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Response to the Contributors

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Essay

Response to the Contributors

RICHARD S. KAY

In this Essay, I respond briefly to 18 articles contributed to this special Festschrift issue of the Connecticut Law Review. All but one of the contributions fall within two categories: constitutional change and constitutional interpretation. These topics have engaged me for most of my career as a legal scholar. While every one of the contributions sheds new and useful light on these subjects, I usually have some differences with the interpretations argued in them. Of course, I can only treat those differences superficially here. In each case, moreover, my comments should not obscure my sincere admiration of and appreciation for the authors' efforts.

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Response to the Contributors

RICHARD S. KAY *

INTRODUCTION

I am both honored and humbled by the publication of this Symposium. Every scholar hopes that something that he or she has produced will strike colleagues as clarifying or helpful in some way. It is rare, however, for the fulfilment of that hope to be demonstrated so clearly as has been the case with the publication of these thoughtful essays. It is difficult adequately to express what this publication has meant to me.

I wish to thank the people who have been responsible for the organization and execution of this issue as well as for the extraordinary conference in September 2019, in which most of the contributors participated. Yaniv Roznai, who conceived the project and has effectively managed it, is at the top of that list. It is of special satisfaction to me that Yaniv, whose interests overlap so substantially with mine, and who is one of our brightest young scholars in comparative constitutionalism, thought my work worthy of his efforts. This undertaking was facilitated and supported by the University of Connecticut School of Law, and for that I am grateful to then-Dean Timothy Fisher, Peter Siegelman and Leslie Levin. Last year's conference was superbly administered by Deborah King. I am also indebted to the editors of the *Connecticut Law Review*, and especially to its Managing Editor, Adam Kuegler, for agreeing to the publication and for their work in producing it.

Naturally, the substantive comments I offer here can only begin to engage the astute and stimulating essays of these accomplished friends and colleagues. I know they will understand, as is always the case in exchanges like this, that my observations mostly reflect my differences rather than my agreement with the positions they take. In each case, however, I admire the contributions and I am sincerely grateful for every one of them.¹

While they show considerable variety, almost all the articles in the Symposium fall into one of two broad and related categories, constitutional

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¹ The limited time I have had to compose this response has necessarily reduced the independent research I have been able to undertake. I have, therefore, only provided citations to direct quotations. Quotations without citations are taken from the articles on which I am commenting. Since my Comments were based on preliminary drafts, there will doubtless be places where they do not reflect the final version. My apologies to the authors and to readers.

change and constitutional interpretation. These topics encompass most of the questions to which I have directed attention over many years.

Carol Weisbrod's contribution does not fit easily under either topic. It deals with a broader theme, the scope of legal education and legal scholarship. Her essay reminded me of some of the significant changes that I have observed in the legal academy in the course of my career. I joined the University of Connecticut faculty in 1974, a time of growing prosperity for American law schools. In contrast, arts and sciences faculties, and especially humanities departments at that time, were tightening their belts. Graduate programs in those fields were producing more candidates than the shrinking market could accommodate, a tendency further encouraged by policies of the Selective Service System which was deferring conscription of full-time students. The result was a surplus of new Ph.D.'s in subjects like English, History, or Philosophy. What were these well-educated and scholarly inclined men and women to do? Many of them went to law school and when they were graduated, they saw an opportunity to redirect their thwarted academic ambitions to faculties in the relatively prosperous law schools.

For some people, the arrival of these scholars explains the broadened fields of study still pursued in law faculties. Today, it is an unusual law school that doesn't include scholars who are best described as historians, economists, or philosophers, not to mention the odd poet and novelist. It is generally assumed that these multidisciplinary endeavors marked a change from the 1950s and 60s, a time when legal scholarship was more concerned with practical questions of legal doctrine and judicial behavior. In fact, as Weisbrod shows, law faculties were never as insular as all that. The law exists in an intellectual web that connects with every kind of social science. The problems of understanding law, moreover, have always engaged with the techniques and perspectives of the humanities. Weisbrod reviews a particularly poignant moment in the association of law and the humanities at Harvard Law School at the turn of the twentieth century, one that reflected the influence of the culture of Boston "Brahmins."

Harvard president, Charles Eliot, expected that the "faculty of law will have very slight connection with any other faculty" and Oliver Wendell Holmes Jr. opined that the "law is not the place for the artist or the poet." Still, Weisbrod shows that men like Harvard professors James Bradley Thayer and John Chipman Gray were "scholars and generalists apart from their contributions to . . . the severely practical private law curriculum." Their wider interests, moreover, were not private avocations; they influenced their writing, teaching and, necessarily, their students. In an introductory lecture, Thayer urged new law students to maintain their "interest in literature, or the ancient classics, or natural science, or politics or art, or poetry." A publication of Thayer's shows him arbitrating a debate about Matthew Arnold's criticism of Ralph Waldo Emerson. Samuel

Williston remembered Gray epitomizing “the old ideal of a rounded life . . . a well-read scholar in various fields with cultivated interests in letters and art.”

This may be a particularly appropriate moment to keep in mind the essential entanglement of humanities and legal education. We now appear to be entering another period in which law schools are more actively pursuing “severely practical” ambitions. The era of “law and . . .” studies may not be coming to an end, but those programs will have to make room for “experiential” courses aimed at providing students with something more “hands on” than legal history or law and literature. This pressure is being driven by the requirements of employers, both individually and as represented in professional associations. The same interests are reflected in the preferences of law school applicants, something much more important at a time when competition for students is more intense. It is no disparagement of the value of such practical education, however, to believe that law cannot fully be understood if it is severed from the larger cultural environment of which it is a part. Weisbrod notes the Wallace Stevens Professorship, which it has been my honor to hold at the University of Connecticut. Stevens may have publicly scoffed at any supposed connection between law and poetry, but the fact is that his writing, like law itself, is preoccupied with the human need to impose form on formless reality—the “[b]lessed rage for order.”² And, as long as the legal academy remains the site for thoughtful consideration of law and legal institutions, we can expect law faculties to continue to explore them through the lenses of the social sciences and the humanities.

CONSTITUTIONAL CHANGE

The essays that deal with the identification and evaluation of constitutional change all engage a critical distinction. Some constitutional changes, including most constitutional amendments, are accomplished under a pre-existing authorization. But other kinds of change, such as revolutions or constitutional replacements must be effected with extra-legal actions. Many of the contributions to the Symposium grapple with the character of the latter, that is, with the nature of “constituent power.” Most of the thinkers who have attempted to describe this power have seen it as antecedent to positive law and, therefore, as something that cannot be controlled or limited by such positive law. This phenomenon and its attributes are often associated with the argument about the power of “the nation” made by the French revolutionary statesman, Emmanuel Joseph Sieyès in his *What is the Third Estate?* Sieyès described that power as “the

² WALLACE STEVENS, *The Idea of Order at Key West*, in *THE PALM AT THE END OF THE MIND: SELECTED POEMS AND A PLAY* 97, 98 (1971).

source and supreme master of positive law,” existing “independently of any rule and any constitutional form.”³

In his contribution, *Mikolaj Barczentewicz* defines several new categories of actions that accomplish or contribute to constitutional changes of various kinds. In his view, for example, there are two types of constituent power: A *de facto* constituent power that mobilizes some pre-existing, “brute” force (physical or social) to change the way the legal system in a given society operates and a *de jure* constituent power the force of which derives from the moral correctness (according to some normative system) of the changes that it attempts to implement. (The terminology seems to me unfortunate insofar as this language typically is employed in rather different senses. *De jure*, in particular, suggests a legal quality, something definitionally apart from constituent power.) He also distinguishes between either kind of constituent power and the idea of “constituent authority” that I have developed in my writing. He correctly notes that the presence or absence of constituent authority is not fixed at the moment of enactment. The “authority” supporting the identical constitutional text may be different at different times, as a society’s understanding of the qualities that an appropriate constitution-maker ought to possess changes.⁴ As I have conceived it, moreover, constituent authority exists for any successful constitution and it performs an essential function even if it is never again perceived in the way it was perceived at the time of its creation.

My ideas about constituent authority do not conceive of it as an *alternative* to constituent power. It goes without saying that every legal system is the result of a set of voluntary actions by human beings—although not always actions intended to create a constitution. It follows, therefore, that every constitution is, by definition a product of some kind of constituent power. My work on constituent authority is an examination of a particular aspect of the exercise of constituent power. A *successful* exercise of constituent power requires that there be something about the agents of change and the manner in which they operated that will strike the population of the relevant state as proper ways to make a fundamental law. As Barczentewicz notes, there could be an effective exercise of constituent power that relies entirely on physical force to establish and maintain a given constitution. Such a regime, however, is unlikely to last very long and it is even more unlikely to instill the kind of attitudes toward the state and the law that make for effective government.

³ EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 128, 131 (M. Blondel trans., S.E. Finer ed., 1964) (1789).

⁴ The historical facts of enactment, however, may limit the capacity plausibly to formulate a new constituent authority that can be associated with the governing constitution. I discuss this in my response to Zoran Oklopčic.

The need for ultimate popular acquiescence in the source of constitutional rules has led many observers to conclude that only a democratic process can generate what I have called constituent authority. Barczentewicz cites H. L. A. Hart and Andrew Arato for the conclusion that constituent power can “be possessed only by ‘the people.’” Just how “the people” can express itself has always been a vexing problem and we live in a time when “populism” has taken on new and not always reassuring forms. Beyond that, however, there is nothing in the idea of constituent authority that requires that it be traceable to the preferences of the population. Such a requirement conforms to most modern ideas of legitimate power but we can easily imagine or recall societies the values of which lodged that authority in other entities. As I note in my response to Yaniv Roznai below, constituent authority may be in a monarch, in the clergy, or in any other entity that commands the confidence of society as a whole. Insofar as it reflects widely held values, moreover, it begins to resemble what Barczentewicz calls *de jure* constituent power.

