

# UNDERSTANDING INFORMAL CONSTITUTIONAL CHANGE

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**ABSTRACT:** Amid much recent American work on the problem of informal constitutional change, this article stakes out a distinctive position. I argue that theories of constitutional change in the US must address the question of the relationship between the “small c” and “big C” Constitution and treat seriously the possibility of conflict between them. I stress the unavoidable role the text of the Constitution and structural doctrines of federalism and separation of powers play in this relationship and thus in constitutional change, both formal and informal. I therefore counsel against theories that rely solely on a practice-based approach or analogies between “small c” constitutional developments and British or Commonwealth traditions of the “unwritten” constitution and constitutional “conventions.” The alternative I advocate is to approach constitutional change from a historicist perspective that focuses attention on state building and the creation of new institutional capacities. This approach will allow us to make progress by highlighting that there can be multiple constitutional orders in a given historical era, thus accounting for the conflictual nature of contemporary constitutional development in the US.

**KEYWORDS:** Constitutional Theory; American Constitutionalism; Constitutional Change; Constitutional Amendment; Informal Constitutional Change.

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**RESUMO:** Entre muitos trabalhos norte-americanos recentes sobre o problema da mudança informal da Constituição, este artigo demarca uma posição distinta. Teorias da mudança constitucional nos Estados Unidos, aqui se argumenta, devem abordar a questão da relação entre a constituição (com “c” minúsculo) e a Constituição (com “C” maiúsculo) e tratar com seriedade a possibilidade de conflito entre elas. Destacam-se o papel inevitável que o texto da Constituição e a doutrina estrutural do federalismo e da separação de poderes desenvolvem nessa relação e, assim, na mudança constitucional, tanto formal, quanto informal. Com isso, teorias que repousam, exclusivamente, em uma abordagem prática ou em analogias entre desenvolvimentos da constituição (com “c” minúsculo) e tradições, que há na Grã-Bretanha e na *Commonwealth*, de constituição não-escrita ou “convenções” constitucionais não são aconselhadas. A alternativa que se advoga é abordar a mudança constitucional a partir de uma perspectiva histórica que enfoca a construção do Estado e a criação de novas capacidades institucionais. Essa abordagem permitirá que se progrida ao enfatizar que, em determinado período histórico, pode haver múltiplas ordens constitucionais, portanto, correspondendo à natureza conflituosa do desenvolvimento constitucional contemporâneo nos Estados Unidos.

**PALAVRAS-CHAVE:** Teoria Constitucional; Constitucionalismo Norte-Americano; Mudança Constitucional; Emendas Constitucionais; Mudanças Constitucionais Informais.

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## I. INTRODUCTION

The study of constitutional change has moved from the periphery of US constitutional theory to the center. Compared to the situation in the 1990s when Bruce Ackerman's theory of transformative "constitutional moments" was nearly the only one on offer,<sup>1</sup> numerous prominent scholars are energetically engaged in advocating a diverse set of theories.<sup>2</sup>

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<sup>1</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, VOL. 1 (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, VOL. 2 (1998). For a symposium summarizing the state of the debate in the late 1990s, see *Moments of Change: Transformation in American Constitutionalism*, 108 *YALE LAW JOURNAL* 1917 (1999). Even in the 1990s, of course, there were alternative approaches. See, e.g., STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1 (1998).

<sup>2</sup> See, e.g., DAWN OLIVER & CARLO FUSARO, *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* (eds., 2011); BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS MOVEMENT*, VOL. 3 (2014); AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) (account of unwritten constitution); JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (theory of political and social movements); ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009) (empirical study of constitutional longevity); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (theory of entrenched "superstatutes"); STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013) (theory of "constitutional orders"); GERARD N. MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007) (theory of "constitutional generations"); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) (theory of "constitutional showdowns"); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (theory of "common law constitutionalism"); MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* (2010) (regime-based theory); Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 *AMERICAN JOURNAL OF COMPARATIVE LAW* (2014); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VIRGINIA LAW REVIEW* 1045 (2001) (theory of "partisan entrenchment"); Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *DUKE LAW JOURNAL* 1213 (2015); Aziz Z. Huq, *The Function of Article V*, 162 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW* 1165 (2014); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 *HARVARD LAW REVIEW* 657 (2011); Richard Primus, *Unbundling Constitutionality*, 80 *UNIVERSITY OF*

Yet as a consequence it cannot be said that there is one dominant approach. Although the field is highly productive, it is clearly in a state of ferment.

Speaking broadly, scholars are concerned with the problem of informal constitutional change. This is one of the most significant problems in American constitutional theory – yet, I will argue, one of the least understood. The problem is how to account properly, on both descriptive and normative dimensions of analysis, for the substantial amount of seemingly legitimate fundamental “informal” change that has occurred to the US Constitution outside the formal Article V amendment process. My purpose is to define and probe the nature of this problem, critique some influential practice based approaches, and argue for the descriptive and normative cogency of a historicist approach that understands constitutional change, both formal and informal, in terms of state-building.

The article proceeds in three parts. Part II is introductory. It is intended to establish a common ground for understanding the problem the phenomenon of informal constitutional change poses for American constitutional theory. It describes the phenomenon along descriptive and normative dimensions of analysis and briefly summarizes what I take to be the stakes of the inquiry. Part III provides a critique of recent, mostly descriptive theories that take a practice based approach. These theories in effect advocate adapting the British or Commonwealth “unwritten constitution” tradition to the case of the US. Although necessarily somewhat schematic for reasons of space, Part IV presents the alternative historicist approach I have developed in prior work that understands constitutional change, both formal and informal, in terms of state building and multiple governing orders. I argue that such a theory offers the greatest likelihood of progress in the effort to reach a better understanding of informal constitutional change.

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CHICAGO LAW REVIEW 1079 (2013); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUMBIA LAW REVIEW 1163 (2013) (theory of constitutional “conventions”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007) (practice based theory).

## II. THE PROBLEM OF CONSTITUTIONAL CHANGE

By constitutional change, we could mean several different things. It might mean focusing on the shifting interpretations of particular provisions of the Constitution by the Supreme Court in the course of judicial review. Ordinarily, however, interpretive change is guided by the text, basic doctrines linked to the text such as federalism and separation of powers, and the Court's own precedents. That is, it is interpretation under law. The guiding framework of the Constitution itself does not change.

Another way to approach constitutional change is to focus on the twenty-seven duly adopted amendments to the US Constitution. But here we face a widely-acknowledged difficulty. Some of these amendments, such as those enacted during the Civil War and Reconstruction, are of undoubted significance. But many are almost unknown to lawyers today and do not serve as significant sources of law. The true difficulty is that there is arguably an enormous gap, a clear asymmetry, between the government the Constitution describes and the contemporary governing order, which we may think of as the full range of significant government institutions and practices. What tends to distinguish US constitutionalism from other countries is that Americans are still dealing with much the same text more than two hundred years after the first presidential administration began operating in 1789. The text has changed little yet, in the judgment of many, governance has changed massively.<sup>3</sup>

If this picture is plausible, it creates a challenge for attempts to understand change either in terms of common law judicial doctrine or formal amendments. There is a basis for arguing that fundamental constitutional changes have occurred that have not or cannot be captured through standard-form evolution in constitutional doctrine by the Supreme Court. In this connection, we should remind ourselves that the Court has never had the power to adjudicate all possible constitutional disputes, as some are not "justiciable."<sup>4</sup> This is relevant, for example, to

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<sup>3</sup> The plausibility of this claim has been enhanced greatly by a magisterial reader on the history of American constitutionalism. See HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT*, VOL. 1 (2013); HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES*, VOL. 2 (2013).

