employed similar arguments to an opposite effect. John Vining opposed Sherman's idea of listing amendments as postscripts on the grounds that "the system would be distorted . . . like a careless written letter. . . . The Constitution being a great and important work, it ought all to be brought into one view, and

5. See also Mehrdad Payandeh (2011).

made as intelligible as possible." Madison observed that if amendments were "supplementary," then their meaning could "only be ascertained by a comparison of the two instruments." The result "will be a very considerable embarrassment. . . [and] it will be difficult to ascertain to what parts of the instrument the amendments particularly refer." Elbridge Gerry declared, "[W]e shall have five or six constitutions, perhaps differing in material points from each other, but all equally valid"—it would "require a man of science to determine what is or is not in the constitution" (quoted at Gienapp 2018, 184–86). At the same time, defenders of incorporation confirmed some of their critics' suppositions by asserting that the adoption of an amendment *did* mean reconceiving the whole. In the case of an amendment, said William Loughton Smith, "the present constitution was to be done away, and a new one substituted in its stead." Gerry insisted that the same would be true regardless of how amendments were presented: "[I]f the amendments are incorporated it will be a virtual repeal of the constitution. . . . I say the effect will be the same in a supplementary way" (quoted at Gienapp 2018, 184–86, 187).

Both Anti-Federalists and Federalists worried that an amended text would pose difficulties of interpretation such that only experts would be able to disentangle the complicated relationships among elements of the text. For the Federalists, the solution was to treat the amended constitution as a new, unitary whole presented to the people for their understanding, an approach exemplified in Madison's explanation for his change in position on the question of a national Bank. Madison had vehemently opposed the idea when Hamilton first proposed it in 1791, and again as a member of Congress in 1811. In 1816, however, President Madison signed off on the charter of the Second Bank of the United States. In later correspondence he explained his actions as an expression of his theory of popular constitutionalism: "[T]he inconsistency is apparent only not real. . . . [M]y abstract opinion of the text of the Constitution is not changed, and the assent was given in pursuance of my early and unchanged opinion, that in the case of a Constitution, as of a law, a course of authoritative expositions sufficiently deliberate, uniform, and settled, was an evidence of the Public Will necessarily overruling individual opinions" (Madison 1831).

In the end, Sherman's preferred mode of presenting amendments as supplements was adopted by the United States. As Richard Albert (2019) demonstrates, this is far from a universal approach; in many if not most constitutional systems amendments are treated as incorporated into the text. In addition, by the end of the debates over the Jay Treaty in the late 1790s, says Gienapp, there was agreement on "historical excavation" as mode of interpretation, an approach similar

to Lieber's search for epistemological certainty. This move involved a reconception of authorship, from "wisdom of the ages" to "an image of concrete creators at specific moments in time," and so "[h]istorical excavation [was] increasingly imagined as a means of sharply distinguishing between past and present Constitutions, rather than a means of uniting the two" (Gienapp 2018, 290). This was a combination of treating the Constitution as a "fixed" text, treating amendments as sedimentary additions to an unchanged core, and perhaps most important, making the hermeneutic frame from which to determine the true meaning one based on the historical past. Modern interpreters, from this perspective, would be called on to imagine the hermeneutic horizons of earlier readers, an approach that adopts the Anti-Federalist view of the Constitution as preservative of ontological identity commitments. To be sure, the challenge of what historians call "the pastness of the past" was not a great one in the first ten years following adoption of the Constitution, but it would provide a much greater challenge and requires a much richer and more contestable set of hermeneutic commitments in the modern era.

The move to historical excavation of meaning, like the model of textual exegesis, again treats the text as superior to the reader; the reader is called on to abandon his or her own hermeneutic horizons and attempt to move into the imagined horizons of an earlier generation. Rather than an ontologically critical exercise of fusing horizons, this approach is one characteristic of religious hermeneutics in which the text stands for an external authority superior to its readers, "the people" of a present generation. It is crucial to note if we are bound by hermeneutic horizons of an earlier generation—not just by specific definitions of terms—then the question is not what the Constitution does but what it *can* do. This is precisely the kind of argument that is occasionally invoked to prove that the Constitution cannot be read in a way that would conflict with eighteenth-century notions of sovereignty. If a text is understood to encompass a historical set of hermeneutic horizons, then that text cannot express anything that would have required moving beyond those horizons. To say otherwise would involve one of two difficult claims: that the generation of authorship was made up of individuals who, uniquely, had perspectives unbound by their historical epoch; or that the exercise of constitution-making occupies a unique and specific position with respect to questions of hermeneutics.

These founding era debates were far from the last effort to define the relation between an amendment and the rest of the constitutional text. In the nineteenth century, however, the locus of the debate shifted to the courts and the terms of the arguments appeared in the form of constitutional doctrine.

B. Revisiting the Hermeneutics of Amendment: The *Slaughterhouse Cases*

Fittingly, it was in debates over the meaning of amendments that later generations reopened the debates that Gienapp describes. One particularly important exploration occurs in the context of the first case to interpret the Fourteenth Amendment, the *Slaughterhouse Cases* (1873). The case is both too familiar to students of American constitutionalism and too complicated to present in any depth. The fundamental question was whether the Fourteenth Amendment's guarantee of "the privileges and immunities of citizenship" meant that a new set of substantive rights were subject to enforcement by the federal courts, under XIV(1), thus profoundly altering the balance between federal and state authority and effectively nationalizing the system of American law.[6] There were two opinions in this seminal 5-4 opinions: the majority opinion by Justice Miller and the dissenting opinion by Justice Field. The debate between Miller and Field illustrated two sharply different approaches to the hermeneutics of constitutional amendment.

Writing for the majority, Miller declared that the case presented the most important questions. "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members." To answer the question, Miller turned to the approach of historical excavation to determine the "purposes" of the Fourteenth Amendment: "The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning" (*Slaughterhouse Cases*, 83 U.S. at 67). Reviewing the historical context of the post–Civil War era, Miller concluded that the purpose of the Fourteenth Amendment was to secure equality.

From there, Miller turned to a form of analysis that directly implicated a theory of the constitutional hermeneutics of amendments. The phrase "privileges and immunities" was not new; a century earlier it had been included in Article 4 of the original Constitution: "[T]he citizens of each state shall be entitled to all privileges

6. A closely related question was whether Congress had been given authority to enact legislation protecting these new rights under XIV(5). That issue, in fact, was the more central one at the time, but the treatment of the privileges and immunities clause as a judicially enforceable rights guarantee is more salient to this discussion.

and immunities of citizens in the several states." In that form, the clause had been interpreted by a Supreme Court justice (Bushrod Washington, nephew of George) in 1823 while presiding over a district court proceeding. Justice Washington had determined that the provision required neutrality only. That is, if a state guaranteed certain rights to its own citizens, citizens of other states were entitled to the same rights. But not all rights were subject to this requirement of equal treatment, only those that were "fundamental." "What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole" (quoted at *Slaughterhouse Cases*, 83 U.S. at 76). Crucially, Washington did not argue that Article 4 required any state to protect any of these rights, only that *if* a state chose to protect "fundamental" rights for its own citizens, it would be required to give equal protection to noncitizens within its borders. As Millller said, "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. . . . Its sole purpose was to declare to the several States that, whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction" (*Slaughterhouse Cases*, 83 U.S. at 77).

Turning to the Fourteenth Amendment, Miller concluded that the term "privileges and immunities of citizenship" should have the same meaning that it had in 1823; that is, he read the amendment in a way that conformed it to the preexisting text. The reason was that any other reading would violate the limits not of what the Constitution did but what it *could* do. Specifically, the Constitution of 1868 could not alter the hermeneutic horizons of the Constitution of 1791 with respect to the conception of sovereignty. "Was it the purpose of the fourteenth amendment . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow if the proposition of the plaintiffs in error be sound" (*Slaughterhouse Cases*, 83 U.S. at 77–78). Ultimately, it was the necessity of reconciling the Fourteenth Amendment's provisions with the late-eighteenth-century understanding of states as "sovereign" that dictated the outcome, an argument squarely located in the preservation of a historical ontological understanding by restricting the scope of linguistic analysis.

Writing in dissent, Field took the opposite tack. Joining with Federalists of the Revolutionary generation, he insisted that the Fourteenth Amendment was precisely intended to create a new constitutional order.

> The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. (*Slaughterhouse Cases*, 83 U.S. at 95)

Field was calling for nothing less than an open-ended exploration of the meaning of the rights of "a citizen" and "a free man" and a reconception of the Constitution as a higher law guarantor of those emergent understandings. To say that this reading involved a reconceptualization of the constitutional order is an understatement. In Field's reading, all the provisions of the pre–Fourteenth Amendment Constitution had to be reconceived and reconciled with the understandings of the new epoch. The new Constitution was a successor text to the old, one that contained all the implications and significations of its own hermeneutic horizons; looking forward, subsequent interpretations or interpretations of amendments would have to wrestle with this new perspective. All of which raises a question: if an amendment truly requires this level of reimagining the horizons of constitutional understanding, is it properly considered an amendment rather than an outright replacement of the Constitution itself? Employing Richard Albert's (2018, 2019) categories, we might ask, what are the implications, from a hermeneutic perspective, of the tripartite distinctions among constitutional amendment, "dismemberment," and outright replacement? These distinctions raise the problem of the limits of constitutional amendment in light of a grounding commitment to the concept of constituent power. That is, the whole idea of constituent power is that it extends to the replacement of constitutional orders. But what are the limits of the category of "amendments" to which the hermeneutic of constituent power discussed in this article applies (leaving the consequences for incidents of dismemberment or replacement for another discussion)?

III. CONSTITUENT POWER AND THE LIMITS OF AMENDMENT

To repeat a point, at issue in the Miller-Field debate was not only the question of what the Fourteenth Amendment did but also what it *could* do. Can an amendment rewrite the entirety of a constitution or completely redefine the relationship between the text, its history, and its interpreters? Alternatively, the question can be reversed. Can a constitution *limit* the scope of its own subsequent amendments in order to prevent this kind of disruptive change? These questions raise issues of constituent power.

Andreas Kalyvas traces the idea of constituent power to Marsilius of Padua's text, *Defenso Pacis*. Confronted by rival claims of authority by Louis IV, the Holy Roman emperor, and Pope John XXII, Marsilus discovered a paradox. Each had an articulable claim to sovereignty in the sense of being an unruled ruler, yet the asserted sources of sovereignty were entirely separate and entirely overlapping in practice. "In this extreme situation, Marsilius argued, there is always a final authority that decides the matter: it is the multitude, he asserted, that possesses the right to appoint its secular and spiritual rulers, that is, to authorize them to rule. In the space separating the two instituted sovereigns, in the void opened up by their struggle for supremacy—between the secular and the spiritual—a new political subject made its appearance: the multitude with its supreme right to appoint its Emperors and Popes" (Kalyvas 2013, 2). Furthermore, Marsilius argued, the authority of the "multitude" extended not only to appointing persons to act as rulers but to the very formation of government itself, and when appropriate to its reformation: "[I]t pertains to the legislator [i.e., the multitude] to correct governments or to *change* them completely, just as to *establish* them" (quoted at Kalyvas 2013, 4).[7]

The idea that traditional conceptions of sovereignty rest in the first instance on the authority of "the people" represented a new conception of political legitimacy, one central to the development of ideas of social contract theory and democracy.[8] Among Federalist writers, no one understood the implications of this theoretical development as well as James Wilson. "To the Constitution of the United States, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But even in that place, it would not, perhaps, have comported with the delicacy of those who ordained

7. For different accounts of the history of the concept, see N. Srinivassan (1940), identifying the concept as arising in seventeenth-century English radicalism; and Marcia Rubinelli (2020), looking to the modern articulation of the concept beginning in the French Revolution.

8. For a discussion of early American thinking about constituent power see Frank (2010); see also William Partlett (2017).

and established that Constitution. They might have announced themselves 'SOVEREIGN' people of the United States. But serenely conscious of the fact, they avoided the ostentatious declaration" (*Chisholm v. Georgia*, 2 U.S. at 454 [1793]). This was Wilson's answer to challenges based on limits to what the Constitution could do, as opposed to what it had actually done. Such arguments, he insisted, were based on a fundamental misunderstanding. "[I]n the practice, and even at length, in the science of politics, there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the state has claimed precedence of the people, so, in the same inverted course of things, the government has often claimed precedence of the state, and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence (*Chisholm v. Georgia*, 2 U.S. at 455 (1793)).