Barczentewicz also makes some interesting and important observations on the relationship between constituent power and Hart’s “rule of recognition.” As a “social rule,” the latter reflects social practice—something that cannot respond perfectly to the exercise of a power to change the law. But it is also true, as Barczentewicz notes, that the exercise of a legal power that results in changes in behavior may itself be one of the ingredients influencing the attitudes that are at the core of the rule of recognition.⁵ We can examine this phenomenon in Barczentewicz’s discussion of attempts to define the creation or substitution of a new constitutional text by promulgation of a rule of positive law. He mentions the specification in Article V of the United States Constitution of the option of calling national and state constitutional conventions, something peculiarly appropriate for wholesale constitutional change. He also cites Article 146 of the German Basic Law providing that the Basic Law may be replaced by a constitution chosen by a “free decision” of the German people. These and other instances can be seen as disproving the claim that constituent power is something altogether apart from the exercise of legally created power. There are, in fact, judicial decisions—carefully analyzed by Yaniv Roznai in his *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*—that hold that there are some changes that are so thorough that they cannot be effected by a power created by the very instrument that they aim to abandon. But even when such provisions are invoked and appear to be successful, it is unclear if the best way to describe such actions is as the result of a legally authorized process. Even

⁵ I discuss Hart’s understanding that it is only the viewpoint of officials of the legal system that is essential in inferring a rule of recognition in my response to Larry Alexander’s contribution.

though it is formally traceable to acts of the United Kingdom Parliament that might in theory be repealed, we understand that the current force of the Canadian legal system owes nothing to the rule of recognition that underlies the legislative power of the Westminster Parliament. The formal link only demonstrates what Hart called a “relationship of validating purport.”⁶

Yaniv Roznai also sees the constituent power as more orderly and restrained than the “wild west” described by some commentators. He is concerned that even when the sovereign “people” are able to express themselves clearly and fairly, they may end up producing a system that stifles democracy. This danger is by no means hypothetical, as is clear to anyone observing the development of populist political movements in the twenty-first century. Even when manifested in an authentically democratic constitution-making action, the result may still be a case of “one person, one vote, one time.”⁷

Roznai first describes some limitations of the constituent power that have been suggested in the academic literature, but he dismisses each of them as ineffective or insufficient. Historically, all positive law-making power has been understood as subject to natural law, rules of conduct that stem directly or indirectly from divine law. (I do not, by the way, understand Sieyès’s reference to natural law in *What is the Third Estate* to be anything more than an expression of the nation’s immunity to limitation by *positive* law.) In any event, as Roznai concludes, the relative formlessness of natural law, in its ancient or its modern versions, deprives it of any practical ability to affect the action of the constituent power. Natural law, as Justice Iredell, himself a constitution-maker, said, is “regulated by no fixed standard” as shown by the fact that “the ablest and the purest men have differed upon the subject.”⁸

Nor does Roznai find “eternity clauses” in written constitutions, prohibiting the use of the amendment power for certain purposes, capable of limiting constituent power. Constituent power, by definition, creates a new constitution and decommissions the old one. Whatever force the old constitution has, including its restrictions on *that* constitution’s capacity for reform, is exhausted once the constituent power is brought to bear on it.

Finally, Roznai notes the idea that, in certain cases, constitution-makers can restrict themselves to creating texts that conform to “pre-agreed upon [constitutional] principles.” The best-known example

⁶ H. L. A. HART, *Kelsen’s Doctrine of the Unity of Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 309, 319–20 (1983).

⁷ The phrase was originally used in connection with the election of Islamist governments in the Middle East. EDWARD P. DJEREJIAN, *DANGER AND OPPORTUNITY: AN AMERICAN AMBASSADOR’S JOURNEY THROUGH THE MIDDLE EAST* 22 (2008).

⁸ *Calder v. Bull*, 3 U.S. 386, 399 (1798).

is the formation of the 1997 South Africa Constitution. He regards the observance of those principles, however, as evidencing only voluntary behavior, not a real restraint on the enactors' behavior. Indeed, it may make more sense in such cases to understand the exercise of constituent power as including the entire process leading to the promulgation of the new instrument. It would, that is, take into account the participation of the various interest groups typically involved in the formulation of the prior principles, as well as the judgment of the court charged with certifying the draft constitution's compliance with those principles. Looked at this way, the constituent power, now wielded by a complex set of institutions, would still be unrestricted in creating its preferred constitution.

Roznai goes on, however, to take note of three other kinds of norms that he finds may be more effective limits on constitutional creation. He mentions first the international obligations of the states engaged in constitutional re-writing. It is true that, as matter of international law, applicable treaty commitments are understood to bind a state in all of its manifestations—when legislating, enforcing law, or constitution-making. Certain international norms, moreover, such as those associated with modern human rights treaties, will be relevant to the choices of a state in enacting a new constitution. Such an obligation, however, arises only *within the system of international law*. The obligation of states to conform to international law is itself only a rule of international law. That is all that can be shown by the utterances of international tribunals. The force of that international law in the legal system of a given state, however, is a matter of municipal law—whether it embraces a monist or dualist theory of international and domestic law—and that, by definition, is subject to the exercise of constituent power.

Roznai also observes that the near universal adoption of constitutions has revealed certain core elements essential to the existence of a constitutional state. These include the sovereignty of “the people,” the rule of law and the inviolability of certain individual rights. It follows, Roznai contends, that when a constituent power establishes a legal system that fails to respect these principles, the product will be illegitimate. These principles, however, are so general that their application in any given case will always generate plausible and honest differences as to whether or not they have been observed. In that respect, this limitation presents roughly the same problems as those we identified with respect to the discipline (or lack thereof) imposed by the norms of natural law.

Finally, Roznai believes that the very idea of constituent power has some limits built into it. Since constituent power is “the power of the people” to create a constitutional regime, its exercise must be “inclusive, participatory and deliberative.” This recognition necessarily also entails respect for certain rights—of expression, assembly, and participation, for example—that are presupposed in any democratic process. Although

constitution-making is almost always associated with popular choice these days, I am not sure that the very idea of constituent power needs to be understood this way. The agency that creates a constitution must be perceived as possessing the qualities that entitle it to legislate fundamental law, but those qualities will be different in different times and places. Thus, in some situations, the only credible source may be a grant of the monarch (an “*octroi* constitution”), a certain family or certain religious authorities. It is true that currently a constitution-making event will almost always have elements that its defenders point to as evincing the approval of the population. Nevertheless, we know that there are successful constitutions that have resulted from foreign or international pressure or from elite negotiation between various interests in society.

Like Roznai, *Joel Colon-Rios* explores the possibility that constitution-making has certain inherent limitations. The process of creating a constitution never arises out of a void. Before a new constitution-maker begins its work, someone must have been decided that the existing constitutional arrangements were no longer acceptable. That decision, most probably, was expressed in such form as to convince the political society to start up a constituent process. This will almost always result in the convocation of some kind of constituent body. (The legislature of an existing regime may take this function upon itself, but when it does, it has adopted a qualitatively different character.) One need not believe this sequence is defined by any positive law to recognize in it a kind of principal-agent relationship.

Based on this reasoning, Colon-Rios argues that even a constituent authority must respect implicit limits. Constituent authority, that is, is a *created* power and one must look to the creator and the act of creation to discover the tasks that were assigned to it, as well as those that were withheld from it. In this picture, only the creator—usually some entity or procedure that is taken to represent “the people”—is to be treated as genuinely sovereign. Thus, Colon-Rios takes issue with Carl Schmitt’s distinction between commissarial and sovereign dictators. For Schmitt, the *commissarial* dictator had defined powers to deal with a pressing emergency and was obliged to restore the normal constitutional order as soon as possible. In contrast, the *sovereign* dictator, as the name implies, recognized no restriction on either the matters with which it would deal nor the means it could employ. Indeed, the “sovereign dictator”—who could be an assembly as well as an individual—could be expected to create an entirely new constitution. The commissarial dictator is appointed and is a functionary under an existing constitution, whereas for Schmitt, the sovereign dictator “springs out of a normative nothingness and from a

concrete disorder.”⁹ Colon-Rios reasonably notes that this description fails to describe accurately what happens in real constitutional transformations and that Schmitt was willing to concede that even the sovereign dictator acts on a commission “from the people.”

Some examples illustrate the point. A common pattern of constitution-making is a sequence in which existing state agencies decide for one reason or another that an entirely new constitution is necessary. Then, with or without legal sanction, a referendum is called on the question of whether or not a constituent assembly should be convened. This assembly drafts a new document, and that constitution is promulgated, usually after a second ratifying referendum. The initial referendum may be interpreted to make the consequent assembly a single-purpose institution or the question that the referendum approved might have specified that any resulting constitution must have or not have certain features. If the constituent assembly should then proceed in ways that violate these limitations, some people will believe it has acted wrongly, even though the whole process, from start to finish, is conceded to be thoroughly illegal under the law of the previous regime.

In such cases, we can say that the constituent body acted “*ultra vires*.” But what exactly are the “*vires*” which the assembly has exceeded? They are certainly not the kinds of legal empowerments with which that expression is usually associated. We might expect the members of a constitution-drafting body to feel some kind of obligation to the voters who participated in the referendum that called that body into being. But, by hypothesis, that cannot be a *legal* obligation. And, as Colon-Rios acknowledges, it is far from clear that the voters in a plebiscite will have either the intellectual or the moral qualities that would justify their authority to impose conditions on the constituent process. As he also notes, there are many examples of “runaway” constitution-makers who have cast off whatever restrictions were imposed when they were given their mandate. Probably the most famous instance is the Philadelphia Convention of 1787 that drafted the United States Constitution. The mandate of the Continental Congress that called the convention restricted it to proposing amendments to the Articles of Confederation, a limitation repeated in the commissions of some state delegations. Colon-Rios begins his essay by describing the acts of the French National Convention taking on the ordinary governance of the state after it finished the drafting work for which it had been created. The Convention’s rule was short-lived, but its demise was prompted by crimes that were far more serious than its violation of the “*vires*” assigned to it by the Legislative Assembly in 1792.

⁹ Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 720 (2011) (quoting Andreas Kalyvas, *Popular Sovereignty, Democracy and the Constituent Power*, 12 CONSTELLATIONS 223, 227 (2005) (citation omitted)).

Colon-Rios's suggestion that the limits of a constituent assembly's mandate ought to be enforceable in courts raises particularly interesting questions. In all these cases, the courts he mentions were created by the legal system that was about to be displaced. When the constituent process is unauthorized by that prior system it is unclear just what law a court could apply in deciding whether the unlawful assembly was obliged to follow the instructions arising from the unlawful referendum. Nevertheless, as Colon-Rios shows, the unavailability of controlling law has not prevented some courts—including American state courts—from hearing and deciding such cases. And these judgments can make a difference, as was the case when the Supreme Court of Canada issued its critical decision during the “patriation” controversy in 1982.¹⁰ In these situations, however, it is impossible to see the judges as anything but political actors in the legal process of making a new constitution.

The existence of a legal competence for constitution-making is also foremost in *Warren Newman's* essay. Newman makes the case by examining the history of the Canadian legal system. The Canadian constitution has gone through various basic changes, every one of which appears to have been accomplished with perfect legality. “Canadian constitutionalism . . . abhors revolution.” It is true that the various Canadian polities have come into being in connection with the invocation of some existing legal authority. I have had several occasions to quote a 1981 statement by the Canadian Ministry of Justice during the great patriation debate that Newman discusses: “Canadians take pride in the fact that our Constitution unlike those of many nations, is entirely lawful both in its origins and its subsequent development.”¹¹ As Newman shows, this attitude has, with very few exceptions, been evident in official pronouncements going back to and before Confederation in 1867 and it has been prominent in decisions of the Supreme Court of Canada.

“Legal” constitutional transition has an undeniable appeal, but it may be going too far to say that changing the constitution of a regime in a way not provided for in the state's existing law demonstrates that the “commitment to constitutionalism itself has been abandoned.” It is enough in this regard to refer to occasions when an authoritarian government is overthrown and replaced with a liberal government acting under the auspices of a new constitution, one that provides for elected officials, individual rights, and an independent judiciary. This was the course, for example, followed by the government created in the wake of the 1986 “people power” revolution in the Philippines, an action plainly in conflict

¹⁰ Re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Can. Man.).

¹¹ Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 138 n.134 (1984) (quoting JEAN CHRÉTIEN, THE ROLE OF THE UNITED KINGDOM IN THE AMENDMENT OF THE CANADIAN CONSTITUTION 5 (1981)).

with governing law, that ended the Marcos despotism. As we have just seen, the existing Constitution of the United States was, as Newman notes, established in the teeth of existing law. Both of these examples are probably better described as the implementation than the abandonment, of constitutionalism.

