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Beginning the World Again

Social movements and the challenge of constitutional change

by Ben Manski

“We have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth. We have it in our power to begin the world over again.”

~ Thomas Paine, *Common Sense*¹

In recent years, movements for constitutional reform have risen across the United States. Tens of millions of Americans have signed on to the proposition that the federal constitution should be changed. The idea that 21st century understandings of human rights and democracy should be inscribed in our basic law has been moved from the margins to the mainstream. But what would it actually take to modernize the U.S. Constitution?

This question may seem like a technical one. There are well-known and lesser known formal procedures for achieving constitutional change. But the law in action is never limited to the specifics of formal procedure.² If we really want to know what it would take to drive human rights into our basic law, we must dig a lot deeper and ask what has been the past experience of social movements for constitutional reform? What obstacles face advocates of human rights and democracy today in their efforts to amend the Constitution, and how might those obstacles be overcome?

In taking on these questions, we will find that constitutional change is not merely a matter of formal legal procedure or of political contention. Constitutionalism is a social movement form.

¹ Thomas Paine, “Appendix to *Common Sense* (1791),” vol. 1, 4 vols., *The Writings of Thomas Paine* (New York, NY: AMS Press, 1972), 112–20.

² “Law is in its nature a halfway thing—part principle and part power . . .” as per p164, par 4 in Marc Galanter, “The Modernization of Law,” *Modernization: The Dynamics of Growth*, 1966, 153–65. See also John R. Sutton, *Law/Society: Origins, Interactions, and Change*, Sociology for a New Century Series (Santa Barbara, CA: SAGE Publications, Inc., 2001).

Constitutionalization is a social change process.³ Those who wish to sanctify and give life to human rights in the basic law of the United States must struggle with the particular challenges faced by *constitutional reform movements* in contemporary American society.

The clamor for constitutional change

In the six years since the Supreme Court ruling in *Citizens United v. FEC*, more than seven hundred local governments and sixteen state legislatures have adopted resolutions in support of the provisions of the We the People Amendment, which states that, “The rights protected by the Constitution of the United States are the rights of natural persons only,” and that “The judiciary shall not construe the spending of money to influence elections to be speech under the First Amendment.” Over 300 of these resolutions, including those in major cities like Los Angeles, San Francisco, Chicago, and Milwaukee as well at the state level in Colorado and Montana, won adoption by a popular vote.⁴ Altogether, these resolutions cover more than one third of the population of the United States.

The movement to overturn *Citizens United* is significant but it is not the only large scale constitutional reform effort in the United States today. The proposed Balanced Budget Amendment has won majority support in both houses of Congress in recent years. A renewed campaign for ratification of the Equal Rights Amendment (ERA) is moving forward in the 15 states which have not yet ratified the ERA. In the years since the Supreme Court ruling in *Bush v. Gore*, voting rights and election reform advocates have united behind the proposed Right to Vote Amendment. And both at the state level and nationally a series of constitutional struggles have emerged over marriage, immigration, war powers, treaty rights, federalism, the rights of future generations, and much else.⁵

³ D. Douglas Lummis, *Radical Democracy* (Ithaca, NY: Cornell University Press, 1996); Stephen L. Elkin and Karol Edward Soltan, eds., *A New Constitutionalism: Designing Political Institutions for a Good Society* (Chicago, IL: University of Chicago Press, 1993); Douglas Greenberg et al., eds., *Constitutionalism & Democracy: Transitions in the Contemporary World* (New York, NY: Oxford University Press, 1993).

⁴ Move to Amend Coalition, “Move to Amend,” *MTA Coalition*, June 10, 2014, <https://movetoamend.org/about-us>.

⁵ Ben Manski, “The Democratic Turn of the Century: Learning from the U.S. Democracy Movement,” *Socialism and*

Popular constitutionalism has returned to the politics of the United States. In response to a widespread perception that some of our society's problems are in part structural in origin, many Americans increasingly are looking for constitutional solutions. That some of these constitutional reformers espouse clashing political views only strengthens the impression of a generalized democratization of constitutionalism. And the energies and resources already invested toward achieving these new social movement goals suggest a belief that constitutional change is not only possible, but also, fruitful.

Constitution Making 101 for Human Rights Advocates

If we want to learn whether faith in constitutional reform might be justified as a means toward securing human rights, we can begin in familiar territory by looking to the procedures through which people have changed the U.S. Constitution in the past or could change it in the future. Constitutional change is intrinsically procedural. Procedures for constitutional reform range from more formal to less formal, from amendment to constitutional convention to various forms of constitutional review. At the same time, we should not let any dry associations we might have with the word "procedure" fool us. Most of the significant changes in the constitutional history of the United States have followed and helped produce great social rupture. Constitutional change is rarely anything other than revolutionary.

The *amendment* process is the most familiar procedure for constitutional reform. Article V of the U.S. Constitution provides for not one but two formal paths toward amendment.⁶ The first of these is

Democracy 29, no. 1 (January 2, 2015): 2–16, doi:10.1080/08854300.2015.1006392.

⁶ "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate." U.S. Const. art. 5.

amendment initiated by Congress. Here the process begins when one or more members of Congress propose an amendment resolution. For ratification, the amendment must first win a vote of two thirds of the members in each chamber of Congress. Then it must secure the support of the legislatures of three quarters of the states.

