2000

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Constitutional Chrononomy

RICHARD S. KAY

Abstract. Every constitution defines and is defined by a period in time. Like all law the creation and application of constitutions require reference to the past and future respectively. Every instance of constitution-making is an attempt to control behavior over an extended period of time. Therefore constitutions will be drafted, both in style and substance, to reflect that temporal ambition. The effectiveness of a constitution also requires that its interpretation makes reference to the understanding of its rules held by the constitution-makers. As a result, and notwithstanding the efforts to make it suitable over a long period by its creators, every constitution is bound to become unsuitable. Courts employ a number of devices to cope with the inevitable obsolescence of constitutions but, sooner or later, every constitution will have to be discarded and a new constitutional era begun.

The creation and application of positive law involve attempts to move forward and backward in time. The *creation* of any explicit legal rule is a way to specify, in advance, how some category of human conduct should or should not proceed: It is a future-oriented act. By the same token, the *application* of a rule of positive law—either officially or by the relevant private persons—is a reference to that prior enactment; it requires consulting a decision made in the past.

The creation and application of constitutions display the same characteristics. This is, at least, true of constitutions in the modern sense. (And it is partially true even when we speak of constitutions in the sense of an implicit set of assumptions and values controlling state behavior—as might be appropriate in the case of the British Constitution.) In this modern sense the term “constitution” refers to an explicit formulation of fundamental rules for a politically organized society. Such constitutions are a species of positive law—of legislation (Michelman 1998, 64–8). Constitutions of this kind have a special place at the top of the hierarchy of legal rules, but when viewed by participants in the relevant legal systems, they are regarded as binding in the same way that inferior and more prosaic legal rules bind. More particularly, redress for violation of these rules may be sought from some kind of court.

While in most modern constitutional systems special courts are designated for hearing such claims, these tribunals act very much like the sub-constitutional courts and, indeed, are largely staffed by judges drawn from the ordinary judicial system (ECDL 1997, 11–3).

The creation and application of the law of the constitution differ from the creation and application of ordinary law principally insofar as they reflect the special purpose of constitutions. The particular aim of constitutional enactment is to control the future behavior of the state. The premise of the constitutional project is that it is possible to specify, in advance, certain rules of state conduct which, when observed, will minimize the extent to which the state is capable of imposing on citizens in unacceptable ways. This is accomplished through two strategies: First, the constitution defines the institutions and procedures required to effect genuine acts of the government created. It constitutes in the literal sense. Second, the constitution marks off certain substantive activities as forbidden to the government so constituted (Kay 1989a, 430–1). (More recently we have seen more constitutions adopting a third function. They set forth affirmative obligations of the government as well as prohibited acts.) Both methods aim to confirm power within acceptable limits, the latter directly, the former by requiring decisions to be made with the concurrence of sufficiently diverse interests as to make offensive conduct unlikely. But both of these aspects of a constitution involve the creation and application of rules of positive law. The latter class contains familiar rules of the “thou shalt” and “thou shalt not” kind. But the former may also be reduced to legal rules. In each case, the sanction for noncompliance is that actions undertaken outside of the processes specified or in conflict with the injunctions given are treated as ineffective. Like all rules, their enactment supposes that future actors will understand them and heed them. Their success thus depends on an attitude that, by definition, respects the act of constitution-making, a particular historical event.

The actual processes of constitution-making and constitutional application constitute complicated and ill-defined practices. I will treat them generally, conceptually and, therefore, inevitably incompletely. I will discuss three attributes of the linkage between constitutionalism and the passage of time. The act of constitution-making requires an acute awareness of the inevitably unpredictable course of future events in the period in which the constitution is to govern. The act of constitutional interpretation and application demands attention to that historical act of constitution-making. Finally the act of resisting and finally terminating the authority of a given constitution will involve a comparison between the past beliefs, plans and aspirations embodied in the relevant constitution and those of the new society which it purports to govern. There is, therefore, a chronomic aspect to every constitution. It marks out not merely a social, geographic and political space but also a limited interval in time.

1. Looking Forward

The central social function of constitutions is the prevention of a proven danger—overreaching by the state. As already noted, the machinery for this purpose consists of the specification of legal rules—rules of institutional design, of procedure and of substance. In and of themselves the creation and observance of these rules confine the state within limits determined to exclude the most obnoxious exercises of state power. The judgment that the state is in need of this kind of limitation is an implicit adoption of one view of the optimal conditions for developing human welfare—the liberal view. It supposes that human thriving is most likely to be obtained in a life that is largely self-defined. The removal of some kinds of state interference with individual action is, definitionally, the expression of a preference for individual over collective planning. The creation of rules of state conduct enhances individuals' capacities in this respect. This results not only through the simple withdrawal of the state from certain sectors of human activity. The rules also provide a prior definition of the scope of permissible government action and the manner in which such action may be effected. This definition informs subjects of the circumstances in which they may and those in which they may not act. They thus create some assurance that their actions will not be (or are less likely to be) undone by unexpected public intervention. This benefit of constitutional limitation is independent of the content of the constitution. The constitutional specification of a more or less permanent set of rules of state conduct makes individual planning possible. Even where the constitutional restraints are few, the confidence that they will be observed creates a reliable space for private action (Kay 1998, 22–4).