To reiterate, Wilson was invoking the concept of constituent power, the idea that there exists an inherent power in the people to determine the forms of "sovereign" power by an act of creation ("constitution"). That concept is invoked in the observation that the power to amend a constitution is not dissimilar to the power to create a constitution in the first place. In 1895 Albert Venn Dicey declared, "To know how the constitution of a given State is amended is almost equivalent to knowing who is the person or who are the body of persons in whom, under the laws of that State, sovereignty is vested" (1897, 388). Dicey's use of the term "sovereignty" is misplaced, however. Rather than the sovereign power, what is at stake in determining the limits of constitutional amendment is constituent power, the power of a people to create sovereignty.[9]

Yaniv Roznai has created a database of 735 constitutions containing unamendability provisions adopted between 1789 and 2013.[10] Both procedural and substantive limits to amendment are frequently defined in very broad terms: "spirit of the constitution" (Norway, 1814, Art. 112(1)); "spirit of the preamble" (Nepal, 1990, Art. 116(1); "fundamental structure of the constitution" (Venezuela, 1999,

9. The relationship between constituent power and sovereignty is a consistent them in explorations of democratic theory, notably in the tradition initiated by Rousseau. For a review of these argument, see Joel Colón-Ríos (2020).

10. Interestingly, Roznai finds that unamendability provisions are becoming more common: between 1789 and 1944, only 17 percent of world constitutions enacted in this period included unamendable provisions (52 out of 306), whereas between 1945 and 1988, 27 percent of world constitutions enacted in those years included such provisions (78 out of 286). Out of the constitutions that were enacted between 1989 and 2013, already more than half (53%) included unamendable provisions (76 out of 143). In total, out of 735 examined constitutions, 206 constitutions (28%) include or included unamendable provisions (Roznai 2017).

Art. s 340, 342); or "the nature and constituent elements of the state" (Ecuador, 2008, Art. 441). The Indian Supreme Court has identified unamendable "basic structure" principles of the constitution, and the Constitutional Court of South Africa has identified similar principles. In the words of Justice Abie Sachs, "There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not amend them" (*United Democratic Movement v. President of the Republic of South Africa and Others* (2002)). When one turns to the content of substantive unamendability provisions, even greater variation appears. Some such provisions preserve religious national identity, others secularism or pluralism. Democratic or monarchial forms of government, basic rights, and in some cases rules that allow amendments to expand but not contract rights protections all appear in different versions.

Commentators who have considered unamendability provisions have tended to consider them as articulations of deep constitutional values. In this view unamendability provisions are preservative of a constitution's "true meaning" against the machinations of later generations. Ulrich Preuss identifies the ontological element implicit in an unamendability provision. Such limitations, he argues, "define the essential elements of the foundation myth. In other words, they define the collective 'self' of the polity—the 'we the people.' If the 'eternal' normative stipulations were changed, the collective self—or identity—of the polity as embodied in the constitution would collapse" (Preuss 2011, 445).

The difficulty with these theories arises in describing the operation of constituent power subsequent to the adoption of a constitution. Have the people lost their power to create a new constitution? Or is it all or nothing? That is, have the people the power to create a new constitution but short of that should not be conceived as having the power to alter its essential meaning through amendment?

Preuss attempts to resolve the problem by conceiving of sovereignty as active prior to the adoption of a constitution and "dormant" thereafter, a description similar to Sheldon Wolin's idea of fugitive (episodic) democracy. For Wolin, the term "democracy" does not describe a form of government but rather a shared moment in which a people asserts a "political mode of existence" by virtue of their participation in public deliberations in opposition to an existing political order (1994, 23–24). In this formulation, moments of amendment would be episodic assertions of constituent power, woken from its slumber by a defect in the working

of a constitutional order analogous to an unsolvable problem of defining sovereignty. Whatever the other merits of this approach, it cannot account for the practice of including unamendability provisions in a constitutional text. Mark Tushnet (2015) argues that the contradiction of constituent power contained in unamendability provisions makes them presumptively invalid, expressions that contradict the basic legitimating principles of the constitutional order in which they occur. Alternatively, one might argue that such provisions represent an exercise of constituent power above and beyond ordinary constitutional entrenchment, a kind of super-entrenchment that reserves a certain kind of constitutional change solely to the people rather than their representatives. From this perspective the argument would be that constituent power of the people remains available to replace the constitutional entirely, as occurred with the replacement of the Articles of Confederation by procedures those same articles did not recognize. These considerations point to the question of when an "amendment" is actually something more, a replacement of one constitution with another (Ackerman 2000).[11]

Answering these questions is directly relevant to the hermeneutics of constitutional amendment; if amendments are understood as exercises of constituent power, how does that affect arguments about their interpretation?

IV. THE HERMENEUTICS OF CONSTITUTIONAL AMENDMENT: THREE APPROACHES REVISITED

At the outset were identified three possible ways of relating an amendment to the prior text. These can now be reformulated to include their implied hermeneutic elements:

- Amendments can be made to conform to the understandings of the original so that the resulting whole is understood within a historically fixed set of hermeneutic horizons (the religious hermeneutic approach in its classical exegetical form, described by Pelikan).
- An amendment and the pre-amendment text—or specific portions of the text—can be independently interpreted each within its hermeneutic horizons, accepting the possibility that the results will be contradictory as one moves from one part of the text to another (the historical excavation/epistemological

11. Indeed, it may be argued that the onerous requirements for amendment in accordance with Article 5 of the United States Constitution render the concept of constituent power meaningless except in the case of a complete replacement of the current constitution (Griffin 2007).

hermeneutic approach described by Lieber and in its historicist form by the *Lebensphilosophen*).

- The adoption of an amendment can be understood to require a reconception of the entirety of the constitutional text to bring the whole into a coherent understanding based on a fusing of hermeneutic horizons (the critical theoretic ontological approach described by Gadamer and others).

While drawing these analogies may (or may not) be an interesting exercise, the real goal is to move from an analytic to a normatively critical argument. That is, on what basis should one of these approaches be preferred to another, and what is the outcome of that analysis?

A. Exegesis and the Search for Truth: The Amended Text as Sacred Object

Jaroslav Pelikan presented an understanding of a constitution as a sacred text treated as the object of exegesis in accordance with the tradition of religious hermeneutics. "Object" may be the wrong word; in his description of a text that "speaks," Pelikan pointed to the idea of a constitution as an independent subject standing entirely outside the actions of its recorders and its interpreters alike. In this understanding, constitutional amendments must be made to conform to understanding of the original so that an amendment cannot fundamentally contradict the earlier text. Obviously this is not meant literally in terms of specific outcomes; the Fourteenth Amendment unquestionably alters the outcomes dictated by the pre-amendment text. Rather, the idea is that amendments remained hermeneutically bound by the horizons of the original text. The changes wrought by amendments are corrections of earlier errors to make the text a more authentic expression of its subjectivity, a concept captured in the phrase "the spirit of the Constitution." Thus specific outcomes may change, but the fundamental categories that determine what *can* be said—the horizons of comprehensibility—are preserved. One can see this approach in the description of the Eleventh Amendment as a restoration of a background understanding that the text was presumed to intend and the intentionality that was misrecorded in the drafting process. The same way of thinking informs Miller's *Slaughterhouse* opinion. For Miller the adoption of the Fourteenth Amendment assumed a continuation of the system of sovereignty, with the proviso that participation in the national entity is conditioned in equal treatment of subjects. By contrast, consider, Field's abandonment of sovereignty in favor

of a single national community of citizens exercising constituent power, a revival of Wilson's project that requires a sharp break.

It was noted earlier that Pelikan's description of a sacred text as a freestanding entity that "speaks" to its readers independent of its recorders appears in certain forms of constitutional argumentation, particularly Justice Scalia's version of textualist originalism. In fact, "recorders" or "redactors" are more appropriate terms than "authors" if one is referring to theories of original public meaning, just as they are the appropriate terms for those who recorded divine revelation in biblical texts. In this view the act of constitutional adoption was less about the creation of meaning than about the closing of the canon, with items such as Madison's Virginia Plan left to the category of Apocrypha. Apocryphal texts are interesting artifacts of earlier ways of thinking, but they are not elements of the authoritative "venerable, widely understood"—that is, canonical—constitutional understandings.

The difficulty is that this approach is not easily reconciled with the idea that the Constitution today should have a publicly accessible meaning. For one thing, those who do not share in the prescribed articles of constitutional faith find this mode of interpretation mysterious and arbitrary. For another, it is truly only a trained cadre of the faithful who are able to engage in this form of interpretation, a more Catholic than Protestant approach to the text (Levinson 1988.) There is an irony that justices who engage in this priestlike assertion of authority over access to true meaning assert that they are exercising judicial restraint. From an hermeneutic standpoint this is the opposite of humility. Perhaps most important, the fixed/sacred text approach raises the question of the location of constituent power. In this view constituent power appears to exist outside the people. For a religious text, that power lies in the divine source of law. For a constitutional text, constituent power appears to be fixed in disembodied "traditions" and "principles," as in William Blackstone's description of common law rules as those with respect to which "the memory of man runneth not to the contrary." The legal historian John Baker records a fifteenth-century English magistrate who declared "the common law has been in existence since the creation of the world"; as Baker adds, "he probably meant it" (1979, 2).[12]

12. In the British case principles of constituent power operate in an ambiguous way in relation to the doctrine of parliamentary sovereignty. Historically, British writers argued that parliamentary sovereignty was an expression of constituent power uncontaminated by American-style ideas of republican representation; more recently, critics have argued that parliamentary sovereignty enforces a constrained and limiting conception of constituent power that is essentially undemocratic (Goldsworthy 1999; Green 2021).

B. Historicist Epistemology and the Search for Accuracy: The Amended Text as Pastiche

A second approach, also common in American constitutional interpretation, partakes of the epistemological projects of Lieber and the early philosophical hermeneuticists, the project Gienapp called "historical excavation." Two things separate this approach from the mode of reading sacred texts. First, the emphasis from the outset is on the historical specificity of the understanding being recovered. That is, modern readers have no authority to assert the existence of a unified understanding or an otherwise mysterious set of background principles; these elements must be demonstrated by careful and critical analysis of the historical record. This is an approach that features the historiographical understanding of "scientific history" as described in the late nineteenth century. Second, confronting the task of interpreting amendments, readers employing this approach will acknowledge that the historical meaning of the Fourteenth Amendment is different from the historical meaning of the Constitution of 1791. In *Slaughterhouse*, this was Field's approach to understanding the phrase "privileges and immunities"; despite the repetition of the language, its meanings at different historical points were potentially incommensurate.

This project presents itself as purely epistemological, without concern for the ontological implications for either reader or writer. But even accepting the concept of the possibility of recovering historical understandings by application of the "hermeneutic circle" approach, the ontological element is not banished by ignoring it. In this approach, the judge's choice of historical reference dictates the applicable horizons. Far from deferential, the judge asserts the authority to dictate the eyes through which the polity is required to see the world, and he or she does so based on a selection among an available range of choices. That imposition, in turn, dictates without discussing commitments about the ontological status of the current generation as a people willing to allow itself to be bound by a series of different, potentially incommensurate systems of understanding. The question that Field posed—what are the rights of American citizens?—cannot be answered in the same way in the vocabulary of eighteenth, nineteenth, and twenty-first century discourse, yet this historicist approach requires that modern-day Americans accept the commitment to accept one or another as the "correct" hermeneutic frame for the discussion. Whether this is understood as a surrender of authority or merely the people holding their authority in abeyance, that decision goes to the core of the concept of constituent power.

As a purely epistemological argument, moreover, the approach is one that is unlikely to be taken seriously in any modern intellectual context other than the

study of constitutional law, as it is an approach grounded in what Leyh calls "the hermeneutical howler that we can understand the past largely apart from our present" (1988, 378). As a mode of textual analysis, moreover, this approach is the apotheosis of reductionist, clause-by-clause reading. Consistency is preserved with respect to time, as the meaning of a provision is fixed at a point of historical understanding. What is sacrificed is synchronic consistency, the possibility of reading the Constitution as a coherent whole at any given moment despite its authorship across different periods. So any constitutional argument should be identified by a pair of coordinates: textual reference (the *x* axis), and the historical horizons that are to be applied to that reference (the *y* axis). None of these various methodological commitments are justified by any obvious appeal to constitutional norms. From a democratic perspective, this historicist approach presents a particularly sharp version of the "dead hand of the past" objection; we are trapped by others' (past) ontological conditions in our pursuit of epistemological rigor.