Every change to date to the text of the federal constitution has been the direct result of amendment by this familiar process. Yet some important amendments have actually occurred in response to the probability of implementation of the second constitutional amendment process, that of the constitutional convention initiated by the states.⁷ Here a state legislature begins the process by adopting a resolution calling for a national *constitutional convention* and specifying the purpose and scope of that convention. Once two thirds of the states have adopted such a resolution, Congress is charged with convening a convention. Any amendments to the Constitution proposed by that convention must then, again, secure the ratification of three quarters of the states.

Constitutional review is the less formal and much more commonplace set of procedures through which various political actors have changed the federal constitution.⁸ In the process of constitutional review, the text of the Constitution remains unchanged, yet the meaning of that text is reinterpreted by the federal courts, Congress, the president, or the people of the United States. This is deeply problematic, for as we shall see, the practice of constitutional review is dominated by elites concerned more with enlarging the role of the state than with the protection of human rights.

When the federal courts engage in constitutional interpretation, this is called *judicial review*. The

⁷ For instance, the 17th Amendment, providing for the Direct Election of Senators, was adopted by Congress in order to avoid a probable constitutional convention.

⁸ Constitutional review is sometimes described as an *informal* process of constitutional change; this is simply wrong. Consider that when courts, legislatures, and executives interpret the Constitution, they do so according to well established sets of procedures. They generally record their decisions, intending them to be read and relied upon by others. Only popular review might be understood today to be informal in character, and even there we find a historical tendency toward formalism, with great efforts made to record the proceedings and decisions of mass meetings, public votes, and the like.

Supreme Court of the United States and its lower courts have engaged in so much judicial review that much of what Americans believe themselves to understand about their constitution has actually been the product of court decisions. When the Constitution said that Black people were, “so far inferior that they had no rights which the white man was bound to respect,” that was the Supreme Court of *Dred Scott*, not the text of the Constitution, that was speaking. And when forty years later the Constitution said that “separate but equal” was consistent with the principles of equal protection – and then again 60 years later still, when the Constitution changed its mind and said that “separate” was “inherently unequal” – in each case it was the Supreme Court that was speaking.

Americans have become so accustomed to hearing the voice of the Constitution come from the robes of the Court that the process of constitutional review has become subsumed within the doctrine of *judicial supremacy*. But judicial review and judicial supremacy are not the same thing; the former was contested and the latter was anathema for much of U.S. history.⁹ In his first inaugural address in 1861, Abraham Lincoln spoke for a dominant, republican critique of the notion of judicial supremacy:

*"The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."*¹⁰

Lincoln’s criticism of judicial supremacy remains a vital force in debates over constitutional review to this day. Political scientists and legal scholars have long debated what Alexander Bickel termed the *counter-majoritarian difficulty* and what Jamin Raskin more recently described as, “reading democracy out of the Constitution.”¹¹ The Supreme Court of the United States, an elite body if ever

⁹ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, NY: Oxford University Press, 2004).

¹⁰ Ibid at p 212 par 2

¹¹ Jamin B. Raskin, *Overruling Democracy: The Supreme Court vs. The American People* (New York, NY: Routledge, 2005); Allison M. Martens, “Reconsidering Judicial Supremacy: From the Counter-Majoritarian Difficulty to Constitutional Transformations,” *Perspectives on Politics* 5, no. 03 (September 2007): 447, doi:10.1017/S1537592707071484.

there were one, has more often discovered rights and protections for the wealthy and powerful as opposed to the poor and disenfranchised.¹²

Yet if not the Supreme Court, who should decide what the Constitution means? Originally, it was held that Congress and “the People” themselves were to serve as the final arbiters of constitutional review. In practice, *congressional review* has proven limited. When the Supreme Court issues a determination on a constitutional question, it does so with a clear voice and following a formal, visible procedure. Congress, however, rarely speaks in one voice. To the extent that Congress has engaged in constitutional review, it has done so most effectively through its role in the confirmation and rejection of federal judges. Efforts to settle constitutional questions through resolutions of Congress have been undermined by the federal courts as well as by Congress’ own inability to function as a disciplined institution.¹³

Complicating matters has been the expansion of the powers of the presidency to shape the meaning and practice of constitutional rights, powers and duties. The idea that the executive branch would ever attain something akin to *executive review* was considered and flatly rejected by the first generations of U.S. citizens. Yet today the president exercises review powers all the time through claims of executive privilege, the use of signing statements, and the issuance of uncontested executive orders.¹⁴

This last practice has very serious consequences in questions of war and peace. Article I, Section 8 of the Constitution makes clear the primary role of Congress as the branch responsible for overseeing

¹² Moon-Kie Jung, João H. Costa Vargas, and Eduardo Bonilla-Silva, eds., *The State of White Supremacy* (Stanford, CA: Stanford University Press, 2011); David Cobb, “The Case Against Judicial Review,” *By What Authority* 9, no. 2 (Fall 2007); Greg Coleridge, Richard Grossman, and Mary Zepernick, “Rumors of USA Democracy Discovered to Be Counterfeit,” *By What Authority*, Fall 2000; Greg Coleridge, “Supreme Authority: The Growing Power of the US Supreme Court and Democratic Alternatives,” *By What Authority*, October 2014; Jane Anne Morris, *Gaveling Down the Rabble: How “Free Trade” Is Stealing Our Democracy* (New York, NY: The Apex Press, 2008); David Kairys, “A Brief History of Race and the Supreme Court,” *Temple Law Review* 79 (2006): 751.

¹³ A. Christopher Bryant and Timothy J. Simeone, “Remanding to Congress: The Supreme Court’s New ‘On the Record’ Constitutional Review of Federal Statutes,” *Cornell Law Review* 86, no. 1 (January 2001): 328–96.

