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## A THEORY OF *AMERICAN* CONSTITUTIONAL TIME

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### ABSTRACT

*Jack Balkin's new book, The Cycles of Constitutional Time, teaches us that there are three cycles of change in American politics: the cycle of the rise and fall of regimes, the cycle of polarization and depolarization, and the cycle of constitutional rot and renewal. Although Balkin gestures toward the possible application of his theory to the world abroad, his theory of constitutional time must be understood as a theory of distinctly American constitutional time. The phenomena of time cycles Balkin identifies in his groundbreaking book are visible elsewhere in the world, but they interact in unique ways in the United States. In this Article, I explain why and how with reference to three idiosyncratic features of the U.S. Constitution: its endurance, its amorality, and its veneration. I explain that the significantly shorter life spans of constitutions abroad make it much harder for them to experience the same frequency of cyclical rotations that occur in the United States. I show also that the Constitution's amorality has profound implications on the cycle of constitutional rot and renewal in the United States—implications that do not apply to many constitutions abroad because of their moral foundations. And finally, I suggest that the U.S. Constitution's popular veneration is the unspoken predicate for Balkin's theory of American constitutional time. As the Constitution endures and grows in public salience, its increasing veneration catalyzes the three cycles of American constitutional time. I close by exploring whether the endurance, amorality, and veneration of the U.S. Constitution could ultimately distort the nature of constitutional time in the world.*

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INTRODUCTION: *AMERICAN CONSTITUTIONAL TIME*

Jack Balkin's new book, *The Cycles of Constitutional Time*, teaches us that there are three cycles of change in American politics, namely the cycle of the rise and fall of regimes, the cycle of polarization and depolarization, and the cycle of constitutional rot and renewal.<sup>1</sup> These cycles interact in peculiar ways to generate different pressures, outcomes, and opportunities for political actors. These three cycles are not synchronized; they move along variable paths at different speeds and therefore do not always overlap. But a great fault line opens at the rare moment these three cycles converge on their own separate trajectories. That is where the United States currently finds itself: near the end of the cycle of regimes, with the once-ascendant conservative regime losing its grip on power; at a high point in the cycle of polarization, with partisan division seemingly at its sharpest since the Civil War era; and at the apex of constitutional rot, as the constitutional system presently reveals deep fissures in its democratic and republican foundations.

Constitutions abroad experience similar cycles of regimes, polarization, and rot, but they do not experience all three cycles in the same way, nor with the same effects, as they are lived in the United States. Balkin's theory of constitutional time must accordingly be understood as a theory of *American* constitutional time.

Balkin of course recognizes that the American case is different.<sup>2</sup> He explains, correctly in my view, that the United States and many other countries face similar problems, but he stresses that their solutions differ, largely because of pivotal differences in culture, history, and institutions:

Even when the United States and the rest of the world face the same set of causes, history repeatedly shows that the effects in the United States diverge in important respects. This is not because of "American exceptionalism" in the style of Louis Hartz. Rather it is because different institutions with different histories are likely to absorb shocks and influences differently.<sup>3</sup>

Constitutional time, then, passes differently in the United States.

Still, the most important reason why time passes differently in the United States remains absent from Balkin's theory of American constitutional time. Balkin refers to structural devices, cultural and political practices, and institutional arrangements as central factors in understanding American constitutional time.<sup>4</sup> These are of course key points, but they do not alone explain why time passes differently in the United States when compared to other constitutional states.

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<sup>1</sup> See generally JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020).

<sup>2</sup> See *id.* at 9-10.

<sup>3</sup> *Id.* at 10 (footnote omitted).

<sup>4</sup> See *id.*

There is one factor that looms largest in the United States, and whose effect on American constitutional politics has virtually no equal elsewhere on the planet: the peculiarities of America's ancient constitution. The age of the United States Constitution is the crucial social fact that explains, more than anything else, why American constitutional time runs at its own pace, on its own clock, and according to its own calendar.

In this Article, I situate the theory of constitutional time in the global constitutional experience. The phenomena of time cycles of regimes, polarization and depolarization, and constitutional rot and renewal are visible elsewhere in the world, but they interact differently in the United States. I locate the root cause of these differences in three idiosyncratic features of the U.S. Constitution: its endurance, its amorality, and its veneration. In Part I, I explain that the significantly shorter life spans of world constitutions makes it much harder for them to experience multiple rotations of these three cycles. Indeed, when world constitutions do pass through a convergence of these cycles, political actors are likely to break with the prior regime by creating a new constitution. In contrast, the U.S. Constitution has chosen a path of transformative change always within the existing text, though sometimes clothed in only a veneer of legal continuity. In Part II, I show that the Constitution's amorality is both a cause and a consequence of its endurance. The U.S. Constitution's amorality has profound implications on the cycle of constitutional rot and renewal in the country, as compared to world constitutions that are often anchored in *moral* foundations. In Part III, I suggest that the Constitution's popular veneration is the unspoken predicate for the theory of American constitutional time. Were the Constitution not so venerated, it would likely have been replaced by now, but instead it endures and grows in public salience, and its increasing veneration sets in motion the three cycles of American constitutional time. I close with some preliminary observations about how the endurance, amorality, and veneration of the U.S. Constitution may ultimately distort the nature of constitutional time in the world.

#### I. CONSTITUTIONAL ENDURANCE

It is well-known that the United States is home to the world's oldest codified constitution. What is less well-known is just how much of an outlier the Constitution really is when measured against the constitutions of the world. The average life span of a national constitution is nineteen years; in contrast, the U.S. Constitution is over 230 years old and counting.<sup>5</sup> Even if we count only the world's current democratic constitutions, their average life span of forty-two years is twice as long as the average constitution but still considerably younger than the U.S. Constitution.<sup>6</sup> The staying power of the Constitution may or may not be a badge of honor, but it has important implications for the theory of

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<sup>5</sup> See ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 1-2 (2009).

<sup>6</sup> *Id.* at 32.

American constitutional time—both for what the long-enduring U.S. Constitution makes possible and also for the choices it forecloses to political actors.

A. *Legal Discontinuity and New Beginnings*

Balkin explains that there have been at least six cycles of regimes in the United States, along with at least three cycles of constitutional rot and one full cycle of polarization.<sup>7</sup> No country can live through as many rotations of these cycles under the same constitution unless its constitution endures a long time. But constitutions rarely live long, certainly none as long as the U.S. Constitution. Young constitutions, which have existed through most of the history of the world, quite simply do not have the time to endure multiple rotations of these three cycles of constitutional time.