It is evident from this sketch of the purpose of the constitutional enterprise that to be effective, constitutional rules must be relatively long lived. If a central feature of constitutionalism is the ability it creates to predict what the state will and will not do in relation to the projected conduct of individuals, that ability is subverted if the constitution undergoes repeated changes. It is true that there are some polities where constitutions have changed with some frequency. There is a joke about a person who visits a Paris bookstore shortly after the inauguration of the Fifth Republic to buy a copy of the French Constitution. "I am sorry, sir," says the clerk, "but we do not deal in periodical literature." The point, of course, is that there is an intrinsic incompatibility between constitutions and continuous constitutional revision.

The makers of constitutions, therefore, who, we assume are concerned about this aspect of their task, will approach their work conscious that its temporal span will extend into an indefinite but presumably long future. This is sure to influence the resulting constitutional rules. Still, no constitutions are likely to be drafted on the assumption they will operate properly over an indefinite future with no changes whatsoever. Constitutions, therefore, will make provision for their own amendment. The method prescribed for

amendment, however, will take into account the need for long term stability. It will make the successful adoption of amendments difficult. This is, in part, a reflection of the importance of the constitution in the political and legal system, but it is probably also designed simply to reduce the frequency of constitutional change. An easy method of constitutional amendment is an indication of a lack of faith by its drafters in the idea of constitutional restraint. At a minimum, the procedure for amendment must be more difficult than that of ordinary legislation, since the legislature must necessarily be one of the principle targets of constitutional limitation.¹

The creators of constitutions thus work on the assumption that the rules they establish will remain in place relatively unchanged for a long period of time and that frequent amendment cannot be expected. Naturally these enactors also understand that the world in which those rules will be applied will not stand still. A central issue in the process of constitution-making, therefore, will be how to draft stable reliable rules which will continue to make sense in substantially changed circumstances. The objective must be to write a constitution capable, as United States Chief Justice John Marshall said while considering this very issue, of being "adapted to the various *crises* of human affairs." (*M'Culloch v. Maryland*; [1819] 17 U.S. 316, 415). This concern will manifest itself in three ways—with respect to the subject matter to be controlled by the constitution, the content of the constitutional rules chosen to govern that subject matter and the manner in which those rules are expressed.

As to the first issue, the expected longevity of a constitution will be reflected in a narrower range of topics subjected to constitutional control. Perhaps the most salient way in which the reach of the constitution will be limited is to confine its restrictions to the activities of the state. Historically abuses of state power have been the most powerful stimulus for the creation of constitutional limits. It may be that, as a practical matter, concentrations of private power also pose a grave risk to a person's capacity for controlling his or her own life. But the dangers of private power may be dealt with by ordinary, sub-constitutional state regulation. Absent a constitution only state power is immune to external legal control. It is the constitution that provides such control, both in its design of public institutions and in the substantive rules it lays out. It is possible, of course, to have constitutional rules that apply to private as well as public activity and, in fact, such rules, whether

¹ The Constitutional Court of South Africa refused to "certify" the amending provisions of the proposed 1996 Constitution because they were inconsistent with the controlling constitutional principle requiring that amendments be effected by "special procedures involving special majorities." The Court said that this principle "makes a distinction between procedures and majorities involved in amendment to ordinary legislation on the one hand and the constitutional provisions on the other. Its purpose is obviously to secure the [new constitution], the 'supreme law of the land,' against political agendas of ordinary majorities in the national Parliament." *Certification of the Constitution of the Republic of South Africa, 1996*, 1996(4) SA 744, par. 153.

express in the constitutional text or the result of subsequent interpretations, have become increasingly common in modern constitutional law (Constitution of the Republic of South Africa, sec. 8(2); Currie 1994, 182–7). Such an expansion of constitutional rules to private persons raises some particular difficulties for judicial enforcement by creating the possibility of conflicting constitutional rights, and by making the fashioning of effective remedies more complicated (Fisch and Kay 1998, 451–8). The extent of these difficulties may be especially hard to forecast as they are projected further out in time. This may be one of the reasons why constitutional regulation of private conduct continues to be controversial and why it continues to be exceptional.