¹⁴ Raoul Berger, *Executive Privilege: A Constitutional Myth*, Studies in Legal History (Cambridge, MA: Harvard University Press, 1974).

the U.S. military and deciding on the use of military force. Yet in the 20th and 21st centuries, successive presidents have ignored Congress' primary authority over war powers and engaged in unauthorized warfare across the globe. And Congress and the federal courts have let them. The text of the Constitution says one thing, but the practice of all three branches of the federal government says another.¹⁵ The American people are left without any direct say on war powers, and so their opposition to empire building, war, human rights violations, and the expanded security state takes form beyond the Washington D.C. beltway.

Washington today doesn't show much respect much for the institution of the sovereign power, that branch of government which the revolutionaries of 1776 called "The People." Yet the role of the people in deciding constitutional questions has never been a matter left to Washington to decide on its own. Popular sovereignty is a matter of practice, not simply of normative law, and the power of the people earns respect when it is exercised, not in its absence. Popular movements have repeatedly decided for themselves what the Constitution does say and what it should say. This practice of *popular review* predates the Constitution of 1787 and has played a significant and largely progressive role throughout U.S. history.¹⁶

The procedures of popular review are sometimes quite formal, involving public meetings, testimony, and popular votes. Formal popular review can be seen in constitutional amendment processes as well as in efforts to counterpose local, state, and global governmental institutions against federal power.¹⁷ In other cases, popular review is less formal and less direct, manifesting in mass mobilizations

¹⁵ Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution*, American Empire Project (New York, NY: Metropolitan Books, 2005); Constitution Project (Georgetown Public Policy Institute), *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* ([Washington, D.C.]: [The Constitution Project], 2005), http://www.constitutionproject.org/wp/WarPowers_final.pdf; Elaine Scarry, *Who Defended the Country?*, ed. Joel Rogers and Joshua Cohen, New Democracy Forum (Boston, MA: Beacon Press, 2003); Elaine Scarry, *Thinking in an Emergency* (New York, NY: W.W. Norton & Co, Inc., 2011).

¹⁶ Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*.

¹⁷ Examples of constitutional struggles between localities, states, the federal government and institutions of global governance range rebound throughout U.S. history, and include more recent cases involving municipal engagement in global

for or against a particular interpretation of the Constitution.¹⁸

Where does all of this leave the advocate of a human rights constitution? Most of what we think of today as constitutional law is the product of some form of constitutional review. Yet constitutional review is dominated by the judiciary and the executive, the least democratic and least accessible federal branches. Popular constitutional review is commonly practiced, but when its practice is informal its impact is usually indirect. Formal popular participation in the shape of efforts to amend the constitution is more directly effective. Yet social movements seeking formal constitutional change face such significant challenges that it is often said that they are unworkable . . . or are they?

A history of amending America

Much of the history of social change in America is a history of popular movements engaged in constitutional struggles. The same revolutionaries who destroyed two million dollars worth of British East India Company tea in Boston Harbor weren't just saboteurs, they were also constitutionalists. They engaged in popular lawmaking as a matter of course, drafting and adopting hundreds of local resolutions of independence and statements of principles that prefigured the U.S. Declaration of Independence and the Constitution.¹⁹

policy questions around trade, war and peace, civil liberties, and immigrant rights, as well as state level efforts to challenge federalization of the National Guard, and much more. See Ben Manski and Karen Dolan, "Unleash Democracy: Policies for a New Federalism," in *Mandate for Change*, ed. Chester W. Hartman (Lanham, MD: Lexington Books, 2009), 315–26; James A. Conti, *Between Law and Diplomacy: The Social Contexts of Disputing at the World Trade Organization* (Stanford, CA: Stanford University Press, 2011); Ben Manski and John E. Peck, "Corporatization: An Internal Clash of Civilizations," in *Beyond the Market: The Future of Public Services* (Amsterdam, The Netherlands: Transnational Institute, 2006), 159–69; Boaventura de Sountha Santos and César A. Rodríguez-Garavito, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality," in *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, UK: Cambridge University Press, 2005).

¹⁸ Peter Irons, *A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution* (New York, NY: Penguin Books, 2006).

¹⁹ Pauline Maeier, *American Scripture: Making the Declaration of Independence* (New York, NY: Alfred A. Knopf, 1997); Ray Raphael, *The First American Revolution: Before Lexington and Concord* (New York, NY: The New Press, 2002); Alfred F. Young, *Liberty Tree: Ordinary People and the American Revolution* (New York, NY: New York University Press, 2006); Elizabeth Beaumont, *The Civic Constitution: Civic Visions and Struggles in the Path toward Constitutional Democracy* (Oxford, England: Oxford University Press, 2014).

The abolitionists who voted in the years immediately following the Revolution to end slavery in northern states and sought to nullify the various Fugitive Slave Acts, grounded their actions in what they sometimes called the “Liberty Constitution.” This was an interpretation of the Constitution that drew on the Declaration of Independence and earlier revolutionary documents to conclude that in disputes between liberty (for slaves) versus property (in slaves), the Constitution favored liberty.²⁰ Radical constitutionalism had more than a small role in the two most significant revolutionary movements of the first century of U.S. history.²¹

A journey through American constitutional history is tempting. But our purpose here is limited. It is enough to recognize that the Constitution has been changed many times, and that social movements have been the primary agents of those constitutional changes that enlarged human rights and deepened democracy, the two great riverways of progressive constitutionalism.

