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## THE CONSTITUTION IS DEAD, LONG LIVE THE CONSTITUTION! THE CREATION, ENDURANCE, AND MODIFICATION OF MODERN REVOLUTIONARY CONSTITUTIONS

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**THE CONSTITUTION IS DEAD, LONG LIVE THE CONSTITUTION!  
THE CREATION, ENDURANCE, AND MODIFICATION OF MODERN REVOLUTIONARY CONSTITUTIONS\***

Jorge M. Farinacci-Fernós\*\*

**I. INTRODUCTION**

Constitutions come and go. Some were born illegally, but still manage to gain legitimacy and endure. Others observed the established processes of adoption yet floundered shortly after. This is so, because the validity of a constitution is not wholly dependent on the *legality* of its creation. On the contrary, how a constitution is *created*, why it *endures*, and how it *changes* depends on the *legitimacy*, and thus *authority*, generated by the process of creation and the level of *connection*, and thus *fidelity*, the current generation has with the content of the original constitutional project. There is also interdependency between these stages of constitutional existence, since how a constitution is created will also impact its endurance and future developments, including possible modifications. All of this is particularly true and relevant in the context of revolutionary constitutions, both in terms of the processes that generated them and their substantive content.

This article will analyze these stages of constitutional existence—namely: (1) creation; (2) endurance; and (3) change—and how normative factors such as legality, legitimacy, authority, connection, and fidelity impact each of them. It will also analyze the interaction between the stages among themselves and how they impact one another. My main normative proposals are that: (1) highly democratic processes of creation, even if illegal or extralegal, can generate sufficient legitimacy and authority so as to be accepted by the community as valid; (2) revolutionary processes of constitutional creation that reflect and capture the deeply-rooted preferences of the social majority will endure, so long as the original social consensus holds; and (3) when a new process of constitutional creation takes place, the available avenues of constitutional change will depend on the contrasting levels of legitimacy and social connection of the original and new constitutional creation processes.

In particular, I propose that: (1) *legitimacy* and *authority* are the main normative factors relevant to the validity of constitutional creation; (2) both *legitimacy* and *authority*, on the one hand, and *connection* and *fidelity* on the other, will be almost equally crucial to constitutional endurance; and (3) that *connection* and *fidelity* will be the deciding factors when engaging in constitutional change, linking up with the legitimacy and authority of the process of change itself, particularly in the case of replacement. These proposals require a normative model that discusses each individual interaction between stage and conceptual factor, analyzes their interdependency, and proposes a more general explanation as to the critical process of constitutional development that allows a particular society to establish, maintain, and modify its constitutional structures.

As we will see, most of the answers to these questions are to be found in the realm of *constitutional politics* and not in the technicalities of law. Because of the central role modern constitutions play in the development of a particular political community, there is a critical intersection between politics and law that increases when there is a particularly transcendental social process that requires or generates a legal revolution.<sup>1</sup>

Constitutions are at the heart of any revolutionary change in law and politics, whether as an obstacle to these transformative processes, as their main ally, or as their product. As such, there is nothing as counter-revolutionary as an old constitution on its way out, and nothing as revolutionary as a new constitution on

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<sup>1</sup> Jorge M. Farinacci-Fernós, *Post-Liberal Constitutionalism*, 54 TULSA L. REV. 1, 37-41 (2018).

its way in. How this process plays out requires a deeper look. In particular, we need to analyze how a revolutionary process can impact the different levels of constitutional existence, specifically as to issues of legitimacy, authority, connection, and fidelity between future social majorities and the one that originated the current constitutional project in the first place.

This article is divided into the following parts. Part I is this introduction. Part II will focus on the normative factors that impact the different stages of constitutional existence and their validity. In particular, we will discuss concepts such as legality, legitimacy, authority, connection, and fidelity. Part III will offer an analysis of the different stages of constitutional existence. In particular, we will discuss each stage (creation, endurance, and change) separately, so as to learn their respective inner-workings, and we will also analyze the impact each of the normative concepts discussed in Part II has on the different stages of constitutional existence. Finally, we will discuss how each stage interacts with the other two. Part IV will offer some final thoughts.

## II. NORMATIVE FACTORS

### A. Introduction

In this Part we analyze the different normative factors that impact how a constitution is created, why it endures, and how it changes in the future. Each factor will be applied to each particular stage in Part III, and they are directly related to the issue of constitutional validity, in other words, the continued acceptance of a constitutional process and order by a particular community.