The influence of the long term nature of constitutions on the second feature, the substantive content of the rules propounded, is directly related to the necessity of limiting the scope of the constitution just discussed. On the one hand, the unforeseeable course of future events will caution against too strict a definition of governmental powers. The creators of constitutions will be interested in establishing a government that will be effective as well as one which will be less dangerous. Therefore, they will be careful not to hedge it in with limits so specific so as to disable it from carrying out, in unknown circumstances, the large activities for which it is desired in the first place.² They will focus their efforts on the kinds of institutions and rules most likely to maintain individual safety in the unknowable time to come.

This result follows naturally from the typical process of constitution-making. The promulgation of a constitution, being an event both important and infrequent, is generally thought to require an extraordinarily broad political consensus in order to invest it with that legitimacy which will allow it to function effectively over the long term. The need for such agreement will necessarily reduce the number of propositions that are adopted. This consequence will be more pronounced the more disagreement there is on the large questions of the proper role of the state. Constitutions in such circumstances will be “thin”; they will concern only subjects which are relatively uncontroversial. It is not surprising, therefore, that constitutional rules tend to focus on matters of institutional design and procedure. It is easier to arrive at what John Rawls calls an “overlapping consensus” (Rawls 1987) on long term ways of dealing with substantive matters than on a more or less permanent outcome for the substantive issues themselves. Again, this is especially true in light of the impossibility of knowing how particular limitations will work out as they are applied in new and unforeseen situations (Hamburger 1989; Sager 1990, 951–2).

Furthermore, the long term perspective and the need for wide agreement will move the constitution-makers to limit themselves to those restraints that

² It is this insight and not, as is commonly assumed, the need for an expansive approach to judicial interpretation, that underlay Marshall’s dictum in *M’Culloch v. Maryland* ([1819] 17 U.S. 316, 407) that “we must never forget, that it is *a constitution* we are expounding.”

are generally believed essential for future safety. The choices in this regard will be a function of both the substantive importance of various kinds of protected activities and a historical judgment about what kinds of state incursions are sufficiently likely that it is worth guarding against them. Commenting on the rights guaranteed in the first ten amendments to the United States Constitution, Justice Black captured this element of constitution-writing when he insisted that the constitution-makers had not imposed a "strait jacket" on state governments:

[I]t is true [the rights specified] were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. (*Adamson v. California*; [1947] 332 U.S. 46, 89)

While the list of these substantive limitations will certainly differ from place to place and from time to time, there has developed in Western societies over the last two hundred years—the period in which positive law constitution-making has become more familiar—a common core of constitutional rights. These rights, whose genealogy may be traced from the English Bill of Rights of 1689 through the American Bill of Rights and the French Declaration of the Rights of Man and Citizen of the eighteenth century, to the Universal Declaration of Rights of fifty years ago, center on protection of the integrity of the individual personality, prohibiting assaults on the person (limitations on arbitrary incarceration and on cruel, inhuman or degrading treatment) and restrictions on the mind (freedom of opinion, expression, religion). While, as already noted, there is a growing tendency to expand this list to include rights to minimum social and economic welfare, this has always been in addition to the traditional negative rights mentioned. Whether, given the problems of long-term prediction, the creation of positive constitutional rights will be effective in achieving their purposes is a matter of some controversy and it is, perhaps, too soon to make a useful evaluation.

The same considerations will influence the third aspect of constitutions, the way in which the selected constitutional rules are expressed. More so than is the case with ordinary legislation, constitutional rules must deal not in instances of conduct but in categories. Constitution-makers, conscious of the temporal dimension of their activity, will worry that the same evil they wish to guard against may emerge in a somewhat different form. In this sense they will share the motivation of the judges who refused precisely to define common law fraud "lest men's fertile mind invent a new scheme outside the definition but just as nefarious [...]." (*Arkansas Valley Compass and Warehouse Co. v. Morgan*; [1950] 217 Ark. 161, 164). Consequently the constitution-makers will choose to prescribe and proscribe at a higher level

of generality (Hart 1961, 125; Perry 1994, 76–9). The common constitutional prohibition on “cruel and unusual punishment” or on “inhuman and degrading treatment” provides an obvious example. Such provisions may confidently be expected to apply to whatever new forms of torture technology may develop. But it will surely not be appealing to constitution-makers to take this feature of drafting very far lest it undermine the essential element of restraint at the center of constitutionalism. The point of constitutional rules is to remove from the arsenal of state powers those actions having certain undesirable qualities. If the categories chosen are too broad, the result may be not only to inhibit unobjectionable action but to provide colorable arguments that the vague terms of the restriction do not apply. A prohibition of “arbitrary or oppressive” acts will be of little use to anyone. Moreover, this kind of rule may increase the indefiniteness of the boundaries of permissible state conduct since future applications may define the limits of public power in unpredictable ways.