The many struggles to expand governmental human rights protections are today celebrated in official histories. This may be because so many of them proved ultimately successful. As should be well known, when the Constitution of 1787 was first drafted, the vast majority of human beings living within the borders of the United States did not enjoy the “blessings of liberty” promised by the Preamble. Women, men who didn’t own significant property, non-whites, slaves, indentured servants, and non-Christians were denied fundamental rights in most states and across the United States.²² Social movements are what changed all that. Since the 1800s, liberation movements have secured

²⁰ William Goodell, *Views of American Constitutional Law, In Its Bearing on American Slavery*, 2nd ed. (Utica, NY: Lawson & Chaplin, 1845).

²¹ Ben Manski, “State Power Against the Slave Power: How Wisconsin Warred on Slavery, and Won,” *Liberty Tree Journal* 1, no. 3 (Summer 2006).

²² Jules Lobel, *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (New York, NY: Monthly Review Press, 1988); Bertell Ollman and Jonathan Birnbaum, eds., *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive, and Especially Socialist Criticism* (New York, NY: New York University Press, 1990); Robert Dahl, *How Democratic Is the American Constitution?*, 2nd ed. (New Haven, CT: Yale University Press, n.d.); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York, NY: Oxford University Press, 2006).

constitutional reforms that brought the majority of Americans within the protections of the Constitution.

At least eight constitutional amendments following the adoption of the Bill of Rights constitutionalized the liberation of particular populations. The post-Civil War Reconstruction Amendments – the 13th, 14th and 15th Amendments – respectively abolished slavery (1865), greatly expanded equal protection and due process rights (1868), and guaranteed equal voting rights to non-whites and former slaves (1871). Women secured their part of the vote with the 19th Amendment in 1920. Those who wished to drink alcohol certainly felt liberated by the abolition of Prohibition with the 21st Amendment in 1933. The 23rd Amendment gave the voters of Washington D.C. representation in the Electoral College (1961). The use of the Poll Tax and other taxes to deny poor people the right to vote was abolished with the 24th Amendment in 1964. And 18, 19, and 20 year olds gained access to the vote with the 26th Amendment in 1971.²³

Social movements sought each and every one of these amendments, and more. For instance, the early 19th century extension of the right to vote to non-propertied white males was the result of constitutional struggle at the level of the states. In 1848, 100 women’s rights delegates at the Seneca Falls Convention engaged in archetypal popular constitutionalism with their signatures on the Declaration of Rights and Sentiments. In the decades following, working at the state level, women won liberation from *coverture*, the old system of property law in which children and married women were the possession of the male head of household. Constitutional amendment campaigns like the Child Labor Amendment (1924) and the Equal Rights Amendment (1974) remain unratified, yet they have recognizably affected American law and culture by framing public debates over child labor and the

²³ I write “access to the vote” as opposed to the “right to vote” because the Supreme Court of the United States has ruled that, “The individual citizen has no federal constitutional right to vote for electors for the President of the United States ...” as per *Bush v. Gore*, 531 U.S. 98 (2000). One response to that ruling has come in the form of the national campaign for a Right to Vote Amendment.

status of women.²⁴ And even where constitutional debates have been initiated by the opponents of human rights, the resulting public deliberation has often produced the opposite from the intended effect. Over the past twenty years, as the state-by-state conflict over same-sex marriage has gone on, the debate altered social norms, eventually leading to the Supreme Court's 2015 recognition of equal marriage rights.²⁵

As we've seen, campaigns to secure human rights protections in the Constitution have profoundly changed our society. Yet that is only half the picture. Struggles for human rights and collective liberation nearly always have been associated with struggles for political and economic democracy. The logic of this is simple. Democratic processes are often thought to be more likely than elite-driven processes to generate human rights protections. And human rights protections that are the result of democratic deliberation are thought to be more resilient than those handed down from on high.

26

The history of efforts to democratize the Constitution is less recognized than the history of campaigns to expand constitutional rights. This may be in part because only one amendment to date – the 17th Amendment, which mandates the direct election of U.S. Senators (1913) – is commonly thought of as having democratized the structure of the federal government. But American democracy movements have played a much more powerful role in the history of constitution-making than the textual residue of a single amendment suggests.

Consider the most celebrated provisions of the U.S. Constitution, the Bill of Rights. These first

²⁴ President Franklin D. Roosevelt's proposal for an Economic Bill of Rights has played a similar role as a North Star for employment, wage, health, housing, welfare, and other critical economic rights. Judith Blau and Alberto Moncada, *Justice in the United States: Human Rights and the U.S. Constitution* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006).

²⁵ A review of *Obergefell v. Hodges*, 576 U.S. ____ (2015) will show that both the majority and the dissents claimed popular grounding, with the majority pointing to a marked shift in public opinion in the course of the marriage debate, and the minority claiming that a plebiscite would be required to find equal protection rights for same sex couples.