<sup>4</sup> See STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996), pp. 17-18; Gerard N. Magliocca, *Constitutional Change*, in THE OXFORD

the development of presidential war powers, an area that the Court has not legalized by cabinining it with a set of common law precedents.<sup>5</sup> It is true that some fundamental changes are attributed to the Supreme Court, such as those that occurred during the New Deal. Yet such fundamental cases are almost as rare as formal amendments.

These observations point toward the relevance and significance of *informal* constitutional change. Provisionally, this is fundamental change outside formal amendment and “ordinary” judicial interpretation of the Constitution. As we have seen, the relevance of informal change is highlighted when we ask how we got from the kind of government existing in 1789 to the far more complex governing order that exists today.<sup>6</sup> As just suggested, most scholars who have addressed this problem believe that despite the significance of a few of the amendments adopted through the Article V process after the Bill of Rights, such formal changes fall well short of a full accounting of the fundamental constitutional changes that have happened since the early republic.<sup>7</sup>

We can usefully explore this problem along two dimensions – a surface descriptive difficulty and a deeper normative challenge. With respect to the descriptive dimension, many scholars simply do not find it credible that the spare text of the Constitution adequately describes or somehow undergirds all of the fundamental institutions and practices that constitute the government of the United States.<sup>8</sup> The prevailing sense is that over time the Constitution has described less and less about the way government actually works. The challenge of explaining fundamental informal constitutional change became especially acute in the twentieth century. Whole categories of government actors such as “independent” regulatory agencies are unmentioned.<sup>9</sup> Specific agencies

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HANDBOOK OF THE U.S. CONSTITUTION (M. Tushnet, M. Graber & S. Levinson eds., 2015), pp. 909-914.

<sup>5</sup> See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

<sup>6</sup> See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001).

<sup>7</sup> See David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1469.

<sup>8</sup> See, e.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARVARD LAW REVIEW 657 (2011), pp. 697-705; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1469-75; Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007), pp. 415-28.

<sup>9</sup> For a comprehensive review of these agencies, focused on the degree of independence they have from the president, see Kirti Datla & Richard L. Revesz,

of critical importance to national policymaking such as the Federal Reserve Board or the Central Intelligence Agency do not appear. Impressive powers such as the presidential power to initiate war appear to be created by circumstances subsequent to the ratification of the Constitution and so are not reflected in the document.<sup>10</sup>

David Strauss's provocative argument on the "irrelevance" of the formal amendments to the Constitution is an especially enlightening example of the scholarly take on the relative lack of amendments and the corresponding belief that the phenomenon of informal change is significant.<sup>11</sup> Strauss maintains that the following are clear examples of fundamental changes that amount to amending the Constitution outside the text:

- 1) Enormous growth in the permissible range of federal legislation, especially in relation to the state governments;
- 2) Expansion of power of the President, especially in foreign affairs;
- 3) Creation of an administrative state with the delegated power to make rules and adjudicate cases.<sup>12</sup>

Note that the content of Strauss's list rests more on an appeal to history than jurisprudential considerations. That is, Strauss does not present criteria to identify legally valid informal amendments. He constructs his list from "the kinds of developments that an untutored reader of the Constitution would expect to be accompanied by a change

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*Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL LAW REVIEW 769 (2013).

<sup>10</sup> See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

<sup>11</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001). Strauss generously cites my own early work in which I advanced much the same thesis. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1470, n. 28 (citing Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (S. Levinson ed., 1995), pp. 37. I should note therefore that I do not endorse Strauss's specific argument that formal amendments are somehow irrelevant to constitutional change. I critique this argument with respect to the Reconstruction Amendments in Part III.

<sup>12</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1469-73.

in the text.”<sup>13</sup> This may suffice to get the discussion off the ground, but it rests on a controversial assumption about how to determine when a fundamental informal change has occurred. Whereas some observers might consider informal constitutional change to be routine, others might see much “informal” change as occurring through the “formal” common law judicial process and thus discount the possibility that fundamental changes have occurred outside both formal amendment and judicial interpretation. Obviously people can differ over what new institutions and practices are so “fundamental” that they must be authorized by the Constitution. Yet the prevailing sense is that we have seen so many significant developments in the process of government and so few corresponding amendments that arguments like Strauss’s are plausible.

The conventional wisdom illustrated by Strauss’s argument is that because formal amendments explain so little, *informal constitutional change* is doing all the work. It is in response to this felt reality that scholars have elaborated theories in order to address the descriptive difficulty and so better understand the contemporary governing order.<sup>14</sup> What are the stakes along the descriptive dimension? The idea seems to be that without a reliable way to conceptualize informal constitutional change, we risk holding on to an increasingly problematic understanding of what the Constitution amounts to in contemporary times. It has become *de rigueur* for scholars to urge that we have a “big C” and a “small c” Constitution.<sup>15</sup> They maintain that keeping both in view is necessary to understanding American constitutionalism.

Here we begin to tread on the deeper normative challenge, which I suggest is not well understood. As I will argue, the critical normative issue is the *relationship* of the “small c” constitution – presumably full of contemporary institutions, “superstatutes”<sup>16</sup> and practices – to the “big C” Constitution.<sup>17</sup> I maintain that the “small c” – “big C” distinction states at most the *starting point* for descriptive and normative analysis, *not* the *solution* to the problem of constitutional change.

Consider the issue, mostly bypassed by Strauss, of how should we define informal constitutional change. The “small c,” “big C” distinction

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<sup>13</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1469.

<sup>14</sup> See, e.g., the theories listed *supra* note 2.

<sup>15</sup> See *supra* note 8.

<sup>16</sup> See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010), pp. 12-22.

<sup>17</sup> Richard Primus, *Unbundling Constitutionality*, 80 UNIVERSITY OF CHICAGO LAW REVIEW 1079 (2013), pp. 1083.

tends to simply restate the problem. Earlier, I suggested that what we should be interested in are *fundamental* constitutional changes that occur through informal means (again, outside formal amendment and “ordinary” judicial interpretation). In other words, informal changes that are nonetheless in some sense equivalent to significant formal amendments.<sup>18</sup> But how are we to understand the notion of “equivalent?” It is time to provide some specific criteria. I suggest the sort of informal changes we are interested in: (1) relate to the subject matter of the Constitution (e.g., the exercise of a constitutional power or right); (2) are fundamental to governance in some sense; and (3) have the same legal status as the Constitution itself, i.e., are regarded as supreme law.

These criteria may strike some as too stringent, especially (3). I will argue for their plausibility throughout the article. For now, I will simply suggest that without them, we are in jeopardy of being unable to distinguish between the relatively limited sphere of the Constitution and the much larger spheres of ordinary law and politics. To be sure, a few scholars have gone down this road, in effect proposing to eliminate the line between the constitutional and political by counting any important political change as “constitutional.”<sup>19</sup> In my view, this gives the game away before we determine whether it is possible to identify a boundary line and advance the discussion about constitutional change in a different direction.