There is a sense, moreover, in which the utilization of pre-existing law to effect a fundamental change does not really avoid legal discontinuity so much as disguise it. The experience of Canada makes that clear. The Canadian legal system that came into being in 1867 was the result of legislation enacted in the United Kingdom and every subsequent change can therefore be traced back to that initial act. But if Canadians were asked today why acts of the Canadian parliament ought to bind, very few would cite any allegiance owed to the Parliament at Westminster. Sometime between 1867 and 2020 the political bottom on which the Canadian legal system rests shifted from Britain to Canada. That shift was a matter of politics, not law. While the Statute of Westminster, 1931, and the Canada Act, 1982—both statutes of the United Kingdom Parliament—do appear to legislate a transfer of state authority to Canadian institutions, this is just another example of the “relationship of validating purport:” first the change in sovereignty, then the statutory acknowledgement.

There are both advantages and disadvantages to the employment of legal form to accomplish what is, in effect, a peaceful revolution. The former involve the reassurance that legality can impart to a transition that might otherwise disturb a population worried about the unsettling effect of an irregular change of government. It might, as Claude Klein has said, help secure “*une transition en douceur*.”¹² This is an especially powerful reason for invoking legal form in societies where legality has assumed a central place in the array of shared political values. So strong was the penchant for legality in seventeenth century England that lawyers were able to posit a perfect continuity in its constitutional history, starting with an “original contract” entered into at some time beyond memory. They vigorously denied, for example, that English legal authority originated in the conquest of 1066, something that would, as J.G.A. Pocock put it, have left an “indelible stain of sovereignty upon the English constitution.”¹³

The *disadvantages* of reliance on legal form arise from its obscuring the real political forces that caused one regime to be established and another one to be rejected. That makes it more difficult for public agencies to interpret rules and operate institutions in ways that cohere with the real values that undergird the state. For the same reason, it may distort honest debate about constitutional change. The prolonged Canadian patriation

¹² CLAUDE KLEIN, *THÉORIE ET PRATIQUE DU POUVOIR CONSTITUANT* 195–96 (1996).

¹³ J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 53 (1957).

crisis is a case in point. The substantive issues in controversy concerned the extent and allocation of powers between the federal and provincial governments and the propriety of a new charter of rights applicable to both levels of government. Those issues were difficult enough, but their resolution was hardly facilitated by the necessary recourse to the Westminster Parliament. It is true, as Newman points out, that patriation was finally “effected legally” but it might have been accomplished with less “strain on the constitutional system” if the indisputable sovereignty of Canada had been recognized and the decisions made in a thoroughly Canadian process.

There is some reason to think that, on balance, the peculiar constitutional and federal history of Canada may have made reposing ultimate formal authority in the United Kingdom a useful tool in negotiating serious political differences on the nature of the Canadian state. But, in other circumstances, a compelling case can be made for an overt rejection of the formal source of a system’s law. Several Caribbean states explicitly rejected their independence constitutions exactly because it was deemed seriously incongruous for an independent state to live under a constitution that had been given the force of law by the Parliament of a foreign state.

Peter Oliver has a different take on constitutional change but, like Newman, he affirms the possibility that such change may be both fundamental and legal. Like some other contributions, his analysis blurs the distinction between constituent and constituted power. Oliver expounds this view by examining the work of R. T. E. Latham who, in the course of his tragically shortened academic career in the 1930s, explored basic questions of British and Commonwealth constitutional law with insights that, in some ways, anticipated work of Hans Kelsen, H. W. R. Wade, and H. L. A. Hart. As we have already seen, there are many examples of cases where political actors have made fundamental changes to their constitutions in ways that are peaceful, orderly, and refer to an apparent pre-existing legal authority. The transformation of British colonies into the independent states of the Commonwealth of Nations are clear cases. Oliver has fruitfully examined those cases in *The Constitution of Independence* (2005). No one disputes that these nations are now thoroughly independent in the sense that the political locus of legitimacy for all effective law has shifted from Westminster to the local seat of government. And, as we have already seen, these changes were memorialized in legal enactments of the United Kingdom Parliament. Any differences we have about those developments, therefore, come down to the terminology we use to describe them.

As Oliver notes, one label for such changes, one adopted by H. W. R. Wade, was “revolution,” a word that Wade believed best characterized changes in authority like those that resulted in the independence of former

colonies. He thought it was also an appropriate term to describe the pre-Brexit subordination of United Kingdom law to that of the European Union. Similarly, H. L. A. Hart contended that at a certain point, some changes in a legal system's foundational rules no longer owe their effectiveness to decisions enabled by the "rule of recognition" of the former legal system. "This is a factual statement and not the less factual because it is one concerning the existence of legal systems."¹⁴ Latham (and Oliver) dispute the idea that every change that affects the identity of the ultimate legal authority should be characterized as a revolution. The reach of the rule of recognition, like any legal rule, is in some measure indeterminate. Metropolitan courts and courts of the former colony might look at the same data and disagree on the contents of that rule. Institutions in these two different legal systems may well desist from explicit declarations of their different jurisprudential understandings. The original rule of recognition may effectively have been transformed in the newly independent state, eliminating any role for the law-making institutions of the imperial legal system. But each of the steps leading to this result, may have been taken in accordance with the formal constitutional allocation of authority in force at the time of enactment. On this basis, Oliver concludes that the "ultimate rule of a legal system can change by legal means, and not just by the sort of revolution noted by H.W.R. Wade."

Whether or not this development has in fact occurred consistent with legal continuity depends on what we mean by "the ultimate rule of a legal system." According to Oliver, we may mean one of two things. In the first, "logical-legal" sense we work our way back to the starting point in a "chain of validity." In that case, we will end up at the imperial power's "abdication" of authority. For reasons already discussed in connection with the contribution of Mikolaj Barczentewicz, this raises questions about the "authenticity" of the new state's independence. The second approach does not call for us to look backward in time; we are concerned only with "those rules that are active and available . . . at the present moment." Definitionally, the authority of the prior metropolitan power is not part of the legal system "in [this] vital second sense." I find it hard to understand just how this way of viewing the emergence of a new legal system avoids recognition of the essential revolution that has taken place. The subjects of the new regime can think about it in this second sense only if they ignore the historical fact that something happened that caused the population, or the political part of the population, no longer to regard the prior law-making power as a proper agency for creation of binding law. This is something that would quickly become apparent should the colonial power attempt to re-assert its authority over its former possession. Why is it

¹⁴ H. L. A. HART, *THE CONCEPT OF LAW* 121 (3rd ed. 2012).

wrong to call this change in the social understanding of constitutional legitimacy a revolution? Wade certainly understood that revolutions can come in many forms: "When sovereignty is relinquished in an atmosphere of harmony, the naked fact of revolution is not so easy to discern beneath its elaborate legal dress. But it must be there just the same"¹⁵

Mapping the causes and consequences of constitutional change presents peculiar challenges in the United Kingdom, given the absence of a canonical supreme text or a clear procedure for constitutional amendment. The effect of this situation is presented vividly in *Alison Young's* close examination of the momentous developments of the last several years. Of course, as she notes, the relevant ground has been shifting for a considerably longer time. There was a standard and fairly simple picture of the United Kingdom constitution as late as the 1960s. This was the regime of "parliamentary sovereignty," the classic statement of which is found in A.V. Dicey's *Law of the Constitution*, published at the turn of the twentieth century. Parliament (by which Dicey meant the Houses of Commons and Lords and the Monarch "acting together"), had "the right to make or unmake any law whatever" and "no person or body . . . [had] a right to override or set aside the legislation of Parliament."¹⁶ There was one necessary exception: No Parliament could make a law which would reduce the legislative authority of future parliaments.

Parliamentary supremacy fit well with another feature of British governance. Members of Parliament are elected according to a "first past the post" procedure. This has usually resulted in a solid majority for one party, reducing the risk of the kind of parliamentary stalemate that arises more often with proportional representation schemes as shown recently in countries like Spain, Italy, Greece, and Israel. A UK tradition of rigorous party discipline, moreover, has had the result of concentrating power in the government and, more particularly, in the Prime Minister. An election victory in the usual circumstances, therefore, entrusted the unlimited sovereignty of Parliament to the hands of the winning party. That party then had little difficulty enacting its preferred program. This is the situation to which Young refers when she explicates a "majoritarian" as opposed to a "consensual" form of democracy.

This state of affairs, however, has been under pressure for several decades. Young mentions some of the relevant developments. In recent years, it has not been uncommon for parliamentary decisions to be limited or even overridden by decisions of courts, both international and domestic. And, in the most recent, post-Brexit era, the disintegration of the orthodox Diceyan view of the constitution appears to have drastically accelerated.

¹⁵ H.W.R. Wade, *The Basis of Legal Sovereignty*, 13 CAMBRIDGE L.J. 172, 191 (1955).

¹⁶ A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3-4 (Liberty Classics, 8th ed. reprinted 1982) (1885).

But, as Young shows, it is hard to characterize the new developments as moving things in any one clear direction.

One of the reasons that the most recent changes have been so perplexing arises from the fact that an unlikely combination of factors produced a perfect constitutional storm. Prime Minister Theresa May sought an early election and the opposition Labour Party decided to concur, providing the two-thirds vote in the Commons required by the Fixed Term Parliament Act, 2011. Against all predictions, the outcome of that election in June 2017 deprived the Conservative Party of its majority. The resulting minority government, therefore, constituted a rare exception to the usual secure, one-party government described above. This was the Parliament that had to make the decisions associated with the United Kingdom's departure from European Union (Brexit), decisions that were perceived as critically important and therefore were intensely contested. The Prime Minister's own parliamentary caucus was bitterly divided. Finally, those Brexit decisions could not be debated strictly on their merits since Brexit itself had been endorsed in a national referendum. This forced the relevant institutions to negotiate what Young properly identifies as a conflict between parliamentary sovereignty and popular sovereignty: There was no majority in the House of Commons for carrying through the "people's" decision in the 2016 referendum to leave the European Union.

Another reason for the increased constitutional confusion was the progressively more assertive part played by the judiciary in the formulation of public decisions. The original 1973 commitment to recognize the supremacy of European law had the practical effect of vesting the courts with power to review acts of parliament for consistency with European norms, including, as Young notes, the European Charter of Fundamental Rights and Freedoms. Acts of Parliament could also be challenged in the courts insofar as they were alleged to work a violation of the European Convention of Human Rights. In the latter case, these laws could be either subjected to a "declaration of incompatibility" or "interpreted" as consistent with the Convention even if that interpretation departed from the meaning intended by Parliament. A third kind of judicial intervention has even more potential to destabilize the regime of parliamentary supremacy. For more than 50 years, individuals adversely affected by determinations of a public body have had the right to challenge the legality of such actions by initiating a proceeding in "judicial review." In addition to finding that the agency in question failed to follow appropriate procedures, courts have quashed such actions on broad substantive grounds—such as "irrationality" or interference with "legitimate expectations." At first, these decisions were justified as a way of confining the executive to the powers granted to it by the authorizing act of Parliament, although it was often hard for an objective observer to agree that the reviewing court's rationale was really part of the legislative plan. A growing body of opinion, on the other hand,

has argued that judicial review was “based not on the will of Parliament, but rather on common law created doctrines and principles.”¹⁷ This must be a rather different kind of common law, however, than the familiar judicial development and adaptation of rules regulating private disputes. For one thing, those rules were always understood as intrinsically subordinate to—and therefore revisable by—parliamentary correction. But to the extent that the substance of an executive action fails one of the tests devised under *this* “common law” power, it will be very difficult for Parliament to undo the decision.