Of course, nothing about the age of a constitution alone forestalls any of these three cycles, whether a regime change, the intensification or decline of polarization, or the phenomenon of constitutional rot. All constitutional states experience these cycles. The difference, though, is that when these three cycles somehow converge in a country with a young constitution—so, in the vast majority of the world—what commonly results is the creation of a new constitution. Indeed, new constitutions are created for lesser reasons, for instance, when there is only a regime change, at the top of a period of polarization, or in a period of high constitutional rot.<sup>8</sup>

Consider what is possible in the context of a regime change outside of the United States, where constitutions are replaced with much greater frequency. In France, the breakdown of the regime of parliamentary primacy coincided with the creation of a new constitution, its most recent one written in 1958, which ushered in a new regime of executive ascendancy.<sup>9</sup> Political actors thought it necessary to formalize the foundations of the new order in a new constitution.<sup>10</sup> They could certainly have chosen to override the regime of parliamentary supremacy with the new framework of presidential government using the procedures of constitutional amendment. But they chose instead to break from the earlier regime by replacing the old constitution altogether and marking a new beginning with a fresh constitutional settlement.<sup>11</sup>

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<sup>7</sup> BALKIN, *supra* note 1, at 15, 33, 45.

<sup>8</sup> Constitutions are, of course, created around the world for reasons that do not involve any of these three cycles. Germany and Japan, for instance, created their constitutions in the aftermath of a conquest in war. See Grundgesetz [GG] [Basic Law] (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan). Australia and Jamaica created their constitutions in the context of decolonization. See *Australian Constitution*; JAMAICA CONST. Aug. 6, 1962.

<sup>9</sup> A useful exposition of these traditions of French constitutional history appears in SOPHIE BOYRON, *THE CONSTITUTION OF FRANCE: A CONTEXTUAL ANALYSIS* 18-21 (2013).

<sup>10</sup> See *id.* at 18 (“This aimed to provide distance for the future constitutional settlement from past experiences . . . and protect its legitimacy.”).

<sup>11</sup> See *id.*

There is a well-worn joke about French constitutions. To borrow from Roger Foster in his 1895 study of constitutions, a bookseller in France is asked whether he has a copy of the French Constitution for sale, to which the bookseller responds with regret that, no, he does not have it for sale in his bookstore because “we do not deal in periodical literature.”<sup>12</sup> French constitutional culture is accustomed to constitution making, having adopted five constitutions since its first in 1791.<sup>13</sup> From an American perspective, five constitutions in 230 years seems like a lot—perhaps too much—but it is well within the global norm for modern constitutional democracies. In fact, it is the United States, with its lone constitution in over two centuries, that is anomalous in the world.

Another instructive contrast with the American experience comes from Brazil. At the height of its modern constitutional rot, Brazilians adopted a new constitution in 1988 to mark their transition from a militaristic regime to an aspirationally democratic one.<sup>14</sup> The people had begun to mobilize for change twenty years prior, and this led to proposals from the official opposition party, the *Movimento Democrático Brasileiro*, to create a new constitution in a constituent assembly.<sup>15</sup> Adopting a new constitution had always been the plan, both to break from the past and to codify a new charter of rules that would set the standard for political actors in the new republic.

There are examples in the world of the rare convergence among the cycles of regimes, polarization, and constitutional rot. One is the South African constitutional revolution in the 1990s. At the cusp of its transition from a regime of apartheid to democracy, political actors found themselves in an unusual period of depolarization that made it possible for them to engage the entire country in a momentous exercise in constitutional renewal.<sup>16</sup> The result was a new constitution that bore many of the hallmarks of modern constitutional

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<sup>12</sup> 1 ROGER FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: HISTORICAL AND JURIDICAL WITH OBSERVATIONS UPON THE ORDINARY PROVISIONS OF STATE CONSTITUTIONS AND A COMPARISON WITH THE CONSTITUTIONS OF OTHER COUNTRIES 1 (Boston, The Boston Book Co. 1895).

<sup>13</sup> See ELKINS ET AL., *supra* note 5, at 168.

<sup>14</sup> CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.) (declaring in preamble its purpose to create “a democratic state destined to ensure the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values”).

<sup>15</sup> See Thomas da Rosa Bustamante, Emilio Peluso Neder Meyer, Marcelo Andrade Cattoni de Oliveira, Jane Reis Gonçalves Pereira, Juliano Zaiden Benvindo & Cristiano Paixão, *Why Replacing the Brazilian Constitution Is Not a Good Idea: A Response to Professor Bruce Ackerman*, BLOG INT’L J. CONST. L. (July 28, 2020), <http://www.iconnectblog.com/2020/07/why-replacing-the-brazilian-constitution-is-not-a-good-idea-a-response-to-professor-bruce-ackerman> [https://perma.cc/TM9Y-3Y7Q] (“Though the Constituent Assembly took place between February 1, 1987 and October 5, 1988, the drafting of the Constitution, from different angles, is much longer and is anchored in the expressive effort by Brazilian society to overcome the military dictatorship (1964-1985).”).

<sup>16</sup> For an excellent account of this transition, see generally HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA’S POLITICAL RECONSTRUCTION (2000).

democracy: the promise of human rights enforcement, the separation of powers, judicial independence, and universal suffrage.<sup>17</sup> Adopting a new egalitarian constitution was a necessary step toward repudiating the prior regime.

B. *Legal Continuity and Transformative Change*

The United States has taken an alternative path when faced with the need for constitutional renewal. It has never replaced its Constitution, nor seriously contemplated doing so. Political actors have instead relied on both formal and informal constitutional amendment, including procedurally irregular forms of constitutional change, to update the Constitution. In every case, the country has retained at least a veneer of legal continuity between the old and the new regime, all the while operating nominally under the existing Constitution. In some cases, political actors have so transformed the Constitution that we might describe the product as a new constitution. Yet in the self-conscious understanding of the political class and the people, these reforms have always been accepted as legally continuous constitutional changes.<sup>18</sup>

Not even Reconstruction produced a new constitution. Had a constitutional transformation on this scale occurred elsewhere, it is more likely the country would have chosen to mark this new beginning by writing an altogether new constitution. We know from Bruce Ackerman's theory of constitutional moments that the Unionists decided not to call a second Philadelphia Convention and instead to adopt the Reconstruction Amendments irregularly, in a fashion that defied both the spirit and the text of the codified rules of constitutional amendment.<sup>19</sup> Article V authorizes a constitutional amendment when two-thirds of both houses of Congress propose one, and it subsequently becomes valid when ratified by three-quarters of the states, either in state conventions or state legislative votes, the choice being up to Congress.<sup>20</sup> The problem with both the Thirteenth and Fourteenth Amendments concerns the inconsistent status of the state legislatures. To put it much too briefly, southern state legislatures were counted in ratifying the Thirteenth Amendment, but congressional delegations

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<sup>17</sup> S. AFR. CONST., 1996 (including human rights enforcement and universal suffrage in its founding provisions in Chapter 1, separation of powers in Chapter 3, and judicial independence in Chapter 8).