Another difficulty, already mentioned, is the likelihood that concerned Anti-Federalists and Federalists alike: the inevitability of contradictions in the interpretations of different provisions. Justice Sutherland, in his dissenting opinion in *Home Building and Loan Association v. Blaisdell*, argued that this concern motivated his embrace of historical excavation. "A provision of the constitution, it is hardly necessary to say, does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different at another time. . . . As nearly as possible we should place ourselves in the condition of those who framed and adopted" the provision (*Blaisdell* 290 U.S. 398, ___ (1934)). In fact, consideration of the challenges involved in interpreting amendments demonstrate that Justice Sutherland has it wrong. The project of determining the "intent of its framers" may lead to an internally consistent interpretation of a particular clause or provision, but it effectively guarantees that in the reading of the Constitution as a whole, the text will necessarily be found to "admit of two distinctly opposite interpretations."

One implication of this possibility is that there is not one constituent power—one "people"—but rather multiple constituent powers at different moments of time, working at cross purposes. Aside from being an aesthetically displeasing conception, this situation created precisely the kind of conflict among allegedly supreme authorities that the idea of constituent power was created to resolve. One might be tempted to adopt something like a last-in-time rule, where in cases of outright contradiction the amendment trumps the inconsistent earlier text, but this is at best a partial solution. What happens when different pieces of text in amendments or elsewhere do not directly contradict but appeal to historically

bounded understandings that conflict? Is there a last-in-time principle for constitutional hermeneutics? That, essentially, is the assumption that underlies the critical theoretical approach, referred to here as the "palimpsest approach" to constitutional hermeneutics.

C. Critical Engagement and the Search for Understanding: The Amended Text as Palimpsest

The remaining approach is to treat the constitutional text with its amendments as a palimpsest. This is, essentially, the "incorporation" model favored by early Federalists and employed in most constitutional systems, in which amendments are introduced directly into the text and overruled elements are removed from the text. John Laurence suggested that the text cannot be amended "without making it speak a different language"; what he failed to understand is that the project of preventing that act of translation represented a usurpation, the reversal in priority of people and government that Wilson had warned against.

Not all amendments are obviously at issue. By definition, any constitutional amendment reflects the hermeneutic horizons within which it was generated, but it is not the case that all amendments bear the marks of that environment equally clearly. By the same token, not all provisions of a constitutional text prior to amendment provide equally clear indicia of a worldview specific to their epoch. But some provisions contain clear and intentional declarations of interpretive principles: examples include the Nineth Amendment of the United States Constitution, which warns against narrow textualism in the description of rights and the treatment of human dignity as a *Wesengehalt* principle of German constitutionalism.[13] Each of these provisions declares an interpretive principle in light of which the text should be read, and in doing so each incorporates the understanding of that principle—the hermeneutically bounded understanding of constitutional interpretation—specific to the historical self-understanding of "the people" exercising its constituent power. It is this last observation, that the exercise of constituent power extends to, if it does not begin with, the exercise of authority over hermeneutic principles—that is the critical observation for understanding the hermeneutics of amendment.

The act of amendment, then, asserts at least the possibility of an exercise of the same constituent power over the text short of constitutional revolution. The status

13. (German Basic Law Article 19(2); see *Regarding the Luftsicherheitsgesetz*, German Constitutional Court, Judgment of 15 February 2006, 1 BvR 357/05, BVerfGE 115, 118).

of unamendability provisions, in particular, is clarified. The application of such provisions to proposed amendments may be justified, but doing so raises the question of a clash between exercises of constituent power. For that reason, unamendability provisions themselves must be amendable; the hermeneutics of amendment thus provide a way to unify the two expressions of constituent power into a single and coherent whole by subjecting the unamendability provision to interpretation within the horizons of "the people" acting in its present capacity.

An obvious question is how to conceive of "the people" in this (or any) formulation. Mark Tushnet (2015a) has suggested that the term is best understood conceptually rather than literally. In a subsequent exchange Tushnet (2015b) has acknowledge the ambiguity that results from trying to avoid a nationalist or ethnic starting point but at the same time treating "people" as a concept prior to democratic constitutionalism. This is what Robert Dahl called the chicken-egg problem of democratic theory: how can we employ democratic means to determine the *demos* that engages in democracy? The hermeneutic approach suggests a different way of answering the question. In order to act as a constituent power, "a people" is required to share a set of hermeneutic horizons, or as I have elsewhere argued, a common constitutional language (Schweber 2007). That is, both the creation and the amendment of a constitution imply a claim of constituent power that may be evaluated or contested. As a result, the question "what is the people?" is best answered in terms of conditions necessary for engaging in constitution-making.

This formulation of "the people" recognizes a further point. Acting as a constituent power, the people exercise authority over hermeneutics rather than being subjected to the rule of a sacred text. In the creation and amendment of a constitutional text, the people exercise the capacity to imagine the possibility of constitutional objects that are not articulable in their own frame of reference. The act of amendment is an act of authorship, and the resulting text is a palimpsest. It is not simply a last-in-time rule in which the amendment dictates meaning to the pre-amendment text, because that is impossible; directly translation from one world-view to another is not available. Instead, the entire text is capable of interpretation by future readers in engagement with their hermeneutic understandings, a fusion of horizons that requires the critical examination of both and results in a synthesis not perfectly consonant—not comfortable or easily assimilated—with either. The act of interpretation is an exercise of imagination and criticism, not merely epistemological excavation. Amending a constitution involves a self-aware people to exercise constituent power over the construction of meaning of an existing text and extending an invitation to its future collective self to engage in the inescapable hermeneutics of constitutional amendment.

V. CONCLUSION: THE PEOPLE AND THE TEXT

Throughout this article, the discussion has been a level removed from the common debates about the proper role of constitutional judges or lawyers. Ultimately, the argument of this article is addressed to a broader concern, the relation of "the people" to a constitutional text. The treatment of "the people" as a legitimating concept rather than a concretely identifiable population is essential for a theory of constituent power. One can think of the idea in terms of Rousseau's description of three moments of the people: "the State when passive, the Sovereign when active, and Power when compared with others like itself." The active sovereign is the people engaged in constitution-making, "the action of the entire body acting upon itself—that is, the relationship of the whole to the whole, or of the sovereign to the State." While Rousseau uses the language of sovereignty, the concept he is deploying is more precisely captured by the term "constituent power," the power of a people to create sovereignty in the form that it appears in constituted states. Similarly, Rousseau identifies three moments in the political lives of citizens: "[T]hey collectively take the name people; individually they are called citizens, insofar as participants in the sovereign authority, and subjects insofar as they are subjected to the laws of the state" (Rousseau [1778] 1997, 50-1). The identification of individual citizens and legal subjects can be determined by the operation of laws; the identification of the collective "people" cannot be reduced to a positivistic fact precisely because it precedes the constitution of the entity that would generate such facticity.

The recognition of the central role that constituent power plays in the legitimation of constitution-making leads to a recognition of the same phenomenon at work in the process of constitutional amendment. This question arises regardless of which of the many different systems for constitutional amendment one is discussing. The variation among such systems is the subject of a considerable and deeply informative scholarly analysis with significant import for our understanding of the relationship between constitutional amendment and constituent power in a particular system (Albert 2019). For purposes of the present discussion, however, these distinctions are secondary, as the hermeneutic significance of an amendment occurs as an event, an embedded element of the moment of amendment however that moment occurs. This focus on the moment of amendment provides a fruitful point of entry because of the way it brings questions of hermeneutics into sharp focus. Questions about the nature of constitutional textuality that may be elided in discussions of constitutional interpretation *tout court* are inescapable when one confronts the question of the relation of an amendment to the prior text. Whatever

the merits of a philosophical hermeneutic approach for other objects of interpretation, the argument of this article is that in the case of a constitution, this kind of critical, reflective interaction is mandated as a consequence of accepting the idea of constituent power. The adoption of such an hermeneutic perspective, in turn, helps us resolve the problem of interpreting and amended constitutional text.

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AUTHORIZING REVOLUTIONARY CONSTITUTIONAL CHANGE: THE APPROXIMATION THESIS

JOSEPH FRANCESCO COZZA[1]

ABSTRACT

This study examines how the amendment power can be used to legitimately produce a constitutional revolution, altering the core identity of a constitutional system. In doing so, I introduce the concept of the revolutionary amendment and discuss how such an amendment can achieve legitimacy in a constitutional system. Drawing on deliberative civic republican theory, I argue that the process of enactment must approximate the primary constituent power by fostering citizen representation and deliberation in both the drafting and the ratification of the amendment. This *approximation thesis* can help determine when the citizens of the state will see a revolutionary amendment as legitimate. This theoretical contribution is followed by case studies of contemporary constitutional revolutions in Ireland and the United Kingdom.

KEYWORDS: *constitutional revolution, constitutional amendments, popular sovereignty, constituent power, referendums*

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I. INTRODUCTION

In his 1789 letter to James Madison, Thomas Jefferson proclaimed, "[I]t may be proved that no society can make a perpetual constitution. . . . The earth belongs always to the living generation." Through this letter, Jefferson argued that each generation has the right to alter the constitutional agreement bequeathed to its members by their ancestors and, in effect, each generation has the right to revolution. Should each generation start anew to draft its own constitution? Would the amendment process be sufficient to keep a constitutive document in line with a new generation of citizens? What are the limits to the amendment power? These are critical questions constitutional theorists have sought to address in understanding the social contract.

In this study, I examine how the amendment power can be used to legitimately produce a constitutional revolution, altering the core structure or identity of a constitutional system. In doing so, I introduce the concept of the revolutionary amendment as a mechanism for fundamental constitutional transformation, offer a normative assessment of the path to legitimation by connecting the concept to the literature on constituent power and popular sovereignty, and provide initial empirical support for the theory, demonstrating that the normative procedural guidelines offered in the study can enhance sociological legitimacy. Drawing on deliberative civic republican theory, I argue that the process of enactment must approximate the primary constituent power by fostering citizen representation and deliberation in both the drafting and the ratification of the amendment, mirroring mechanisms that would be used to draft a wholly new constitution. In this way, the revolutionary amendment can make a claim to a new popular sovereignty independent of the existing document whose core identity the polity is seeking to alter. This *approximation thesis* can help determine when and how a revolutionary amendment will be seen as a legitimate exercise of constitutional change by the citizens of the state.

This theoretical contribution is followed by case studies of contemporary constitutional revolutions in Ireland and the United Kingdom. While Ireland's process of significant constitutional reform has received much social support, the process of change in the United Kingdom has been much more controversial. Over the past decade, Ireland has experienced what Tánaiste Leo Varadkar called a "quiet revolution" meant to establish "a modern constitution for a modern country" ("Ireland Abortion Referendum" 2018). This constitutional revolution has sought to sever Ireland's de jure link with the Catholic Church, reducing the document's commitments to Catholic natural law and placing its liberal democratic elements front and center. This revolution has gained legitimacy through its ongoing commitment

to citizen inclusion and deliberation in a multistage reform effort, generating significant social support while mitigating destabilizing backlash. This study focuses specifically on the repeal of the Eighth Amendment.[2]

The process of constitutional change in the United Kingdom, however, has not been as smooth. The 2016 vote to leave the European Union was only the beginning of a long and tumultuous process involving several delays, two general elections, and an increasing threat of Scottish independence and an Irish border poll. What this revolution has lacked is proper citizen representation and deliberation, as the referendum turned on vague promises and failed to properly include the voices of the devolved governments, undermining the national interest. Thus, the process has failed to meet the approximation standard highlighted above, generating significant domestic backlash that undermines the stability of the constitutional system.

Constitutions are meant to be enduring documents that constrain and shape political governance in order to provide stability and predictability. In doing so, they are a critical link between a foundational past and an aspirational future. This dual role opens the door to significant disharmonies both internal to the text and between the document and the people (Jacobsohn 2011). These disharmonies provide the fuel for constitutional revolutions, helping the living generations keep their constitutive document aligned with their values and aspirations (Jacobsohn 2014). However, the process of revolutionary change need not result in an entirely new document. Instead, the link between past and future can remain, even as the constitution is fundamentally altered, through the use of a heightened amendment power that seeks to bring citizens and elites into an important dialogue about the nature of constitutional justice in the polity.