²⁶ Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*; Raskin, *Overruling Democracy: The Supreme Court vs. The American People*.

ten amendments not only provide negative rights against state action. They are designed to strengthen the capacity of the “the People” to act as the sovereign.²⁷ The First Amendment constitutionalized the critical role of popular assemblies, public debate, citizen petitions, and the popular press as institutions of self-government. The Second Amendment, together with the Constitution’s War Powers and Militia clauses, was largely intended to protect against the development of a standing army.²⁸ The Fifth, Sixth, and Seventh Amendments enshrine that democratic bane of many a judge, prosecutor, and corporate attorney – the jury. The 9th and 10th Amendments reserve powers to the people and the states not expressly delegated to the federal government. We should remember, as well, that the Bill of Rights was forced upon the Framers, anti-democrats that most of them were. Democratic uprisings compelled a second (in this case, progressive) crucial compromise, without which the new republic might not have survived.²⁹

This dynamic was to repeat in later years. Suffrage for unpropertied white males followed widespread popular constitutionalism such as that famously practiced with Rhode Island’s People’s Convention and the Dorr Rebellion. The U.S. Civil War, Abolition, and Reconstruction had at least a little something to do with a man named John Brown who, together with 45 others, convened a convention in Chatham, Canada to draft the *Provisional Constitution and Ordinances for the people of the United States*. The idea was that, after arming slaves with weapons from the armory at Harpers Ferry, Virginia, insurrectionary forces would need a constitutional framework for the administration of territories under their control.³⁰

Brown’s guerrillas were not alone among abolitionists in this. In 1859, Wisconsin’s legislature,

²⁷ Ollman and Birnbaum, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive, and Especially Socialist Criticism*.

²⁸ Paul Buhle et al., eds., *Come Home America.US* (Lake Wales, FL: Titan Publishing, 2010).

²⁹ Ollman and Birnbaum, *The United States Constitution: 200 Years of Anti-Federalist, Abolitionist, Feminist, Muckraking, Progressive, and Especially Socialist Criticism*.

³⁰ Robert L. Tsai, “John Brown’s Constitution,” *Boston College Law Review* 51 (2010): 09–35.

dominated by radical abolitionists engaged in determined resistance to enforcement of the Fugitive Slave Act of 1850, began secession proceedings.³¹ Two years later, with the Confederacy threatening to defeat Union forces, a conference of western governors gathered in Cleveland and warned President Lincoln that if the federal government proved too incompetent to win the war, the abolitionist states “will act for themselves.”³² Some to this day deride the radical constitutionalism of the abolitionist movement as unrealistic. They should remember that that movement *did* realize its primary goals.

Popular constitutionalism has also taken less confrontational forms. The populist, progressive, and socialist movements of the late 19th and early 20th centuries succeeded in bringing democratic reforms such as municipal home rule and direct legislation to the constitutions of states across the country. Both of these critical initiatives originated in popular frustration at the inability of the state and national legislatures to achieve desired human rights and good government policies. And both democratic reforms have proven useful to human rights campaigners to this day.³³

Finally, it helps us to recognize the many powerful efforts to democratize the Constitution which have not proven successful as of yet. Having learned that dangers of leaving questions of war and peace in the incapable hands of the three Washington branches of the federal government, efforts to secure a War Referendum Amendment – requiring a vote of the people before the use of military force in a non-defensive action – achieved 73% public support in 1938 and the support of half of Congress.³⁴

³¹ Manski, “State Power Against the Slave Power: How Wisconsin Warred on Slavery, and Won.”

³² “I must *be permitted to say it, because it is a fact*, there is a spirit evoked by this rebellion among the liberty-loving people of the country, that is driving them to action and if the Government *will not permit them to act for it, they will act for themselves*. It is better for the Government to direct this current than to let it run wild. So far as possible we have attempted to allay this excess of spirit, but there is a moral element and a reasoning element in this uprising, that cannot be met in the ordinary way. There is a conviction of great wrongs to be redressed, and that the Government is to be preserved by them. The Government must provide an outlet for this feeling, or it will find one for itself.” Alexander Randall to Abraham Lincoln, “Letter on Behalf of the Western Conference of Governors, as Reprinted in *The Military History of Wisconsin: A Record of the Civil and Military Patriotism of the State in the War for the Union*, by Edwin B. Quiner, Chicago, Clarke & Co, Publishers, 1866. P. 64, Par 4,” May 6, 1861.

³³ Manski and Dolan, “Unleash Democracy: Policies for a New Federalism.”

³⁴ Ben Manski, “The Struggle to Put Ballots Before Bullets,” *Liberty Tree Journal* 1, no. 4 (2006).

Indeed, the experiences of the two World Wars convinced millions of Americans of the need both to rewrite the U.S. Constitution and to create a new global constitutional order.³⁵ The Universal Declaration of Human Rights, as well as the United Nations, UN agencies, and various associated compacts all resulted in part from the upsurge in world federalism.

The intended lesson here is that a powerful mutualism can form between liberation movements and democracy movements.³⁶ Movement demands for human rights and collective liberation challenge the legitimacy of the existing order, and strengthen the case for democratization. Movement demands for democratization challenge the authority of the existing order, causing the establishment to consider giving in on specific human rights questions rather than risk losing state power. Similarly, human rights amendments expand the circle of standing and personhood, and thereby democratize the polity. Democracy amendments strengthen the capacity of the people to safeguard their own rights.

Shall we overcome?

“Every age and generation must be free to act for itself, in all cases, as the ages and generations which preceded it. The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies.”

~ Thomas Paine (1791)

Movements to humanize and democratize the U.S. Constitution are active across the United States. These movements are treading well-worn procedural paths to constitutional reform. But the contemporary United States is not the bowie knife frontier society of pre-Civil War America, nor the tumultuous progressive era of the 1910s, nor the optimistic New Frontier society of the 1960s. Today’s

³⁵ Ely Culbertson, “The Preliminary Draft of a World Constitution, by the Committee to Frame a World Constitution,” *Indiana Law Journal* 24, no. 3 (1949): 20; Rexford Guy Tugwell, *The Emerging Constitution* (New York, NY: Harper’s Magazine Press, 1974); John W. Boyer, “Drafting Salvation,” *University of Chicago Magazine*, December 1995; Rexford Guy Tugwell, *Model for a New Constitution* (Santa Barbara, CA: Center for the Study of Democratic Institution, 1970); Staughton Lynd and Gar Alperovitz, *Strategy and Program* (Boston, MA: Beacon Press, 1973).