I will sharpen these criteria a bit further by specifying that fundamentality in (2) is a qualitative standard assessed relative to a governing order and that (3) might indeed pose difficulties given we are dealing with, after all, informal change. Nonetheless, as just suggested, I will defend (3) as being necessary to mark truly *constitutional* change. It may turn out that a supremacy requirement renders the category of informal change somewhat problematic. But consider for now that this may be entirely appropriate, given that making *fundamental informal* changes within a system based on *formal* premises poses normative difficulties. Why might this be the case?

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<sup>18</sup> In general terms, this aligns the scope of my inquiry with Bruce Ackerman’s. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, VOL. 1 (1991); BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, VOL. 2 (1998).

<sup>19</sup> This is the problem I see with respect to the theory of constitutional construction offered by JACK M. BALKIN, *LIVING ORIGINALISM* (2011), pp. 297-300. I comment on this point in Stephen M. Griffin, *How Do We Redeem the Time?* 91 TEXAS LAW REVIEW 101, (2012), pp. 108-11.

These difficulties are not well appreciated because scholars tend to uncritically assume a peaceable relationship between the “big C” Constitution and its “small c” counterpart. The conventional wisdom is that the provisions of the “big C” Constitution exist harmoniously alongside later “small c” informal developments. Although I do not wish to advance a completely contrary picture of “nature, red in tooth and claw,”<sup>20</sup> the implicit assumption of harmony strikes me as misleading. We need to take seriously the possibility of *conflict* between “small c” informal practices and the “big C” Constitution, a conflict given life and fueled by the unquestioned legal supremacy of the latter.

To illustrate briefly the reality of conflict, consider Strauss’s examples of informal constitutional change. The first and third examples, which we may call the “welfare state” and “administrative state” respectively, have been under steady attack by the conservative legal movement for decades.<sup>21</sup> Furthermore, the attack is firmly based on what that movement sees as the supreme law of the “big C” Constitution.<sup>22</sup> One of the latest significant episodes was the surprise challenge to President Obama’s Affordable Care Act.<sup>23</sup> This initiative which fell just short of succeeding, was partly grounded in libertarian thinking<sup>24</sup> and resulted in the rewriting of a critical part of the statute (the expansion of the Medicaid program for the poor) on the basis of the doctrine of federalism.<sup>25</sup> With respect to the second example, whether we call it the “imperial presidency”<sup>26</sup> or the “warfare state,”<sup>27</sup> it has been under steady challenge by liberals ever since the Vietnam War as contrary to both the text of the Constitution and the doctrine of separation of powers.

Although each of Strauss’s examples plausibly identifies an arena in which informal constitutional change has occurred, it also appears *for that reason* that informal change creates a deeply contested ground of

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<sup>20</sup> Quoted from ALFRED, LORD TENNYSON, *IN MEMORIAM* A.H.H (1849).

<sup>21</sup> See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

<sup>22</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

<sup>23</sup> *National Federation of Independent Business v. Sibelius*, 132 S.Ct. 2566 (2012).

<sup>24</sup> ANDREW KOPPELMAN, *THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM* (2013).

<sup>25</sup> *National Federation of Independent Business v. Sibelius*, 132 S.Ct. at 2581-82.

<sup>26</sup> ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

<sup>27</sup> REBECCA U. THORPE, *THE AMERICAN WARFARE STATE: THE DOMESTIC POLITICS OF MILITARY SPENDING* (2014).

constitutional conflict. Yet how is this possible if, by hypothesis, such “small c” informal changes are accepted modifications to the constitutional order? Theories of informal change have generally ignored this normative difficulty. One obvious possibility is that the legitimacy of the informal changes is questionable given that they were not adopted through the Article V process. In any case, in order to improve our understanding of the problem of constitutional change, we need to understand how such conflicts are possible. Only then will we be in a position to construct sounder theories.

We need to proceed with caution at this point. Insisting on the key role informal change plays in American constitutionalism is often confused with the thesis that formal change is unimportant or, worse, that the text of the Constitution and doctrines such as separation of powers and federalism are irrelevant to informal change. So, for example, some may see the role of informal change as filling the gaps left by the framers of the Constitution. Although this view is plausible to an extent, most of the fundamental changes made through informal means are not best viewed as filling gaps. Indeed, they were *resisted* precisely on the ground that they were radically inconsistent with the formal Constitution. All of Strauss’s examples are apposite here (arguably, they are still being contested!).

If informal constitutional change has been common, it has also thus been deeply problematic because of its fraught relationship with the “big C” Constitution. Yet this is one of the least understood aspects of the problem of constitutional change. Scholars have been overlooking that in most of the major episodes of constitutional change in American history, formal and informal, doctrines of federalism and separation of powers play a prominent role. These structural doctrines cannot be divorced from the “big C” Constitution. At the same time, although they are well-accepted features of the Constitution, they are not literally and completely specified within the bounds of the text, something the Supreme Court has repeatedly emphasized.<sup>28</sup> The hard-core textualism that infuses much of contemporary American constitutional theory makes it more difficult for scholars to comprehend eras of constitutional change, such as the antebellum period, Civil War and Reconstruction, in

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<sup>28</sup> On the Court’s federalism decisions, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harvard Law Review* 2003 (2009). With respect to the existence of a freestanding separation of powers doctrine, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harvard Law Review* 1939 (2011). It should be noted that Manning is critical of both of these doctrines to the extent that they are not rooted directly in the Constitution’s text.

which such doctrines dominated debates over the meaning of the Constitution.

What happens during these eras of constitutional change is that policy proposals are resisted on the ground that they are unconstitutional and can be made only through the formal amendment process. Opponents of change thus attempt to defeat these proposals by invoking the authority of the Constitution. In contemporary terms, opponents argue that doctrines of federalism and separation of powers not literally in the text are nonetheless “hard-wired” into the “big C” Constitution. If such claims are accepted, this creates a historical basis for thinking that fundamental constitutional change will occur if the proposals are adopted. To accomplish this, proponents of change have several options. One way is to advocate adoption of a constitutional amendment, but clearly this option will always be more costly than making the change through legislation or other political means. Another path is through the Supreme Court, but this presumes proponents already control it. Still, there are eras of change such as New Deal in which one side claims victory based on a combination of repeated attempts to enact path breaking legislation and landmark Court decisions. One signal challenge for theories of constitutional change is to account for such periods in which arguably “amendment-like” changes take place outside Article V.<sup>29</sup>

These historical episodes illustrate why the stakes are so significant with respect to reaching a sound understanding of the role of informal constitutional change. Arguments about constitutionality assume a legal baseline established in the past against which current laws and practices are assessed. Using the original “big C” eighteenth-century baseline is appropriate only if it has not been legitimately changed, formally or informally. On the descriptive dimension, theorists tend to agree that without a sound account of what is “in” the Constitution, we will not be able to accurately map our governing order in a constitutional sense. On the normative dimension, without an adequate theory we cannot reliably evaluate potential conflicts between the “big C” Constitution and informal developments that claim to be legitimate constitutional changes.

The normative stakes are even more substantial than this account suggests. Without an adequate normative theory of informal constitutional change, the legal legitimacy of *all* of the items on Strauss’s list are in question. *None* of them were authorized by formal amendments. Theories of constitutional change are required to construct plausible normative baselines for American constitutional law. A normative

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<sup>29</sup> Ackerman’s theory makes this challenge central. See especially BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, VOL. 2 (1998).

baseline tells us what the Constitution legally comes to at a given time. With respect to the New Deal welfare state, for example, we could say provisionally that it would not count as a legitimate informal constitutional change unless it either fit within a previous legal baseline (such as the original Constitution as validly amended) or somehow legitimately changed the previous baseline. Theories of constitutional change can be judged as more or less adequate depending on whether they can replace this bare construct with historically plausible and persuasive normative justifications of the constitutional order in a given era.

