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## Two Ways to Rewrite the Constitution

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## TWO WAYS TO REWRITE THE CONSTITUTION

RICHARD S. KAY\*

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The proposition that the Constitution needs to be rewritten begs a critical question—namely what the Constitution is. If we posit that by Constitution we mean the rules drafted by the Philadelphia Convention of 1787 as amended in accordance with Article V of those rules, the argument that many of those rules are out of date and need to be replaced is a powerful one. This inadequacy appears in the powers they grant, the powers they do not grant, some of the limitations they impose on public decisions, and some limitations they ought to impose but do not. No matter how sensible they were for the eighteenth century, changes with respect, at least, to geography, demographics, technology, and prevailing values make current problems of governance substantially different from those confronting the original enactors. And, notwithstanding the regular invocation of the Constitution as expressing the authentic will of “We the People,”<sup>1</sup> every passing decade makes the existence of such a popular endorsement increasingly rhetorical. I also assume, for the sake of this Essay, that the original Constitution’s own procedures for rewriting in Article V are practically unavailable to make the changes necessary to correct these deficiencies.<sup>2</sup>

If we accept that the Constitution (as defined) needs to be rewritten, we must then ask *how* it should be rewritten. I discuss two methods in the balance of this Essay. The first is to write and adopt a new text from scratch. The second is to maintain the existing text but to reinterpret its rules so as to make it better fit with modern realities. Each of these methods, however, suffers from serious problems.

### I. METHOD ONE: STARTING OVER

Having decided that the existing Constitution is inadequate and that amendment is an insufficient response, the most obvious next step might

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1. See U.S. CONST. pmb1.

2. See, e.g., Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1046–51 (2014) (noting that “the requirements of Article V [are] practically impossible to meet”).

be simply to start over, to write a new constitution. The enactors could select those features of the old constitution that appear to have continuing utility. They could also borrow features from other more recently written constitutions. This kind of constitution writing is more or less routine in the nations of the world.<sup>3</sup> If we honestly think we need a new constitution, why should we not undertake such a project?

We usually make law under an authority and according to procedures that are themselves defined by superior law. A statute tells us how to make regulations; a constitution tells us how to make statutes. But there is no such thing as a law that tells us how to make constitutions.<sup>4</sup> The authority for constitution making, therefore, must derive from something other than law—something essentially political. Writing a new constitution necessarily involves abandonment, that is to say, repudiation of the prior constitution. (Only in treaties are governments instituted in a lawless state of nature.) A thorough constitutional rewriting demands an especially intense political motivation. It requires a widespread conviction that the old constitutional rules are no longer satisfactory and an equally broad agreement on the principles that ought to guide design of the replacement.<sup>5</sup> The resulting new constitution would have a far more credible claim to be an authentic act of “the People” subject to it than does our current original Constitution, written and approved by people long dead.

The main obstacle to rewriting the United States Constitution is less disagreement on what the new charter should contain (though, in the event, that would also be a formidable problem) than a distinct reluctance to discard the existing Constitution. Every change of constitution is a risky enterprise. It was not without reason that the drafters of the Declaration of Independence acknowledged that “all [e]xperience hath shewn, that [m]ankind are more disposed to suffer, while [e]vils are sufferable, than to right themselves by abolishing the [f]orms to which they are accustomed.”<sup>6</sup> And with respect to the United States Constitution that reluctance is likely to be especially pronounced. That is

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3. Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 905 (2008).

4. Some constitutions provide distinct procedures for amendment to the constitution and replacement. *See, e.g.*, C.E., B.O.E. n. 311.1, Dec. 29, 1978 (Spain). It is an interesting but ultimately unanswerable question as to whether such a replacement, enacted according to the prescribed procedure, should be considered a new constitution. *See* Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 725–27 (2011).

5. Such critical attention to fundamental matters of constitutional design shares much with Bruce Ackerman’s device of a “constitutional moment” applicable both to formal and informal constitutional change. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE* 133 (1991). I refer here only to the explicit abandonment of one constitution and its replacement with another.