<sup>18</sup> It is of course possible to create a new constitution using legally continuous constitutional procedures where the existing constitution codifies a procedure for its replacement. See RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 193 (2019).

<sup>19</sup> 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 122 (1998) (“[R]ather than calling a second Philadelphia convention, the Unionists adapted the separation of powers between Congress, President, and Court as a great new engine for refining the constitutional will of the American people.”).

<sup>20</sup> U.S. CONST. art. V. Article V authorizes also a convention process to amend the Constitution, but this second track has not been used to fruition under the current Constitution. See *id.*

from those states were not counted in proposing the Fourteenth Amendment.<sup>21</sup> As Ackerman explains, either the states count or they do not: how can the representatives and senators of southern states be excluded from Congress for proposing an amendment while their state legislatures are treated as valid ratifiers of another?<sup>22</sup>

In the United States, there is no rule against using the procedures of Article V to make either housekeeping or transformative changes, and everything in between. For example, the Nineteenth Amendment recognized a new class of voters,<sup>23</sup> the Twentieth Amendment changed the date of the President's installation from March 4 to January 20,<sup>24</sup> and the Twenty-First Amendment repealed the Eighteenth Amendment, which imposed prohibition across the land.<sup>25</sup> All three passed the same procedural hurdles. There also exists a political culture of innovative constitutional reform outside of Article V, including recourse to super-statutes,<sup>26</sup> transformative appointments,<sup>27</sup> and creative judicial constitutional interpretations.<sup>28</sup> The point here is plain: the Constitution has remained intact throughout two centuries of constitutional changes big and small, formal and informal, in contrast with other constitutions, which do not commonly endure for as long without being replaced.

## II. CONSTITUTIONAL MORALITY

There is a revealing disjuncture among Balkin's three cycles of constitutional time. To grasp the significance of this disjuncture, we must first consider what each cycle measures. The cycle of regimes inquires whether the country finds itself presently in the same metapolitical era as before.<sup>29</sup> Reasonable persons may have different views on the precise beginning and end of a given regime, but it is likely to be clear to informed observers at what general point one regime follows another, as well as the foundational values of each regime. The same may be said of the cycle of polarization. Either the country is politically polarized or it is not; it is an empirical question that may be answered in a number of ways, including by ascertaining the general sense of the polity,

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<sup>21</sup> ACKERMAN, *supra* note 19, at 103.

<sup>22</sup> *Id.* (positing that some "fancy footwork" would be required to reconcile this different treatment).

<sup>23</sup> U.S. CONST. amend. XIX.

<sup>24</sup> *Id.* amend. XX.

<sup>25</sup> *Id.* amends. XVIII, XXI.

<sup>26</sup> See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1217 (2001).

<sup>27</sup> See generally Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988) (explaining that constitutional change in modern America occurs often through "transformative appointments" to the United States Supreme Court).

<sup>28</sup> See generally ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* (2000) (illustrating transformative effect of judicial constitutional interpretation in the United States).

<sup>29</sup> See BALKIN, *supra* note 1, at 13.



assessing the quality and content of political rhetoric, and conducting opinion polling, to name a few.

The disjuncture appears when the cycles of regimes and polarization are contrasted with Balkin's third cycle: the cycle of constitutional rot and renewal. Recall how Balkin explains the phenomenon of constitutional rot. It occurs when there is "decay of those features of a constitutional system that maintain it both as a democracy and as a republic."<sup>30</sup> But how can we measure reliably when a constitution begins to rot, when democracy is under attack, and how republican a government is?

Here is the revelation: Balkin's cycles appear to conflate the descriptive with the normative. Balkin seems to understand the cycle of constitutional rot and renewal as a descriptive idea, not unlike the cycles of regimes and of polarization and depolarization. Yet the cycles of regimes and polarization propose a descriptive typology of constitutional politics in the United States while the cycle of constitutional rot and renewal offers a normative appraisal of the Constitution. Identifying the beginning and the end of a cycle of constitutional rot requires a normative vision of democracy, and perhaps also republicanism, and of how the Constitution should perform. Blurring this boundary between the descriptive and the normative has an immediate payoff for Balkin: it becomes possible to unveil his theory of constitutional time from what appears to be an authoritative, detached, third-party perspective. But it is not a detached perspective because Balkin must draw from his own set of values to determine what amounts to constitutional rot and when it has occurred. This is different from determining when the United States finds itself in the midst of one regime or another, or when it finds itself in a period of polarization or depolarization. This blurring of the descriptive and the normative makes Balkin himself a dependent variable in the equation of constitutional time.

There is something even more profoundly revelatory about Balkin's account of the cycle of constitutional rot and renewal: that Balkin casually accepts as unobjectionable that the U.S. Constitution actually contemplates the possibility of *both* constitutional rot *and* constitutional renewal. He accepts that the Constitution does not foreclose the decline of democracy or of republicanism, however we might define these principles. He accepts also that the Constitution does not prohibit attacks on democracy and indeed recognizes that attacks are possible and have occurred in American history. According to Balkin, there have been three periods of constitutional rot<sup>31</sup> and this has been fully and completely *constitutional* in the sense of being lawful and acceptable to the design of America's higher law.

If Balkin is right that there exists a cycle of constitutional rot and renewal in American constitutional time—and I believe he is correct on this point—here, now, is the next revelation: the U.S. Constitution is an amoral set of rules that

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<sup>30</sup> *Id.* at 44.

<sup>31</sup> *Id.* at 45 (specifying that the three episodes of constitutional rot were the 1850s, the Gilded Age, and the Second Gilded Age).

makes no predetermined judgment on what is right or wrong. This shines a light on a further point of distinction between the U.S. Constitution and so many of the world's modern constitutions. Many other constitutions establish no-go zones that express and protect their non-negotiable constitutional values.<sup>32</sup> When the people and political actors in those countries wish to change those values, a new constitution may follow. But not in the United States: constitutional values can change for better or worse, and the Constitution remains always in place.

A. *Constitutional Non-negotiables*

Unamendability and the doctrine of unconstitutional constitutional amendment are two devices in the global constitutional toolkit to guard against what Balkin describes as constitutional rot. The first is one of the most controversial constitutional designs of our time, and it is becoming increasingly common. Constitutional designers these days codify a variety of unamendable rules.<sup>33</sup> These rules are not lawfully amendable as long as the constitution endures. Germany, for example, makes human dignity unamendable.<sup>34</sup> The Algerian,<sup>35</sup> Brazilian,<sup>36</sup> and Ukrainian<sup>37</sup> Constitutions make their fundamental rights unamendable. Secularism is unamendable in Turkey,<sup>38</sup> theocracy is unamendable in Iran,<sup>39</sup> and socialism is unamendable in Cuba.<sup>40</sup> The list goes on and on: unitarism in Indonesia,<sup>41</sup> monarchy in Jordan,<sup>42</sup> republicanism in

<sup>32</sup> See *infra* notes 34-46 and accompanying text.