II. THE APPROXIMATION THESIS: CONSTITUENT POWER, POPULAR SOVEREIGNTY, AND REVOLUTION IN CONSTITUTIONAL THEORY

A. Conceptualizing the Revolutionary Amendment

First, it is important to ask, What is a constitutional revolution, and how does the concept apply to the amendment power? In his work on revolutionary constitutional

2. In analyzing this case, I conducted interviews with party leadership, members of the Oireachtas Committee on the Eighth Amendment of the Constitution, members of the Citizens' Assembly, founding members of the leading pro- and anti-Repeal campaigns, as well as research leaders and staffers at the Citizens' Assembly. In conducting these interviews, I spoke with elected officials from each of Ireland's major parties as well as several independent politicians. All interviews were conducted over a period of three weeks in June and July of 2018.

transformation, Bruce Ackerman (1991) focuses on "constitutional moments" that present a clear and decisive repudiation of the past in forging a new constitutional identity for the nation. These moments require acts of self-conscious collective mobilization and tend to be elite-led, with the people entering the process during the final ratification stage. So too, these moments often—though not always—play out in a relatively short time span. Rivka Weill states that "it [is now] conventional wisdom to expect a revolution—'thunder and lightning . . . [and] fire' [Exodus 19:16]—as prerequisites to achieving a constitutional transformation" (2006, 465). Ackerman's work also implies that constitutional revolutions are inherently illegal, as the creation of a new constitutional order typically violates the existing constitution, again emphasizing the repudiation of the past (see Braver 2018).

When analyzing revolutionary constitutional change, however, Gary Jacobsohn argues that one must pay more attention to the *substance* of the transformation rather than the process through which it occurs. For Jacobsohn, a constitutional revolution is "a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity" (2014, 3). Thus, constitutional revolutions need not be connected to a political revolution in the conventional sense and can occur without mass mobilization or abrupt, extralegal breaks in political governance.[3] Instead, if over the course of several years changes to the constitution, however incremental, result in a document so fundamentally transformed that the social and political experience of constitutional governance is radically altered, then a constitutional revolution has certainly taken place. Using this definition, constitutional revolutions may be incremental and need not occur in a moment of thunder, lightning, and fire so long as they fundamentally shift the identity of the constitutional order.[4] So too, unlike Ackerman, Jacobsohn recognizes that these revolutions can be *legal*, occurring within the framework of the existing document, often through the amendment process, as has recently occurred in states such as Hungary and Turkey (Jacobsohn 2014; Tushnet 2015; Gardbaum 2017; Jacobsohn and Roznai 2020). This insight opens the door to two critical, unanswered questions: What does a revolution achieved through the amendment power look like, and how can it be seen as legitimate?

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3. Stephen Gardbaum (2017) distinguishes *constitutional revolutions* from *revolutionary constitutionalism* in that the latter concept is linked to a political revolution in the classical sense.

4. What distinguishes constitutional revolution from constitutional evolution is that the former involves a fundamental shift in the framework of the constitutional order. Evolutionary changes, in contrast, are changes to the document that, while potentially profound, are in keeping with the document's core identity structure. As stated by Jacobsohn and Roznai, "[E]volution is a process of developing in detail what is implicit in idea or principle" (2020, 35).

Ultimately, the people can formally alter the constitution in three ways: ordinary constitutional amendment,[5] constitutional replacement, or *legal* constitutional revolution, what I call "revolutionary constitutional amendment."[6] Following the definition of constitutional revolution offered by Jacobsohn (2014), a revolutionary amendment is one that produces a paradigmatic shift in the experience of constitutionalism without displacing the entirety of the constitutional text.[7] More specifically, revolutionary amendments profoundly alter the delegation of sovereignty within the polity or produce a considerable shift in the document's core values and commitments.[8]

Revolutionary amendments, then, are not simply legal versions of constitutional replacement but rather more limited alternatives to them. Unlike constitutional replacement—which occurs outside the bounds of legality—revolutionary amendments do not alter the entire constitution. As amendments, they can be less radical and allow for a degree of legal continuity and stability that can prevent widescale disruption during chaotic moments of constitutional transition. Indeed, it is the legality of the process that can provide the entrenched institutional support necessary for proper citizen representation and deliberation, discussed in the next section (B).[9]

A polity may choose to enact revolutionary amendments, rather than engage in illegal replacement, for several reasons. Practically, these amendments may be easier to adopt than a wholesale rewrite of the constitutional text when the critique of the constitutional system is significant in magnitude but limited in scope. It is often easier to find consensus and to focus the people's attention on a singular matter of constitutional importance rather than a more wide-ranging array of

5. Here I am referring to an amendment that does not produce a constitutional revolution.

6. Beyond these formal mechanisms, constitutions can also be altered in an informal fashion via interpretation, executive action, desuetude, or a change in unwritten norms (Albert 2014, 2015a; Doyle 2018). These informal mechanisms are beyond the scope of this analysis.

7. Richard Albert (2018) refers to this form of constitutional change as *constitutional dismemberment*. Since these alterations are described as amendments when the occur, I believe it is more appropriate to classify them as such. So too, the term *revolutionary amendment* critically links the process of intraconstitutional change with the theoretical insight provided by the term *constitutional revolution* (see Roznai 2018).

8. What constitutes a considerable shift in the delegation of sovereignty or constitutional values is dependent on the specific document and the sociopolitical history of the constitutional order in question (see Jacobsohn and Roznai 2020).

9. This argument has a basis in the work of Hannah Arendt, who disagrees with Ackerman's assessment that revolutionary constitutional transformation necessarily occurs outside the bounds of legality. See Joshua Braver's (2018) work on extraordinary adaptation for a larger discussion of the role of legality in the process of constitutional replacement.

constitutional changes, especially where there is widespread sociopolitical support for the rest of the constitutional system. So too, the possibility of enacting revolutionary change through the amendment procedure allows for a more gradual process in which multiple revolutionary amendments—or multiple amendments that together perform a revolutionary function—are debated and enacted over time.[10] Taking a more gradual approach allows the public to adapt to and reflect on the new changes before continuing the revolutionary process, which can build trust between the people and the government while avoiding the alienation of potential allies. Indeed, the Irish politicians, activists, and citizens interviewed for this study demonstrated little desire for wholesale reform, arguing that such a dramatic step would be unnecessarily disruptive and divisive, harming the prospects for genuine change.

However, revolutionary amendments are feasible only in certain circumstances. If the criticism of the constitutional order is more comprehensive, an illegal replacement will be a better option because it more fulfills the demands of the people. So too, profound moments of transition, such as those that follow a war, coup, or revolution, may call for a new constitutive moment and a more fundamental reevaluation of constitutional governance than a revolutionary amendment can offer. Such a profound break with legality helps legitimate a new regime, particularly following a period of autocratic rule or a severe breakdown in constitutional governance. However, revolutionary amendments may be a useful interim solution following a regime change, allowing for a return to stable democratic politics before a new document is drafted.[11] Ultimately, revolutionary amendments may be better suited for targeted reforms in more stable constitutional systems.

Revolutionary amendments give states another tool to adjust the rules of constitutional governance to better align the system with the population. Unlike illegal replacement, revolutionary amendments can bring about needed change without displacing the entirety of the constitutional text, and thus they have an important and potentially positive role to play in the maintenance of a constitutional system.

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10. See the discussion of the Irish case in Part III of this paper.

11. For example, Chile democratized through a series of revolutionary amendments following the fall of the Pinochet regime. But over time the need for an entirely new constitution became apparent. Thus, the country is currently in the process of writing a new document. However, the revolutionary amendments proved to be an effective interim solution, allowing the return of stable democratic governance and the construction of reliable institutions.

B. Legitimatizing The Revolutionary Amendment

Thus, constitutional revolutions can be achieved within the parameters of the existing constitutional system through the amendment power. The question remains, If these revolutions can occur within the bounds of legality while fundamentally transforming the constitutional order, how can they be seen as a legitimate without the new constitutive moment Ackerman claims is necessary?

Understanding the nature of the social contract remains a critical component of constitutional theory. Imbued in the notion of the social contract is the concept of popular sovereignty, that the agreement between the people and the lawmaker, embodied in the constitution, can claim authorship by the people. According to Abbe Emmanuél Sieyès, the constituent power is the people's power to forge such an agreement and thus "establish a constitutional order of a nation" (Roznai 2015, 239). This power can be distinguished from the *constituted* power, or the power to make laws within the framework established by the eventual constitution (Roznai 2015). The constituent power, in its ability to delegate sovereignty and establish lawmaking authority, ultimately exists outside the bounds of legality and is unlimited and unrestricted by formal constitutional rules (Kelson 2006; Schmitt 2008; Roznai 2015). Thus, through an act of popular sovereignty (embodied in the exercise of constituent power), the people give themselves a constitution that sets out the power to make laws for the polity (expressed through the constituted power). However, the people retain the power to alter this sovereign arrangement, even after the constitutional order is established.[12]

As stated earlier, the people can formally alter this constitutional agreement via ordinary amendment, constitutional replacement, or revolutionary amendment. Critically, each of these mechanisms has a different relationship with constituent power. According to Yaniv Roznai (2015), we can consider the power to amend the constitution as specified in the document to be a *secondary constituent power*. Because the process through which an amendment can occur is established in the constitution and occurs within the bounds of legality, the amendment power is derived from and thus constrained by the *primary constituent power* that established the constitutional order. The replacement of one constitutional order for another, in contrast, necessarily requires an act of primary constituent power in order to ensure a proper expression of popular sovereignty. This process requires a break with legality, which provides a new constitutive moment and an appeal for popular

12. For an account of the distinction between sovereignty and constituent power, see Colón-Ríos (2020).

legitimation.[13] According to Richard Stacey, "The makers of a new constitution . . . cannot rely on whatever claims to popular sovereignty the previous constitution made, as a basis for claiming that the new constitution is backed by the authority of popular sovereignty," and thus the new constitution requires "a discrete act of collective constitution making" (2018, 11).

The relationship between constituent power and popular sovereignty in the third case of constitutional change, revolutionary amendment, is much more delicate than that of the other two mechanisms. Carl Schmitt has argued that it is not possible to change the basic structure or fundamental values expressed in the constitution via the delegated amendment power (Schmitt 2008; Roznai 2015). Such profound change must be authorized by the people themselves. Following this logic, constitutional courts around the world have found that amendments exceeding the limits of the secondary constituent power may be deemed unconstitutional (Albert 2009; Barak 2011; Roznai 2017).[14] Thus, many constitutional theorists, designers, and courts recognize the explicit or implicit unamendability of certain provisions (Albert 2015b). However, changes to the basic structure or identity of the constitution need not be forbidden, nor should they require a wholesale rewrite of the constitutional text. Instead, these changes require a special process that can infuse the constitutional revolution with the critical element of popular sovereignty it requires to claim legitimacy. Since such a process occurs within the framework of the existing constitutional order, providing a degree of institutional regulation and legal continuity, it cannot be said to be a pure expression of the unconstrained primary constituent power. What is required of such a revolutionary amendment, then, is an *approximation* of the primary constituent power.

Approximating the primary constituent power is no easy task, requiring the establishment of representative and deliberative institutions that mirror those that would be formed to draft a new constitution, without displacing the entirety of the existing document. In this way, the approximation is not a lower procedural bar than the primary constituent power, but rather it has a narrower and more regulated mandate. Ultimately, though this special amendment process works within the

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13. This argument can be traced to Carl Schmitt and is prominent in Bruce Ackerman's work. In his 2018 piece, Joshua Braver introduces the concept of extraordinary adaptation in discussing how constitutional replacements occur outside the bounds of legality while avoiding lawlessness.

14. The German Federal Constitutional Court was among the first to raise the possibility of an unconstitutional constitutional amendment in the 1951 *Southwest State* case. The Indian Supreme Court also held that constitutional amendments can be deemed unconstitutional if they violate the basic structure of the document (*Kesavananda Bharati* 1973). Since that time, constitutional courts around the world have accepted the principle of unconstitutional amendments.

bounds of the existing constitutional order, it must be granted greater authority to make the desired changes. As argued by Roznai, "[T]he more similar the characteristics of the secondary constituent power are to those of the democratic primary constituent power . . . the less it should be bound by limitations" (2017, 162). Thus, a revolutionary amendment requires a special process that can ensure a claim to popular sovereignty separate from the mandate of the original constitution whose core values, commitments, or structure the polity is seeking to change. This process should thereby foster proper citizen representation and deliberation during the issue-framing *and* the ratification stages of the amendment process.[15] Thus, while theorists such as Ackerman argue that elites should lead the process during profound constitutional moments, with the people entering during ratification, I argue that true legitimation in moments of constitutional revolution is achieved through a process in which the people are consulted from the very beginning. Doing so helps provide the public with the information needed to make an informed decision and ensures their voice is heard throughout the process, establishing a more intimate connection between the people and the constitutional transformation. To properly assess this approximation thesis, then, it is important to discuss the interactive role of representation and deliberation in the process of revolutionary constitutional change.