Young’s description of the Supreme Court’s holding in the *Miller/Cherry* case, invalidating the Queen’s prorogation of Parliament, illustrates how far the courts have gone in assuming a defining role with respect to the constitutional shape of the state. The object of review was not a form of subordinate legislation which might—even implausibly—be argued to be *ultra vires* its authorizing source. It is uncontroversial that prorogation is a decision falling within the royal prerogative, the set of decisions of state that have not been regulated by statute. Prerogative is “the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.”¹⁸ There is, by definition, no positive law that controls what the monarchy may and may not do when acting within the prerogative power. Insofar as the “common law” controls *that* kind of decision, there is no reason why it ought not equally control acts of Parliament when the judges find those acts offensive to the “fundamental principles” embedded in the United Kingdom legal system. The *Miller/Cherry* case is a good example of the slipperiness of such principles. The ones invoked there were “parliamentary sovereignty and parliamentary accountability.” It should go without saying that these concepts are sufficiently flexible that when they are held to govern, any outcome can be supported with explanations that sound reasonable.

Having said this, it may be important to point out that the unsettled situation that seems to be overtaking the United Kingdom would not be prevented by the adoption of a written constitution enforceable by independent courts. The restraints imposed on the government of the United States after 230 years of constitutional rule are just about as hard to discover as those that may or may not be emerging in the UK. It is a commonplace observation that the United States Supreme Court decisions “interpreting” the United States Constitution (something more directly considered in connection with the essays on constitutional interpretation discussed below) are dictated by the rules in that document only in the loosest sense. As a result, it is impossible to know with much assurance

¹⁷ Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, 57 CAMBRIDGE L.J. 63, 72 (1998).

¹⁸ DICEY, *supra* note 16, at 282.

how much influence the judges will have on public decisions or what the outcome of their interaction with the political departments of the state will be. That these two societies, organized with such different constitutional structures, may end up in roughly the same place, reminds us that the most fitting personal quality for nation-builders is humility.

The instinct to search for legal explanations for even basic constitutional change is not unique to lawyers or legal scholars. As Anthony Bradley shows in his characteristically precise and accurate review of my book, *The Glorious Revolution and the Continuity of Law*, people in general may look for legal justification even when they are dealing with an obvious breach of legal standards. In 1688–1689, the revolutionaries clearly violated the constitutional rule requiring hereditary succession to the English monarchy. In declaring the new King and Queen, they passed over James II, his infant son, and (in the case of the Prince of Orange's ascent to the throne) James's daughter, Princess (later Queen) Anne. Though there were historical precedents for such actions, they were at that time more than 200 years old. Since the accession of Henry VII in 1483, every new monarch had been next in the line of succession according to the rule of primogeniture. The revolutionaries' plain deviation from the constitution, however, did not stop the supporters of the new settlement from casting the succession of William and Mary as lawful. Their explanation was not that the new king and queen were the proper heirs but that the hereditary line had "run out" and the throne was therefore "vacant."

That the revolutionaries were willing to embrace this highly implausible theory tells us something about the value they put on the ability to disguise their unconstitutional action with a façade of legality. It was important to them to claim that the English legal system in 1689 was the same system that had prevailed in 1688. This is one reason why the interregnum of December 11 to February 13 that Bradley discusses created such distress for contemporaries. By their own logic, it was necessary that the throne be "vacant," so that they would be in a position to "fill" it with William and Mary. But then, as now, all public authority in England was, at least in form, a manifestation of the monarch's authority. So, for example, crimes were offenses against the king and, in theory, could not be committed if there were no king in being. Retrospective legislation in April 1689 clumsily provided that crimes in the relevant period could now be prosecuted "as if" they had been committed before December 11. This situation was without English precedent. The argument Bradley cites, that there "must have been an interregnum" in the 1640s and 1650s, fails to take into account the fact that, since the question is one of law, it can be answered only from within one or another legal system. Once Charles II was restored in 1660, the officials of *that* legal system viewed his reign as having begun at the moment of his father's execution in 1649. From that

point of view, there had continuously been a king-in-being, notwithstanding the various novel institutions that were in practical charge and that had claimed lawful authority during that period. After 1660, the acts of those interim governments were treated as without legal effect. Some, but not all of them were—they had to be—confirmed by the restored king in parliament. That course of action was unavailable in 1689. The legal system after the later revolution was the one in which William and Mary were lawful sovereigns. The constitutional premises of that system left no choice but to recognize their accession as occurring on February 13 when the Convention proclaimed their accession to fill the “vacancy” of the throne. That essential “vacancy” required recognition of James’s “abdication on December 11. If the pretense of a legal succession were to be maintained, there had to be this period without a monarch. Of course, had there been no restoration in 1660, whatever government replaced the Stuarts might also have looked upon 1649-1660 as a time without a state, but the very constitutional centrality of the hereditary crown relieved the 1660 statesmen of that necessity, just as it encouraged the 1689 regime to elide it.

Bradley, like Alison Young, is right to suggest that the unique unwritten nature of the British constitution continues to influence how answers to fundamental questions about legal authority evolve in the United Kingdom. And, like her, he is right to present the *Miller/Cherry* case of 2019 as his primary exhibit. The assertion of “common law” norms to control the exercise of the prerogative is a cardinal example of the kind of opposition between specific legal doctrine and broad constitutional principles that characterized the legal debates involved in making the Glorious Revolution. In both cases, reliance on specific positive law necessarily restricts the scope of potential constitutional change, while citation only of the large values underlying the legal system opens many more possibilities. It is notable that in the recent case, the wider sources of law on which the Supreme Court relied were labeled doctrines of the common law. Insofar as the rules emerging from such doctrines control the decisions of Parliament and the Crown, it will follow that future constitutional evolution will be crucially directed by the judiciary.

Constitutional change is also at the center of *Mark Janis’s* examination of the disestablishment of the Congregational church in Connecticut by the adoption of the state constitution of 1818. The prior constitution dated from 1662 and was in the form of a charter issued by King Charles II at the request of Connecticut’s colonists. While it did not, in express terms, create the church or provide for its support, it posed no obstacle to such an establishment. When, or shortly after, the thirteen American colonies declared independence in 1776, eleven of them adopted new constitutions. Connecticut, however, was content with its Charter which had ensured significant self-government. Instead of a new constitution, at independence

the legislature enacted a statute confirming that the Charter “would remain the civil constitution of the state,” though now “under the sole authority of the people, independent of any king or prince.”¹⁹ It is notable that this decision, unlike that of several other states, was made by the colonial legislature and not by any special, ad hoc convention.

The Charter of 1662 allowed a “theocratic” government, one that roughly suited the political and religious preferences of Connecticut’s population. As Janis notes, the colony was overwhelmingly Congregationalist at that time. But 150 years is a long time. Among the changes occurring over that period was increasing religious diversity. Many residents found themselves paying for the maintenance of the Congregationalist church even though they disagreed with its tenets. At the same time, unfair suffrage rules advantaging the dominant Federalist Party became more noticeable. Under the Charter, moreover, the General Court served as “the political legislature, executive, and judiciary . . . and as the presiding religious ecclesiastical body . . .” This concentration of power contravened both the separation of powers and the separation of church and state, concepts which were already foundational in most other American jurisdictions. There was, therefore, an increasing if indistinct misalignment between the formal rules of the Charter-Constitution and the political values of the population governed by it. It is not unusual, however, for societies to live satisfactorily with sub-optimal constitutional rules. That seemed to be the case in Connecticut in the period after independence. Constitutional reform was slow in coming.

When, however, in response to the failure of the Hartford Convention in 1815, the Federalist powers-that-were looked politically vulnerable, the universe of constitutional possibilities expanded, and reformers captured a majority of the legislature even under the old rules. Their election platform included a pledge to institute a new constitution. But now they confronted another problem. The Charter of 1662 contained no provision for amendment, to say nothing of replacement. When that instrument had been authoritative only because it reflected the will of the monarch, such a device would have been superfluous. As noted, the alteration of 1776 changing only the Charter’s political status, had been embodied in an ordinary act of the colonial legislature. No one, at that time, seemed particularly worried that such a procedure might be insufficient for the purpose. The reformist majority of 1818, however, apparently did not consider following the 1776 precedent. American constitution-making had come a long way since 1776. The earliest state constitutions were drafted quickly and, in most cases, adopted by the state legislatures. The fairly

¹⁹ See ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT*: IN SIX BOOKS 59 (1795) (discussing the statute that confirmed the Charter of 1662).

frequent experiments in new constitutions that were made in the following decades converged on certain principles. Most importantly, it became universally accepted that constitutional texts were the highest form of positive law as a result of their promulgation by the fundamental constituent power. In turn-of-the-19th century America, that power was the “will of the people.” The lawmakers of 1818, therefore, had to find a practical way to identify “the people’s” desires and “the people’s” approval. The broader American experience also suggested that the proper mode of securing that authorization was the election of a special convention to draft a new constitution. And once such a draft was produced, it would be submitted to the voters. Nothing about this sequence was found in any positive law, neither in the Charter nor anywhere else. The election and meeting of that convention were set in motion only by a law that the General Court made for this occasion. But, in this context, a legality was actually an advantage. “The people,” it is true, were also represented in the ordinary legislative process and, indeed, the convention contained many of the same men. But, when they were assembled as the “constituted” General Court, they were definitionally incompetent to enact a new constitution. In this case, the whole process including the convention and subsequent referendum was completed in about five months. Though frequently amended, the resulting text served the state for about another 150 years until another convention and another referendum—still not provided for by law—produced the current document in 1965.

Like several of the contributors already discussed, the essays of *Peter Lindseth* and *Zoran Oklopčic* cast doubt on the distinction between legal constituted power and pre-legal or alegal constituent power. Lindseth’s description of my scholarship is both accurate and illuminating, as is his recognition that I am keenly interested in the necessary interface between law and not-law. He explores this question with the help of ideas propounded by Maurice Hauriou, an important French “institutionalist” legal scholar working at the turn of the twentieth century. Hauriou was interested in the ways in which law responds to important changes in the society in which it operates. He situated legal change in the flux of “social facts—economic, political, cultural, historical, ideological” As Lindseth observes, this examination shows an affinity to H. L. A. Hart’s understanding of the things that may figure in changes in the “rule of recognition.” Hart made only the most cursory references to the “different disturbing factors” that might cause “a breakdown in the complex congruent practice which is referred to when we make the external statement of fact that a legal system exists.”²⁰ Hart’s examples—revolution, enemy occupation, anarchy, banditry—seem to neglect the

²⁰ HART, *supra* note 14, at 118.

more likely situation in which gradual changes in social norms and shared political principles eventually make a particular system of law generation and application unsuitable for the society in which it operates. Hart's description of the emergence of independent legal systems from the colonial legal system of the British empire, on the other hand, illustrates exactly the kind of complex social development that can eventually result in fundamental constitutional change—the same type of thing that features prominently in Hauriou's depiction of legal evolution.