This discussion is meant to be introductory and so I am not trying to rule any particular theory in or out. Nevertheless, I hope that it has suggested something of the significance and complexity of the problem. It is possible to see in this discussion some glimmers of how we can make progress in evaluating the various theories of informal change that have been put forward. Such theories must be mindful of the three criteria for informal change I advanced earlier, especially with respect to the Constitution's essential role as supreme law, find a place for nontextual doctrines such as federalism and separation of powers regarded as part of the "big C" Constitution, and account for the relationship between the "small c" and "big C" Constitution, including the possibility of conflict. In Part III I examine what I take to be the most popular current theories of constitutional change. These are practice based or "small c" theories which take inspiration from the British or Commonwealth tradition of the "unwritten" constitution.

### III. PRACTICE BASED THEORIES MEET FORMAL REALITY

Scholars impressed by the distinction between the "small c" and "big C" Constitution have put forward practice based theories that maintain the US has an "unwritten" constitution. Although I will argue that this approach is ultimately a false trail, considering these theories is a useful way to develop a number of crucial lessons. To anticipate, the primary lesson is that, believe it or not, the text of the US Constitution is legally supreme and so highly relevant to any adequate theory of constitutional change. The text is, so to speak, an independent variable that must always be considered in judging the legitimacy and stability of constitutional changes occurring through informal means. The supremacy of the "big C" Constitution can thus operate to both stabilize and destabilize

informal practices, as it enables the branches of government to stage sudden interventions to override them.

The origin of the practice based approach is generally conceded to be famed legal realist Karl Llewellyn's classic article "The Constitution as an Institution."<sup>30</sup> I will therefore discuss and critique Llewellyn's theory along with more recent practice based theories offered by Ernest Young, Adrian Vermeule, and David Strauss.

In an article still worth reading, Llewellyn proposed what he believed was a realistic theory of how the US Constitution operates. He advocated the concept of the "working constitution"<sup>31</sup> as a "living institution."<sup>32</sup> To Llewellyn, the working constitution consists of practices that are fundamental and essential to the operation of the government.<sup>33</sup> He asserted that the working constitution controls the meaning of the paper document in all but a few cases,<sup>34</sup> stating controversially that practice can negate the text.<sup>35</sup> Ultimately, Llewellyn's theory grounded the working constitution on the behavior of public officials or specialists in government.<sup>36</sup>

Llewellyn began by asserting that the standard approach supposes that the 1789 Constitution plus valid amendments and judicial interpretation is the entire Constitution.<sup>37</sup> He granted this approach is

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<sup>30</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934). Here I draw on a prior analysis of Llewellyn's article. See Stephen M. Griffin, *The United States of America*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* (D. Oliver & C. Fusaro eds., 2011), pp. 357, 366-367.

<sup>31</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 3.

<sup>32</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934).

<sup>33</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 28-31.

<sup>34</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 12.

<sup>35</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 15-16.

<sup>36</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 15.

<sup>37</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 3-4.

useful in some instances.<sup>38</sup> Parts of the 1789 Constitution match the “working constitution.”<sup>39</sup> Like many scholars today, Llewellyn conceded that some provisions are hard-wired and still reflect reality.<sup>40</sup> In general, however, Llewellyn contended that this appearance is misleading and objected to the standard approach on the grounds that it did not adequately describe the real Constitution and how it functioned.<sup>41</sup> He argued that only practice can demonstrate that the text is “*still part of our going Constitution.*”<sup>42</sup> If the Electoral College were to vote for someone not on the ballot, for example, that action would be “contrary to our Constitution.”<sup>43</sup> This is the realm of the Constitution in practice and it has come to be as fundamental as the text.

Llewellyn provides additional examples apparently meant as departures from the 1789 Constitution: “the President’s power over war-making”<sup>44</sup> and the “dependence on him [president] to initiate legislation.”<sup>45</sup> He asserted that there are practices that are part of the working Constitution including the limit of two terms per president.<sup>46</sup> Llewellyn argued these practices cannot be assimilated by calling them “extra-constitutional” for that assumes the standard approach is correct.<sup>47</sup>

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<sup>38</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 4-6.

<sup>39</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 3.

<sup>40</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 11.

<sup>41</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 4, 12.

<sup>42</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 12 (emphasis in original).

<sup>43</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934).

<sup>44</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 13, 16.

<sup>45</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 13.

<sup>46</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 13-14.

<sup>47</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 14. Some additional examples given by Llewellyn: senate filibusters, congressional conference committee powers, president’s power of removal, judicial

Llewellyn proposes that the real Constitution is an institution<sup>48</sup> arising from the interaction of three key groups: specialists in government, private interest groups, and the public.<sup>49</sup> Whenever these groups decide to change the fundamental rules of government, government institutions change and so the constitution changes. As he insisted: “*the working Constitution is amended whenever the basic ways of government are changed.*”<sup>50</sup> Typically, this has been done by the first group, the specialists in governing – “it is they who have remade the pattern of government as we have passed from a dominantly agricultural into a dominantly industrial and on into a dominantly financial economy.”<sup>51</sup>

Llewellyn gave practice such a dominant position that he had trouble accounting for why the Constitution had been formally amended. He gave a somewhat ad hoc response, saying that specialists in government have attitudes that attach enormous importance to the text.<sup>52</sup> He concluded by commenting in a paradoxical way on judicial interpretation, saying that when Supreme Court decisions have no important consequences, the text can play a role. Otherwise, in truly controversial cases, Llewellyn left the sense that the written document didn’t matter to the outcome: “For the rest, the Constitution is an institution.”<sup>53</sup>

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review, the party system, campaign funds. Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 15.

<sup>48</sup> Llewellyn defines an institution as a pattern of behavior. See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 17.

<sup>49</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 19, 21. Llewellyn acknowledged his debt to group theorist ARTHUR BENTLEY, *THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES* (1908). See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 1, and n. 1.

<sup>50</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 22 (emphasis in original).

<sup>51</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934). We might wonder how Llewellyn would handle the possibility of disagreement among these groups over a proposed constitutional change. How would the disagreement be resolved and how would we tell whether a subsequent change was authoritative?

<sup>52</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 23.

<sup>53</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 39. Llewellyn does devote additional effort to defining the working

Many scholars have found Llewellyn's theory provocative and suggestive.<sup>54</sup> He challenged us to explain the constitutional status of the rules that structure fundamental institutions (such as congressional procedures) and key institutions not mentioned in the text such as political parties. But a note of caution is surely appropriate. After all, in Llewellyn's theory the "working" or unwritten constitution virtually swallows the "big C" Constitution whole.<sup>55</sup> The "Constitution" becomes a set of practices without a clear relationship to the text or supreme law. I suggest that the posited near-total transformation of a governing order based on an authoritative text into an "unwritten" British-style system is not very plausible. Although Llewellyn rightly emphasized the role institutions play in constitutional change, I will argue that he should have understood them as rule-based rather than purely as patterns of behavior.