Citizen representation is critical to the legitimacy of a revolutionary amendment, as "popular sovereignty and representation can never be separated one from the other. 'The people' is too large and diverse a body to manifest itself without the intervention of representational forces" (Tierney 2012, 126). The people as a group are typically represented in an amendment process through elected officials in an ordinary legislature, delegates to a specially elected constituent assembly, or the voters in a referendum (or, more frequently, some combination in a multistage process). When assessing representation, however, there has been a long-standing debate as to which interests should be represented in political processes: those of the people as individuals or constituents or those of the people as a united sovereign, or put more simply, the interest of the nation (Pitkin 1967; Plotke 1997; Shapiro et al. 2010). Although the views of the majority must be considered in democratic processes—and will often be decisive—the national interest should also be represented in any process of designing (or redesigning) a constitutive document if the outcome is to be seen as fully legitimate. In her seminal work on political

15. Stephen Tierney argues that constitutional referendums occur in a series of stages. In the issue-framing stage, "the matter to be put to the people is formulated" (2012, 51). The final stage is ratification, which encompasses the campaign and final vote.

representation, Hannah Pitkin argues that "the representative is, typically . . . an agent of his locality as well as a governor of the nation. His duty is to pursue both local and national interest, the one because he is a representative, the other because his job as representative is governing the nation" (1967, 218). Ultimately, the use of a referendum in the amendment process does not negate the need for both politicians and voters, as representatives of the polity, to consider the greater national interest. This consideration is particularly relevant where majoritarian decision-making mechanisms can overlook distinct groups within society, especially in multinational or deeply divided states where the approval of the constituent units may be necessary for the legitimacy of the outcome (Tierney 2012).

Naturally, there can exist a gap between the preferences of the current majority and the welfare of the nation as a whole. A sufficiently deliberative process, by providing representatives and citizens with accurate information, inducing reflection on significant questions of constitutional governance, and allowing for sincere debate among competing points of view, can help bridge these two aspects of representation.[16] Deliberative democratic theorists have argued that participatory lawmaking processes that ensure free and equal deliberation help legitimate law by seeking mutual acceptability and consensus (see Habermas 1992; Dryzek 2002; Chambers 2003; Landemore 2020). So too, exercises in deliberative democracy can allow for a more accurate aggregation and representation of *informed* public opinion without creating undue polarization or bias (Fishkin and Luskin 2005; Sunstein 2006; Pateman 2012). Indeed, deliberation not only reveals preferences but can help *shape* them by allowing individuals to debate and reflect on questions of constitutional importance from multiple points of view, which can provide new information or correct misinformation (Manin 1987; Chambers 2003, 2009). In doing so, proper deliberation requires justification, which asks that "citizens go beyond the self-interests typical in preference aggregation and orient themselves to the common good" (Bohman 1998, 402). By facilitating the development of informed preferences, inducing sincere reflection on significant constitutional questions, and allowing for debate among multiple points of view, thus bridging the gap between individual and national interest, deliberation and representation are linked in the process of legal legitimation.[17]

In his analysis of constitutional referendums, Stephen Tierney (2012) distinguishes between two forms of deliberation: micro-level, what I call *structured*

16. This argument can be traced back to Edmond Burke and John Stewart Mill (see Pitkin 1967; Manin 1987).

17. See Pitkin (1967), Squires (2000), Dryzek and Niemeyer (2008), Urbinati (2014), and Schweber (2016) for a longer discussion on how deliberation and representation have been linked by democratic theorists.

deliberation, and macro-level, what I call *unstructured deliberation*. In the former, citizens gather to engage in controlled discussions regarding potential changes to the constitutional text. In the latter, elite actions, as occur in a legislature, constituent assembly, or referendum campaign, can trigger broader deliberation within society. Ultimately, unstructured deliberation may be sufficient to ensure a claim to popular sovereignty so long as citizens are given the time and information necessary to arrive at an informed decision, deliberating on their own time and in their own way (Tierney 2012).[18] Doing so requires both a focus on citizen education—by the media, civil society, and politicians—and a sufficient amount of time to ensure citizens are able to engage in informed reflection. This form of deliberation could come from a robust referendum campaign or through a transparent and participatory constituent assembly process.[19] Increased societal deliberation in the issue-framing process, then, can generate a more accurate and representative expression of the will of the people—and thus popular sovereignty—allowing for free and equal participation and consideration with respect to the individuals and viewpoints involved independent of the mechanism of ratification.

A state can legitimately engage in constitutional revolution in a manner that fosters proper representation and deliberation through many mechanisms, including a constituent assembly or a referendum. However, because these amendments require a claim to popular sovereignty independent of the existing document to gain legitimacy, a parliament elected for the purposes of ordinary legislation—channeling the more constrained constituted power—does not have the mandate on its own to engage in revolutionary constitutional change (Colón-Ríos 2018). So too, constitutional referendums without sufficient deliberation have the potential to perpetuate misinformation or prioritize the interests of the current majority over the interests of the nation as a whole, which can undermine the outcome's claim to legitimacy by sparking domestic backlash or destabilizing the constitutional system.[20] Thus, analyzing the legitimacy of a revolutionary constitutional amendment put to a referendum against the approximation standard requires an analysis of

18. This does not negate the necessity of structured deliberation within representative institutions, such as constituent assemblies and legislatures, which is critical to democratic legitimacy and should itself induce unstructured deliberation within society.

19. Evidence has shown that structured deliberation among citizens can influence attitudes of non-participants, increasing political interest and efficacy ahead of referendum campaigns (Knobloch et al. 2019), thus inducing unstructured deliberation within society. In addition, experimental evidence demonstrates that citizens who disagreed with the policy outcome from a citizen-led deliberative body still viewed the outcome as fully legitimate (Garry et al. 2021).

20. See discussion of Brexit in Part IV of this paper.

the various stages involved in the amendment process, most significantly the issue-framing and ratification stages (Tierney 2012).[21]

Conceptually, then, revolutionary amendments are neither normatively good nor bad for a constitutional system. Rather, it is the process of their enactment that matters in assessing the outcome's legitimacy.[22] If a state follows the approximation thesis, it is unlikely the system will adopt changes that lack significant popular support, diminishing the possibility of illegitimate reform.

Certainly, revolutionary amendments open the door for bad actors to introduce profound changes under the specter of ordinary amendment. In this way, an illegal replacement may be normatively superior because the illegality of such an act is blatant and typically accompanied by an appeal to popular support (Braver 2018). However, obscuring the revolutionary nature of the amendment is often difficult and would run afoul of the approximation thesis—which requires an adequately informed citizenry—and could thus harm the legitimacy of the constitution as the revolutionary nature of the change becomes apparent. Also of concern is that elites have control over this reform process, allowing them to prevent revolutionary change that has significant public support. However, this concern is also present when a state attempts to rewrite its constitution, as occurred during the push for a new Icelandic constitution in 2013. The more representative, inclusive, and deliberative the process, the more social and political pressure will exist for elites to honor the process. If these elites weather the storm, the desire for revolutionary change may be less than initially perceived or a more wholesale reform of the constitutional system may be necessary. Thus, the failure to enact a revolutionary amendment does not foreclose the possibility of illegal replacement (and may make it more likely). Indeed, Braver (2018) has cited the exhaustion of other legal channels for constitutional change as a prerequisite for extraordinary adaptation.

Ultimately, the purpose of approximating the primary constituent power in enacting a revolutionary amendment is to ensure a proper expression of popular

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21. Richard Stacey (2018) claims that referendums are neither necessary nor sufficient for an appeal to popular sovereignty, as one needs to account for the authorship of the constitutional text rather than simply the ratification method. So too, in his critique of modern polling, James Fishkin argues that "what polls tend to capture is a statistical aggregation of vague impressions formed mostly in ignorance of sharply competing arguments" (1995, 89). A similar argument can be made regarding referendums if they lack sufficient societal-level deliberation. Indeed, Fishkin argues that "the locus of ostensible decision resides in millions of disconnected and inattentive citizens, who may react to vague impressions of headlines or shrinking soundbites but who have no rational motivation to pay attention so as to achieve a collective engagement with public problems" (23).

22. The substance of the amendment is also relevant to any normative evaluation; however, such analysis is beyond the scope of this study.

sovereignty independent of the existing document whose core features the polity is seeking to alter. Doing so allows the paradigmatic shift in constitutional identity to gain legitimacy through a claim to have been authored by the people themselves. To approximate the primary constituent power, states must design drafting and approval mechanisms that mirror those that would be used to adopt an entirely new constitution. Such a process requires sufficient citizen representation and deliberation, providing the public with adequate information and ensuring citizens feel their voices are heard in the process. To demonstrate the empirical utility of this normative theory and the mechanisms behind it, I next analyze the process of constitutional revolution in Ireland and the United Kingdom.

III. IRELAND'S DELIBERATIVE REVOLUTION

Over the past decade, Ireland has embarked on a dialogical process of revolutionary constitutional change that has sought to sever the constitutional link between church and state in favor of the document's commitment to liberal democratic rights. The nation has constructed a reform process that represents a sophisticated approximation of the primary constituent power, enhancing the legitimacy of the outcome. While the Irish model is not the only method by which a state can approximate the primary constituent power, it is an innovative and successful model that has ensured proper representation and deliberation across several sites in a multistage process, thus deserving closer consideration.

First, it is important to analyze the significance of the ongoing reforms to constitutional governance in Ireland. Mark Tushnet has argued that preambles provide a deeper, symbolic meaning to the constitutional enterprise, often through direct proclamations of collective identity (2006). The Irish preamble's invocation of "the most Holy Trinity" and "our Divine Lord, Jesus Christ," combined with the textual commitments of the state to protect the "inalienable and imprescriptible" rights of the family (Article 41) and "acknowledge that the homage of public worship is due to Almighty God" (Article 44), places Catholic social thought at the heart of Ireland's constitutional identity (Kissane 2003; Jacobsohn 2014; Doyle 2018). The preamble thus demonstrates that "the 'common good' should be evaluated by religious criteria and implicitly identifies the Irish nation with the Catholic religion" (Kissane 2003, 77). So too, the Supreme Court has cited the preamble as a guiding principle of constitutional law.[23]

23. In *Norris v. The Attorney General* (1983), the Supreme Court stated that based on the preamble, "it cannot be doubted that the people, so asserting and acknowledging their obligations to our Divine

Thus, the 1937 Constitution "boldly featured [Catholic] natural law as a limiting principle on the expression of the popular will" (Jacobsohn 2014, 26). Indeed, the 1937 Constitution was drafted by a small cohort of political elites, with the Catholic Church having a strong—though not necessarily deterministic—influence on the final text (Chubb 1991; Jacobsohn 2014; Doyle 2018). The immense role of the Catholic Church and Catholic social thought in the formation and development of Irish constitutional law demonstrates the significance of the Catholic faith to early Irish national and constitutional identity.

Catholic social thought, however, was not the only operating force in the development of Irish constitutional identity. The adoption of the 1937 Constitution was itself the culmination of a fifteen-year revolution that fused the liberal democratic principles of the 1922 Free State Constitution with the religious commitments of Catholic theology (Jacobsohn 2014). Thus, while Catholic social thought had been an integral part of the constitutional enterprise in Ireland, the nation has also embraced secular principles of liberal democracy (Hogan 2005; Doyle 2018). In doing so, the drafters of the Irish Constitution incorporated the principle of religious freedom (Article 44) and guaranteed liberal democratic rights such as the right to equality, personal liberty, and freedom of expression (Article 40).[24] Thus, since 1937 constitutional governance in Ireland has sought to balance the internal disharmony inherent to the nation's dual constitutional commitments.

This tension between Catholic social thought and the principles of liberal democracy set the parameters through which constitutional identity would develop in the decades ahead. Over time, this internal disharmony also interacted with a growing external disharmony. As posited by Gary Jacobsohn, "[A] dialogical engagement between the core commitment(s) in a constitution and its external environment is crucial to the formation and evolution of a constitutive identity" (2011). Ultimately, it is the external disharmony between the document and society that fueled the recent constitutional revolution, seeking to resolve the decades-long internal disharmony.

Lord Jesus Christ, were proclaiming a deep religious conviction and faith and an intention to adopt a Constitution consistent with that conviction and faith and with Christian belief." In this decision, Chief Justice O'Higgins upheld legislation prohibiting same-sex conduct "on the ground of the Christian nature of our State."

24. There has been a long debate as to the true role of Catholic social thought in the Irish Constitution. John Henry Whyte and R. F. Foster argue that Catholicism plays a central role in Irish constitutional identity, whereas Gerard Hogan argues that the religious elements of the constitution have been overemphasized (Doyle 2018). Bridging the two, Oran Doyle argues that "the Irish Constitution reflect[s] two competing intellectual traditions," influenced by both liberalism and Catholic natural law (2018, 160).