³⁶ Richard Flacks, *Making History: The American Left and the American Mind* (New York, NY: Columbia University Press, 1988).

constitutional reformers face a particular set of cultural, structural, and strategic challenges. How likely are they to succeed?

The oldest and most difficult obstacle to constitutional reform rests in the provisions of the Constitution itself. The Constitution's architect, James Madison, was an admirer of that great English anti-democrat, Edmund Burke. Madison intended to produce a *Burkean constitution*.³⁷ Thomas Jefferson, who called for a constitutional convention every 30 years and, "a little revolution from time to time," chastised Madison that, "The earth belongs to the living, not to the dead."³⁸ But Jefferson and Thomas Paine were not present (nor were they wanted) when Madison and his fellow Federalists adopted the procedural requirement that amendments win ratification by three quarters of the states. This poses what social movement scholars would call a very challenging *political opportunity structure* that was a tall order even in Madison's day.³⁹ Two centuries later Americans are still significantly governed from beyond the grave.

The structural difficulty faced in amending the Constitution has directly produced a second, cultural obstacle, that of the *Sacral Constitution*. Its many years have given the document such quasi-religious character that many Americans react negatively to calls for constitutional reform. For instance, in the weeks immediately following *Citizens United v. FEC*, U.S. Senator Russ Feingold of Wisconsin reacted negatively when urged to support a constitutional amendment to overturn the Supreme Court's ruling protecting corporate campaign expenditures as free speech. He initially warned against "tampering with the Constitution," and suggested a court-packing strategy and legislative reform

³⁷ Ernest Young, "Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation," *North Carolina Law Review* 72 (1993): 619–724.

³⁸ Thomas Jefferson, "Thomas Jefferson to James Madison," September 6, 1789, University of Chicago, <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>.

³⁹ Doug McAdam et al., "Dynamics of Contention," *Mobilization* 8, no. 1 (February 2003): 109–41; Sidney Tarrow, "Cycles of Contention: Between Moments of Madness and the Repertoire of Contention," *Social Science History* 17, no. 2 (1993); Sidney Tarrow, *Power in Movement: Collective Action, Social Movements and Politics* (Cambridge, UK: Cambridge University Press, 1998); Charles Tilly, "Repertoires of Contention in America and Britain, 1750-1830," *Center for Research on Social Organization Working Papers*, no. 151 (1977), <http://deepblue.lib.umich.edu/handle/2027.42/50926>.

instead.⁴⁰

Fear of constitutional change often goes beyond the surface of secular religiosity and into fears of other kinds; specifically, *fears of other people*. The concern, as expressed by some liberals, is that “if the Constitution is opened up” by amendment or a constitutional convention, civil, political, economic and other human rights will be taken away.⁴¹ The concern, as expressed by the U.S. Chamber of Commerce, is the opposite – that all kinds of human rights (to health care, organize unions, quality education, and more) will find a constitutional home. And the concern, as expressed by some conservatives, is that personal gun rights will be done away with, or that “the immigrants will take over.”⁴²

The notion of the *Sacral Constitution*, as well as *fears of other people*, both pose what social movement scholars call *collective identity problems*. Collective identity problems arise when people who have common grievances have difficulty developing a sense of group identity through which they can work and act together.⁴³ The difficulties here are several. For a constitutional reform movement to cohere sufficient social consensus to succeed, it may need to overcome obstacles posed by elites whose distrust of the American public underlies fears of “constitutional tampering.” Then, once elites become involved in constitutional reform efforts, they often seek to establish themselves as leaders in the new

⁴⁰ Since then, voters in 61 of 61 Wisconsin communities that have held votes on the provisions of the We the People Amendment have voted in favor of amendment. Russ Feingold responded to those votes and now supports amendment.

⁴¹ Michael Leachman and David A. Super, “States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues,” Legal Memorandum (Washington D.C.: Center on Budget and Policy Priorities, July 16, 2014); T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, 2nd ed. (Oxford, England: Osford University Press, 2003).

⁴² John D. Malcolm, “Consideration of a Convention to Propose Amendments Under Article V of the U.S. Constitution,” Legal Memorandum (Washington D.C.: The Heritage Foundation, February 19, 2016).

⁴³ Cristina Flesher Fominaya, “Collective Identity in Social Movements: Central Concepts and Debates: Collective Identity in Social Movements,” *Sociology Compass* 4, no. 6 (June 4, 2010): 393–404, doi:10.1111/j.1751-9020.2010.00287.x; Scott A. Hunt and Robert D. Benford, “Collective Identity, Solidarity, and Commitment,” in *The Blackwell Companion to Social Movements*, ed. David A Snow, Sarah A Soule, and Hanspeter Kriesi (Malden, MA: Blackwell Publishing, 2007), 433–548; Francesca Polletta and James M. Jasper, “Collective Identity and Social Movements,” *Annual Review of Sociology*, 2001, 283–305; Taylor, Verta A Taylor and Nancy Whittier, “Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization,” in *Frontiers in Social Movement Theory*, ed. Aldon D Morris and Carol McClurg Mueller (New Haven, CT: Yale University Press, 1992), 104–29.

movement, potentially undercutting the leadership cohorts that prepared the movement upsurge in the first place.⁴⁴ Finally, and most seriously, even in the absence of elites, constitutional reform movements face the problem of becoming popular movements in practice, not just in name. In a both pluralistic and white supremacist society such as the United States, in which group identities are many, intersectional, and also oppositional, the formation of an inclusive constitutionalism that is truly expressive of majoritarian sentiments is both difficult and required.