6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

because the American population has come to view the Constitution as the basis for much of what makes the nation worthy of allegiance. Devotion to the Constitution has become an essential component of patriotism. And it is clear that the Constitution that serves this essential role is not some notional charter but the actual written document containing the eighteenth century rules and their amendments. Congresswoman Barbara Jordan became a national hero in the Nixon impeachment hearings in 1974 when she said: “My faith in the Constitution is whole, it is complete, it is total. I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction of the Constitution.”<sup>7</sup>

This belief in the critical role that the Constitution plays in national well-being is admittedly not fully informed by the content of the actual rules and procedures in the constitutional text. The population’s ignorance of the Constitution’s contents is routinely documented in public opinion polls.<sup>8</sup> We have, therefore, a disconnect between the public’s estimate of the importance of the original Constitution and the opinion they might hold if they were to read it carefully and dispassionately. It might conceivably be possible to correct the popular misunderstanding of the written rules. But until that happens, no aspiring political leader is likely to adopt an anti-Constitution platform.

All of this suggests that a total or near total constitutional replacement—no matter how logical—may simply be off the table. Such a leap into the unknown would require endorsement by a process representative enough to claim the emphatic approval of the existing “people.” That is something that, given the broad popular attachment to the imagined Constitution—erroneously associated with the original Constitution—is a practical impossibility.

## II. METHOD TWO: BIT BY BIT

The second way of rewriting the original Constitution is the way we actually have been rewriting it for more than 200 years. That is by rule-altering judgments of public actors, most notably by the Supreme Court of the United States. The rules that emerge from the decisions of these agents are effectively enforced in the name of the Constitution even though they depart substantially from the original rules as amended. We

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7. Congresswoman Barbara Jordan, Statement at the U.S. House Judiciary Committee Impeachment Hearings (July 25, 1974), *available at* GIFTS OF SPEECH, <http://gos.sbc.edu/j/jordan3.html>.

8. For a summary of recent findings, see *Americans Know Surprisingly Little About Their Government, Survey Finds*, PR NEWSWIRE (Sept. 17, 2014), <http://www.pnnewswire.com/news-releases/americans-know-surprisingly-little-about-their-government-survey-finds-275420031.html>.

might, of course, describe this process in a different way; it is in the nature of the Constitution to be constantly changing and, therefore, no real rewriting has taken place. The somewhat misleading metaphors for this phenomenon are “the living Constitution” or sometimes “the common law Constitution.”<sup>9</sup>

Whatever the label applied to it, we are talking about the same process. There is a fixed set of textual rules that, accurately understood, apply to designated activities. Certain officials, usually referring to some array of values then apply *different* rules to one or more of those activities citing, though not actually applying, the original text. As noted, the principal agency responsible for this process has been the Supreme Court. That Court has claimed for itself the exclusive right to decide the meaning of the Constitution, and this claim has been largely accepted.<sup>10</sup>

This ongoing, covert, and piecemeal rewriting of the Constitution by (mainly) the Court has certain advantages. It allows the fundamental rules to be kept roughly up to date. It does this, moreover, without the intense, dramatic, and sometimes dangerous context of a wholesale constitutional revolution. It allows constitutional change to proceed incrementally and therefore permits the continuous evaluation and reevaluation of previous constitutional experiments. In a country like the United States, moreover, this kind of constitutional revision by courts fits comfortably with the well-established and broadly accepted process of common law lawmaking by courts.

This way of rewriting the Constitution, however, also raises some serious problems. A constitution is not just a collection of rules. It is supposed to be an integrated system of grants of power and limitations of power that make sense in a given time and place. It ought, therefore, to create a coherent functioning state, one appropriate for the population that will be subject to it. A constitution, therefore, needs to be *designed*. Common lawyers once thought that, over time, the decisions of judges would gradually and more or less automatically, evolve into a thorough and rational system of rules: the common law “works itself pure.”<sup>11</sup> That time, however, has long passed, and almost everyone recognizes that the rules that emerge from adjudication, like those arising from legislation, are exercises of human will. Moreover, because of the peculiar, episodic—one might say haphazard—nature of constitutional litigation, the resulting set of rules taken together, can hardly be described as resulting from the exercise of one intelligible will. It is a far cry, that is, from what Sieyès saw as essential to genuine constitution making, the

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9. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); see also JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

10. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18–19 (1958).