<sup>33</sup> See generally Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010) (creating typology of unamendable rules in the world).

<sup>34</sup> GG art. 1(1) (Ger.) ("Human dignity shall be inviolable."); *id.* art. 79(3) (prohibiting amendment of Article 1).

<sup>35</sup> ALGERIA CONST. art. 223 ("No constitutional revision may infringe on . . . the fundamental freedoms, the rights of Man and of the Citizen . . .").

<sup>36</sup> C.F. art. 60, § 4(IV) (Braz.) ("No proposed constitutional amendment shall be considered that is aimed at abolishing . . . individual rights and guarantees.").

<sup>37</sup> KONSTITUTSIYA UKRAINI [CONSTITUTION] art. 157 (Ukr.) (prohibiting amendments that "foresee the abolition or restriction of human and citizen's rights and freedoms").

<sup>38</sup> TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 4 (Turk.) (prohibiting amendment of the provisions that call for State to be secular republic).

<sup>39</sup> ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1368 [1989] art. 177 (Iran) (stating that Islamic character of constitution cannot be altered).

<sup>40</sup> CONSTITUCIÓN DE LA REPÚBLICA [CONSTITUTION] art. 4 (Cuba) ("The socialist system that this Constitution confirms . . . is irrevocable.").

<sup>41</sup> UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [CONSTITUTION] art. 37(5) ("Particularly regarding the form of the Unitary State of the Republic of Indonesia no amendment can be made.").

<sup>42</sup> JORDAN CONST. art. 126(2) ("No amendment of the Constitution affecting the rights of the King and the succession to the Throne may be passed during the period of Regency.").

France,<sup>43</sup> the separation of powers in Greece,<sup>44</sup> presidential term limits in El Salvador,<sup>45</sup> and political pluralism in Portugal.<sup>46</sup> This short list is only a sampling of the kinds of rules that constitutional designers have made unamendable.

These unamendable rules are sometimes empty words used only for public relations. For instance, the Constitution of the Democratic Republic of Congo makes human rights and civil liberties unamendable and undiminshable.<sup>47</sup> But one can reasonably doubt the strength of the country's commitment to these values, given that its authoritarian regime ranks among the world's least democratic.<sup>48</sup> Political Scientist Jan-Erik Lane would call this a "camouflage constitution," a formal constitution that exhibits a "tremendous distance" from the real constitution, and "has no connection whatsoever to institutional practices in the country."<sup>49</sup>

But courts sometimes enforce these unamendable rules as non-negotiable constitutional commitments. Courts in many countries,<sup>50</sup> though not in most,<sup>51</sup> have asserted or exercised the power to invalidate a constitutional amendment that, in their view, violates an unamendable rule. For instance, the Constitution of the Czech Republic makes unamendable the "essential requirements for a democratic state governed by the rule of law."<sup>52</sup> The Constitutional Court has interpreted this unamendable rule to bar an amendment proposing to shorten the

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<sup>43</sup> 1958 CONST. art. 89 (Fr.) ("The republican form of government shall not be the object of any amendment.").

<sup>44</sup> 1975 SYNTAGMA [CONSTITUTION] art. 110 (Greece) (declaring that the form of government shall not be subject to revision).

<sup>45</sup> EL SALVADOR CONSTITUCIÓN [CONSTITUTION] art. 248 (prohibiting amendment of Articles that refer to "alternation" of presidency).

<sup>46</sup> CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA art. 288(i), English translation available at <https://dre.pt/constitution-of-the-portuguese-republic> ("Constitutional revision laws shall respect . . . [p]lural expression and political organization, including political parties, and the right to democratic opposition . . .").

<sup>47</sup> CONSTITUTION DE LA RÉPUBLIQUE DÉMOCRATIQUE DU CONGO art. 220 ("Any constitutional revision having for its object . . . the reduction of the rights and freedoms of the person . . . is formally prohibited.").

<sup>48</sup> See THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2020: IN SICKNESS AND IN HEALTH? 13 tbl.2 (2021) (ranking the Democratic Republic of Congo second to last out of 167 countries and classifying it as authoritarian).

<sup>49</sup> JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 45 (2d ed. 2011).

<sup>50</sup> See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 197-200 (2017).

<sup>51</sup> See Richard Albert, Malkhaz Nakashidze & Tarik Olcay, *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 647 (2019) ("[T]here is a strong front of resistance to the doctrine of unconstitutional amendment around the world . . .").

<sup>52</sup> Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 9(2).

term of the Chamber of Deputies.<sup>53</sup> The Court struck down the amendment and voided the President's decision to call new elections for the Chamber.<sup>54</sup> According to the Court, this term-shortening amendment violated the core guarantee of democracy protected by the constitution's unamendable rule.<sup>55</sup>

Courts have sometimes gone even further. They have implied the existence of non-negotiable constitutional commitments where those commitments are neither codified as unamendable nor even written into the constitutional text. Consider the Indian Constitution, which makes no rule unamendable; according to the constitutional text, everything is amendable using the procedures of amendment.<sup>56</sup> Yet the Supreme Court of India has created the concept of the "basic structure" of the constitution, the idea that the constitution's organizing logic prevents political actors from adopting amendments that would do violence to the constitution as designed.<sup>57</sup> Precisely what forms part of the "basic structure" of the Indian Constitution is not enumerated in the constitution. It derives instead from the court's own interpretation of the constitution.<sup>58</sup> The court has used this basic structure doctrine to invalidate procedurally perfect amendments that undermine those constitutional commitments the court sees as integral to the Indian Constitution.<sup>59</sup>

Other constitutions also sometimes adopt a strategy of militant democracy to protect the liberal democratic values of the polity. Under this strategy, democratic countries take illiberal actions to combat attempts to attack democracy.<sup>60</sup> For instance, imagine a political party registers to contest elections in Germany on a promise to create an elected dictatorship. It is likely that the German Federal Constitutional Court would invoke its constitutional authority to ban the party even before it runs in a race. The German Constitution confers this extraordinary power on the court: "Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of

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<sup>53</sup> See *Nález Ústavního soudu ze dne 10.09.2009 (ÚS)* [Decision of the Constitutional Court of Sept. 10, 2009], sp.zn. ÚS 27/09 (Czech).

<sup>54</sup> See *id.*

<sup>55</sup> See *id.* (explaining that the "legislature is bound by certain fundamental values that the Constitution declares to be untouchable" and "removal of one of these principles . . . could not be interpreted otherwise than as removal of this constitutional state as such").

<sup>56</sup> India Const. art. 368, cl. 1.

<sup>57</sup> See *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) SCR (Supp) 1, 43 (India) (outlining some elements of the "basic structure" and explaining that this structure is of "supreme importance" and "cannot by any form of amendment be destroyed").