Nonetheless a number of scholars have taken up Llewellyn's banner in contemporary times. Ernest Young has addressed the problem of constitutional change by advancing a similar theory, although Young's presentation is far more thorough and sophisticated than Llewellyn's.<sup>56</sup> Young argues that the functions we associate with the Constitution, such as constituting the basic workings of government and providing rights, are accomplished in the contemporary legal order by fundamental federal statutes and regulations rather than by the spare constitutional text.<sup>57</sup> But in an interesting move, he also contends that to understand our constitutional order properly, we should "decouple the constitutive function of a constitution from the entrenchment function."<sup>58</sup> In other

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constitution. To be part of it a practice or institution must (1) be regular in occurrence; (2) it must involve official office-holders in ways that are important to more than just the participants; (3) the actors must feel that the way or institution is not subject to alteration; (4) alteration can occur under stress; and (5) "it is not essential that the practice or institution shall be in any way related to the document." Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 29-30.

<sup>54</sup> See, e.g., Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE LAW JOURNAL* 408 (2007), pp. 454, n. 235.

<sup>55</sup> For a relevant discussion see DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* (2005), p. 245-50.

<sup>56</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE LAW JOURNAL* 408 (2007).

<sup>57</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE LAW JOURNAL* 408 (2007), pp. 411-12.

<sup>58</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE LAW JOURNAL* 408 (2007), pp. 413.

words, Young does not maintain that constitutive statutes and regulations are supreme or higher law.<sup>59</sup> This move allows him to avoid controversial normative issues and thus more easily specify which subconstitutional rules are part of the informal Constitution.

Young's examples of constitutive statutes are drawn in the main from the arena of the administrative state. He observes that most of government is composed of "vast administrative bureaucracies"<sup>60</sup> rather than people occupying offices created by the Constitution.<sup>61</sup> He cites the example of the Federal Reserve, obviously a critically important government agency regulating the financial system created by statute and unmentioned in the Constitution.<sup>62</sup> Young thus makes the sound point endorsed by many other scholars through the years that the Constitution simply does not adequately describe the basic institutions of the government we actually have. As discussed in Part II, these are the circumstances that create the problem of informal constitutional change.

The practice based theories advanced by Llewellyn and Young perform the valuable service of providing many undeniable examples of new governing institutions that in some sense are permanent pieces of our current governmental (and so presumably constitutional) furniture. But practice based theories also face steep challenges. I will begin with two general observations.

Let's remind ourselves of how we got here. We are trying to understand how the Constitution has changed over time outside formal amendment (and perhaps Supreme Court decisions) because we think it plausible that there have been many fundamental changes in our system of government that are not reflected in the document. One danger is that relying too heavily on notions of practice will erase the difference between the governing actions of the moment and the permanent "big C" Constitution. How are we to distinguish the changes that truly count as fundamental and thus "constitutional?" A practice based approach runs the risk of leaving us with an undifferentiated soup of subconstitutional rules. Llewellyn and Young's theories cannot meet the criteria I specified in Part II because they offer no reliable way to identify those truly

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<sup>59</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007), pp. 413-14.

<sup>60</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007), pp. 417.

<sup>61</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007).

<sup>62</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007), pp. 418.

fundamental changes that are the legal equivalents of the provisions in the text. This means their theories have trouble grappling with the key question I posed in Part II – the *relationship* between the “small c” and “big C” Constitution. By stressing the all-inclusive character of the unwritten constitution, Llewellyn in particular left no basis for distinguishing ordinary or minor changes in governance from amendments of fundamental significance, formal or informal.

In addition, I suggest that appeals to practice work best when all of the relevant historical examples point in the same direction. But this would imply that practice is of little help precisely when we need it most – in circumstances in which there is a *conflict* between practice and the text or when different historical episodes point in varied directions. As I have discussed in prior work, this is the case with respect to disputes over presidential war powers.<sup>63</sup>

With respect to Llewellyn specifically, his theory went wrong in not giving adequate consideration to the text and the role the institutions it created have in implementing it. To be sure, we must always keep in mind that all three branches of government can influence the meaning of the Constitution. Yet they cannot be understood solely as patterns of behavior as Llewellyn would have it. As much as Llewellyn tried to avoid them,<sup>64</sup> rules and standards are indispensable. In a constitutional order based on the rule of law (a value Llewellyn never mentions), they are essential to guiding action. If we understand governing institutions as rule-based, then it is hard to avoid the relevance of the text, something Llewellyn was all too eager to do. I believe the sounder approach is to treat the text as an independent variable.<sup>65</sup> However paradoxical it may seem, the powers and institutions created by the text are essential to building a sound theory of informal constitutional change.

Focusing on the importance of the text also points up the difficulty with Llewellyn’s ad hoc effort to account for the significance of formal amendments. According to Llewellyn, we should understand the Constitution in terms of the behavior of public officials. Yet when that behavior highlights the necessity of formal amendment, Llewellyn

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<sup>63</sup> See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013), pp. 11-18, 77-85, 95-98, 236-43.

<sup>64</sup> See Karl N. Llewellyn, *The Constitution as an Institution*, 34 *Columbia Law Review* 1 (1934), pp. 17.

<sup>65</sup> For a similar point, see the insightful discussion in Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *DUKE LAW JOURNAL* 1213 (2015), pp. 1227-32.

responds by suddenly positing an “attitude” of caring about the text. To remain consistent, he should have explored the significance of this behavior rather than trying to explain it away. As I will argue below with reference to Strauss’s work, it is hard to avoid the reality that beliefs about the text have sometimes influenced constitutional actors to sponsor constitutional amendments. This again points to its central role, a proposition lawyers would no doubt find unsurprising.

With respect to both Llewellyn and Young, I observed earlier that practice based theories cannot account for the possibility of a conflict between practice and the “big C” Constitution. There are in fact instances in which the text has come into conflict with longstanding practices.<sup>66</sup> Consider the relevance of *INS v. Chadha*, the well-known legislative veto case.<sup>67</sup> As recounted by Justice White in dissent, Congress had been using legislative vetoes steadily for half a century in order to exert control over the administrative state.<sup>68</sup> The veto allowed one house of Congress to nullify an administrative measure, thus bypassing both the other house and the president. The legislative veto surely satisfied any reasonable set of criteria for the establishment of a longstanding practice. Yet this made no difference to a near-unanimous Court. Although some scholars may still find the Court’s reasoning in *Chadha* unduly formalistic, what counts for my purposes here is that the unquestioned status of the legislative veto as a longstanding practice counted for nothing. The Court did not even bother to review why Congress had employed the legislative veto over the years – it was irrelevant. *Chadha* can be regarded as a textbook (casebook) demonstration of what happens when practices collide with the text. As Justice Souter once commented in a related context, “plain text is the Man of Steel”<sup>69</sup> and the Court clearly regards the supreme text as capable of overriding contrary practices. With respect to practices that arguably violate the text, there is thus the ever-present possibility of a “big C” override.

The lesson we should draw from *Chadha* is that in developing theories of constitutional change, it is unwise to ignore the special status of the text of the Constitution, the “supreme law of the land.”<sup>70</sup> Perhaps we should add “when the Supreme Court so recognizes,” but this would not

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<sup>66</sup> Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE LAW JOURNAL 1213 (2015), pp. 1227.

<sup>67</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

<sup>68</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), pp. 968-69 (White J., dissenting).

<sup>69</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), pp. 116 (Souter J., dissenting).