2. Looking Back

The creators of constitutions must speculate about the future in which their decisions will be applied. Necessarily those who are then governed by constitutions—the public actors to whom the rules apply as well as the private persons who wish to know what those officials may do—must look into the past in order to understand the content of constitutional limitations. This, as already noted, is built into the definition of enacted law. In the case of modern constitutions the most salient example of such retrospection must be that of the judges to whom is committed (in most systems) the final responsibility for deciding the meaning and applicability of constitutional rules.

Notwithstanding this inevitable connection between the interpretation of constitutions and historical inquiry, a large and respectable body of opinion supports the idea that it is possible to operate a constitutional system with little or no regard to the process of human deliberation that created it. In a much noted lecture Justice William Brennan of the United States Supreme Court said:

Current Justices read the Constitution the only way that we can: as twentieth-century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be: What do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. (Brennan 1986, 438)

This notion of a constitutional text as a “living instrument,” changed in the process of interpretation to make it more helpful in resolving contemporary

problems, will be considered again in the next section. As the frequency of appeals to it shows, it has an undeniable attraction. But a little reflection shows that it is in tension with a central aspect of the enterprise of constitutionalism. Constitutions exist to restrain public actions. Those actions represent the best judgment of legislatures or other officials as to what the public welfare requires. As noted in the previous section, constitutions accomplish this by specifying structures, procedures and substantive rules and these are chosen with an awareness that they will be applied over a long future. This exercise is nothing if not a judgment that the constituent decisions are to be preferred to the subsequent official decisions. A constitution always being "adapt[ed] [...] to cope with current problems and current needs" is no constitution at all.

A somewhat different problem attends another attempt to extirpate historical reference from the process of constitutional application. This is the argument that it is the constitutional text itself that binds, divorced from the particular historical act of its creation. This view which in its application to both statutes and constitutions has been labeled "textualism" in the United States, defines somewhat stricter limits for interpretation than the more general "living constitution" model. The words of the constitution themselves restrict the number of possible interpretations by limiting them to those consistent with the standard definitions of the words of the textual provision invoked. The dictionary from which definitions are to be drawn is usually that in use when the language was drafted (Bork 1990, 144), although some critics suggest there is no reason why courts might not exploit a contemporary meaning which would have been unknowable to the drafters (Schauer 1982, 831).

There are several problems associated with justifying this (partially or totally) ahistorical understanding of constitutions. It would apply to constitutional language a method of reading wholly at odds with the everyday way in which we receive and understand both spoken and written communications. Most of the time our object in such activity is to infer the meaning intended by the speaker or writer. It is true that literary critics of various modern and post-modern schools emphasize the variety of meaning that may be extracted from any text, but in the practical affairs of life imaginative reconstructions of the meaning of communications are fraught with danger (Kay 1989b, 39–44). A legal enactment is an instrument for guiding behavior. It would be remarkable if the sense in which it was understood were to be determined by the inchoate possibilities in the particular form of words in which it happened to be expressed.

This textualist understanding also raises problems that are especially troublesome for the idea of a constitution as an *a priori* and relatively stable set of rules for public action. This kind of interpretation definitionally makes proper more than one meaning of the same constitutional text. As such it makes the meaning of the constitution intrinsically uncertain and diminishes

its capacity to draw the kind of assurance as to the limits of state activity (and, as important, the boundaries of undisturbed private conduct) that follow when we rely on the usual assumption that a communication has a single meaning.³

Perhaps more significantly, the refusal to inquire into the specific meaning attached to a constitutional rule by its enactors undercuts the claim of the constitution to be regarded as authoritative. Like all positive law, a constitution's authority depends on the manner and source of its enactment. Usually the authority of the lawmaker is a consequence of some higher level law granting the enacting power. Statutes are binding because the legislature is authorized to make law by the constitution. Constitutions, on the other hand, are foundational in the sense that their creation is not the result of a lawfully authorized act of lawmaking.⁴ But this does not mean that their authority is not a product of the circumstances of their enactment. On the contrary, as noted in the last section, it is generally believed that it is especially important that constitutions be created through a process that ensures the widest possible political agreement. Most new modern constitutions are drafted in an assembly popularly elected for that special purpose and then approved in a referendum. The continuing normative force of constitutions is, at least in part, made possible by appeals to the solemn decision of "the people" in creating them. In the United States, the actual process of constitution-making (at the federal level) was far from democratic in the modern sense. Still, praise of the two hundred year old text routinely includes references to its status as the act of "we the people." More generally, the legitimacy of a constitution—or any enactment—may not be divorced from its historical origins. It is true, as will be explored further in the next section, that no constitution can be effective unless there is some minimum fit between its provisions and the prevailing values of a society at the time it is invoked. But, by itself, this is insufficient. An acceptable set of constitutional rules that is found under a rock will never command the allegiance of those whom it is to govern. There must be a further understanding that it is the product of some shared purpose amongst a group of people who it was, and continues to be, believed were the right people to make fundamental decisions for a polity (Raz 1992, 295).