<sup>58</sup> See *id.*

<sup>59</sup> See *Minerva Mills Ltd. v. Union of India*, (1981) 1 SCR 206, 206 (India) (invalidating sections 4 and 55 of the Constitution (Forty Second Amendment) Act, ruling that it "demolishes the very pillars on which the preamble rests").

<sup>60</sup> See JAN-WERNER MÜLLER, *Militant Democracy*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1253, 1253 (Michel Rosenfeld & András Sajó eds., 2012).

Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality.”<sup>61</sup> Party banning is common in Europe, where parties have been banned for various reasons in several countries, including Austria, Belgium, Bulgaria, Croatia, the Czech Republic, France, Germany, Greece, Italy, Latvia, Lithuania, Moldova, the Netherlands, Norway, Romania, Slovakia, Spain, Turkey, the United Kingdom, and Ukraine.<sup>62</sup> Militant democracy can therefore be a safety valve to protect democracy.

These three strategies—unamendability, the doctrine of unconstitutional constitutional amendment, and militant democracy—are not perfect. They are, of course, manipulable, and they can be used for nondemocratic purposes. But notice the contrast: many other constitutions have at their disposal a number of strategies to diminish, slow, or altogether prevent the onset of constitutional rot. And when many of the world’s constitutions become unacceptable to the political class, they are commonly replaced with a brand new one. Not so in the United States.

#### B. *The Politics of Constitutional Choice*

The U.S. Constitution does not presently make any rule formally unamendable, nor have federal courts adopted the doctrine of unconstitutional constitutional amendment, and there is no equivalent to the strategy of militant democracy. Instead of constitutional non-negotiables in the United States, everything is on the table; anything can change and nothing is absolute. This has implications for Balkin’s theory of constitutional time: in the United States, constitutional rot is expected to occur from time to time, and this is consistent with the design of the Constitution. But a larger point is missing from Balkin’s analysis of the cycle of constitutional rot and constitutional renewal. It is a point about both preference and definition: it is fully acceptable in the American tradition of constitutional choice for political actors and the people to choose the path of what Balkin defines as “constitutional rot” because they may well see it as “constitutional renewal.” Let me explain why this is a fundamental feature of the U.S. Constitution.

According to Balkin, the United States currently finds itself in a period of constitutional rot, awaiting to reverse the attendant decline in democracy and republicanism with a period of constitutional renewal.<sup>63</sup> Balkin identifies a number of structural constitutional devices that exist to combat constitutional rot, including federalism, separation of national powers, checks and balances,

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<sup>61</sup> GG, art. 21(2) (Ger.).

<sup>62</sup> See Fernando Casal Bértoa & Angela Bourne, *Prescribing Democracy? Party Proscription and Party System Stability in Germany, Spain and Turkey*, 56 EUR. J. POL. RSCH. 440, 443–46 tbl.1 (2017) (cataloging list of banned political parties in each European country).

<sup>63</sup> BALKIN, *supra* note 1, at 44–49 (arguing pursuit of personal wealth and increasing interest in serving only a small number of powerful individuals cause “democracy and republicanism [to] decay,” leading to constitutional rot).

staggered elections, fixed terms, and independent judges.<sup>64</sup> According to Balkin, these constitutional devices amount to an “insurance policy for republics”<sup>65</sup> like the United States.

We know that some of these devices—namely the essentials of presidentialism—have not protected republics abroad from constitutional rot, either. This is the central teaching of the work of Juan Linz. He has shown that presidential systems are less stable than parliamentary systems, especially in countries with deep political cleavages<sup>66</sup>—not unlike the United States today, as Balkin explains with reference to the cycle of polarization and depolarization. Linz highlights two major shortcomings of presidential systems. First, the president’s plebiscitarian legitimacy leads to the “personalization of power,”<sup>67</sup> which privileges charismatic leaders around whom a cult of personality risks emerging. And, second, fixed terms do not allow for the “continuous readjustments that events may demand,”<sup>68</sup> and instead may bring sharp breaks in ideology and identity from one leader to the next, not only at the end of the fixed term but perhaps more problematically in midstream successions that yield a leader lacking democratic legitimacy.

In the United States, these devices do not prevent constitutional rot. They instead serve an altogether different purpose: they make institutional consolidation difficult to achieve.<sup>69</sup>

To understand institutional consolidation, we must first understand that the default position in American constitutional politics is institutional conflict. Federalism, the separation of national powers, checks and balances, staggered elections, fixed terms, and independent judges are key features in the founding design to disperse power, to thwart the possibility of the concentration of powers in the hands of a single branch or actor, and to place veto gates in ordinary and constitutional politics. To what end? To slow the march of a leader, party, or set of interests toward capturing control of the apparatuses of public power.

In contrast, institutional consolidation occurs when these various actors and the people converge in their interests and subsequently express their agreement in constitution-level actions, including passing new landmark laws, confirming presidential appointments by wide margins, winning national and state elections, and amending the U.S. Constitution.

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<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.* (“[T]he central point of a constitution like the United States’ is to create a system that, even if ungainly in the best of times, can buffer itself against the worst of times.”).

<sup>66</sup> Juan J. Linz, *The Perils of Presidentialism*, J. DEMOCRACY Winter 1990, at 51, 52 (comparing parliamentary and presidential systems throughout history and concluding that “parliamentarism generally offers a better hope of preserving democracy”).

<sup>67</sup> *Id.* at 54 (noting trends toward the personalization of power occur even though “presidential constitutions . . . reflect profound suspicion of the personalization of power”).

<sup>68</sup> *Id.*

<sup>69</sup> See Richard Albert, *America’s Amoral Constitution*, 70 AM. U. L. REV. 773, 805 (2021) (describing how these devices “are intended to instigate institutional conflict”).

We are now in a position to understand why it is a remarkable feat in American constitutional politics to successfully navigate this labyrinth and eventually consolidate power. It is hard to do. And it does not happen regularly. Consider only the difficulty of amending the Constitution. There have been, quite literally, thousands of amendments introduced in American history, yet only twenty-seven have ever been approved by two-thirds of the Congress and three-quarters of the states,<sup>70</sup> and even that number might be an overcount in light of the procedural irregularities of some of those amendments.<sup>71</sup>

Achieving institutional consolidation is its own source of legitimacy in the United States. As a result, what matters is not the subject of agreement but agreement itself. Political actors and the people can achieve institutional consolidation on any manner of subject—whether good or bad, just or evil—and it will be treated under the Constitution as a valid choice. There are no subject matter barriers standing in the way of any constitutional choice in the United States. All choices are open to political actors and the people. The only obstacle is the complex and onerous path to achieving institutional consolidation.