<sup>70</sup> U.S. Constitution, Art. VI.

alleviate the problem *Chadha* poses for practice based theories of informal change. However one feels about the result in *Chadha*, the relevant point here is that such theories cannot account for the Court's total lack of interest in the legitimacy of the longstanding practice at issue in that case. Nontextual practices and constitutional "conventions"<sup>71</sup> not endorsed by the Court appear to have a provisional, even uncertain, status in the American constitutional order. Although practices may appear permanent, they are always subject to being targeted by litigants and destabilized.

Another example cited by these theorists is that of a practice prior to FDR's presidency limiting the president to two four year terms. Llewellyn contended it would be "unconstitutional" for then-sitting President Roosevelt to run for a third term.<sup>72</sup> Llewellyn had the misfortune to make this argument only six years before FDR indeed decided to run for a third term. Yet a number of scholars, including Young and Adrian Vermeule, believe that the two-term limit is a valid example of how practice can change the "big C" Constitution. There is plenty of evidence that Americans thought this was a standard part of their constitutional order – right up to the time when FDR made his surprise decision to run for a third term in 1940. As Vermeule summarizes in the course of arguing for a theory of informal constitutional "conventions": "In the constitutional setting, the unwritten convention that Presidents should step down after two terms was discarded when Franklin Roosevelt successfully stood for a third consecutive term in 1940; part of the impetus may have been a belief that the convention was 'inapplicable in times of economic stress and with rumours of war abroad.'"<sup>73</sup>

My intuitions about the FDR case are considerably different. Prior to FDR's decision, what was the constitutional status of the unbroken practice that each president stood for only two terms? This is a reasonable test for theories of constitutional change. Although I will present my own approach in Part IV, I have already laid some groundwork for analyzing this question. In brief, given that the supreme text is an independent variable and the central role of the three branches of government in providing authoritative constitutional interpretations, the two-term presidential limit was always ripe for destabilization by a popular

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<sup>71</sup> See Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUMBIA LAW REVIEW 1163 (2013).

<sup>72</sup> Karl N. Llewellyn, *The Constitution as an Institution*, 34 Columbia Law Review 1 (1934), pp. 13-14.

<sup>73</sup> Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUMBIA LAW REVIEW 1163 (2013), pp. 1184 (footnote omitted).

president. FDR's advocates could point to the undeniable fact that the "big C" Constitution did not prohibit a third presidential term. Further, they could observe that presidents had established "practices" in the past simply by doing new things. So despite the supposed "constitutional" status of the two term practice, no reasonable legal argument could be made that the Democratic Party was prohibited from nominating FDR as their candidate, that votes for him somehow did not count, or that his eventual election and inauguration violated the Constitution. Some may view the Twenty-Second Amendment, limiting presidents to two terms, as confirming that a practice existed before 1940.<sup>74</sup> I suggest it rather supports the conclusion that it did not become unconstitutional for any president to stand for a third term until the amendment was ratified. Only at that point did it become constitutionally impossible for any president to repeat FDR's action.<sup>75</sup>

There is an important lesson here for scholars like Vermeule who simply appropriate British or Commonwealth concepts of an "unwritten" constitution or constitutional "conventions" for the US case without confronting squarely the clear differences between the two constitutional systems.<sup>76</sup> To be sure, as Young notes, the issue is not that the US system is based on "written" law and Commonwealth systems are "unwritten."<sup>77</sup> There is plenty of writing regarding the basic arrangements of government in Commonwealth systems. As I have argued previously, however, the key difference is that Americans have always attached the quality of *legal supremacy* to their single-document Constitution.<sup>78</sup>

This point is somewhat abstract and the examples so far are perhaps historically distant. But consider that the Supreme Court has recently reminded us of the central role of the "big C" Constitution. Practice theorists like William Eskridge and John Ferejohn argue that "superstatutes" like the Voting Rights Act (VRA) have a special

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<sup>74</sup> U.S. Constitution, Amendment XXII.

<sup>75</sup> Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE LAW JOURNAL 1213 (2015), pp. 1284-85.

<sup>76</sup> The lesson that the text is an independent variable is one I have come to appreciate over time. In my early work, I took a position similar to Vermeule's. See Stephen M. Griffin, *Constitutionalism in the United States: From Theory to Politics*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (S. Levinson ed., 1995), pp. 56.

<sup>77</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE LAW JOURNAL 408 (2007), pp. 410-11.

<sup>78</sup> STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013), pp. 11-12.

constitutional status.<sup>79</sup> In *Shelby County v. Holder*,<sup>80</sup> however, the Court essentially terminated any meaningful role for the provisions of the VRA that allowed the federal government a measure of control over state and local voting laws that discriminate on the basis of race.<sup>81</sup> Practice based theories make this result hard to explain. But the *basis* of the decision is even more important to my purpose here.

*Shelby County* is based entirely on claims about the role of federalism in the structure of the Constitution. The Court begins with the proposition that the federal government has no authority under the Constitution “to review and veto state enactments before they go into effect.”<sup>82</sup> Further, absent a direct conflict between a state law and the Constitution, “States retain broad autonomy in structuring their governments and pursuing legislative objectives.”<sup>83</sup> The Court understands the Constitution as guaranteeing “the integrity, dignity, and residual sovereignty of the States” in order to achieve “the liberties that derive from the diffusion of sovereign power.”<sup>84</sup> Citing precedents that mostly predate the civil rights movement, the Court contended that “our Nation ‘was and is a union of States, equal in power, dignity and authority.’”<sup>85</sup> The Court asserted that this “fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.”<sup>86</sup> The Court proceeded to strike down sections of the VRA based on this principle of equal sovereignty.

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<sup>79</sup> WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010), pp. 16, 99-118.

<sup>80</sup> *Shelby County v. Holder*, 133 S.Ct. 2612 (2013).

<sup>81</sup> For discussion of the practical impact of the decision, see Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WILLIAM & MARY BILL OF RIGHTS JOURNAL 713 (2014).

<sup>82</sup> *Shelby County v. Holder*, 133 S.Ct. at 2623 (2013).

<sup>83</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013) (opinion of the Court), p. 9, available at <<https://supreme.justia.com/cases/federal/us/570/12-96/>>.

<sup>84</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013) (opinion of the Court), p. 10, available at <<https://supreme.justia.com/cases/federal/us/570/12-96/>>. [quoting *Bond v. United States*, 564 U.S. \_\_\_\_ (2011), available at <<https://supreme.justia.com/cases/federal/us/564/09-1227/>>].

<sup>85</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013) (opinion of the Court), p. 10, available at <<https://supreme.justia.com/cases/federal/us/570/12-96/>>. [quoting *Coyle v. Smith*, 221 U.S. 599 (1911)].

<sup>86</sup> *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013) (opinion of the Court), p. 9, available at <<https://supreme.justia.com/cases/federal/us/570/12-96/>>.

Attention must be paid when a statute like the VRA, “super” or not, practically entrenched or not, is struck down on the basis of the doctrine of federalism. Any theory of constitutional change must be able to account for what happened in *Shelby County* and other cases in which the Court appeals to structural principles of federalism. This poses a problem for practice based theories because it exposes a flawed assumption common to them – that only the literal text of the Constitution has the status of supreme law. If, from the Supreme Court’s perspective, the Constitution *also* contains nontextual doctrines of federalism and separation of powers, then it is hard to avoid the conclusion that they are part of the “big C” Constitution. They are thus capable of *invalidating* aspects of the “small c” constitution, no matter how longstanding, creating realistic possibilities for conflict between the two. These are conflicts that practice based theories cannot account for descriptively or handle in any clear way normatively.