The first set of factors—legality, illegality, and extra-legality—deal with the relationship between each stage of constitutional existence and established legal order and its relation with the legal processes and structures used to create, maintain, and modify a constitution. Here, the formal-informal dichotomy is also analyzed. The second set of factors—legitimacy and authority—deal with the issue of validity and social acceptance of a particular constitutional action, particularly creation and endurance. The final set of factors—connection and fidelity—deal with the level of social support of the substantive content of the constitutional project.

### B. Legality, Illegality, and Extra-Legality

*Legality* refers to the compatibility of a particular action, process, or rule with the existing legal order. In particular, it refers to their compatibility with pre-established formal structures that are accepted as the current legal system. Ideally, these structures are also the result of a legal exercise, tracing back to some original source of legal authority, sometimes called the “rule of recognition.”<sup>2</sup> Such a rule “helps us to determine whether a given rule is indeed a valid law,”<sup>3</sup> since it constitutes the “ultimate and supreme rule because it itself is not subject to another test for its own validity nor draws its existence from another rule.”<sup>4</sup>

As most relevant here, Black’s Law Dictionary defines legality as “[t]he quality, state, or condition of being *allowed* by law.”<sup>5</sup> In turn, the condition of being allowed by law can be met either through an express authorization or, in some instances, the absence of a direct prohibition.

In the constitutional realm, this concept is somewhat tricky, since the only source that can be used to analyze the legality of a particular action is the constitution itself. In other words, the legality of a constitutional action can only be analyzed through the structures and norms laid out in the constitution. But because an accepted constitution is the quintessential example of a rule of recognition, the issue of legality will be relative and, most important, context-specific. This is so because a new constitution, while it may be

<sup>2</sup> Joseph D’Agostino, *Law’s Necessary Violence*, 22 TEX. REV. LAW & POL. 121, 184 (2017).

<sup>3</sup> Norman P. Ho, *Internationalizing and Historicizing Hart’s Theory of Law*, 10 WASH. U. JURISP. REV. 183, 190 (2017).

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

<sup>5</sup> *Legality*, BLACK’S LAW DICTIONARY (11th ed. 2019).

adopted illegally, will determine its own legal status if it is accepted as valid by the community. When this happens, the previous illegality will be cured by the new legal order.

*Illegality* refers to situations of a direct violation of the structures and norms established in the current legal system. In other words, it is a direct contradiction to, and thus incompatible with, the pre-established legal system. According to Black's Law Dictionary, this term can be defined as "[a]n act that is forbidden by law; the state of not being legally authorized; [t]he quality, state, or condition of being unlawful."<sup>6</sup> As relevant here, illegality focuses primarily on actions and processes that are either expressly prohibited by the legal system or sufficiently in tension with it as to be considered incompatible.

In the constitutional realm, this concept applies to actions that are in direct contravention to the specific, and sometimes exclusive, processes and norms recognized by the constitution, particularly as to its modification or replacement.<sup>7</sup> Interestingly, what starts out as illegal can become legal through the establishment of a new constitutional order that is accepted by the population, thus becoming its own rule of recognition.

*Extra-legality* refers to those actions or processes that, while outside the formal structures and norms of the existing legal order, are not necessarily in direct violation of, or in contradiction with, that system. For its part, Black's Law Dictionary defines the term as "[b]eyond the province of law."<sup>8</sup> Extra-legality occupies a gray area between legality and illegality.

Admittedly, sometimes it's difficult to distinguish illegality from extra-legality. In some instances, what starts as apparently illegal may become extra-legal.<sup>9</sup> For now, the main distinguishing factor is that while illegality is characterized as a direct violation of formal law, extra-legality operates *outside* what is either permitted or prohibited. In relative terms, however, it is safe to state that extra-legality is closer to illegality than to legality.

This trichotomy is related to the formal-informal dichotomy used by other scholars,<sup>10</sup> particularly in the context of constitutional change, but that can also be used when analyzing constitutional creation. In the context of change, Marshfield explains that informal change "happens when binding constitutional rules are modified without any corresponding alteration of the constitutional text."<sup>11</sup> As such, formal change requires an actual modification of the content of the constitution itself. But the informal-formal dichotomy is not limited to issues of change. For example, it can be applied to the creation stage. Formality is mostly, though not inherently, related to legality; while informality can have both illegal and extra-legal characteristics.

### C. Legitimacy and Authority

*Legitimacy* is a normative concept that stems from the public's approval of a particular process.<sup>12</sup> *Authority* is produced when that approval generates general acceptance and recognition of its validity.<sup>13</sup> In that sense, legitimacy creates authority. Both allow a community to accept a constitutional process, and its resulting content and operation, as valid.