The deeper meaning behind the politics of constitutional choice in the United States is perhaps not what defenders of American liberal democracy might wish for their homeland: amorality is the first principle of American constitutionalism. What is right may be ascendant today but not tomorrow, just as the values one might regard as wrong could well rise to prominence. And this is permissible and constitutional because the U.S. Constitution is oriented, above all, toward agreement, not content. There is no right or wrong according to the Constitution. There are only winners and losers in the battle for constitutional supremacy.

Balkin seems to recognize that the Constitution is open to the full range of choices when he offers his resolution to the present period of constitutional rot. Tellingly, his answer is not that the Constitution does not permit attacks on democracy or republicanism. Nor is his answer that courts will save the republic. He envisions instead a future where “constitutional rot so disgusts Americans that reform movements develop in both parties.”<sup>72</sup> Salvation, for Balkin, comes from popular politics, from the people acting with and through their representatives to reach a period of depolarization.<sup>73</sup> And this period of depolarization “creates the possibility of new policy initiatives that cross-cut the two party coalitions, as well as opportunities for good-government reforms.”<sup>74</sup>

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<sup>70</sup> See Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691, 692 (1996) (stating, specifically, that 11,000 amendments have been proposed, thirty-three have received congressional supermajorities, and just twenty-seven have been ratified by the states).

<sup>71</sup> See generally Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013) (describing unconventional process in which the Fourteenth Amendment was ratified).

<sup>72</sup> BALKIN, *supra* note 1, at 171.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

The way out of constitutional rot, then, is politics—developing third-way policies, creating innovative platforms, and winning elections to break through the current cycle of polarization. In other words, for Balkin, it is politics in all directions. The U.S. Constitution structures those politics, but it does not establish any no-go zones, neither to prevent the onset of constitutional rot nor to catalyze constitutional renewal.

We may put the point plainly: the U.S. Constitution accepts the possibility of democratic decline or republican decay. The Constitution runs through the cycle of constitutional rot and renewal, and both rot and renewal are equally acceptable in the outcome-neutral culture of constitutional choice in the United States. The Constitution, then, self-consciously chooses not to protect either democracy or republicanism from attack, and instead takes an agnostic view of constitutional ends.

### III. CONSTITUTIONAL VENERATION

It is worth tracing the ground we have covered. We began by noting that the old age of the U.S. Constitution has made it possible to observe multiple rotations of the three cycles of change identified by Balkin—observations that are not possible in most other constitutions. Unlike the two-centuries-old U.S. Constitution that has survived through all three cycles, other constitutions are ordinarily replaced with the creation of a new constitution when they pass through a convergence of the cycles of regimes, polarization, and constitutional rot and renewal.

The United States does not discard its own Constitution. It keeps running, on its own time to be sure, but running nonetheless without contemplating the creation of a new higher law. Under this American model of constitutional time, the Constitution endures swings from the highest of highs to the lowest of lows, it survives crises and shocks, both great and small, and all while the politics of constitutional change rotate through the three cycles of regimes, polarization and depolarization, and constitutional rot and renewal. Even when constitutional time pulls the country down into constitutional rot, the political response is not to write a new constitution; it is to ride out the attacks on democracy and republicanism and hope that politics will at some point catalyze a period of constitutional renewal. As always, the Constitution remains solidly in place, with no consideration given to breaking with time and writing a new text. This American constitutional reality raises an essential question: why does the Constitution remain intact through it all? That is the subject to which we now turn.

#### A. *Constitution as Means*

A constitution is often a means to an end. Political actors will encounter a problem and they will seek to resolve it by embarking on a new constitution-making project. For instance, the problem in the country of Niger was a series



of violent coups that had disrupted governance and divided the country.<sup>75</sup> Hoping to create a new beginning for the country and the people, political actors adopted a new reconciliatory constitution to help make peace among previously warring factions.<sup>76</sup> The new Nigerian constitution was designed with one overriding goal in mind: to assuage prior conflict and inspire unity across the land. A problem turned into an opportunity.

Consider also the Canadian case. The means used in Canada to manage a multinational, multilingual, and multijural state was the country's founding constitutional document of 1867.<sup>77</sup> This founding bargain did not keep pace with the evolution of Canada's modern society, so the constitution was updated in major acts of renewal, including an extraordinary episode of constitution making in 1982, which culminated with a new constitutional document.<sup>78</sup> After that, political actors recognized that even more changes were needed to meet the needs of this complex multinational state, and therefore mounted two noteworthy efforts at wholesale constitutional reform.<sup>79</sup> Although both the Meech Lake Accord of 1987 and the Charlottetown Accord of 1992 failed to win ratification within Canada's onerous federal structure of constitutional change,<sup>80</sup> these efforts illustrate the willingness in Canada to transform the constitution in the service of social ends.

The cases of Canada and Niger are not anomalous. When a constitution ceases to serve the purposes to which it is directed, political actors have few qualms about replacing it. Constitution making is not without risks, of course, but it is not something that political actors have shied away from doing. Since 1789, political actors around the world have created over 900 constitutions for 220 different nation-states.<sup>81</sup>

If there is something political actors do, and often, it is writing new constitutions. And they do so for many reasons—for instance, in the context of a revolutionary independence movement, as in the Indian Constitution of 1950;<sup>82</sup>

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<sup>75</sup> See generally Mamoudou Gazibo, *Niger: l'Usure Progressive d'un Régime Militaire* [Niger: The Gradual Attrition of a Military Regime], 101 AFRIQUE CONTEMPORAINE 29 (1999).

<sup>76</sup> CONSTITUTION DE LA VÈME RÉPUBLIQUE (1999), arts. 140-41 (Niger) (granting amnesty to authors of the 1996 and 1999 coups).

<sup>77</sup> Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), reprinted in R.S.C. 1985, app II, no 5 (Can.).

<sup>78</sup> Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>79</sup> For a modern history of Canada's efforts at constitutional reform, see generally PETER H. RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE? (3d ed. 2004).

<sup>80</sup> See Richard Albert, *The Conventions of Constitutional Amendment in Canada*, 53 OSGOODE HALL L.J. 399, 404-09 (2016).

<sup>81</sup> Tom Ginsburg, *Written Constitutions Around the World*, INSIGHTS ON L. & SOC'Y, Spring 2015, at 4, 4.

<sup>82</sup> See generally ARUN K. THIRUVENGADAM, THE CONSTITUTION OF INDIA: A CONTEXTUAL ANALYSIS (2017) (recounting founding and evolution of Indian Constitution).

in the transition from dictatorship to democracy, as in the Spanish Constitution of 1978;<sup>83</sup> to formalize a new political and economic orientation for the country, as in the Chinese Constitution of 1982;<sup>84</sup> or in tandem with an effort to consolidate multiple constitutional texts into a single master-text constitution, as in the Finnish Constitution of 2000.<sup>85</sup> This is simply part of the life of a country.