Constitutional reform movements also face particularly significant *resource mobilization* problems. Amending the Constitution is a long-term project, often spanning decades, not just years. The fact that at minimum 38 states must sign on for ratification means that the movement must build strong support in nearly every state of the union. All of this requires the development of resource capacity in the forms of labor, organization, and financial capital. Given that constitutional reform movements usually arise from the margins, rather than the political core, the challenge of mobilizing the necessary resources for success is all the more significant.

Activists consider all of these factors (resource mobilization, collective identity, political opportunity structure) and more in deciding whether to invest their time and energies in a particular constitutional reform campaign. Social movement scholars call such common considerations of “whether a campaign is worth it” matters of *strategic choice*. Activists ask themselves a series of utilitarian questions: How likely is the campaign to succeed? What are the potential risks of cooptation by members of Congress, other politicians, or Beltway elites? For that matter, what are the cooptation risks posed by other social movement actors, or by perceived opponents of the movement?⁴⁵ If

⁴⁴ Prior experience and long-term involvement can produce personal knowledge and commitment, as well as function-specific forms of social movement organization, that are better suited to stewarding a radical reform through to ratification. Elite players that join in process will often face difficulties in negotiating the tensions between needing short and midterm victories (which is to say, statutory changes, executive actions, or court rulings) in order to maintain their established resource base and the longer-term mobilization strategies required for constitutional amendments.

⁴⁵ Allison Marie Martens, “A Movement of One’s Own? American Social Movements and Constitutional Development in the

successful, how much of an effect would the constitutional reform actually present: Would the change be merely expressive or would it actually be felt in daily life?

Finally, one particular question that is as present for constitutional reformers today as it was in the Civil War and World War periods is this: Is the United States the future? This question arises from two directions at once. From within the United States, struggles over federalism have increasingly involved human rights protections enacted at the local and state level struck down by the federal courts under the guise of *preemption doctrine*.⁴⁶ Absent a complete reinvention of federalism doctrine on questions of municipal home rule, reserved powers, and human rights versus property rights, should the federal courts be trusted with the job of constitutional review?

From without the U.S., the challenge posed by corporate globalization raises similar questions about the long term effect of amendments to the U.S. Constitution. Will U.S. (or EU, Argentine, Mexican, South African, Indian, etc) constitutional guarantees of human rights and democracy withstand challenges from transnational trade tribunals organized via the World Trade Organization (WTO), Trans-Pacific Partnership (TPP), or Transatlantic Trade and Investment Partnership (TTIP)? And even should U.S. constitutional provisions survive such challenges intact, can the United States withstand the likelihood of a *capital strike* involving the withdrawal of massive amounts of capital from our economy by transnational corporations? It may not be enough for Americans to democratize and humanize our constitution. We may need to participate in something more: *A global constitutionalism*.

Amending Society by Amending the Constitution

Constitutional reform movements in the United States face serious challenges. Nevertheless,

Twentieth Century” (PhD Dissertation, University of Texas, 2007).

⁴⁶ Manski and Dolan, “Unleash Democracy: Policies for a New Federalism.”

popular constitutionalism sometimes succeeds. When it does, we find that it is not merely the written constitutional text that has been amended, it is society itself. The process of overcoming the structural, cultural, and strategic obstacles to constitutional reform is deliberative, participatory, and usually transformative.⁴⁷ In reconstituting law, constitutional reform movements play a role in the reconstitution of existing social relations.⁴⁸

The procedural obstacles to reform posed by the anti-democratic Burkean provisions of the Constitution can be turned to advantage. The need to secure the support of at least 38 states creates a long-range terrain of struggle composed of many intermediate campaigns that each of them have clear, definable goals. This in turn necessitates serious organizing, outreach, and public debate. Length by length, stoked along the way by the incremental availability of winnable victories, constitutional reform movements build up their resource mobilization capacity. Thus, the political opportunity structure of constitutional change may actually be advantageous to the very kind of long term movement building required to amend the Constitution.⁴⁹

⁴⁷ There is an emerging discussion on the question of whether and how constitutional reform processes produce democratization. In a crossnational longitudinal study of 244 countries over 68 years, I found strong evidence of a positive democracy effect from constitutional amendment processes. Devra Moehler makes the case that constitution making in Uganda produced “distrusting democrats” who were better equipped to participate in politics, but less inclined to do so at the national level. Abrak Saati analyzes twenty cases of transitional processes in less stable societies involving constitution making and concludes that the idea that participation produces democratic effects is a myth. Ben Manski, “Constitutional Change, Deliberation, and Democratization” (West Coast Law & Society Retreat, UC Irvine, 2016); Davra C. Moehler, *Distrusting Democrats: Outcomes of Participatory Constitution Making* (Ann Arbor, MI: University of Michigan Press, 2008); Abrak Saati, *The Participation Myth Outcomes of Participatory Constitution Building Processes on Democracy* (Umeå: Statsvetenskapliga institutionen, Umeå universitet, 2015), <http://urn.kb.se/resolve?urn=urn:nbn:se:umu:diva-102719>.