The development of Irish law surrounding the question of abortion rights is among the most vivid examples of this ongoing conversation between constitution and society. Irish citizens approved Article 40.3.3 of the Constitution—referred to as the Eighth Amendment—in 1983, explicitly recognizing the right to life of the unborn.[25] Although abortion had been banned via statute, there was increasing concern regarding the potential for judicial intervention similar to the United States Supreme Court's decision in *Roe v. Wade*, especially after the Irish Court's contraception decision in *McGee v. The Attorney General* (1974).[26] The centrality of this provision to Ireland's constitutional identity is underscored by the European Union's guarantee that these restrictions would not be altered by the adoption of either the Maastricht or Lisbon treaties, key conditions that facilitated the latter's approval in a national referendum (Jacobsohn and Roznai 2020).[27]

Since adopting the Eighth Amendment, the judiciary, the Oireachtas (Parliament), and Irish citizens have engaged in a dialogical reflection regarding the contours of this prohibition, reflecting the nation's growing secular/religious divide. In the 1992 case *Attorney General v. X*, the Supreme Court recognized the right to obtain an abortion if the life of the mother was at risk, including risk of suicide. Also in 1992, voters adopted the Thirteenth Amendment, guaranteeing the right to travel abroad to obtain an abortion, and the Fourteenth Amendment, establishing the right "to obtain or make available . . . information relating to services lawfully available in another state."[28] Finally, the Oireachtas passed the 2013 Protection of Life During Pregnancy Act to further clarify abortion regulations.[29] Thus, as it

25. Although not initially included in the Constitution, this provision is consistent with the Catholic aspects of the document's identity and is well within the document's original spirit. Thus, it has been argued that abortion may have been implicitly banned in the Constitution prior to the Eighth Amendment (Doyle 2018).

26. The Fourteenth Amendment was seen as a response to Supreme Court cases such as *Attorney General (SPUC) v. Open Door Counselling Ltd* (1988). In *re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill* (1995), the Supreme Court held that the ban on abortion was implicit prior to the passing of the Eighth Amendment, relying on the Constitution's preamble.

27. The initial referendum to approve the Lisbon Treaty failed by a vote of 53.4 percent to 46.6 percent in June 2008. After further concessions and a guarantee that the Irish stance on the right to life would not be altered, the treaty was approved in a second referendum in October 2009.

28. In *re Art. 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill* (1995), the Supreme Court held that the Fourteenth Amendment was constitutional despite claims that the contradiction with the Eighth rendered it invalid.

29. This law was also partially prompted by the outcome of the ECHR case *A, B, and C v. Ireland*, which required Ireland to clarify the nation's abortion regulations.

stood before the 2018 referendum, an abortion could be legally obtained in Ireland only when the life of the mother was at risk.

According to Labour Party senator Aodhán Ó Riordáin, "In the '40s and '50s, people replaced the colonialism of the Brits with a kind of colonialism of the Church," which had the effect of intermingling Catholicism and Irish identity, producing "a toxic mix" (quoted in Stack 2017). This "toxic mix" fueled a secular/religious disharmony at the heart of Irish constitutionalism that produced a dialogical engagement between the citizens, politicians, and courts as the nation sought to make harmonious these fundamental tensions. As noble and illuminating as this endeavor has been, however, there comes a time when the effort to reconcile growing disharmonies in the system of constitutional justice is no longer sufficient, requiring a new approach that will ultimately transform the identity of the constitutional order to align it with sociocultural developments.

Irish society has changed significantly since the Constitution was adopted in 1937. Vatican II reforms, European integration, the scandals plaguing the Catholic Church, and the increasingly progressive views on social rights in the West have fueled a shift in Irish values and identity. As stated by then-TD Clare Daly, "[W]e're a very different society in terms of cultural identity: more open and inclusive."[30] While Catholicism remains an important component of Irish culture, its influence over public policy is waning (Kennedy 2001; Hogan and Whyte 2003; Kissane 2003; Jacobsohn 2011). This shift in Irish cultural identity, though not uniform or uncontroversial, has sparked a new approach to the nation's constitutional disharmonies. According to one Sinn Féin politician, "[S]ociety has changed substantially. Constitutional changes are behind what's happening already."[31] Although the results of this constitutional reevaluation have taken shape over several years, they have been nothing short of revolutionary.

The 2011 economic crisis is often seen as the catalyst for a more robust constitutional reevaluation.[32] As stated by one party leader, "[A]fter the crash here in 2011. . . there was a whole flowering of citizen engagement. After that, the ideas of constitutional conventions and a review of our Constitution and really

30. Author's interview, July 2018.

31. Author's interview, June 2018.

32. Before 2011, there had already been significant changes made to the Constitution's Catholic principles. As discussed, the prohibition on abortion had been altered by subsequent amendments. Also, in 1972 voters removed the reference to the special position of the Catholic Church (Article 44.1), and in 1995 they narrowly voted to remove the constitutional prohibition on divorce. What separates these earlier reforms from the more recent alterations is the process by which they were adopted.

a reconsideration of political mechanisms was very widespread . . . it was a time of change."[33] However, this flowering of citizen engagement did not lead to an immediate constitutional transformation. Instead, Ireland has pursued a "quiet" revolution as the nation continues to shed its de jure connections to the Catholic theological tradition. In 2015 Irish citizens voted to constitutionalize the right to same-sex marriage, and in May 2018 they voted to remove the constitutional ban on abortion, both controversial issues that have long been opposed by the Catholic Church.[34] These amendments have sought to bring the Irish constitutional order in line with its Western European counterparts by severing the link between church and state. Like most constitutional revolutions, the Irish experience is anchored in the very conflicts that have fueled constitutional discourse since its founding, seeking to resolve the document's internal disharmony in favor of liberal constitutionalism.

The steps in this revolution were deliberate and were taken with the understanding that the changes represent a fundamental transformation in the Constitution's identity. Because of its role in Irish constitutional history and the unique process by which it was adopted, I focus here on the repeal of the Eighth Amendment. As stated by Justice Mary Laffoy, "[Abortion] is one of the most divisive and difficult subjects in public life in Ireland."[35] Indeed, one Irish senator described the repeal of the Eighth as a "cataclysmic watershed moment in relations between church and state. Abortion was the last ditch stand for the Catholic Church."[36]

Under Article 46 of the Irish Constitution, an amendment need be passed only by a majority vote in both chambers of the Oireachtas and a subsequent referendum. While this procedure mimics the process through which the Constitution was ratified (Doyle 2018), it does not mimic the process through which modern constitutions are *drafted*, typically through an elected constituent assembly with some degree of public participation (Hart 2003). Thus, in considering the liberalization of abortion rights, Ireland added an extra step, establishing a deliberative process that brought citizens into the issue-framing stage in a more direct and meaningful fashion.

To fully consider the question of abortion, and perhaps to avoid political fallout (Doyle 2018), the Oireachtas established a citizens' assembly in 2016

33. Author's interview, July 2018.

34. In addition, in October 2018 Irish citizens voted to remove the constitutional prohibition on blasphemy, although this amendment did not face fierce opposition from the Catholic Church.

35. Quoted in the Citizens' Assembly's final report.

36. Author's interview, July 2018.

populated with ninety-nine randomly selected citizens and chaired by Justice Laffoy.[37] This assembly considered public comment and expert and activist testimony, live-streaming all its sessions for public access.[38] After extensive deliberation, the assembly voted to support the repeal of the Eighth (87%) and recommended that it be replaced with a provision authorizing the Oireachtas to regulate abortion via statute (57%). These recommendations were then evaluated by a joint legislative committee representing the major parties of Ireland, in proportion to their seats in the Oireachtas, which decided to simply repeal the amendment.[39] After consultation with the attorney general, however, the Oireachtas overwhelmingly voted to put the assembly's full recommendation to a binding referendum, as mandated by the Constitution, which was then overwhelmingly ratified.[40] Finally, the successful vote to repeal the Eighth triggered the introduction of legislation regulating abortion, the broad contours of which were outlined before the referendum based on the assembly's recommendations.

This process was clearly articulated and meticulously designed well in advance of the proceedings and involved nearly every aspect of Irish society in a deliberative and dialogical constitutional conversation meant to ensure that the revolution would be seen as legitimate. The committee within the Oireachtas was not elected on a special mandate and thus cannot be considered a constituent assembly. As such, it had little authority to engage in constitutional revolution on its own (Colón-Ríos 2018). So too, since the drafting of the amendment is at least as important as the mechanism by which it is ratified, a successful referendum result alone may not be sufficient to ensure popular sovereignty and thus legitimacy without assessing the issue-framing stage (Tierney 2012; Stacey 2018). No doubt the vote of the Oireachtas and the referendum were important steps that provided constitutionally mandated checks and established a proper dialogical process, ensuring that the controversial change was duly considered and achieved wider sociopolitical

37. The Citizens' Assembly was proposed by the incoming Fine Gael-Independent government.

38. Having received over thirteen thousand public submissions, a random cross-sample of approximately three hundred was prepared for Citizens' Assembly members. However, all submissions were available online.

39. The committee comprised TDs and senators from Fine Gael, Fianna Fáil, Sinn Féin, Independents4Change, and People Before Profit, as well as several independents. Because of low representation in the Oireachtas, the Green Party was not included. Although each recommendation needed to secure only a simple majority, the adopted recommendations received wide support within the committee. For a full breakdown of the committee votes, see Bardon (2017).

40. The vote in the Dáil was 115 to 32. In the Seanad, the vote was 35 to 10. In the referendum, the amendment was supported by 66.4 percent of voters and all but one county.

acceptance. However, neither of these processes alone is sufficient for establishing a new claim to popular sovereignty, as they do not guarantee proper citizen deliberation. From the perspective of constitutional legitimacy, the more interesting and critical design choice made by the Oireachtas is its formation of the Citizens' Assembly.

In gathering ninety-nine randomly selected citizens for several weekends to hear testimony, debate profound issues of constitutional justice, and ultimately vote on recommendations for amending the 1937 document, the Citizens' Assembly engaged in a critical process of deliberative democracy that captures the essence of popular sovereignty. While "the greater the involvement the people have in drafting the constitutional text . . . the more closely the constitutional referenda will fulfill the demands of popular sovereignty," obviously not every citizen can participate in this process (Stacey 2018, 21). To overcome this limitation, most polities create a special, representative constitutional assembly elected by the people. Ireland, however, chose a different path, opting instead for a more inclusive process. Doing so ensured a true connection between the people of Ireland and the revolutionary constitutional provision in question.

The assembly ensured diversity in its membership with respect to region, age, gender, and social class and facilitated the inclusion and debate of competing views from dispassionate experts as well as pro-choice and pro-life advocates.[41] So too, the assembly allowed for extensive public comment and ensured sufficient transparency through its final report and by making all sessions available for public consumption online both during and after the sessions. It is fair to be skeptical that such a process can be genuinely deliberative. However, when speaking with citizens who served in the Citizens' Assembly, it becomes clear that the voices of the citizens drove the body's work. As explained by one member, "[W]e completely felt ownership over the whole thing. . . . [Serving on the assembly] is one of the proudest things I've ever done."[42] Describing his experience, one member commented, "I felt that as the sessions were done, people were starting to think very deeply and seriously about [abortion]. I could see them moving in the direction we eventually

41. In any deliberative forum that relies on statistical sampling, there are concerns that those who choose to participate differ from those who decline or fail to respond. Many argue participants are likely to be better educated, better informed, and perhaps, more progressive. In conducting their deliberative polling experiments, however, James Fishkin and Robert Luskin found that those who participated were largely representative of the public (2005). For a detailed explanation of the selection process and assembly membership, see www.citizensassembly.ie.

42. Author's interview, July 2018.

got to."[43] Another member stated her belief that the citizens on the assembly were "wildly more informed than the politicians. [There was] very little we didn't know by the end."[44] The members described a heavy workload, but they emphasized the impartiality of the expert witnesses, the flexibility of the process to their requests, the depth and inclusivity of the discussions, and the open-mindedness of the citizens involved. Indeed, responsiveness to member feedback and consensus building were critical elements of the design process. Members were surveyed before and after each weekend to ensure they received the information they needed and felt their voices were being heard. Thus, the citizens were not only part of the process, they helped *shape* it.