As a segue to Part IV, I suggest that these considerations bring into question a critical part of David Strauss’s influential argument that formal amendments have been “irrelevant” to constitutional change.<sup>87</sup> Strauss insists that formal amendments “often do no more than ratify changes that have already taken place in society” and “when amendments are adopted even though society has not changed, the amendments are systematically evaded.”<sup>88</sup> At least in terms of the Reconstruction Amendments, amendments that stand in the background of *Shelby County* or any case that involves federalism and race, we should recognize that there are some legal and constitutional realities that *only* amendments can change and that if they fail to change the governing order, it is likely due to their conflict with doctrines that have always been understood to be part of the “big C” Constitution.<sup>89</sup> This again points up

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<sup>87</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001).

<sup>88</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1459.

<sup>89</sup> In particular, I doubt Strauss would continue to maintain that all the Thirteenth Amendment did was “hasten[ed] the end of slavery in a few border states by a few years.” David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1480-81. James Oakes’s recent magisterial history comprehensively establishes that slavery was ended and could only be ended by a constitutional amendment. See generally JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865* (2013). What is of special relevance for my argument is that Oakes documents the existence of the “federal consensus,” by which all parties to the slavery controversy (save for a few outliers

that accounting for such conflicts is essential to understanding the problem of constitutional change.

#### IV. A FRESH START: CONSTITUTIONAL CHANGE AS STATE BUILDING

The general import of Parts II and III is that recent theories of constitutional change have to some extent been avoiding the true nature of the problem. As I claimed at the outset, it seems the problem of constitutional change is not well understood. My impression is that like Llewellyn, many scholars instinctively accept an account in which “small c” developments automatically take up the slack left by an overly rigid Constitution.<sup>90</sup> Interestingly, this is similar to the position taken by the prominent legal theorist Hans Kelsen. As Melissa Schwartzberg summarizes in her penetrating study, Kelsen argued that formal entrenchment was not necessarily a barrier to constitutional change: “even if formally entrenched, changes are inevitable through what one might term a ‘hydraulic’ mechanism: if modifications cannot occur through the formal amendment process, changes instead will occur through other means, most notably through the interpretive process, even if it involves completely distorting the meaning of entrenched laws in order to do so.”<sup>91</sup>

Much like Llewellyn’s theory of the behavioral constitution, Kelsen’s hydraulic theory is highly suggestive. But I have argued that hydraulic

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optimistic about the potential of the original Constitution), agreed prior to the Civil War “that the Constitution put slavery in the states beyond the reach of federal power.” JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865* (2013), pp. 3. In other words, this application of the doctrine of federalism was considered to be part of the Constitution and could be changed only by formal amendment. This is a significant demonstration that informal “small c” changes or judicial interpretations cannot always substitute for formal amendments, even in situations not involving the literal text. See also Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 *TULANE LAW REVIEW* 247, (2002), pp. 259-60.

<sup>90</sup> See, e.g., ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009), pp. 83.

<sup>91</sup> MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* (2007), pp. 177-78 (footnote omitted).

theories encounter major difficulties in the US case. In the US, not only is the literal text of the Constitution regarded as supreme law, but so are implied structural doctrines of federalism and separation of powers. A related source of difficulty is that scholars tend to attribute failures of formal amendments, such as the long post-Reconstruction period in which the Fourteenth and Fifteenth Amendments were not effectively enforced, to exogenous factors such as a lack of social consensus.<sup>92</sup> Although it is beyond the scope of this article, I believe historians have shown persuasively that part of the reluctance of white Americans to continue the vigorous enforcement of these amendments in southern states was that doing so would permanently change the federal structure they prized.<sup>93</sup> Arguably, this same doctrine has played an important role in recent decisions of the Rehnquist and Roberts Courts. In any case, my present point is that the well-known failure of the Reconstruction Amendments was in fact endogenous to the Constitution, a point that is much easier to see if we study the process of constitutional change from a historicist perspective.

This raises another key issue largely avoided by recent theories of informal change – what is the baseline for analysis? How are we to tell whether true “fundamental” change has occurred? Here I agree wholeheartedly with Bruce Ackerman that we must use a historicist baseline.<sup>94</sup> Roughly, this means the standard against which we judge subsequent change is the dominant understanding of constitutional meaning in a given era. Determining this understanding is a matter of historically sound research in which we seek to arrive at judgments about the self-conscious use of interpretive arguments by relevant historical actors. So this would include, for example, the mid-nineteenth century understanding of the doctrine of federalism that eventually undermined the Reconstruction Amendments.<sup>95</sup> Crucially, however, employing a historicist baseline also means if we can show that a shift in such understandings occurred, such as during the civil rights era, then we are

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<sup>92</sup> See, e.g., David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARVARD LAW REVIEW 1457 (2001), pp. 1482-84.

<sup>93</sup> See the seminal article by Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUPREME COURT REVIEW 39 (P.B. Kurland & G. Casper eds., 1979). For an updated discussion to the same effect, see LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* (2015), pp. 40, 110, 121, 124.

<sup>94</sup> BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS MOVEMENT*, VOL. 3 (2014), pp. 34-35.

<sup>95</sup> See supra note 93.

on track to demonstrating that fundamental constitutional change has happened, regardless of whether it manifests itself through formal amendments, Supreme Court opinions, “superstatutes” or other means.

The importance of the baseline issue is exemplified by cases such as *Shelby County* and *Sibelius* in which the Supreme Court relies on the doctrine of federalism to invalidate or rewrite important congressional enactments. In these cases, the Court in effect takes the position that the baseline with respect to federalism has not shifted since the eighteenth century – despite the Civil War, Reconstruction, the New Deal, the civil rights movement, and many other relevant constitutional developments. The adverse reaction to these decisions, especially *Shelby County*, illustrates how differently the contending sides view the history of American constitutionalism.<sup>96</sup> This is why the question of how to understand constitutional change should be front and center.

Current theories tend to represent the process of informal change as one of smooth adaptation to the flow of history. The picture I have drawn in contrast is one of conflict. But how can conflict occur within the ostensibly unitary Constitution and time-honored doctrines such as federalism and separation of powers? The idea is that in the process of implementing the Constitution, multiple governing orders can be developed legitimately by the different branches of government. With respect to separation of powers, I provide an in-depth case study in *Long Wars and the Constitution*.<sup>97</sup> I argue that the original constitutional order, based on a plan of interaction between Congress and the president with respect to decisions for war, exists alongside a newer order built in the territory of the “Constitution outside the courts” by both branches since the end of World War II. The newer Cold War constitutional order gave the initiative of deciding for war to the president on the grounds that the executive branch was best suited to advancing the foreign policy and protecting the national security of the United States.

We can better understand the notion of two or more governing orders existing side by side by consulting work in American political

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<sup>96</sup> See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS MOVEMENT*, VOL. 3 (2014), pp. 328-37; Guy-Uriel Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, University of Chicago Law Forum (May 28, 2015), pp. 113, 115, available at <[http://scholarship.law.duke.edu/faculty\\_scholarship/3460](http://scholarship.law.duke.edu/faculty_scholarship/3460)>.