³ Restriction to the meaning apparent on the surface of the language may make its meaning more accessible. It makes impossible the application of an intended meaning not inferable from the ordinary meaning of the words used. In that sense this technique is consonant with the aim of providing clear and knowable rules. But ordinarily there is only a need to articulate a view of interpretation in cases where there is more than one plausible apparent meaning. In such cases, as noted, the textual approach causes more uncertainty than certainty. The situations where a single apparent meaning will differ from the historical meaning are likely to be few. In most such cases the enactors' mistake in expressing their intentions will be more or less obvious. Consequently it will be only on the rarest of occasions that it will be necessary to apply a meaning which is undiscoverable from an inspection of the text (Kay 1996, 336).

⁴ Such authorization, at any rate, need not be the effective source of the constitution's normative force (Hart 1970).

If this is accepted, the idea that one may invoke the authority of the constitution for a decision that may be derived from one superficial reading of its words, but which has no connection with the purposes of its creators, is insupportable. Such an approach cuts the constitution off from its critical source of legitimacy. The constitutional text in such a situation becomes indistinguishable from any other set of rules that might be proposed. It would, that is, be like the constitution found under a rock just mentioned. The fact that it had the same words as the historically legitimate constitution would be a mere accident.

It follows, therefore, that there is a necessary historical component in the application and interpretation of a constitution. When the question is whether a given action is permitted by the constitution, the interpreter will have to ask whether it is one of those things intended to be permitted or prohibited by the enactors when they made the constitution. Such an inquiry will have to concern itself with the kinds of issues present to the minds of the enactors and the political and social values they held. This will often be a daunting task and it will become more difficult as the time between the promulgation of the constitution and the moment of application increases. Since we have already concluded that constitutions must be long term propositions, it follows that constitutional interpretation will be an inexact and controversial practice.

It will, however, appear somewhat easier when we recall that the constitution-makers themselves, conscious of the special character of their creation, must be presumed to have been drafting and enacting for the long term. Thus we will be less willing to attribute to them an intention to deal with narrowly defined objects of regulation rather than with more broadly defined evils. It will ordinarily be unnecessary to ferret out the precise techniques they had in mind for dealing with particular problems because, as noted in the previous section, we can be confident they would not have wished to hamstring the state over an indefinite future in order to address questions that could well be short lived. Of course, this will not always be the case. The uncontroversial meaning of some constitutional language—the specification in years of an elected official's term of office or the legislative majorities necessary for different kinds of decision—indicates that sometimes the constitutional enactors will choose to define conduct with considerable precision. A much discussed issue in the literature of constitutional interpretation addresses the "level of generality" with which constitutional rules should be read (Dworkin 1981, 488–97). In light of the indispensable need to refer to the decisions of the enactors already discussed, the proper response is straightforward. Officials regarding themselves bound by the constitution will inquire how wide or narrow a category of conduct was intended to be regulated by the constitution-makers. Given the imperatives of constitution-writing, those intentions will likely, although not invariably, be to define the powers and limitations of government in

such a way as to permit the state to respond to changing needs. But they will also be to prevent the state from perpetrating the evils that concerned the enactors, even if the specific conduct in which they were embodied was beyond their contemplation.

3. Temporal Dysfunction

It is clear from this discussion that the great ambition of constitution-makers is to bind the future to the values of the present. They engage, in Anne Norton's phrase, in an attempt at "temporal imperialism" (Norton 1988, 460). It is equally clear that the great problem for this enterprise is the inability to predict with confidence how the future will look and how the human beings whose actions are to be controlled will respond in that unpredictable time to come. I have already noted a number of techniques that will be employed by sensible constitution drafters to maximize the chances that their intentions will continue to be respected. Their success will depend on a number of factors. First, it will turn on the degree to which the enactors are capable of foreseeing the kinds of new facts that will emerge during the period in which they expect the constitution to operate. Perhaps more seriously, it will hinge on the degree to which the political and social values that animate the making of the constitution continue to be widely shared in the relevant society. To some extent this will be a function of the wisdom and perspicacity of the people writing the constitution but it will almost surely turn equally on luck.