Most members of the Citizens' Assembly and politicians on the Oireachtas committee concede that the Eighth could not have been repealed, especially not in such an overwhelming fashion, were it not for the assembly and that the process itself heightened the legitimacy of the outcome. According to one committee member, the "Citizens' Assembly report gave the committee a starting point that couldn't have been agreed to without it. It was an invaluable template and I couldn't imagine the outcome happening the same way without it."[45] Indeed, the assembly was critical to moving the amendment process forward, not only by providing a specific recommendation to repeal the Eighth and replace it with a provision allowing the Oireachtas to regulate abortion rights but also by providing specific recommendations for the subsequent legislation, allowing the Oireachtas to craft a regulatory framework ahead of the referendum campaign.[46]

The assembly not only provided the Oireachtas with a template for the amendment and subsequent legislation but also generated a much larger conversation in society. Information and discussions filtered from the assembly to the public through the media accounts of the assembly's meetings and final report, through the constant engagement with civil society, through the live-streamed and archived sessions, and through the extensive citizen comment period in which the assembly received over thirteen thousand submissions, eventually making their way to the kitchen table and thus engaging the population in this constitutional conversation before the referendum was even initiated. This process helped increase unstructured deliberation within society during the issue-framing and ratification stages, a key

43. Author's interview, July 2018.

44. Author's interview, July 2018.

45. Author's interview, June 2018.

46. The report recommended the grounds under which the termination of a pregnancy should be permissible, including rape, incest, fatal fetal abnormality, and socioeconomic considerations.

factor in assessing the legitimacy of referendum campaigns (Tierney 2012).[47] These recommendations also served as a political constraint on elected officials by providing civil society organizations with a powerful accountability mechanism through which they could judge the votes in committee and the referendum campaign.

Thus, the assembly played a critical role in legitimizing the revolution. In an RTÉ exit poll, 66 percent of voters stated that they were aware of the Citizens' Assembly process. As well, respondents reported much higher levels of trust in the assembly (6.5/10) than in elected politicians (4.2/10).[48] Indeed, the very fact that citizens were the ones deliberating on the issue, rather than politicians, heightened the legitimacy of the outcome by tapping into a well of social trust during a time of low political trust. According to one citizen interviewed by *The Guardian*, "[T]he Citizens' Assembly meant the discussion about our abortion laws was led by the people rather than politicians. . . . Crucially, a citizens' assembly is non-partisan and so it creates a people-led discussion and understanding of an issue. I think this also helps create a debate that isn't dominated by black-and-white mantras from political parties but a more nuanced discussion about the issues. . . . Furthermore, politics can feel far removed from the average person and so the discussion and findings can feel far more relatable." Yet another emphasized that "the fact that it was citizens who recommended the terms of the referendum and informed the proposed legislation introduced greater clarity, and meant voters did not just have to trust politicians since a representative body of their fellow citizens had carefully reflected on the matter and recommended these changes following significant education and deep reflection on the situation" (Bannock 2019). Recent experimental evidence also demonstrates that while many citizens did not change their personal opinion regarding abortion rights following the repeal process, many updated their perception of the societal norm regarding abortion, suggesting that "they accept the result . . . as legitimate" (Jung and Tavits 2021, 2).

This deliberative process thus allowed for a truly representative and more direct expression of the wishes of the public than could have occurred with a referendum alone. By including citizens, allowing them to deliberate in a free, equal, and transparent fashion, and encouraging extensive comment from experts, civil society

47. While the result of the referendum and the vote in the Citizens' Assembly are similar, the constant exchange between the structured and unstructured deliberative arenas makes it difficult to assess whether the decision of the assembly reflected public opinion at the time of the deliberations or the assembly's recommendations subsequently affected public opinion. However, this connection between structured and unstructured deliberation is critical to the formation of a truly deliberative process.

48. The full exit poll is available online at https://static.rasset.ie/documents/news/2018/05/rte-exit-poll-final-11pm.pdf.

organizations, and members of the public, this exercise in deliberative democracy increased the salience, acceptability, and legitimacy of the assembly's final recommendations by ensuring that the issue-framing process engaged the public in a critical constitutional conversation. There can be little doubt that the assembly's recommendations represent an appeal to popular sovereignty by ensuring that the proposed constitutional change reflects the will of the people. So too, by ensuring that the assembly's recommendations were considered and ratified by the elected members of the Oireachtas and subsequently approved by the public in a referendum, Ireland ensured that its constitutional revolution has been properly considered through a dialogical process that constructed sufficient checks on momentary passions. As one senator stated,

> It was a really good process of deliberative democracy based around evidence. When you followed the whole process . . . you can actually see three journeys. You can see the journey on the Citizens' Assembly, you can see the journey on the Oireachtas committee, and you can see the journey in terms of the electorate. With an issue as complex as [abortion], what you have to do is engage society in a way that enables society to stop and think and take a closer detailed look at what we're talking about. And I think over the process of the last couple of years that is what actually happened. Engagement in a real sense happened. Conversations happened. But they sprung from [the assembly].[49]

Since this process occurred within the bounds of the existing constitutional system, it cannot be considered a pure expression of the primary constituent power. However, in fashioning a dialogical process that went beyond the ordinary amendment procedure by fostering citizen representation and deliberation—both structured and unstructured—in the drafting *and* passage of the revolutionary amendment, the citizens and political leaders could jointly base their constitutional revolution on an appeal to a new popular sovereignty independent of the 1937 Constitution, thus approximating the primary constituent power. This appeal to popular sovereignty, as well as the overwhelming outcome in the referendum, provides the normative, political, and social legitimacy necessary for such a controversial shift in constitutional identity to take hold and endure. From the perspective of deliberative civic republican theory, then, the Irish process of incremental, legal, and deliberative constitutional revolution should be considered a model for states who wish to engage their citizens in a process of profound constitutional change.

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49. Author's interview, July 2018.

Although the repeal of the Eighth was a revolutionary moment for Ireland, the process of change in the nation has not yet concluded. As stated by TD Louise O'Reilly, "We're emerging from a period of over-dominance of the Catholic Church where we're trying to rebuild our identity. We have broken the link between church and state. We have to think about how to replace it, but that can't happen quickly. It has to be inclusive and it has to be deliberative."[50]

IV. BREXIT AND THE LIMITS OF REFERENDUMS IN REVOLUTIONARY CHANGE

In the previous section, I demonstrated that Ireland created deliberative and representative mechanisms that ensured the controversial shift in constitutional identity approximated the primary constituent power, enhancing the legitimacy of the ultimate outcome. Next, I look to the United Kingdom's Brexit process to highlight the limitations of referendums in legitimating revolutionary amendments.[51] When assessing the United Kingdom's ongoing constitutional revolution, I address three questions: Can the United Kingdom's withdraw from the European Union be considered an amendment to the constitution? Can it be seen as revolutionary? Can it be seen as legitimate?

The United Kingdom's unwritten constitution presents a challenge when determining what is and is not a constitutional question. In reviewing the history of European integration in the United Kingdom, however, it becomes clear that the European Union and its institutions have profoundly shaped the state's constitutional development (Eleftheriadis 2017; Matthews 2017; Young 2017; Loughlin 2018). By joining the supranational body, the United Kingdom delegated a significant amount of governing authority, undermining the core principle of parliamentary supremacy (see Dicey 1915), as EU law took precedence over domestic law. So too, EU membership led to the adoption of the Human Rights Act, which, along with the integration of other EU laws and regulations, has empowered and extended judicial review, ultimately facilitating the creation of an independent Supreme Court in 2009 (Loughlin 2018; Weill 2019). Membership in the European Union also facilitated one of the most impactful constitutional transformations in the United Kingdom, devolution, by providing the cross-border institutions necessary for the Belfast Agreement to be

50. Author's interview, June 2018.

51. Note that while this section questions the legitimacy of the Brexit result on procedural grounds, it does not seek to question the substance of the decision (i.e., Brexit is inherently illegitimate as a policy matter) beyond a suggestion that the substance *may have* been different under different procedural circumstances.

negotiated and approved by voters in Northern Ireland. In essence, the United Kingdom's relationship with the European Union has, over time, radically altered the state's constitutional arrangement by undermining the nation's strict commitment to parliamentary sovereignty and facilitating the breakdown of its unitary character. Membership in the European Union, then, was indeed revolutionary.

If EU membership facilitated a constitutional revolution in the United Kingdom, restructuring the delegation of sovereignty in the state over the course of several decades, could the vote to leave produce the same? Certainly, all the post-Brexit constitutional questions have yet to be answered. However, in the 2019 Conservative Party manifesto, Prime Minister Boris Johnson promised a review of the Constitution, specifically focusing on the relationship between the judiciary, Parliament, and the government, as well as a replacement of the Human Rights Act. So too, Brexit has placed the question of Scottish independence and Irish reunification back on the political table.[52] It is still too soon to tell if the nature of judicial review or the relationship between the central and devolved governments will be radically altered. Most significantly and most immediately, however, is the return of significant governing authority back to Westminster from Brussels, repealing—and eventually replacing—the 1972 European Communities Act, a key constitutional statute (Loughlin 2018).[53] Thus, EU law will no longer be supreme over UK law and will no longer be an independent source of legal authority.[54] Consequently, EU law will no longer bind the will of Parliament or the government. This change alone is a massive restructuring of sovereignty, opening the door to further constitutional transformation. Indeed, in *R (Miller) v. Secretary of State for Exiting the European Union* (2017), the Supreme Court argued that Brexit would result in "a far-reaching change to the UK constitutional arrangements." In this way, Brexit can be seen as revolutionary, as the nation's withdrawal from the European Union will radically alter the distribution of power and delegation of sovereignty

52. An October 2020 Ipsos MORI poll showed support for Scottish Independence reaching 58 percent (Reuters 2020).

53. The European Union (Withdraw Agreement) Act, which received royal assent in January 2020, repeals the 1972 European Communities Act, except during the transition period, which closed in December of 2020. This transition period allowed the United Kingdom to convert the relevant aspects of EU law into domestic law. The new powers delegated to the government and the need to decide which competencies would be devolved to Scotland, Wales, and Northern Ireland raise further constitutional questions beyond the scope of this inquiry. See House of Lords Select Committee on the Constitution, European Union (Withdrawal) Bill: Interim Report (3rd Report, Session 2017-19, HL 19).

54. Under the Withdraw Agreement, the European Court of Justice will maintain a limited role in the United Kingdom, particularly as it relates to aspects of the agreement itself.

within the United Kingdom. Whether this revolution will trigger a longer, more transformative revolution is still to be seen.

Thus, the decision to leave the European Union can be considered a constitutional alteration, and this alteration is indeed revolutionary, fundamentally transforming the delegation of sovereignty in the United Kingdom. The final question remains, Can this revolution be seen as legitimate according to the approximation thesis outlined above? To assess this question, it is important to analyze the process of its enactment. Ultimately, the decision to leave the EU and thus trigger a complex process with profound constitutional implications was initiated by a slim majority of UK citizens with post hoc approval by Parliament. So too, the decision to hold this referendum was in part the result of a strategic political calculation on the part of then-prime minister David Cameron in an attempt to win back Conservative voters defecting to the UK Independence Party ("The Gambler" 2013). Although the Conservatives won a parliamentary majority in 2015 with a manifesto promising an in-or-out referendum on EU membership, it is difficult to discern whether an election that did not turn on one issue is in itself a mandate for significant constitutional change (Weill 2019). However, it is certainly understandable that Conservatives would want to honor a critical election promise. Thus, for the purposes of evaluating the revolution, it is important to assess the issue-framing and ratification stages to determine if they were sufficiently representative and deliberative.

It has been clear that the constitutional revolution triggered by the 2016 Brexit vote is controversial in the United Kingdom, especially in Scotland and Northern Ireland. Part of this controversy can be traced to the process through which the Brexit vote was framed, ratified, and implemented. Because revolutionary constitutional change requires a claim to popular sovereignty, a parliament elected for the purposes of ordinary legislation does not usually have the mandate to change the basic structure or identity of the constitution. As discussed, while the tradition of parliamentary supremacy in the nation grants sole constitutional authority to Parliament, the existence of this power does not mean its exercise will be noncontroversial or considered fully legitimate by the public without an additional claim to *popular* sovereignty, especially given the United Kingdom's long history of popular ratification of profound constitutional change (Weill 2019). It can be argued that the government opted to make this change via referendum in an attempt to make such a claim.[55] This argument is particularly apparent as pro-Leave politicians claim a

55. In his 2015 piece on the Scottish independence referendum, Stephen Tierney explores the increasing use of direct democracy in constitutional change in the United Kingdom, suggesting that "a more subtle turn in constitutional culture toward popular participation may well be a longer-term development" (230).

mandate to deliver "the will of the people." However, a national referendum alone may not be a sufficient basis for a claim to popular sovereignty, especially when the issue-framing and ratification processes are not sufficiently deliberative or representative of the people.