B. *Constitution as End*

Things are different in the United States, for better or worse. Decades of experience have shown that there is no appetite for constitutional amendment, let alone for wholesale constitutional replacement, even where the Constitution no longer aligns with values thought to be the right ones and even where the Constitution stops producing the outcomes some believe it should. This American practice highlights a key difference between the U.S. Constitution and many other constitutions: in the United States, the Constitution is *both* the means *and* the end.

The endurance of the U.S. Constitution was part of the plan from the very beginning. The new Constitution would of course help the new republic achieve its ambitions to strengthen the economic union. But the cornerstone for a strong and successful republic was to keep the Constitution around for as long as possible, perhaps for all time. To advance this plan, James Madison wanted to cultivate a culture of what he described as constitutional “veneration,”<sup>86</sup> a reverence for and loyalty to the Constitution. Madison saw veneration as a key quality for the success of the Constitution. For him, a venerated constitution would generate a more stable regime whose codified constitution would be more likely to endure.<sup>87</sup> Veneration entailed infrequent amendment to keep the text as close as possible to the original.<sup>88</sup> The fear was that amendment mania would convey the impression that the original text was defective, and this faulty impression would in turn undermine Madison’s vision of growing veneration for the new Constitution.<sup>89</sup>

Madison was not unopposed in his preference for a venerated constitution. What Madison saw as a virtue, Thomas Jefferson saw as a vice. Jefferson worried that constitutional veneration would make the Constitution resistant to

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<sup>83</sup> See generally VÍCTOR FERRERES COMELLA, *THE CONSTITUTION OF SPAIN: A CONTEXTUAL ANALYSIS* (2013) (describing Spanish constitutional history, interpretation, and politics).

<sup>84</sup> See generally QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* (2012) (describing historical and modern bases of Chinese Constitution).

<sup>85</sup> See generally JAAKKO HUSA, *THE CONSTITUTION OF FINLAND: A CONTEXTUAL ANALYSIS* (2011) (explaining basic features and foundations of Finnish Constitution).

<sup>86</sup> THE FEDERALIST NO. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (“[A]s every appeal to the people would carry an implication of some defect in the government, frequent appeals would in great measure deprive the government of . . . veneration . . .”).

changes as time and experience revealed the need for adjustments by amendment.<sup>90</sup> For Jefferson, constitutional veneration grew out of the glorification or thoughtless admiration for the text. Jefferson explained the problem in this way: “Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.”<sup>91</sup> But he wished something else for the new U.S. Constitution: “I am certainly not an advocate for frequent and untried changes in laws and constitutions . . . . But I know also, that laws and institutions must go hand in hand with the progress of the human mind.”<sup>92</sup> And so, for Jefferson, the Constitution should not be venerated because it would risk discouraging constitutional change even when necessary: “We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.”<sup>93</sup> Jefferson foresaw the risk that Madison did not: a political culture of constitutional veneration could make it hard to change the Constitution.

To forestall the ills of constitutional veneration, Jefferson proposed a solution. He called for periodically rewriting the Constitution in order to allow every generation to update the Constitution to reflect its own needs, preferences, and values. He explains the basis for his proposal:

[L]et us provide in our constitution for its revision at stated periods. What these periods should be, nature herself indicates. By the European tables of mortality, of the adults living at any one moment of time, a majority will be dead in about nineteen years. At the end of that period, then, a new majority is come into place; or, in other words, a new generation. Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.<sup>94</sup>

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<sup>90</sup> See Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 THE WRITINGS OF THOMAS JEFFERSON: 1816-1826, at 37-45 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1899) (“As [the human mind] becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”).

<sup>91</sup> *Id.* at 42.

<sup>92</sup> *Id.* at 42-43.

<sup>93</sup> *Id.* at 43.

<sup>94</sup> *Id.*

Jefferson lost this battle. Far from being rewritten every twenty years, the Constitution has retained its content and structure, though of course it has been amended from time to time, albeit only rarely relative to its age and the total number of constitutional amendment proposals introduced in Congress.<sup>95</sup>

But Jefferson was correct that constitutional veneration would dissuade constitutional change. A recent study confirms that venerating the U.S. Constitution makes Americans less likely to support changes to it.<sup>96</sup> This is strong evidence of a “status quo bias” for the Constitution. The reverence Americans have for the Constitution makes constitutional change less likely—whether by textual alteration or constitutional replacement—because tinkering with the Constitution is seen as undermining the founding design and the founders themselves.<sup>97</sup>

Come back now to constitutional time. The Constitution’s veneration is the unspoken predicate for Balkin’s theory of American constitutional time. Constitutional veneration makes the Constitution endure, and this creates a long temporal horizon for the three cycles of change to rotate multiple times under the same constitutional text. Regimes change, as does the degree of polarization, and so too the nature and scope of democratic and republican values. But the Constitution remains, though not necessarily because it should. It remains because of the self-reinforcing phenomenon of constitutional veneration. Americans venerate their constitution and therefore do not replace it, and as it endures longer, Americans grow to venerate it more. As veneration grows, it becomes ever harder for Americans to do what many countries in the world do with regularity: to update or replace the Constitution to keep pace with the changing views and values of the people. The U.S. Constitution is updated in other ways, namely through judicial interpretation and subconstitutional means that are not reflected in the constitutional text. These two ways of constitutional updating may well suffer from problems of democratic legitimacy. But what is certain is that these two sets of strategies cannot be used to update the “hardwired” parts of the Constitution, for instance congressional representation, the Electoral College, the presidential veto, fixed terms, the Equal Suffrage Clause, and Article V itself.<sup>98</sup> The Constitution therefore persists in operation, both as a means to an end, and, just as Madison had hoped, as the end itself.

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<sup>95</sup> Sullivan, *supra* note 70, at 692.

<sup>96</sup> James R. Zink & Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of “Constitutional Veneration,”* 38 POL. BEHAV. 535, 556 (2016) (“At the federal level in particular, our findings indicate that many individuals implicitly accept the U.S. Constitution as something that is, to use Jefferson’s words, ‘too sacred to be touched.’”).

<sup>97</sup> See Sanford Levinson, “Veneration” and Constitutional Change: *James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443, 2459 (1990) (suggesting that veneration and the difficult amendment process has led to “a process of surreptitious and unacknowledged amendment”).