There are limits, however, to both skill and luck. Human history tells us that sooner or later every constitution will begin to chafe. The metaphor most commonly employed to describe this phenomenon is that of the "dead hand" (Klarman 1997, 381). It has two related aspects. First there is a normative objection based on the presumed priority of self-government. The great American lexicographer and essayist, Noah Webster, made the point pungently during the constitution-making era of the late eighteenth century: "The very attempt to make *perpetual* constitutions is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia" (quoted in Rubenfeld 1988, 1088). More particularly, however, it is inevitable that urgent needs or intolerable evils will appear that were simply unforeseeable at the time of constitution-making. Moreover the ordering of social values that informed the initial constitutional decisions may shift significantly. There will then develop a misalignment between the constitution and the social and political realities which any system of government must take into account. A recent commentator put this point forcefully in the context of the United States Constitution of 1787–89:

No matter how smart the Framers were, they still held slaves and subordinated women; they could not dream of space travel, nuclear weapons and computer

technology; and they wrongly assumed basic demographic, political and other facts about the world. Greater wisdom notwithstanding, it is hard to justify binding us to the Founders' constitutional commitments given the handicaps under which they operated. (Klarman 1997, 388–9)

For reasons discussed, this is an unavoidable cost of constitutionalism. Every constitutional system, it would seem, must respond one way or another to this problem.

A number of reactions to constitutional misalignment, including amendment and judicial revision, will be discussed below. But by far the most common response may be to do nothing. The now obsolete constitutional text will continue to be recognized and to have an effect in curbing state action. The lack of fit with important social factors will, from time to time, cause the enforcement of the constitution to impose undesirable consequences. These consequences fall into two categories: First, actions of the state that would be prohibited if a constitution more in tune with the current realities were in place, will be permissible and, therefore, might be undertaken. In democratically organized polities there will be a disincentive to these acts independent of any substantive constitutional prohibition. But the likelihood of their occurrence will still be higher than it would be if there were an explicit constitutional bar. Second, and more probably, actions that come to be seen as critical to social well being will be prohibited by the now sub-optimal constitutional rules. But unless the cost of these constitutional anomalies is severe, it will usually be more sensible to put up with them than to undertake the difficult and traumatic process of full-blown constitutional replacement. The framers of the American Declaration of Independence of 1776 expressed this wisdom succinctly in noting that "all Experience hath shewn that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed." (*The Declaration of Independence*, Par. 2 [U.S. 1776]).

Although every constitution exhibits an increasingly poor fit with contemporary facts and values, such constitutions will be tolerated until some issue arises the importance of which justifies an explicit re-examination (Ackerman 1991). A significant constitutional misalignment can persist for a very long time. In Canada the formal attributes of the 1867 Constitution, an act of the United Kingdom legislature, maintained the constitutional amendment power in the Westminster Parliament. For most of the twentieth century this constitutional arrangement had little to do with anyone's understanding of the locus of political sovereignty in Canada, yet this aspect of the constitution was retained with only minor inconvenience until 1982. It is only when someone seeks to exploit the formal but outdated rules to effect a substantial and concrete change that the need for constitutional reform will become pressing. In Canada a change in the constitutional amendment rules emerged only after the federal government, contrary to long-standing practice, attempted to secure a new amendment procedure and an entrenched

Bill of Rights, by requesting an act of the United Kingdom Parliament without obtaining agreement from provincial governments⁵ (Kay 1984).

Wholesale constitutional change can be forestalled for a long time by the device of constitutional amendment. John Locke proposed a constitution for the Carolinas which was to "be and remain the sacred and unalterable form and rule of government [...] forever" (quoted in Levinson 1995b, 4). But every modern constitution provides machinery for its own amendment. The possibility of amendment cannot, however, prevent the eventual obsolescence of a constitution. For reasons that have already been summarized, a constitution must provide some minimal amount of stability and predictability—such qualities being at the center of the constitutional enterprise. Consequently, the amendment procedures must be designed to frustrate frequent change. While it might be theoretically possible to design a procedure which will be successful just at the point that the existing constitution becomes inconsistent with widespread and lasting social attitudes, it will more probably be the case that the kind of political consensus that any amendment procedure requires will permit a small number of political actors to thwart changes that are intensely desired by a distinct majority of the population.⁶ When this happens the prior question recurs. What happens when an unchanged—and practically unchangeable—constitution becomes politically unacceptable?