Lindseth notes correctly that in both my *Constituent Authority* and *The Glorious Revolution and the Continuity of Law*, I assume that when one legal system is abandoned and a new one has been embraced, we will, by definition, observe a departure from the law of the prior regime. In fact, the best way to know if the acceptable devices for law generation and application have altered is the emergence of a pattern of noncompliance with the primary rules properly created under the previous setup.²¹ Revolutions, as Hart said, “will always involve the breach of some of the laws of the existing system.”²² That seemed to me to be clearly the case in the Glorious Revolution, especially in connection with the critical rule about hereditary succession to the crown. Lindseth is right that the volume could just as aptly have been titled *The Glorious Revolution and the Discontinuity of Law*.

This distinction between legally authorized change and alegal change goes to the heart of the works that Lindseth reviews. He contrasts this distinction with Hauriou's vision of the development of a legal system. As noted, Hauriou emphasized the plurality of non-legal factors that could affect the evolution of legal rules. “The line of causation will always be multidimensional” and there will usually be a bias “in favor of gradual change . . . within the confines of a more enduring institutional ‘settlement’” What we have, then, is a complicated sociological phenomenon which, most of the time, involves not the clean substitution of one set of principles for another, but a dynamic, inexact, and unpredictable process. The results depend on the particular set of forces in play in society at various times. And, as Lindseth makes clear, these forces may include pre-existing *legal* values. “We cannot escape,” he says, “the inherited institutional and legal constructions of that terrain, including in our analysis of politics and society.” Looking at this extended and recursive

²¹ Lindseth raises doubts about my statement that, when the revolutionaries of 1688–89 invoked legal justifications, they were “fak[ing] it.” RICHARD S KAY, *THE GLORIOUS REVOLUTION AND THE CONTINUITY OF LAW* 17 (2014). I now regret using that phrase, although for reasons somewhat different from those Lindseth identifies. Many of the revolutionaries not only used legal language, they also sincerely believed their actions could be justified under the law of England although, as I hope my discussion in that book shows, there was no authentic legal path to where they wanted to go.

²² HART, *supra* note 14, at 118.

process, it is impossible and would be misleading to isolate and measure individual influences on social development.

I find nothing to disagree with in this description of the way law, politics, economics, and many other aspects of society interact. A principal purpose of my work on the seventeenth century English constitutional settlement was to emphasize the importance that popular regard for legality had in that process.

Lindseth may think that my description too easily labels things as law or not-law. Hauriou's picture of the evolution of legal systems suggests that, given the unavoidably complicated set of mutual influences on legal change, such a classification can distort the real historical situation. Nevertheless, as mentioned in my comments about the contribution of Anthony Bradley, it seems clear that the participants in the revolutionary events in 1688 and 1689 were usually less concerned about legal "values" than they were about rules of "hard law." When the House of Lords asked their legal experts about the "original contract," they received mostly abstract and obscure speculations. Based on the Lords' subsequent debate, however, they seem to have been most influenced by the quite different kind of answer offered by William Petyt, an aggressive advocate of parliamentary power. His account of the controlling law was concrete and specific. "The original of government," he announced, "came from Germany."²³ He then detailed a list of examples that he believed demonstrated Parliament's legal power to choose a monarch. This looked like *real* law and the members of the Convention must have felt they needed the support of such law to fill the "vacancy in the throne." When they debated the rules of succession to the throne, they relied not on the "spirit" of the law but on what they took to be specific binding legal rules. Such law could be supported or doubted, demonstrated or refuted by actual historical evidence. There were and are, of course, close cases but there also were and are many things that are clearly legal or illegal.

The same can be said of Lindseth's statement that it is unhelpful to try and understand any legal system as developing from a well-defined beginning. Lindseth is right insofar as we are seeking some historical moment when law was introduced into a society which had moral, political, and social mores, but no law: States of nature are only found in treatises. But I do not believe this means that an examination of the historical roots of a given system cannot tell us something useful about the things that account for the obligatory force of law. The subjects of a legal system may and usually do understand and respect the existing law because of their perception of the events that created it. Americans' reverential attitude towards the constitutional founders is well known. The

²³ KAY, *supra* note 21, at 81.

Revolution of 1688-1689 played a central role in the development of British parliamentary democracy. In both cases, it is beyond question that the pre-existing legal framework was a critical ingredient in fashioning the new regime. But in both cases, it is equally clear that the transition involved a breach of that prior law and that the fact of that breach influenced subsequent development. If we are interested in the most thorough description of the development of law over time, we will do very well to pay attention to Hauriou—and Lindseth. But for purposes of analysis, it is sometimes essential to abstract certain features from the historical record. This is, after all, what Hauriou did in artificially separating the functional, political, and cultural dimensions of institutionalization. Likewise, we will sometimes better understand a historical situation by distinguishing the legal from the non-legal, and origins from consequences.

Like Lindseth, *Zoran Oklopčič* doubts the possibility of clearly distinguishing constituted from constituent authority. He propounds, in fact, a sweeping challenge to the methods and vocabulary of theoretical speculation on constitutional change. I—and most of the contributors to this symposium who deal with the subject—have approached the phenomenon of change as involving an essentially temporal sequence. We posit a society with a constitution that strikes a significant part of the governed population as unsatisfactory. From this situation follows some kind of political process exhibiting characteristics that enable it to create and enact a substitute constitution that is then in force for some extended period of time. In my writing, moreover, I have emphasized what I believe to be a necessary connection between the nature of the constitution-making process and the extent to which the arrangements it puts into operation are able to command the sustained allegiance of the society. This is the relationship between, as Oklopčič puts it “the *process* and the *product*, ‘between the way one gets there and the result.’”

Oklopčič raises doubts about the accuracy of this account of constitution-making and constitutional authority. Thus, he supposes that popular attachment to a constitution should have less to do with regard for the procedures that brought it into being than with “the actual success which that government has had in making a material difference in the lives of the citizens.” It is certainly true that the material accomplishment of a regime is an essential part of what we mean when we speak of a constitution’s “success.”²⁴ But that capacity is not the only factor necessary to secure acceptance. It does not, that is, exclude as irrelevant the forms and procedures employed in the constitution’s adoption. To speak more

²⁴ I have said that to be effective “some minimum part of the relevant population must find the constitution’s substantive rules satisfactory, or at least tolerable.” Kay, *Constituent Authority*, *supra* note 9, at 756.

precisely, the *perception* of the genesis of the constitution must be consistent with widely held ideas about political legitimacy. Thus, Oklopcic is certainly right when he notes that it is highly unlikely that a cold-eyed evaluation of the adoption of the United States Constitution would conclude that it genuinely expressed the will of the American population of 1787-1789. Nevertheless the (largely unexamined) assumption that the Constitution is the authentic act of “we the people” is ubiquitous in American political discourse. Oklopcic asserts that neither the Constitution nor the centrality of popular sovereignty has featured prominently in American public culture. My own impression is the opposite. The phenomenon of “constitution-worship” is widely acknowledged. In fact, one of the works that Oklopcic cites in that connection opens with a description of the of the paradoxical situation in the United States whereby “[f]or almost two centuries [the Constitution] has been swathed in pride yet obscured by indifference: a fulsome rhetoric of reverence more than offset by the reality of ignorance.”²⁵ A brief trip to the hagiographic National Constitution Center in Philadelphia, visited by almost 260,000 people in 2018, should erase most doubts on the subject.

Oklopcic’s concerns about too straightforward an analysis of the course of constitutional change is one aspect of a more basic criticism of attempts to nail down descriptions of legal developments. Explanations of legal decision making are inescapably contingent. So, with respect to my invitation to think about law as a set of rules regulating the activity of a certain group of human beings occupying a defined territory, Oklopcic insists that if we think this assumption “is reasonable, it [must be] in light of some ‘other possibilities’ that we must have already considered—which is to say imagined.” “[T]hat conclusion,” he goes on “may not be so reasonable if we assumed that a number of these communities belong to a federal state whose integrity they contest, or within a supranational organization, as the peoples of its member-states.” It is unclear to me how we could critically think about either of these arrangements without incorporating the geographically defined associations of individuals. But on the larger point, I am in complete agreement. Legal systems might easily be conceived on a non-territorial basis and, in fact, many such systems exist. Furthermore, the impact of any law may be dependent not only on the historical decisions involved in its enactment but also on the reception of that law over time. Rules, at least as lawyers use the term, always operate through the medium of human perception and response.

It is one thing, however, to understand that the state of the law at any instant is a product of choices that might have been made otherwise. It is

²⁵ MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 3 (Routledge 2017) (1986).

quite another to infer from that recognition that it is impossible to draw useful conclusions about the factors that have brought one or more legal systems into being and the kinds of events that may or may not plausibly be expected to cause a given system to survive or perish. That is because the choices that people make, even the choices they make about how to characterize past events, must deal with some things that are not themselves contingent on human decisions. People who occupy certain territory *do* speak certain languages. Certain people *do* command the armed forces. Louis XVI *was* guillotined in 1793. That is why I made the remark that Oklopcic quotes about the human ability to reconceive the historical events that are believed to have invested the constitution-makers with constituent authority: "The materials available to construct that narrative are malleable but they are not infinitely malleable. The constituent authority may be many things, but it is not anything we want it to be."²⁶

It is impossible to argue with Oklopcic's observation that infinite contingencies have been built into our theories about the normative force of law. But, as he also notes, we can say nothing valuable about phenomena such as constitutionalism unless we "cut out," put to the side, some, indeed most, of the possibilities. The ability to choose invests us with power to frame our views of the world. To take into account, on the other hand, all the innumerable ways in which the law *might have* developed can lead only to paralysis. This is one of the reasons why, despite the many valid insights they produced, theories like American legal realism and critical legal studies have tended to sputter out. Speaking of Karl Llewellyn and the realists, Grant Gilmore summed up the problem:

Llewellyn and his co-conspirators were right in everything they said about the law. They skillfully led us into the swamp. Their mistake was in being sure that they knew the way out of the swamp: they did not, at least we are still there.²⁷

CONSTITUTIONAL INTERPRETATION

Theories of constitutional interpretation all suppose that the rules at the apex of a legal system, embedded in a fixed text are capable of being understood and applied to the decisions of government. The essay of *Aviam Soifer* raises doubts about this basic premise of constitutionalism.

Soifer's analysis suggests that the text of the United States Constitution may not provide the resources necessary to support

²⁶ Kay, *Constituent Authority*, *supra* note 9, at 761 (citation omitted).

²⁷ Grant Gilmore, Book Review, 60 *YALE L.J.* 1251, 1252 (1951) (reviewing KARL LLEWELLYN, *THE BRAMBLE BUSH* (1951)).

determinate resolutions of disputes about the meaning of its rules. He emphasizes the “malleability of constitutional text.” It is true that there are many terms in the United States Constitution—and in truth, in pretty much all constitutions—the language of which might yield multiple and conflicting results in particular controversies. The Fourth Amendment that prohibits “unreasonable searches and seizures” is a perfect example. But, of course, not all of the Constitution is like this. There are some very specific rules such as the number of Senators to which a state is entitled. And there are some in-between rules such as the bar on a state entering into a “treaty, alliance or confederation.” If we think that a constitutional interpreter should respond differently depending on the kind of text in issue, he or she will need to decide which rules fall into which category. My own view, based on what I understand be the logic of constitutionalism, has been that the applicable content of any constitutional rule is a function of the intentions that the constitutional lawmakers had in creating the rule. When we focus on those intentions even the most obscure constitutional language can be made to yield a usable meaning, at least in the context of a particular controversy.