<sup>6</sup> *Illegality*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>7</sup> Peter Paczoly, *Constitutional Transitional and Legal Continuity*, 8 CONN. J. INT'L L. 559, 562-63 (1993).

<sup>8</sup> *Extra-legal*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>9</sup> Philip K. Y. Lau, *Revolutionary Disobedience*, 22 BARRY L. REV. 199, 247-48 (2017).

<sup>10</sup> See Jonathan L. Marshfield, *Respecting the Mystery of Constitutional Change*, 65 BUFF. L. REV. 1057, 1058 (2017); Carlos Bernal, *Foreword-Informal Constitutional Change: A Critical Introduction and Appraisal*, 62 AM. J. COMP. L. 493 (2014).

<sup>11</sup> Marshfield, *supra* note 10, at 1058.

<sup>12</sup> Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 185 (2013).

<sup>13</sup> *Id.*

For purposes of this article, legitimacy and authority will mostly emerge from *process*,<sup>14</sup> particularly as it relates to creation.<sup>15</sup> In that sense, in terms of the different stages of constitutional existence, legitimacy and authority will play a greater role in creation, share the spotlight with connection and fidelity in terms of endurance, and perform a smaller role in terms of constitutional change. Of course, the legitimacy and authority of the process of change, particularly when dealing with replacement, can be seen as the *start* of a *new* process of constitutional creation, thus completing the circle.

Legality does not inherently relate to, or even necessarily generate, legitimacy.<sup>16</sup> A perfectly legal process can be characterized as illegitimate if the legal system itself has become suspect and its popular support has evaporated.<sup>17</sup> At the same time, a completely illegal process can receive sufficient popular acceptance so as to be accepted and seen as legitimate.<sup>18</sup> In that sense, popular approval can legitimize an “otherwise illegal” act.<sup>19</sup>

#### D. Connection and Fidelity

By *connection*, I refer to the level of substantive agreement between the current social majority and the content of the original constitutional project—more to the point, whether the policy views of the current generation resemble the policy preferences that the constitutional generation entrenched. Whether it is because the constitution (1) adequately reflected the policy preferences of the social majority, and those preferences endure; or (2) managed to influence and persuade future generations into accepting the policy preferences entrenched in the constitution as substantively desirable, then this creates sufficient connection so as to allow the constitutional project to endure with the support of the current social majority.

*Fidelity* is the result of connection, and it refers to the level of allegiance that the current generation has with the basic content of the constitution, the constitution’s continued status as authoritative, and the current generation’s willingness to obey it and defend it from any potential attack. The ultimate manifestation of connection and fidelity is veneration.<sup>20</sup>

### III. STAGES OF CONSTITUTIONAL EXISTENCE & THE ROLE OF NORMATIVE FACTORS

#### A. Creation

##### 1. Introduction

Creation is, almost by definition, the critical stage of constitutional existence. Without birth, there can be no endurance, let alone growth. But more importantly, it is during constitutional creation that the quest for legitimacy becomes strongest, particularly when the previous legal order resists the change and

<sup>14</sup> For a different view as to a possible source of legitimacy, see Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 OSGOODE HALL L. J. 199 (2010).

<sup>15</sup> There are, of course, other sources of legitimacy and authority other than process. Our focus on process is one of emphasis. See AYSE KADAYIFCI-ORELLANA, *ISLAMIC NARRATIVES ON PEACE AND WAR IN PALESTINIAN TERRITORIES* 5 (2007).

<sup>16</sup> See Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 583 (1995) (referencing the spectrum of legitimacy and legality).

<sup>17</sup> Bassok, *supra* note 12, at 187.

<sup>18</sup> *Id.*

<sup>19</sup> Lau, *supra* note 9, at 225. See also Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 CORNELL INT’L L. J. 169, 175-76 (2017) [hereinafter *Unconstitutional Constitutions*] (discussing the illegality of the formation of the United States Constitutions when breaking from the Articles of Confederation).

<sup>20</sup> Ozan O. Varol, *Constitutional Stickiness*, 49 U. CAL. DAVIS L. REV. 899, 907 (2016).

the new order can be characterized as illegal or extralegal. The legitimacy of the process that creates the constitution will be crucial to the issue of whether it is accepted as valid by the political community.<sup>21</sup>

As we will see, it is here where legality clashes with legitimacy more directly. In the end, a successful creation process will generate its own legality. For now, the critical element is to recognize the normative and analytical challenges produced by the start of a formal process of constitutional adoption. This is what Arato calls “the problem of the beginning.”<sup>22</sup> In other words, a constitution’s immediate fate will depend on its survival of the birth process and its acceptance as valid by the community.<sup>23</sup>

As such, process will be key to acquiring legitimacy and authority, thus allowing the new constitution to establish a new legal order. When this happens, the constitution’s creation becomes the ultimate source of the new legality, generating a fictional, but accepted, origin story that can endure in the future and resist future calls for its early demise. When the creation process is seen as legitimate and authoritative, then the new constitution will be characterized as valid, thus ushering in a new constitutional order that will serve as the core of the resulting legal system.