The most commonly discussed response to this difficulty is for the heirs to a constitution to refit it to current need through a process of interpretation, most prominently judicial interpretation by the constitutional court of last resort. I have already noted that constitutions generally are drafted so as to extend to a variety of contingencies not foreseen or foreseeable at the time of constitution-making. Judicial application of this feature of constitutions, therefore, is not the kind of constitutional change at issue. It is rather an example of how constitutions may be designed to avoid the problem of changed circumstances. Judicial construction becomes a means of dealing with the misalignment between social facts and fixed constitutional rules only when it goes outside of the range of applications reasonably inferable

⁵ For the same reasons states can endure for relatively long periods during which the practical meaning of the constitution is sharply disputed between significant forces in society. See Foley 1989. See also Griffin 1995, 43–9 (disputed nature of the United States Constitution in the nineteenth century).

⁶ The difficulty of constitutional change will be especially acute in a polity that contains a significant and enduring disaffected minority that is able to participate in the amendment decision. The Canadian Constitution makes it possible, although difficult, to effect most constitutional amendments without the assent of the legislature of Quebec. But for the most important changes the unanimous consent of all provincial legislatures is needed. Moreover the federal parliament recently enacted a statute effectively preventing the federal parliament from granting its essential assent to even "ordinary" constitutional amendments if, *inter alia*, Quebec dissents. The result, given the arrangements of political interests in Canada, is that any significant constitutional reform is, in the short and medium terms, pretty much impossible (Hogg 1998, 69–99).

from the constitutional enactment as intended by its creators (Levinson 1995a, 14–24). The common metaphor associated with this practice has already been mentioned. It is the “living constitution.” The obscurity of this notion is captured in one of its most famous restatements when Lord Sankey referred to the Canadian Constitution as having “planted in Canada a living tree capable of growth and expansion within its natural limits” (*Edwards v. Attorney-General Canada*; [1930] A.C. 114, 136 (P.C.)). If this process refers to anything beyond the exploitation of the categories created by the original enactors, it must amount to an irregular amendment of the constitution by its interpreters.

In light of the purposes of constitutions I have assumed in this essay, it is apparent that while such actions may successfully realign the constitution they will also be subversive of constitutionalism in at least two ways. The process of constitutional change through judicial reinterpretation necessarily reduces the capacity to know the content of the constitutional rules that will be applied to any situation. The ability to know what a particular rule was intended to do may, in some cases, be difficult but it is certainly easier than predicting the outcome of litigation, in which a court is seeking not to discover and apply a fixed rule but to create a rule suitable to the exigencies of the time. That task is necessarily made even harder by the fact that such judicial activity is disguised as mere interpretation of a rule already present in the constitution. Such covert rule making is unlikely to provide the security that we seek from a more or less fixed definition of permissible and impermissible state action. Beyond this, the rules that emerge from such a process will lack the legitimacy that attend the constitutional rules made by the broad and intense political activity that we normally require in the course of constitution-making. In the United States the common charges of usurpation by the Supreme Court are often associated with the fact that the Court, unelected and vested with permanent tenure, has substituted its own values for those chosen by “we the people,” acting through the constitution-makers of 1787–89 (Perry 1999).

The experience of the United States, however, is also a reminder that, notwithstanding its corrosive effect on constitutionalism, judicial action may, in fact, significantly and successfully change the shape and content of the effective constitutional rules. While it is possible to overstate the extent to which the original constitutional plan has been altered by the actions of the courts, there is universal agreement that they have permitted, and sometimes imposed, very significant innovations in the constitutional scheme. These include the vast expansion of the authority of the federal government from an important but strictly defined sphere of operation to almost plenary dimensions. Better known, although perhaps less significant in practice, has been the judicial creation of entirely new individual rights, both economic and personal, assertable against both state and federal governments and connected to the constitutional text by little more than rhetorical fiat.

Though often controversial, these judicial revisions have been pretty thoroughly accepted. It is thus accurate to describe the operative American constitution as one which has been substantially changed in the process of constitutional litigation. Yet the American example also illustrates the difficulties with this kind of adaptation. It is almost impossible to say just what this hybrid constitution consists of, which judicial amendments are lasting changes and which are passing experiments. Michael Perry has suggested that the constitution must be regarded as including those norms created in the courts that have become "bedrock" in our legal-political system (Perry 1998, 104–7). But time has shown that the identification of such norms is far from foolproof.⁷ To the extent that we concede (and it is hard, at the end, to deny) that constitutional changes may occur in this way, we have significantly reduced, although not eliminated, the settling and securing functions of the constitution.

The problems with judicial revision mean, among other things, that a thorough reliance on it to resolve the problems of an outdated constitution cannot be entirely successful. Constitutional amendment may, for good reasons of constitutionalism, be unachievable because the particular arrangement of political forces made necessary by the prescribed procedure cannot be assembled. Modernizing interpretations may be refused because the desired result is so much at odds with the text or history of the constitution as to make even the most imaginative court uncomfortable. At some point the constitution becomes incorrigibly unsuitable for the polity it is meant to govern. At this point the only avenue open for dealing with the problem is an explicit departure from the law the old constitution has established.