The same emphasis illuminates the problems Soifer identifies in some of the late Justice Scalia’s readings of the Constitution. Scalia, of course, was a well-known, perhaps the best-known, exponent of the form of interpretation known as originalism which requires interpreters, and especially judges, to apply only the original meaning of the language of the text. There are, however, at least two ways of understanding what we mean by “original meaning.” One version adopted the approach just discussed by looking for the meaning intended by the people whose assent made the constitution law. But a later and now prevalent kind of originalism insisted on examining only the objective meaning of the text in question, that is the meaning this language had for competent speakers of the language of the text at the time of its adoption. It is this latter kind of interpretation that Justice Scalia preached. He formulated the distinction this way: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”²⁸

The refusal to think about the intended meaning of constitutional rules is at least partly responsible for some of Scalia’s perplexing positions. Soifer points to the language of the Ninth Amendment declaring that the enumeration of specific rights in the Constitution “shall not be construed to

²⁸ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Amy Gutmann ed., 1997). Scalia’s references to the “draftsmen” or, in other cases, to the “framers,” misstates the intentions that are relevant for “intentionalists” like me. I am interested in the intentions of the actual constitution-makers. In the case of the original United States Constitution, these are the original ratifiers.

deny or disparage others retained by the people.”²⁹ Looked at apart from the history of its adoption, this language is indeed, “open-ended.” This is not the place to set out the evidence, but I and other scholars have explained what the congressional and state enactors most likely intended. Those intentions were *not* to invest the judiciary with the power to formulate new rights that would be enforceable against the political departments. The same kind of inquiry might explain the Supreme Court’s 1890 decision in *Hans v. Louisiana*. The Court held that, even though, in terms, the Eleventh Amendment prohibits only an interpretation of the Constitution’s grant of judicial power that would allow actions against a state “by Citizens of another State . . . or Subjects of any Foreign State,”³⁰ a state was *also* immune to actions in federal courts by its own citizens. I am not qualified to endorse or dispute the Supreme Court’s history in that judgment, but it should be noted that the unanimous holding was not at all an interpretation of the Eleventh Amendment. The Court rather held that the original grant of authority to the federal courts in *Article III* was never intended to eliminate the immunity of States to suits by any private persons. These examples illustrate what I meant when I said in a recent article: “We can derive a picture of actually intended meaning that is qualitatively richer than one inferred from an investigation that is restricted to standard language use at the time of enactment.”³¹

Soifer is right, however, to point to other cases in which courts, and especially the United States Supreme Court, have made decisions that are clearly indefensible as application of the constitutional rules, whether understood in their original objective or intended sense. Over the long course of the Court’s history, the consequences of these judgments have probably equally distressed people on both the left and the right ends of the political spectrum. This sustained record suggests that, as a matter of human psychology, the project of constitutionalism, of submission to fixed rules, may be impractical. Nevertheless, for reasons I have set out elsewhere, I believe the beneficial effects of the establishment of a constitutional state may turn up in places other than in the judgments of the highest constitutional court. And, although the role of such a court may be problematic as an instrument of classical constitutionalism, it may still serve other useful functions. I discuss these briefly in my response to James Allan.

The distinction just mentioned, between the objective public meaning of legal texts and the meaning actually intended by a text’s creators, is the focus of *Jeffrey Goldsworthy’s* characteristically rigorous examination of

²⁹ U.S. CONST. amend. IX.

³⁰ U.S. CONST. amend. XI.

³¹ Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 17 (2017).

Antonin Scalia and Bryan Garner's 2012 monograph, *Reading Law: The Interpretation of Legal Texts*. As noted above, Scalia is probably the most prominent advocate of restricting the interpretation of statutes and constitutions to their objective public meaning, that is, to the meaning that would have been inferred from the text's language by a competent and informed reader at the time of enactment. In constitutional interpretation, this is the approach that is currently embraced by most self-identified originalists. For Scalia and Garner, the legislative intention that interpreters have purported to rely on for centuries is "pure fiction." The only intentions that may be inferred from examination of the process of legislation is that "the final language . . . pass[] into law." In contrast, Goldsworthy affirms the proposition that "sensible interpretation of enacted laws necessarily presupposes the existence of [lawmakers'] intentions, and endeavours to reveal and clarify them." I find his demonstration of that position thoroughly convincing.

In his review of *Reading Law*, Goldsworthy shows the implausibility of the intentionless meaning promoted by Scalia and Garner. He identifies many occasions on which the book either explicitly relies on the intention of the legislature or adopts rules of interpretation that necessarily incorporate such reliance. They concede that on certain occasions, an inspection of the text alone is insufficient to arrive at a proper interpretation without consideration of the context in which it was adopted. Goldsworthy notes that context contributes to meaning only because it tells us something about the reasons those words were chosen by the lawmakers confronting a particular situation. This is true in almost all instances of verbal communication, but it has particular force in the context of lawmaking, where language has legal force only when expressed by certain authorized human beings.

Scalia and Garner acknowledge the same necessary relevance of legislative intentions when they grant that there are occasions on which interpreters may properly consult data that cannot be inferred from the mere words of an enactment. Their willingness to recognize "scriveners' errors," for example, only makes sense if we presume there was a "correct" expression, one not distorted by the transcription mistake. Similarly, the "golden rule," requiring interpreters to reject language leading to an absurd result presupposes that legislators never intend to enact an absurdity. So, we take it for granted that when the Arkansas legislature enacted a provision declaring that "[a]ll laws and parts of laws, and particularly Act 311 of the Acts of 1941, are hereby repealed,"³² lawmakers did not really intend to repeal "all laws."

³² *Cernauskas v. Fletcher*, 201 S.W.2d 999, 1000 (Ark. 1947).

As Goldsworthy shows, recourse to a writer's intention when dealing with a written communication is so natural that we actually lack an adequate vocabulary to talk about the meaning and force of a legal text without employing words that refer to the mental states of the author. That is manifest from an examination of *Reading Law* in which the authors frequently refer to the question of what "is meant" by certain language. The use of the passive voice in this phrase evades the specification of who or what "means" something. At some level, every use of the verb "means" assumes a human subject. (The same is true of Scalia and Garner's frequent statements about a statute's "purpose.") Goldsworthy points out that "strictly speaking texts do not seek to achieve anything; 'text' here must be a metonym for the maker of the text." So, it is entirely unclear what Scalia and Garner can mean when they criticize the "slippery reference to *intent* . . . as opposed to 'meaning.'"

The simple truth is that every legal text arises from some intentional human effort.³³ Statutes do not appear in the statute book by themselves. The process of conceiving an idea for legislation, studying it, compromising its terms and convincing legislators to approve it are all essential for creation of an effective law. It is obvious, moreover, that these legislators intend more than the legal memorialization of a given set of words. Their objectives are practical not literary. They intend, by permitting, requiring, or prohibiting certain activities, to affect human behavior. The creation of a given text is simply the means by which that conduct may be affected.

Scalia and Garner repeatedly deride the notion of an "intention of the legislature" as a fiction. But it is the idea of an intentionless verbal communication that is the more fantastic idea. The use of language in lawmaking and law itself is part of a purposive human enterprise. "Not: 'Without language we could not communicate with one another'—but for sure: without language we cannot influence other people in such-and-such ways; cannot build roads and machines, etc."³⁴ To treat legal texts as independent of the intentions of the human beings who created them is to rip them out of the complex of human social activity, the only place where they make sense.

In his contribution, *Mark Graber* examines two issues associated with originalist constitutional interpretation. The first, which we have just

³³ "Suppose that printing type thrown by the handful from the top of a tower fell to earth to form Racine's *Athalie*, what would be the conclusion? *That some intelligence has governed the fall and the arrangement of the type.*" JOSEPH DE MAISTRE, *THE GENERATIVE PRINCIPLE OF POLITICAL CONSTITUTIONS: STUDIES ON SOVEREIGNTY, RELIGION, AND ENLIGHTENMENT* 152 (Jack Lively ed. & trans., 1965).

³⁴ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 137e (Gertrude Anscombe trans., 3d ed., 1958).

considered, concerns whether “original meaning” should be determined based on the original intentions of the enactors or from the objective meaning of the enacted language prevalent at the time of enactment. The second issue is whether either form of originalism is sustainable as the time following adoption increases and the original text becomes less and less suitable for the society in question.

With respect to the first question, Graber distinguishes the currently predominant original public meaning originalism from what he calls “original intentions/expectations” originalism. The latter conflates two approaches that the academic literature has distinguished. Original *expectations* usually refers to applications of the rule in question that were anticipated by the enactors. For example, “The Fifth Amendment will prohibit racially segregated schools in the District of Columbia.” Original *intentions*, on the other hand, refers to the criteria that define the category of action that the enactors intended the rule to cover. Although I believe the best way to think about these issues directs us to original intentions not original expectations, I also think that knowing the original expectations is helpful in sussing out the character of the original intentions. Therefore, I will treat Graber’s analysis as arguing on behalf of original intentions originalism and his references to the enactors’ “predictions” as ancillary to that enterprise.

The distinction between original intended meaning and original public meaning is unlikely to make a practical difference in the overwhelming majority of cases. Enactors will want their rule to be understood by the people whose behavior they are targeting and will therefore choose the words typically used to effect that result. Only on the rarest occasions will legislators enact a rule that fails to communicate their intentions. On those unusual occasions, however, I find Graber’s arguments about the inevitability of recourse to the original intentions, at least in the period immediately after enactment, to be entirely persuasive. As I mentioned in connection with Jeffrey Goldsworthy’s essay, rule makers are not interested in uttering words with a particular meaning other than as a means of affecting the conduct of the rule’s addressees. Original public meaning erroneously “replaces politics with etymology.”

While Graber finds that, initially, original intentions ought to be determinative (at “Day 1,”) he believes that that approach to interpretation is less cogent as the time between enactment and application increases (at “Day 10.”) (Of course, at the *real* Day 10 all of Graber’s arguments for original intentions are fully applicable. One problem with the use of this conceit is that it elides the question of how much time will have to go by before that abandonment of originalism becomes necessary.) Constitutions create certain institutions and set out certain rules in order to prevent some undesirable actions and encourage the production of certain social benefits. The problem is that as times and circumstances change, the original

devices may become less and less effective. At least as significantly, the very objects of the original constitutional project—the good to be promoted and the evils to be inhibited—will also tend to change. At this point, sticking to the intended constitutional rules will no longer enhance the welfare of the society in the way that would have been forecast at the time of enactment. It may make sense, therefore, for constitutional decisionmakers to look elsewhere in resolving the issues brought before them. They may decide to deviate from the intended meaning, gradually modifying the substance of the controlling rules in common law fashion, what Graber calls doctrinalism. Or they may believe that the only way to remain true to the larger goals of the founders is by altering the obsolete techniques of the original scheme, embracing what Graber calls purposivism.

In response to these suggestions, we might, as noted, ask what standards interpreters ought to apply in deciding when the original rules and institutions have become so unsuitable as to justify departing from them. Also, assuming this condition is met, it will often be the case that there will be more than one way to respond to the altered situation that requires an extra-constitutional solution. It will be necessary, that is, to choose how the new non-textual powers, procedures, and rights should be shaped. In short, once originalism is abandoned, there will be a wide universe of possibilities and no uniquely appropriate guide for choosing among them. This state of affairs raises the kind of risks that worried Jefferson when he said “[o]ur peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction.”³⁵ Although Graber refers broadly to “constitutional decision-makers,” at the end of the day this will usually mean judges. We can end up, that is, with the familiar situation whereby ultimate legal authority in the state will be transferred from a fixed and abstract constitution to flexible, palpable human beings.