<sup>97</sup> STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013). The example is war powers is important also because it illustrates that Supreme Court decisions cannot be the sole way in which informal change occurs. The Court has had relatively little to do with the development of presidential war powers, especially after World War II.

development (APD). APD scholars emphasize the role of state building within political regimes.<sup>98</sup> They point to a phenomenon called intercurrency, defined as “the idea that political institutions often develop independently at different rates, causing them to move into and out of alignment with each other and with dominant political regimes.”<sup>99</sup> Intercurrency makes it plausible to think that multiple governing orders might exist in a given historical era.

Although this concept may make sense in a political context, how does it apply to the constitutional sphere? I have stressed the role of the supreme text of the Constitution as an independent variable. The text and the institutions it created are essential to understanding not only formal change under Article V, but how legitimate informal change can occur. In responding to changing circumstances, the branches of government rely on their textual powers to build institutional capacities or ways for the state to take action. In the constitutional sphere, state building can be understood as the creation and maintenance of permanent capacities to exercise constitutional power and advance rights. All of these actions serve to create and implement a constitutional order. Yet, as we have seen, the “big C” Constitution is complex. When we view matters through a historicist lens, it is clear that the literal text has never encompassed the totality of the Constitution. Doctrines such as federalism and separation of powers have been regarded as basic elements of the Constitution from the start. This “big C” reality creates the possibility of conflict between these basic elements and later informal changes. In turn, conflicts can create multiple constitutional orders, in which even *formal* amendments (such as the Reconstruction Amendments) can fail to gain a purchase on the prior order.

Perhaps the most startling implication of understanding constitutional change as state building is that new institutional capacities can literally create new constitutional powers.<sup>100</sup> A good example is the president’s power to initiate war, a power that, properly understood, has existed only since 1945. At the same time, I have argued that building a permanent national security state during the Cold War could not completely displace prior understandings based in the text and longstanding principles of separation of powers. These tensions created

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<sup>98</sup> See, e.g., KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004).

<sup>99</sup> Julie Novkov, *Understanding Law as a Democratic Institution Through US Constitutional Development*, 40 *LAW & SOCIAL INQUIRY: JOURNAL OF THE AMERICAN BAR FOUNDATION* 811 (2015), pp. 821.

<sup>100</sup> STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013), pp. 15-16.

a conflict between the original and Cold War orders that continues to this day. These tensions not only structure the ongoing strained relationship between the president and Congress on war powers but link directly to the policy sphere in that they help account for why presidential decision making for major wars has been so dysfunctional.<sup>101</sup>

Consider now how constitutional change as state building addresses the three criteria for change offered in Part II. The criteria identify which informal constitutional changes are equivalent to significant formal amendments. To restate the criteria in terms of this theory: We should investigate in a historicist spirit circumstances in which the branches of government build state capacities to exercise power and advance rights in ways that alter a prior governing order and are regarded by legal authorities as having the status of supreme law. In this way, focusing on state building puts us on the right path to understanding the problem of constitutional change.

I can imagine someone asking whether this theory establishes that the expansion of presidential power in foreign affairs or the changes of the New Deal are constitutionally legitimate. As the preceding discussion suggests, however, I believe we cannot elide the possibility of conflict between the “big C” and “small c” Constitution. This points away from an easy solution to questions of legitimacy or, for that matter, entrenchment. There is no avoiding what I see as the obvious tensions in our contemporary governing order. There are parts of the original order still present in the text and doctrines like federalism that are inconsistent with the new-model Cold War and New Deal constitutional orders. For that matter, they are inconsistent with the advances made in the civil rights era. This explains why, at least in a constitutional sense, we continue to have disputes about the legitimacy, nature and scope of these developments. In a more colloquial sense, adapting the Constitution to changing circumstances is far from a smooth process. To exaggerate, it is more like dealing with a continuing series of earthquakes, some major others minor, resulting from a clash of tectonic plates. Somehow, history discloses, constitutional orders based on very different premises manage to coexist. Considering American history as a whole, the process of constitutional change is thus best characterized as conflictual and discontinuous.<sup>102</sup> Nevertheless, to a point I agree with the conventional

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<sup>101</sup> See generally STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* (2013).

<sup>102</sup> A point which I believe is generally supported by the reader by HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT*, VOL. 1 (2013); HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: RIGHTS AND LIBERTIES*, VOL. 2

wisdom that the Supreme Court plays a role by trying to smooth over the inevitable conflicts.<sup>103</sup> The Court attempts to legalize these conflicts and so stabilize understandings as far as possible. The Court, however, can never be in full control and so it is misleading to view it as the chief agent of informal constitutional change.<sup>104</sup>

I will conclude this Part by briefly distinguishing this theory from those offered by Llewellyn and Ackerman. Focusing on the importance of state building and the role institutions play in American constitutional development may make this theory sound like Llewellyn's. Llewellyn's theory, however, was more behaviorist than institutionalist. Llewellyn was not really interested in how institutions functioned in a historical context. From his perspective, they were simply constantly shifting patterns of behavior. That is why Llewellyn posited that the text had virtually ceased to function as an engine of constitutional development. Consistent with this premise, he thought inaccurately that it was constitutionally impossible for FDR to stand for a third term. By contrast, constitutional change as state building makes the text central (properly understood as including the literal text and structural doctrines such as federalism and separation of powers), as I have somewhat repetitively stressed throughout.

Focusing on the need to understand constitutional change in historicist terms and the idea that informal changes can be equivalent to significant formal amendments sounds like Ackerman's theory and, indeed, there are many similarities between my theory and Ackerman's. Nevertheless, a critical difference is that, like many scholars, I do not believe the evidence supports Ackerman's contention that an elaborate five stage electoral sequence driven by social movements is the royal road to fundamental constitutional change, both formal and informal.<sup>105</sup> The expansion of presidential war powers was not advocated by a social movement and was not debated over a series of elections. The branches did cooperate in building the Cold War constitutional order, giving it a measure of democratic legitimacy. Nonetheless, one could forgive the

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(2013). For the importance of this reader to APD, see Julie Novkov, *Understanding Law as a Democratic Institution Through US Constitutional Development*, 40 LAW & SOCIAL INQUIRY: JOURNAL OF THE AMERICAN BAR FOUNDATION 811 (2015).

<sup>103</sup> ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009), pp. 163.

<sup>104</sup> STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996), pp. 17-18.

<sup>105</sup> For a summary of this sequence, see Stephen M. Griffin, *How Do We Redeem the Time?* 91 TEXAS LAW REVIEW 101, (2012), pp. 108-09.

American people for thinking that they had never had a chance to pass electoral judgment on that order or its consequences.<sup>106</sup>

## V. CONCLUSION

Amid much recent American work on the problem of informal constitutional change, this article has staked out a distinctive position. I have argued that theories of constitutional change must address more directly the question of the relationship between the “small c” and “big C” Constitution, treating seriously the real possibility of conflict between them. The text and structural doctrines of federalism and separation of powers play an unavoidable role in this relationship and thus in constitutional change, both formal and informal. I therefore have counseled against theories that rely solely on a practice-based approach or analogies between “small c” constitutional developments and the British or Commonwealth tradition of the unwritten constitution. The alternative I advocate approaches constitutional change from a historicist perspective that focuses on state building and the creation of new institutional capacities. I believe this theory will allow us to make progress by establishing that there can be multiple constitutional orders in a given historical era, thus accounting for the conflictual nature of constitutional change.

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<sup>106</sup> Perhaps this is one reason why Ackerman has a very low opinion of the expansion in presidential powers. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

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