This kind of constitutional change need not be violent or even particularly disruptive. What it requires is that there be a palpable departure from the authority of the existing constitution. Arguably the enactment of the United States Constitution of 1787–89 was such an event. Although there were some feeble attempts at the time to explain its creation as a lawful continuation of the Articles of Confederation or as authorized under some other subsisting law, it was rather plainly a case of simply putting aside a constitutional regime which was painfully inadequate to the political needs of the time. "The house on fire," explained James Wilson, one of the most influential founders, "must be extinguished without a scrupulous regard to ordinary rights" (Farrand 1911, 469). But this extralegal replacement of one constitution

⁷ The constitutional economic rights invented by the American courts in the late nineteenth and early twentieth century were pretty much spent by the middle of the century. The changes in the spheres of competence of federal and state governments have largely run in favor of the former, but there are signs that even this may be headed for revision, *U.S. v. Lopez*, (1995) 514 U.S. 549 (Federal Statute prohibiting possession of firearms in a school zone, held to exceed Congressional authority to regulate commerce); *Printz v. U.S.*, (1997) 521 U.S. 898 (Federal Statute requiring local law enforcement officers to conduct background checks on proposed handgun transferees, held unconstitutional).

with another was accomplished entirely through peaceful, although unauthorized, procedures (Kay 1987).

There are certain advantages to changing constitutions through overtly illegal means. The new dispensation, being the product of a different political consensus from that creating the replaced constitution, will be able to draw legitimacy from the events of the change. As I will mention below, there may be some value in rooting the new rules to the events associated with the creation of the old ones but sometimes, at least, the historical regard in which those events are held may have become tainted by the discredited constitution they produced. The replacement of the amendment rules of the colonial Canadian Constitution of 1867 mentioned above was, at the end, accomplished in a manner that complied with the formal rules in place. But some of the participants in that event had argued for a process that was explicitly alegal exactly in order to emphasize that the constitution was a product of a solely Canadian decision (Hogg 1998, 54). The quality of the constitutional rules created may also be compromised by failing to acknowledge the break in legal continuity. The act of constitution-making they entail should be undertaken with an eye to the special needs of this kind of law-making discussed above. It will be harder to succeed in meeting these needs if the process is disguised as mere subconstitutional change. Finally, a transparently illegal action allows subsequent interpreters of the new constitutional rules to place them in the true context of their creation. To the extent the updated constitutional rules are represented as merely the continuation of the pre-existing constitutional authority, their meaning may be obscured in the attempt to reconcile them with that authority. Such confusion further undermines the constitutionalist desiderata of stability and clarity.

When there are substantial elements in a society that remain committed to the prior constitutional regime, and when there are no shared supra-constitutional means for resolving such differences peacefully, only a contest of force can effect the necessary constitutional change. When the resistance comes from the official holders of power, the result is a revolution. A successful revolution is the clearest possible indication that time has made the existing constitution unsuitable. It is remarkable, however, how often genuine revolutionaries seek to connect their actions in one way or the other to the artifacts of the legal system they are displacing. After the English revolutionaries of 1688–89 had invited in a foreign army and induced James II to flee for his life they reconceived his actions as an “abdication” and insisted that his replacement was according to ordinary English law. When the southern United States unilaterally seceded from the federal union of 1787–89 initiating the American Civil War, the President of the Southern confederacy declared that their action did not amount to “any failure to perform any constitutional duty” (Kay 1987, 167–82). While there are also examples where such legal justification is absent, its fairly common occurrence illustrates the extent to which legal regularity may be seen as a

fundamental value in the relevant society. The same craving for stability that animates constitutionalism may make the appearance of some form of legal continuity essential to generate the political acceptability even of revolutionary change. It may be possible to acknowledge the break in legality only after the new regime has established itself on a secure footing.⁸

Whether disguised as lawful or overtly revolutionary, such wholesale constitutional change must rest on its own political foundation. Whether the substantive changes it puts in place are minor or substantial, it amounts to a new constitutional founding. No matter how perfectly a constitution's rules and institutions match the social and moral context in which it was created, the inevitable movement of human affairs will doom it to anachronism. Finally there will have to be a new beginning and the constitutional clock will start running again.

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⁸ The affinity for legal justification associated with the English Revolution of 1688 mentioned in text may be contrasted with the sometimes frank celebration of its revolutionary character on its hundredth anniversary (Wilson 1992).

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