The 2016 referendum results demonstrate that the Brexit process was not sufficiently representative of the people of the United Kingdom as a collective sovereign, threatening the national interest. Indeed, in a plurinational state, majoritarian decision-making on significant constitutional questions can "cement existing hegemonic relationships" and threaten the stability of the state if there is little effort to reach intercommunal agreement (Tierney 2012, 278). Thus, the national interest is threatened when the constituent parts are not properly represented in the amendment process. Although the referendum received majority support in England and Wales, both Scotland and Northern Ireland voted against leaving the European Union (63% and 54% respectively). Thus, voters in half the nations that compose the United Kingdom rejected Brexit. Despite the concerns of Edinburgh and Belfast, most post-referendum decisions have been made in Westminster without robust consultation with the devolved governments, which were not given a vote on the legislation that triggered Article 50. Indeed, in *Miller*, the Supreme Court ruled that the power to trigger the United Kingdom's withdrawal from the European Union remained with Westminster alone, limiting the ability of these devolved governments to affect the contours of the Brexit agreement. The lack of regional representation has continued after Article 50 was triggered, causing significant constitutional conflict. The results of the 2019 election, which many commentators claim delivered Johnson a mandate for his Withdrawal Agreement, also highlight the yawning gap between Westminster and the devolved governments. Running on a platform of remaining in the European Union and holding a second independence referendum, the Scottish National Party won the vast majority of seats in Scotland, claiming a mandate for another independence vote. So too, for the first time since the Belfast Agreement, Irish nationalist parties won more seats in Parliament than unionist parties. Although they made gains in Wales, Conservatives won only a plurality of votes in England.

Ultimately, all three devolved governments overwhelmingly passed motions withholding their consent for the Withdrawal Agreement, a mechanism offered to the devolved governments when a piece of national legislation affects devolved capabilities.[56] In doing so, Welsh first minister Mark Drakeford claimed the

56. In Wales, the vote was 35 MLAs to 15. In Scotland, the vote was 92 to 29. In Northern Ireland, the vote to reject the agreement was unanimous.

legislation would result in a "unilateral rewriting of the devolution settlement" ("Brexit" 2020). Although it is still possible to pass legislation without the consent of the devolved governments, as these votes are not legally binding, such an act raises significant constitutional concerns (Loughlin 2018). Thus, while their refusal to give consent to the legislation did not prevent the agreement's passage, it severely limits the ability of Westminster to claim that UK withdrawal from the European Union represents the wishes of the entire country or is in the greater national interest.

The lack of regional representation in the ratification and implementation stage has not only caused friction between the national government and the devolved governments but also undermined the revolution's claim to popular sovereignty, weakening its claim to legitimacy. Indeed, Robert Gascoyne-Cecil, Third Marquess of Salisbury and former prime minister, argued that "no such fundamental change [to the Constitution] shall be introduced into our ancient polity unless England and Scotland are assenting parties to it" (1893, 299). Although the contours of the post-transition Brexit and the impact of the United Kingdom's withdrawal from the European Union remain unclear, the immense controversy is unlikely to disappear in the near future. Indeed, the Northern Ireland protocol remains controversial in the region, generating significant tension between the regional parliament and the Johnson government (Gordon 2021). The controversy surrounding Brexit can be traced to the unrepresentative process through which this revolution was enacted. Ultimately, it appears Brexit was primarily an English revolution.

Thus, the Brexit process has not been sufficiently representative of the various nations that compose the UK and thus not sufficiently representative of the national interest, undermining the revolution's ability to make the claim to popular sovereignty necessary to approximate the primary constituent power. So too, this process was not sufficiently deliberative, further limiting the legitimacy of the ultimate outcome. While the question put to voters may have seemed clear, the constitutional ramifications of Brexit were significant, complex, and largely unknown.[57] Furthermore, the referendum question arbitrarily reduced this complex issue into a binary "Leave" or "Remain" choice, without a consideration of the multitude of potential frameworks for a future relationship (Dunin-Wasowicz 2017). In addition, in voting to leave the Union, citizens were not privy to the contours of a final withdrawal agreement, as one had yet to be negotiated. Indeed, the agreement was finalized more than three years after votes were tallied, in October of 2019. Thus, it is not clear what voters had in mind when they selected the "Leave" option on their ballots.

57. The question put before voters was, "Should the United Kingdom remain a member of the European Union or leave the European Union?"

Given this lack of information, the referendum campaigns turned on vague promises rather than concrete constitutional policy. Citizens were thus not able to fully consider the revolutionary change put before them. In this way, both the campaigns and the media have been criticized for failing to ensure citizens were well informed (Renwick et al. 2016; Lamond and Reid 2017; Organ 2019). For its part, the media has been criticized for focusing on "the process and conduct of the referendum campaigns" rather than the substance of the constitutional change (Deacon et al. 2016, 3). So too, both campaigns have been charged with making significant false statements during the referendum period (Renwick et al. 2016; Lamond and Reid 2017; Organ 2019). One of the most blatant misstatements, the Leave campaign's claim that "we send the EU £350 million a week, let's fund our NHS instead," was believed to be true by 47 percent of the public despite being incorrect and misleading (Ipsos MORI 2016; Organ 2019). Lead Leave campaigner Nigel Farage backed off this claim only after the referendum had passed (Bulman 2016). Inaccurate or misleading information was not limited to the pro-Leave side, however. During the campaign, the Remain campaign argued that each household would be £4,300 worse off if the United Kingdom left the European Union. This claim was based on just one possible post-Brexit relationship with the European Union (Her Majesty's Treasury 2016) and has been described as "at best a red herring . . . an unhelpful summary of the underlying research" (Full Fact 2016). Similar dubious claims were made on critical topics such as migration, jobs, and the ease with which the United Kingdom would be able to secure a post-referendum withdraw agreement.

Ultimately, over half of voters thought the campaign was not fair and balanced (The Electoral Commission 2016, 7), and "voters were left to rely on their gut feelings, rather than an informed judgment, on the merits of the two alternatives" (Offe 2017). The lack of true deliberation has led many in the media to discuss the phenomenon of "Bregret," or having regret over the outcome of the referendum. Indeed, opinion polls have consistently shown that a plurality of citizens believe the decision to leave the European Union was the wrong one (Edwards 2018; Curtice 2020).

The ability of citizens to make an informed judgment on revolutionary constitutional change is critical to the legitimacy of the ultimate outcome. According to Stephen Tierney,

> If a referendum is to overcome the elite control and deliberation deficit criticisms it must be shown to offer a meaningful space for an exercise in collective public reason by citizens who understand an issue, engage with it, and are able to make an informed decision relatively free from elite-led influences and pressures. (2015, 637).

Without proper deliberation, it is difficult to make the claim to popular sovereignty necessary for an approximation of the primary constituent power. In framing the question put to voters, the Brexit campaign failed to take seriously the issue of proper voter education by reducing the potential options, focusing on process rather than substance, offering vague promises, and perpetuating misinformation. Ultimately, voters were not privy to the contours of a post-Brexit constitutional arrangement and thus could not exercise proper judgment in voting in the referendum. As stated by several prominent scholars in a pre-referendum opinion piece, "[A] referendum result is democratically legitimate only if voters can make an informed decision. Yet the level of misinformation in the current campaign is so great that democratic legitimacy is called into question" (Renwick et al. 2016). Indeed, an unofficial citizens' assembly on Brexit produced a report calling for a much closer relationship with the European Union than was ultimately produced by the Johnson government (Renwick et al. 2017). This lack of deliberation has contributed to the current turmoil in UK politics as Britons remain unsure about the future of the United Kingdom outside the European Union. Indeed, a truly deliberative process may have been able to bridge the gap between the preferences of voters in Wales and England and those in Northern Ireland and Scotland, focusing attention on the greater national interest.

The overwhelmingly majoritarian and centralized process, along with the lack of robust deliberation and representation, however legal or steeped in tradition, poses significant problems for the legitimacy of profound constitutional change, especially in a multinational state. The lack of consideration given to public sentiment in Scotland and Northern Ireland threatens the union itself as the Scottish government demands a second vote on independence and talk of an Irish border poll increases. So too, the lack of proper citizen education and deliberation has created unease and uncertainty, contributing the volatility in UK politics. While one could argue that the results of the 2019 election reflect public deliberation on Johnson's Withdrawal Agreement, it is difficult to interpret the results of an electoral campaign that ultimately turns on many issues at once. So too, the majority of the public voted for parties that either supported remaining in the European Union or advocated for a second referendum. This Brexit process stands in stark contrast to the process used to join the European Union (then the European Communities, or EC) in 1973. The membership referendum that resulted in continued EC membership came after several years of negotiations and over two years of pre-referendum membership. So too, continued membership in the EC ultimately earned the support of over 67 percent of the country

and was supported by each of the four nations. Thus, citizens had a great deal more information at their disposal when making such a monumental decision, and consequently the constitutional change could claim to represent the national interest.

Together, the lack of proper representation and deliberation in the Brexit process undermines the ability of the revolution to make a claim to popular sovereignty, limiting the legitimacy of the revolution. While the constitutional questions being debated in both Ireland and the United Kingdom began with approximately 50 percent support, the process in Ireland resulted in an outcome supported by over two-thirds of the nation while in the United Kingdom, the outcome received the support of only a narrow national majority and has only decreased in popularity (Curtice 2020). Ultimately, success can breed legitimacy, and Brexit may yet gain legitimacy among the entire nation. However, this is a much longer and more difficult path to social legitimation, and the United Kingdom is still grappling with implementation issues surrounding the Northern Ireland Protocol (Gordon 2021) and significant trade disruptions (Colson 2021) that continue to threaten the legitimacy of the ongoing constitutional transformation.

V. CONCLUSION

Constitutions serve as a critical link between a foundational past and an aspirational future. As such, they embody the historic experience and identity of the polity as well as the goals and aspirations of its people. This duality inevitably creates disharmonies that can fuel movements for radical change. In times of great change, the people embody their Jeffersonian right to revolution, ensuring that their constitutive document remains linked to the values of the living generation. However, this revolution need not lead to a wholly new constitution, nor need it occur in a single moment of conscious sociopolitical mobilization. Constitutional revolutions, then, can be much more subtle and complex than originally theorized.

Ultimately, constitutional revolutions can be achieved legally, through the use of the amendment power. Such revolutionary amendments will be considered legitimate if the process of enactment, in both the issue-framing and the ratification stage, approximates the primary constituent power, using a representative and deliberative process designed to make a new claim to popular sovereignty independent of the existing document. The approximation thesis augments the basic structure doctrine and the doctrine of unamendability, giving states a process by which they can legitimately change the fundamental nature of their constitutional

order. So too, this theory supports the practice of tiered constitutional design (Dixon and Landau 2018).

Although the approximation thesis is primarily a normative theory of constitutional change that connects the concept of the revolutionary amendment to the theories of constituent power and popular sovereignty, the contrasting outcomes in Ireland and the United Kingdom demonstrate its empirical value. These cases highlight the importance of procedural legitimacy in the constitutional arena, demonstrating the need for proper citizen representation and deliberation in constitutional transformation. These are not the only cases of revolutionary constitutional amendments, however, and they do present their own limitations. Whereas the revolution in Ireland was largely cultural, the revolution in the United Kingdom involved changes to political and economic structures.[58] However, initial experimental research has found that the public is more skeptical of profound constitutional changes to rights than changes to institutions, making the Irish case a more difficult test (Cozza 2019). The Irish revolution was also more gradual than the Brexit process, which certainly contributed to its success. This gradual approach helped Ireland meet the approximation standard, facilitating the intense deliberation necessary for the success of each amendment.[59] In addition, although Irish law on abortion rights has often involved discussions with the European Union, the revolution in Ireland was almost entirely domestic, whereas the revolution in the United Kingdom involved a complex relationship with a supranational entity. Also, whereas Ireland is a unitary nation-state, the United Kingdom contains multiple nations with their own devolved governments. Finally, while Ireland has a written constitution, the United Kingdom's remains largely uncodified.

Thus, future scholars should use this approximation thesis to examine other instances of constitutional revolution. So too, experimental analysis can be used to determine when citizens believe a heightened process is necessary for the legitimacy of constitutional change, ordinary and revolutionary, institutional and cultural, and to examine which mechanisms best facilitate this approximation.

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58. Certainly, membership in the European Union presents questions of cultural and national identity; however, these were not the paramount considerations in the Brexit debate.

59. Although the pace of the changes contributed to the outcome, those interviewed for this study argue that it is unlikely these amendments would have been successful without the deliberative and representative Citizens' Assembly process.

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