This kind of arrangement of the powers of government has its advantages. As Graber makes graphically clear, a state that is subject to rigid limitations is bound to come up against circumstances that the constitution-makers never contemplated, and that any reasonable person would think demand actions that contradict the original rules. And the older the constitution, the more frequently these occasions will arise. Human intelligence and sensibility have distinct advantages over unchanging and insensate rules. Graber asserts that “[c]onstitutions are means for coordinating political activity, maintaining stable rule, fostering deliberative government, promoting national aspirations, and establishing

³⁵ Letter from Thomas Jefferson to Wilson C. Nicholas (Sept. 7, 1803), *in* 10 THE WORKS OF THOMAS JEFFERSON (Paul L. Ford ed., 1905).

compromises that enable people with different values to share the same civic space.” That’s an ambitious agenda and if achieving these “constitutional purposes” is the paramount objective, it is no surprise that the rules in a constitutional text, drafted at a discrete historical moment, will not be up to the job. Responding to this truth, Graber proposes supplementing the original rules with a judicial power to tweak them on an ongoing basis in light of evolving circumstances and values.

My understanding of the purpose of constitutionalism is more modest. It aims to create the institutions and procedures of the state and to impose substantive limits on public power in a few especially sensitive areas of human activity. Faithfully adhered to, this project has the potential to secure some aspects of social life from unexpected interference. If a constitution is to succeed in this project, its rules must be reasonably long-lived, requiring that the permissible methods of changing the rules be difficult. This forecloses recognition of the kind of indefinite revising power that Graber foresees. “A constitution always being ‘adapt[ed] [. . .] to cope with current problems and current needs’ is no constitution at all.”³⁶ Graber is right, of course, that, as things change, a fixed constitution will almost certainly become less suitable and will at some point become unsustainable. (The United States Constitution, now 230 years old may well have passed that point.) If we are determined to maintain the special benefits of constitutionalism, when that time comes, however, the better solution may be the creation of a new constitution.

Laurence Claus has laid out a case for the priority of public meaning interpretation that differs substantially from Scalia’s. His innovative argument follows from what he takes to be the most plausible reason for the normativity of the rules of the legal system. A legal system is a response to the need for “the shared expectations [that] are the only way we can live together in large groups, with people with whom we have no personal intimacy.” A constitution, or any other enacted law, is valuable only insofar as the members of the population subject to it are able to deduce a set of common rules that will allow them to coordinate their conduct. Enactments only become law as people conform to the texts’ rules and observe others doing the same. For Claus, this kind of mutual acknowledgment is the ultimate—and the sole—criterion for the creation of successful constitutions. Other facts, such as the substance of the rules or the political appeal of the process by which the rules were adopted, will make a difference “*only* to the extent they help inform people’s understanding of what others are likely to do and to expect.”³⁷

³⁶ Richard S. Kay, *Constitutional Chrononomy*, 13 *RATIO JURIS* 31, 38 (2000) (quoting William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 *S. TEX. L. REV.* 433, 438 (1986)).

³⁷ Emphasis added.

This view resonates with Anglo-American common law systems where the law declared by courts was once understood to be a species of customary law. Matthew Hale said the rules of the common law “acquired their binding power . . . by a long and immemorial usage, and by the strength of custom . . .”³⁸ The common law judges, however, spent little time explaining *how and why* customary behavior acquired normative force. They do not seem to have explained its force as Claus does, that is by virtue of the fact that people will recognize its widespread adoption by fellow citizens and decide to adjust their own behavior in the same way. In any event, whatever the pre-modern adoption of custom as the basis of law might tell us must be less persuasive in our current intellectual environment, where all law—including common law—is regarded as “the articulate voice of some sovereign.”³⁹ These days, that is, common law rules are regarded as a kind of judicial legislation. Looked at that way, it seems odd to insist that the legal quality of the resulting norms is unrelated to the identity or the conduct of the lawmaker.

This incongruity is even more pronounced when we are dealing with rules created, in the first instance, as canonical text. If the only relevant aspect of valid law is the way it is understood in the regulated society, there is little to distinguish legislatively from judicially promulgated law. Yet, written constitutions devote much of their text to setting out the composition and procedures of legislatures whose enactments will be entitled to the status of law. Can it be that these directions are intended only to improve the chances that the statutes produced will commend themselves to the society as more likely to be widely embraced? Surely these restrictions on lawmaking are also motivated by a conviction that they embody the *right* ways to make law in a society in which certain political values prevail. The same factors are relevant in constitution-making, although the designation of the relevant constituent lawmakers and the proper procedures in that case will necessarily be defined by political rather than legal considerations.

In one sense, Claus’s explanation is undisputable: No rules can be effective if their “binding power” is not acknowledged by a substantial part of the subject society. And, by the same token, the adoption of such an attitude by enough people might alone justify us in calling such rules law. But of all the collections of people whose acts might turn out to be constitutions and of all the potential procedures for drafting and approving constitutional rules, only some people and only some procedures will end up as successes. It is common sense to infer that *these* people and *these* procedures were selected because there is something about them that

³⁸ SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW 23–24 (1792) (spelling has been modernized).

³⁹ S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

reflects the dominant values of the relevant time and place. When, therefore, we confront situations where the application of the resulting rules come into dispute, it will be natural to look at those actual law-making events and to consult the intentions held by those human beings who—in conformity with prevailing political values—achieved the status of successful law-makers.

Larry Alexander's essay deals explicitly with the essential connection between the two main themes of the symposium. As just discussed, the preferred approach to constitutional (and all other legal) interpretation is necessarily determined by assumptions about the basis of the law's normative force. For positivists at least, the legal system incorporates a set of decisions made by certain human beings at certain times. If a written constitution is the highest law in a system, that status is definitionally a consequence of some of those historical decisions. Furthermore, since we are talking about the underlying basis of the legal system, and for reasons I have also summarized in some comments above, those decisions cannot themselves be the exercise of any powers granted by law. A successful constituent process must be a political development. In the case of the United States, the political principle that governed that process was the "sovereignty of the people." What such sovereignty entailed was a complicated matter but the idea that the Constitution's binding force stems from the authority of "the people" continues to shape our legal and political discourse. This conviction assumes that the state convention ratifications of 1787-1789 expressed "the people's" will. An official interpreter who regards him or herself as faithfully serving the legal system that resulted from that act of the "people," therefore, is obliged to respect the intentions held by those ratifiers when they created the Constitution. "Only originalism," as Alexander says, "is authority preserving."

Alexander raises some perplexing issues associated with identification of legitimate constituent lawmakers. He understands those lawmakers to put in place something like H. L. A. Hart's rule of recognition, a rule that I referred to in previous work as a system's "pre-constitutional rule." Hart thought this process involves the creation of a "standard[] of official behaviour" that was accepted by the legal system's "officials."⁴⁰ It is in that connection that Alexander quotes my statement in a 1981 article that, in the United States, "it is the Supreme Court's understanding of the [rule of recognition] that counts." It is not always pleasant to be reminded of speculations from 40 years ago. In this case, Alexander points out some logical difficulties with my (and Hart's) conclusion that one must identify the rule of recognition by reference to the behavior of legal institutions. The status of those institutions, arises from the legal system whose basis is

⁴⁰ H. L. A. HART, *THE CONCEPT OF LAW* 113 (1961).

in issue, thus raising an obvious problem of circularity. Alexander, who like me basically agrees with Hart's framework, insists that the necessary acceptance of a rule of recognition must instead be sought in "the attitudes and beliefs of a much wider population" than the system's officials. Hart agreed with this approach when the legal system being examined was that of a simple society. In that situation, "the bulk of society . . . must generally share, accept or regard as binding the ultimate rule of recognition"⁴¹ The kind of acceptance necessary to support a pre-constitutional rule is also raised by James Allan in his contribution. Unlike Alexander, Allan contests the idea that the assent of the general population is a necessary element of a rule of recognition. If that were true, Hart's analysis could not apply to many authoritarian states that are created and persist without popular approval.

My own views, while not exactly well-defined, have evolved since 1981. In a 2013 article, I suggested that fundamental legal change may "manifest[] itself, in acceptance of the new arrangements by the 'officials' of the system, but the reasons for that acceptance are likely to involve actions and opinions of many people, official and unofficial."⁴² As the quotations above indicate, Hart, himself, failed to stipulate the preconditions for the creation of a pre-constitutional rule with much precision. As Allan makes clear, we are interested in the beliefs of the relevant group not because we think they have themselves exercised a constituent power but because their beliefs are *evidence* for one or another understanding of the nature of the legal system. If we conclude that some common proposition about legal authority is, in fact, *not* accepted by the officials of a community, we may infer that it does not really accurately describe the basic rules of the system. Such a misalignment between the rhetoric and behavior of officials, and what official behavior shows about the effective understanding of the proper sources of law, is a powerful indicator of impending constitutional change. The development of judicially enforced limitations on the powers of the Crown and Parliament in the United Kingdom, pointed out in my comments on Alison Young's contribution, may be an example.

This possible misalignment between formal rules and social and institutional understandings is pertinent to the questions Alexander raises in his conclusion. He refers to the fact that some observers have taken the simultaneous existence of different and incompatible theories of interpretation to mean that "we lack a single preconstitutional rule."

⁴¹ *Id.* at 111.

⁴² Richard S. Kay, *Changing the United Kingdom Constitution: The Blind Sovereign*, in *SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* 98, 110 (Richard Rawlings, Peter Leyland & Alison L. Young eds., 2013).

According to these observers, we have “dueling preconstitutional rules each recognizing a somewhat different legal system” He finds this description implausible, at least in the context of the United States. American judges, after all, uniformly recognize an obligation to “adhere to the 1789 Constitution.” The idea that we can each conform to that Constitution in our own way misconceives what it means to interpret any text, especially a text understood to express the will of an accepted lawmaker. I am sympathetic to this point of view and I agree that the population in general accepts judicial constitutional “interpretations” only because they see them as good faith attempts “to apply *the* Constitution.”

I do not think, however, that this logical argument accurately describes the effective legal system in the United States. As I have already mentioned in my comments on the essay of Aviam Soifer, the hard fact is that the behavior of our constitutional judges does not, in very substantial part, conform to the rules of the 1787-89 Constitution as amended. Those deviations are explained and defended by many—probably most—academic commentators as premised on an understanding of law that does not require reference to the meaning of the text intended by the constitutional enactors. This explicit rejection of intended meaning, moreover, has been espoused by the judges themselves including justices of the United States Supreme Court. In a much-cited article, Justice William Brennan criticized those “who would restrict claims of right to the values of 1789 specifically articulated in the Constitution [and] turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.”⁴³

It is hard to see these facts as suggesting anything other than the existence of pre-constitutional rules other than one that directs us to the original meaning of the Constitution. My view, like Alexander’s, has been that adherence to the original intentions rule has the unique virtue of lining up with our continuing declarations of loyalty to “the Constitution.” By positing a set of fixed rules to govern important aspects of social relations, it also better fits the values of stability and predictability that are the hallmarks of constitutionalism. I recognize, however, that, taken seriously, this approach generates significant costs by tying society to the institutions and values of an increasingly alien time.⁴⁴

There is one lesson to be taken from a clear-eyed examination of the relationship between rules of recognition and the actual practice of constitutional adjudication, something confirmed by comparing a number of developed constitutional systems. Just as there will always be disagreement about the proper allocation of political power in the

⁴³ Brennan, *supra* note 36, at 436.