⁴⁸ Gunther Teubner, “The New Constitutional Question” (Conference on Transnational Societal Constitutionalism, Collegio Carlo Alberto, Torino, Italia, 2012); Gavin Anderson, “Societal Constitutionalism, Social Movements, and Constitutionalism from Below,” *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 81–906; Gavin Anderson, “Unthinking Constitutional Law - Towards a Legal Pluralist Theory of Constitutionalism” (SJD Thesis, University of Toronto, 2002); Steven Buechler, *Social Movements in Advanced Capitalism: The Political Economy and Cultural Construction of Social Activism* (New York, NY: Oxford University Press, 2000); Ron Eyerman and Andrew Jamison, *Social Movements: A Cognitive Approach* (University Park, PA: The Pennsylvania State University Press, 1991).

⁴⁹ A contemporary example of this approach is to be found with the Move to Amend (MTA) coalition’s very deliberate, bottom-up strategy involving a series of escalating campaigns. First, an MTA affiliate is asked to collect signatures to place a resolution supporting the We the People Amendment on a local municipal or county ballot. Once a sufficient number of communities in a state have adopted amendment resolutions (generally once 50% of the population is represented by such resolutions), the campaign moves to the state level to secure state legislative support or, where possible, to place an amendment resolution on the statewide ballot. In following these steps, prior to serious engagement with Congress, Move to

The collective identity problems faced by constitutional reform efforts similarly invoke broad deliberation. The notion of an inviolate Sacral Constitution often falls aside when confronted with the living constitutionalism inherent in popular participation. In the case of *Citizens United v FEC*, for instance, concerns about constitutional tampering have given way in the face of broad popular support for constitutional amendment.

Fears of the other often prove less tractable. The construction of a majoritarian constitutional reform block in a society that is evermore plural involves significant engagement across class, racial, gender, geographic, age, ideological and other boundaries. In the process, individuals and groups will take sides, recognizing common interests and defining differences. Constitutional debate acts as a focal lens through which momentous social questions emerge with clarity. From Reconstruction to the Equal Rights Amendment, popular constitutionalism has a demonstrable history of generating new collective identities and antagonisms – both of which are essential elements in the process of social change.

Individuals considering whether to become involved in a constitutional reform effort will often weigh these and other factors, including alternative uses of their time and energies. They will look not only at the success rate for past amendment campaigns, they will also consider the success rate of alternatives. In some cases, as with women's suffrage, they may decide that they cannot secure the social changes they seek without amending the Constitution. And always they will find their evaluation of their strategic alternatives shaped by how they feel about the present constitutional situation; what is merely a disagreeable nuisance to some may prove intolerable for others.⁵⁰

The world of the 21st century bears some resemblance to those of the 18th, 19th, and 20th

Amend's leadership is building up the resource capacity, leadership networks, and social consensus necessary to secure constitutional change.

⁵⁰ Ron Aminzade et al., "Emotions and Contentious Politics," *Mobilization* 7, no. 2 (June 2002): 107–216; Verta Taylor, "Passionate Politics: Emotions and Social Movements," *Social Movement Studies* 1, no. 2 (October 2002): 199–200; Verta Taylor, "John D. Mccarthy Lifetime Achievement Award: Culture, Identity, and Emotions: Studying Social Movements as If People Really Matter," *Mobilization: An International Journal* 15, no. 2 (June 2010): 113–34.

centuries, but only some. Revolutions against aristocracy, slavery, and colonialism produced constitutions consecrating particular conceptions of human rights and democracy. Those constitutions do not encompass modern conceptions and therefore do not mandate the kind of participatory and socially just society that growing numbers of people around the world have come to expect.⁵¹ Furthermore, the old conceptions of representative democracy and individual liberties are under a constant assault by the institutions of global capitalism.⁵² Constitutional reform in one country – even a country as powerful as the United States – may not be, on its own, enough.⁵³

In the challenge of constitutional reform we are presented with a singular opportunity to reconstitute not only our basic law, but our society. We have, as Paine promised us, the “power to begin the world over again,” and to do so in a deliberative, democratic and non-violent manner. If we are serious about constitutionalizing human rights and democracy, we should decide whether the path forward involves a series of amendments or a constitutional convention, as per the procedures of the U.S. Constitution. Maybe the path involves an entirely new constitutional process, a democratic revolution, or popular engagement in global constitutionalism. Perhaps there are multiple paths forward. Decisions about constitutional strategy should be informed not only by an analysis of law and the state, but by an understanding of the kind of social movements necessary for the radical reconstitution of society. Constitutionalism is a social movement form. Constitutionalization is a social change process. The history of American progress is a history of amending America.

⁵¹ Judith Blau and Alberto Moncada, *Justice in the United States: Human Rights and the U.S. Constitution* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2006); Julie Wark, *The Human Rights Manifesto* (Washington D.C.: Zero Books, 2013).

⁵² William I. Robinson, *Global Capitalism and the Crisis of Humanity* (New York, NY: Cambridge University Press, 2014).

⁵³ Adam Gannaway, “Cosmopolitan Constitutionalism: Democratic Legitimacy and the International Order” (PhD Dissertation, The New School, 2012); Antje Wiener et al., “Global Constitutionalism: Human Rights, Democracy and the Rule of Law” 1, no. 1 (2012): 1–15; Jan-Werner Müller, “Three Constitutionalist Responses to Globalization,” in *The Limits of Constitutional Democracy*, ed. Stephen Macedo and Jeffrey Tullis (Princeton, NJ: Princeton University Press, 2010).