11. *Omychund v. Barker*, [1744] 26 Eng. Rep. 15 (H.L.) [23].

expression of “a common will [arising from] a willing and acting body.”<sup>12</sup>

This incremental constitution making exhibits another related defect. A critical purpose of a written constitution is to settle, in advance, and for some extended period of time, the things that the State may and may not do to individual citizens. Even apart from the actual powers granted and the limits imposed, it must provide some reliable definition of the sphere of potential public interference. This accords the people subject to it the capacity to make plans with some confidence that those plans will have a chance to come to fruition.<sup>13</sup> The prospect of rewriting a constitution, month to month, or year to year is utterly inconsistent with this central reason for having a constitution. It is true that these transformations of the Constitution will be gradual and fairly predictable to anyone who pays attention to the decisions announcing them. This is a standard defense of common law adjudication. But opinions have always differed as to just how orderly the common law process really is. Lord Coke thought “the common law itself[] is nothing else but reason: which is . . . perfection of reason.”<sup>14</sup> But Jeremy Bentham believed that “[a]s a [s]ystem of general rules,” it was “a thing merely imaginary,”<sup>15</sup> and for T. E. Holland it was simply “chaos with a full index.”<sup>16</sup> On the latter view at least, a constitution that is routinely rewritten is hardly a constitution at all.

Perhaps the most serious charge against this way of rewriting the Constitution involves its legitimacy. Like most modern constitutions, the United States Constitution occupies the highest level in the hierarchy of law. Insofar as its meaning is committed to the judiciary, moreover, the last word in many critical collective decisions belongs to the court of last resort. The conventional justification for this allocation of decision making is that the judges are only implementing the rules of the Constitution. And the Constitution controls any other public acts because it has issued from the most legitimate source of authority in the legal system. In the United States (and in almost every other modern constitutional system) there is overwhelming agreement that this source

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12. EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* 121, 130–31 (S.E. Finer ed., M. Blondel trans., 1963) (1789).

13. See Richard S. Kay, *American Constitutionalism*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS*, 16, 22–24 (Larry Alexander ed., 1998).

14. I EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 138 (Francis Hargrave & Charles Butler eds., 1st American ed. 1812).

15. JEREMY BENTHAM, *A Comment on the Commentaries*, in *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* 3, 119 (J.H. Burns & H.L.A. Hart eds., 1977).

16. THOMAS ERSKINE HOLLAND, *ESSAYS UPON THE FORM OF THE LAW* 171 (London, Butterworths 1870).

is the will of “the People.” There are multiple serious problems with this attribution, consideration of which would unduly extend this Essay.<sup>17</sup> But, as noted in the previous section, the dogma of the Constitution as the authentic act of “We the People” has lost little of its appeal as a proper basis for legitimizing the Constitution.<sup>18</sup> But the second kind of rewritten Constitution, having been formed by adding, deleting, and substituting rules in litigation decided by unelected and unrepresentative judges, has just about no claim to be the work of “the People” in the sense broadly held by today’s population.

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I conclude, therefore, that an examination of the question of whether or not the Constitution needs to be rewritten leaves us on the horns of a dilemma. The original Constitution is demonstrably unsuitable for the needs of a twenty-first century state. We cannot live within the confines of those original rules. But there is no way to secure a new more appropriate constitution that does not present its own formidable difficulties. An explicit and wholesale rewriting appears politically impossible due to the popular mystique surrounding the original Constitution and the process that was supposed to have created it. The implicit piecemeal rewriting executed in the course of constitutional litigation, on the other hand, results in an effective constitution that is unplanned, uncertain, and illegitimate.

How serious is this problem? Obviously, it is less than grave. The United States functions in a reasonably competent way, although some of the more explicit—and, therefore, harder to interpret our way out of—provisions create noticeable inconveniences. The government continues to operate fairly effectively through an ill-defined sharing of power between the political branches and the courts. It does so, however, without the stable protective constraint which is supposed to be the central virtue of a constitutionalist state. It is perhaps ironic that, at the same time, it derives much of its perceived authority from the constitutional text that it has largely left behind.

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17. See Kay, *supra* note 4, at 735–55.

18. For example, the “We the People” motto is prominently displayed at the new National Constitutional Center in Philadelphia. See *National Constitution Center*, VISIT PHILA., <http://www.visitphilly.com/museums-attractions/philadelphia/national-constitution-center/> (last visited Jan 23, 2015).