<sup>98</sup> See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

CONCLUSION: THE MIXED INFLUENCE OF THE  
UNITED STATES CONSTITUTION

The U.S. Constitution stands alone in the world as a rare “example of constitutional superlongevity.”<sup>99</sup> No other master-text constitution has lasted as long. We might of course expect that the first or oldest of anything would exert some influence on those that follow. And so it is that the Constitution has exerted significant influence since its creation, impacting constitutional designers in every region of the world.<sup>100</sup> Political theorist Alexis de Tocqueville once described it as “the most perfect federal constitution that ever existed,”<sup>101</sup> while historian George Billias called American constitutionalism the “country’s greatest gift to human freedom.”<sup>102</sup>

Yet, since its bicentennial, the Constitution has declined in its influence abroad.<sup>103</sup> Even Americans have recognized that the Constitution should no longer be the model it once was for the world. The late U.S. Supreme Court Justice Ruth Bader Ginsburg once counseled constitutional designers that “I would not look to the U.S. Constitution if I were drafting a constitution [today].”<sup>104</sup> And constitutional scholar Bruce Ackerman has advised constitutional democracies against adopting American-style presidentialism in favor of German-style parliamentarism.<sup>105</sup> As a matter of doctrine and design, the Constitution is a global outlier today.

But the U.S. Constitution continues to influence the constitutions of the world by its very endurance. Its endurance may itself become what other countries seek to duplicate for themselves. Consider that many of the world’s prominent current

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<sup>99</sup> ELKINS ET AL., *supra* note 5, at 162.

<sup>100</sup> See generally CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990) (containing essays about how U.S. constitutional ideas have impacted countries and regions); THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH, AND INFLUENCE IN ASIA (J. Barton Starr ed., 1988) (discussing whether and to what extent “the American frame of government” influenced “the formulation of Asian constitutions”); Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891 (1988) (discussing how the U.S. Constitution influenced Latin American constitutions); Albert P. Blaustein, *The Influence of the United States Constitution Abroad*, 12 OKLA. CITY U. L. REV. 435 (1987) (describing the U.S. Constitution as “the nation’s most important export”).

<sup>101</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 210 (Francis Bowen ed., Henry Reeve trans., Dover Publ’ns 2017) (1835).

<sup>102</sup> GEORGE ATHAN BILLIAS, *AMERICAN CONSTITUTIONALISM HEARD ROUND THE WORLD, 1776-1989: A GLOBAL PERSPECTIVE*, at xi (2009).

<sup>103</sup> See generally David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

<sup>104</sup> Adam Liptak, *‘We the People’ Loses Followers*, N.Y. TIMES, Feb. 7, 2012, at A3.

<sup>105</sup> Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640 (2000) (“I reject Westminster as well as Washington as my guide and proffer the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers.”).

constitutions have existed for a long time: Australia, since 1901;<sup>106</sup> Austria, 1920;<sup>107</sup> Ireland, 1931;<sup>108</sup> Italy, 1947;<sup>109</sup> India, 1950;<sup>110</sup> France, 1958;<sup>111</sup> and Mexico, since 1917,<sup>112</sup> among others. These countries may have their own peculiar reasons for retaining their old constitutions instead of replacing them. But they may also have been influenced by the distorted value of a long-enduring constitution, much in the model of the U.S. Constitution. Why replace the constitution—and incur the risk of constitution-making failure—when the current constitution works just fine? Jefferson’s theory of generational constitution making may be appealing as a matter of theory, but it is worth asking whether, in practice, risk-adverse political actors would prefer that route over the status quo, especially where many constitutional improvements may be made by judicial interpretation? The U.S. Constitution looms large in the world, and it would not be shocking to learn that countries have come to associate stability and the rule of law with constitutional endurance. Whether such a connection exists is an empirical question, but heuristics are hard to dislodge.

There is evidence that countries around the world are finding ways to extend the life of their constitutions beyond their natural life span. Rather than mounting an effort to create a new constitution when it has outlived its scope and purpose, political actors in every region of the globe are using the procedures of constitutional amendment with what appears to be increasing frequency to transform the constitution into something completely unrecognizable. These transformative changes are “self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations.”<sup>113</sup> The result is to dismantle the basic structure of the constitution, to build a new foundation rooted in principles contrary to the old, and to reimagine the fundamental presuppositions of the constitution—in short, to unmake the existing constitution.

This form of constitutional change is best understood as a constitutional dismemberment, not as a constitutional amendment.<sup>114</sup> A constitutional dismemberment seeks deliberately to disassemble one or more of a constitution’s elemental parts. It does violence to a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution. Changes like

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<sup>106</sup> *Australian Constitution*.

<sup>107</sup> BUNDES-VERFASSUNGSGESETZ [CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 138/2017, art. 151(61) (Austria).

<sup>108</sup> CONSTITUTION OF IRELAND 1937.

<sup>109</sup> COSTITUZIONE (It.).

<sup>110</sup> India Const.

<sup>111</sup> 1958 CONST. (Fr.).

<sup>112</sup> Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 05-02-2017, últimas reformas DOF 11-03-2021.

<sup>113</sup> See Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 2-3 (2018).

<sup>114</sup> See *id.*

these—ones that eviscerate an integral component of constitutional identity, rights, or structure—would ordinarily be achieved in a formal constitutional replacement that occurs through a formal constitution-making process. But they are instead made illegitimately around the world today as ordinary constitutional amendments. These constitutional dismemberments are best understood as new constitutions masquerading as constitutional amendments in name alone. We have seen dismemberments in countries from every region of the world, including Brazil, Georgia, Hungary, Ireland, Italy, Jamaica, Japan, New Zealand, and Turkey.<sup>115</sup> And the list continues to grow.

The phenomenon of constitutional dismemberment has two implications for the theory of constitutional time. First, the widespread resort to constitutional dismemberment instead of formal constitutional replacement suggests that political actors see merit in making constitutional changes, however transformative, within the existing constitution, without breaking legal continuity as would ordinarily occur when adopting a new constitution. This preference for constitutional dismemberment over constitutional replacement may be inspired by the United States model of a long-enduring constitution where constitutional changes big and small have been made using the onerous procedures of constitutional amendment in Article V. Second, as national constitutions continue to grow older, we will have more data points to evaluate the applicability of Balkin's theory of constitutional time in constitutional systems outside the United States. I am inclined to believe that the theory of constitutional time is universally applicable but has unique interactive effects in the United States as a result of its old constitution. When other constitutions have endured for many generations, it will become possible to discern whether, as I suggest, constitutional veneration is an unspoken predicate of the theory of constitutional time.

For now, we can be certain of only one thing: Jack Balkin has hit another home run with his new book, *The Cycles of Constitutional Time*. Like his earlier works, this book will become a point of reference for scholars in search of clarity on the major questions of our time involving the U.S. Constitution, its interpretation, its contestability, and the forces that generate a unique ecosystem of constitutional politics that is as puzzling as it is fascinating. And as before, Balkin has innovated ideas that will endure for as long as the Constitution that inspired them.

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<sup>115</sup> See generally *id.* (drawing on world constitutions to show the “breadth of application of [the phenomenon of dismemberment] to both codified and uncoded constitutions in connection with constitutional rights or structure, and its relevance to changes that improve or deteriorate the democratic values of liberal constitutionalism”).