⁴⁴ I rehearse this theme in my comments on the articles of Aviam Soifer and Mark Graber. See discussion *supra* pp. 1745–47, 1749–52.

organization of society, there will also be disagreement about the proper contents of the pre-constitutional rule. As Alexander accurately observes, “the content of the rule of recognition . . . is a complex, messy, difficult empirical question.” One place that these inevitable disagreements will be manifested is sure to be in the role and behavior of constitutional courts.

James Allan’s contribution directly confronts the fact just mentioned—that the application of constitutions in the United States and elsewhere, has turned out to depart significantly from the rules created in the constituent process. Instead, constitutional courts have distilled large political values from the supposedly controlling constitutions and then extended and elaborated those values in ways which cannot have been uniquely determined by the original rules. That practice is hard to reconcile with constitutionalism, which demands clear and stable rules defining the powers of the state. As I mentioned in my comments on Aviam Soifer’s contribution, this conclusion might persuade us that the project of an enforceable, written constitution is impractical and should be abandoned. That is, we might decide that in a working democracy, it makes more sense for the elected government to be left unconstrained by a judicial review that is, in truth, largely manufactured on an ad hoc basis by the judges. On the other hand, we might decide that leaving judicial review in place yields other benefits even if they do not include the benefits of a rule-bound state.

Allan takes issue with my attempt, in a recent essay, to make the case for the latter alternative. I suggested that we might understand the judges to be discharging the function of the aristocracy in a classical “mixed government” and that such intervention might be more attractive than unlimited and thoroughly democratic public decision-making. In part, I based this possibility on modern scholarship that has raised doubts about the electorate’s ability to evaluate the stakes in public issues, as well as on the virtues of mixed government, as expounded by political theorists going back more than 2000 years. Allan contests some of the premises of this reasoning. He notes that unlike questions that turn on facts, the kinds of decisions made by constitutional courts simply depend on moral values, in the choosing of which the judges hold no particular advantage. It seems to me, however, that there is a difference between value preferences expressed by people who can and those who cannot appreciate the sometimes-complicated social context in which that choice and its consequences will play out. If so, there may be something to be said for some democratic decisions to be monitored by a body likely to take a more deliberate and longer-term view of the issues.

Allan also notes that the limited transfer of authority from elected officials to life-tenured judges removes a critical element of accountability from the decision-making process. Democracy, he reminds us, “lets us ‘throw the bums out.’” It is true that secure judicial tenure makes the judges less responsive to public opinion than legislators who must face the

voters at regular intervals. But in a mixed government, that is a feature not a bug. To the extent that mixed government has an attraction, it lies entirely in the better choices its advocates expect from a system in which the desires of the population are sometimes stymied by the judgment of a group of people who, we hope, may have cooler and wiser heads. For exactly the same reasons, it is of little moment that “you could never sell [mixed government] to people upfront and openly.” Whatever concerns we have about the unrestrained judgment of the people are not alleviated—indeed they may be aggravated—if the same unconstrained people had to approve the allocation of power at the constituent stage of public decision-making.

Our current system emerged when judges, charged with making the rules of a constitution effective, moved further and further away from the constitution-makers’ intentions. Over time—and especially in cases of long-surviving texts like that of the United States—the relative proportion of founders’ rules to judges’ preferences has radically diminished. As a result, the constitutionalist values of clear, stable, and predictable limits were compromised. To the degree, however, that the constitutional enterprise was directed at fear of the exercise of public power, this new situation has simply offered a different way of making that exercise safer. Even on this ground, however, I agree with Allan that handing this power to long-tenured judges makes for a very imperfect mixed government. Were we constructing such a body from scratch, we would be unlikely to staff it exclusively, as we do now, with successful, aging lawyers. As I said in the essay that Allan reviews: “Legal training will be useful in the resolution of many public issues, but so would expertise in science, philosophy, history, engineering, and many other fields.”⁴⁵ The superiority of this judicial brand of mixed government to unrestrained parliamentary democracy, moreover, can be only relative. Our preference for one or another approach must depend on the history, traditions, economics, and demographics of the society where it is employed.

Whatever our final judgment, a mixed government (in whatever form) need not be a pure oligarchy. The American founders were deeply devoted to the central role of popular opinion in the determination of public questions. Madison was typical when he declared that any government ought to “derive[] all its powers directly or indirectly from the great body of the people”⁴⁶ This did not prevent those founders, however, from looking for ways to mitigate the dangers of such a republican constitution, dangers arising from many of the same problems with popular decision

⁴⁵ Richard S. Kay, *Democracy, Mixed Government and Judicial Review*, in *LAW UNDER A DEMOCRATIC CONSTITUTION: ESSAYS IN HONOUR OF JEFFREY GOLDSWORTHY* 199, 223 (Lisa Burton Crawford, Patrick Emerton & Dale Smith eds., 2019).

⁴⁶ *THE FEDERALIST* No. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

making that modern scholars have documented. So, Madison worried that the people might sometimes be “stimulated by some irregular passion, or some illicit advantage” and that to guard against that risk it would be wise to install “some temperate and respectable body of citizens” to delay their actions.⁴⁷ Madison was thinking of the Senate but that body has changed in both selection and behavior. If we, nonetheless, continue to be troubled by the dangers of unlimited popular government, and if we further decide that the constitutional rule of law has ceased to restrain, the interposition of the judges might not be our worst alternative.

Michael Perry’s characteristically meticulous argument sets out and applies a somewhat different model of constitutional interpretation. For a many constitutional questions, Perry adopts an originalist perspective. In deciding whether a norm “truly is a constitutional norm” and therefore eligible to invalidate a government action, he argues that it is necessary to inquire whether or not that norm was either entrenched by the constitutional enactors or is an “unescapable inference” from the structure of government that those enactors established in the constitution. This is perfectly consistent with the originalist idea that constitutional rules must be interpreted in the sense that those rules were understood by the constitution-makers. But there is more to Perry’s scheme.

First, under his “General Rule,” a court must turn down a constitutional claim if it concludes that it is “at least reasonable that the norm [on which the claim is based] is not a constitutional norm.” That is, even in a case where, according to a court’s own best estimate, the norm cited *was* entrenched by the enactors, the claim will fail so long as the proponent’s erroneous judgment on the rule’s status, is still “reasonable.” In such a case the constitution (as interpreted according to the judge’s best understanding) is subordinated to a general rule of deference to the political authorities even though such deference itself was not entrenched by the constitution-makers. This General Rule is justified not by historical proof but as an attempt to bring constitutional law into “closer alignment with the morality of human rights,” as manifested in international human rights instruments. That morality includes as an essential principle, the right to democratic governance, thus favoring the judgment of the elected branches.

Second, even claims that would be rejected under the General Rule just mentioned should be cognizable by the Supreme Court if the constitutional rule on which they are based is “part of the morality of human rights.” In such a case, the asserted norm should be treated as having true constitutional status as long as it is reasonable to think it was established by the constitution-makers. Like the General Rule, this exception is not

⁴⁷ THE FEDERALIST No. 63, at 384 (James Madison) (Clinton Rossiter ed., 1961).

itself tied to any choice made or even argued to have been made by the historical enactors. Once more, it calls for judicial decisions that will depart from the judges' best understanding of the results of the constitution-making process. Here, again, the deviation from the best estimate of the original rules is premised on the value of aligning United States constitutional law with international human rights.

Compared to purely originalist interpretation, which is confined to an examination of the reach of the constitutional rules created by the constitutional enactors, the procedure prescribed by Perry permits—and sometimes seems to require—a different method of decision making. It places much weight on the capacity to determine if certain claims are “reasonable.” That test, which is critical to application of both the General Rule and its exception, may be expected to yield different results even when conscientiously applied by different judges. Furthermore, when, in deciding whether the exception to the General Rule applies, an interpreter makes a judgment about a norm’s inclusion among the rules constituting the “morality of human rights,” the uncertainty is multiplied. Perry relies on international human rights treaties for evidence of the contents of this morality. Those treaties, however, are at least as vague as the United States Constitution. And if these rights are to be understood as they have been construed by international courts or other agencies charged with interpreting them, a large, complicated, and sometimes contradictory body of norms will provide room for further disagreement.

A similar problem besets a third criterion offered by Perry for treating a norm as constitutional—if it is a “bedrock feature of the constitutional law of the United States.” This quality is recognized in norms “so embedded in the life of the nation, so accepted by the society, so fundamental to the private and public expectations of individuals and institutions’ that SCOTUS should and almost certainly will continue to deem [the norm] constitutionally authoritative even if it is open to serious question whether enactors ever entrenched [the norm] in the Constitution.” The difficulty with this criterion is not that there are no uncontroversial principles which meet it; the norm against racial segregation, for example, appears to satisfy it. It is rather that there is a case to be made for many other more controversial doctrines. It introduces, that is, a distinctly open texture into constitutional adjudication. Perry’s example of a bedrock right to engage in conduct dictated by “moral choices rooted in and nourished by one or another nontheistic worldview” is exemplary. And the uncertainty of such a right is multiplied when (combined with a right to act in accordance with one’s religious beliefs) it morphs into an even more general “right of privacy.”

These features of Michael Perry’s approach to the interpretation of constitutional provisions creating individual rights, therefore, seem problematic insofar as they allow or even invite recourse to broad and

contestable standards. And once an interpreter concludes that an instance of conduct is *prima facie* protected by a qualifying constitutional norm, he or she must confront the fact that the right so identified will probably be “only conditional.” Taking a cue from the structure of rights protection in various human rights treaties, as well as in many modern national constitutions, Perry argues that interferences with protected rights will not amount to constitutional violations if the state’s action is for a legitimate purpose (such as “public safety, order, health or morals”), if there is no less rights-impacting way of achieving that objective, and the public benefit of the interference with rights is greater than the cost suffered by the affected rights-holder. Clearly, for controversial modern cases—some of which Perry examines—this examination without more is unlikely to yield a determinate result even when conducted by dispassionate, intelligent judges acting in perfect good faith. Indeed, the kinds of factors that would be considered in this exercise are hard to distinguish from those that went into the legislative process, the product of which is challenged in the constitutional litigation.

The process that Perry describes is powerfully attractive in many ways. Insofar as it foresees a legal system monitored by judges committed to a morality of human rights, it promotes a society in which the dignity of each individual is a prominent consideration in all collective decisions. For the reasons discussed, however, this model fails to deliver fixed limits on public action that guarantee a safe haven for some kinds of human activity. It is, therefore, a system with a constitution but, in its operation, it may fall short in promoting essential features of constitutionalism.

Finally, I can do no more than express my gratitude to my colleague, Richard Pomp, for the kind and generous things he has said about me and about our relationship in his contribution to the Symposium. I am sure I possess only a small part of the virtue that he awards me. I am in his debt for his collegiality, his intellectual support and, most of all, for the warm friendship we have shared for more than forty years.