## 2. Constitutional Politics vs. Ordinary Politics

In order to understand how constitutional creation processes can attain legitimacy and authority, we must analyze the important differences between the exercise of constitutional politics as opposed to engaging in ordinary politics. This distinction is critical in the particular context of revolutionary constitutional creation processes that represent a challenge to the existing legal order.

Blount, Elkins, and Ginsburg explain, “[n]early all the normative and positive work on constitutions proceeds from the assumption that constitutional politics are fundamentally different in character from ordinary politics.”<sup>24</sup> And not only are these types of politics different, constitutional politics are seen to have, almost inherently, *superior normative force*.<sup>25</sup> This is particularly so when the exercise of constitutional politics, unlike ordinary politics, manages to adequately reflect the popular will and the policy preferences of the social majority.<sup>26</sup> This is strengthened when the exercise of constitutional politics is carried out through highly democratic and popular processes and structures.<sup>27</sup> This combination of democratic process and substantive alignment creates an irresistible normative force.<sup>28</sup> When this happens, the actual legality of the process, as measured by the previous legal system, becomes mostly irrelevant.<sup>29</sup>

Of course, constitutional politics need not always generate a formal constitution. In fact, as we will see, the exercise of constitutional politics can also be informal and be used in different stages and instances. But one of the main articulations of constitutional politics is, undoubtedly, the formal adoption of a new constitution.<sup>30</sup> In this article, I focus mostly on the exercise of constitutional politics that results in the formal adoption of a new constitution.

Curiously enough, we can also imagine a community adopting a “constitution” through a process that resembles ordinary politics instead of constitutional politics. But, as we will see, “constitutions” that are the result of ordinary politics lack authority and most likely will not endure or at least will be subject to

<sup>21</sup> Another source of validity, as we will see, is the public’s agreement with the substantive content of the new constitution. I believe that process legitimacy provides a stronger normative base for authority. See Andrew Kilberg, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1077 (2014).

<sup>22</sup> Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191, 194 (1995).

<sup>23</sup> Kilberg, *supra* note 21.

<sup>24</sup> Justin Blount, Zachary Elkins & Tom Ginsburg, *Does the Process of Constitution-Making Matter?*, in COMPARATIVE CONSTITUTIONAL DESIGN 42, (Tom Ginsburg eds., Cambridge University Press 2012).

<sup>25</sup> *Id.*

<sup>26</sup> Farinacci-Fernós, *supra* note 1, at 40.

<sup>27</sup> Blount et al., *supra* note 24, at 42.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> David M. Mednicoff, *A Tale of Three Constitutions: Common Drives and Diverse Outcomes in Post-2010 Arab Legal Politics*, 28 TEMP. INT’L & COMP. L.J. 215, 243 (2014).

constant modifications through the future exercise of constitutional, or even ordinary politics. This reflects the critical link between constitutional politics on the one hand, and legitimacy and authority on the other.

This is so because constitutional politics is not about form but is instead about process and content. More importantly, it's about the democratic engagement of the People in an exercise of direct self-government. In that sense, for example, a single-issue national referendum about an important subject can be considered an exercise in constitutional politics, while adopting a constitution without popular participation or democratic authorization can be considered to be outside of constitutional politics. The normative power of a constitution is dependent on whether its adoption was the exercise of constitutional politics as opposed to ordinary politics.

Of course, constitutional politics tend to be rare or extraordinary, although there could be periods of heightened democratic activity that stretch through a considerable time period.<sup>31</sup> Revolutionary situations are a prime example of this.<sup>32</sup> As a result, constitutional politics “should be permitted to determine the nation’s life only during rare periods of heightened political consciousness.”<sup>33</sup> In that sense, ordinary politics are what happen between extraordinary periods when constitutional politics are exercised.

When the exercise of constitutional politics actually results in the adoption of a new constitution, then the normative effects of that exercise can remain well after the exercise is over and, as we will see, will probably even endure until a new exercise of constitutional politics requires a course correction.<sup>34</sup> In that sense, ordinary politics will be exercised within the framework established by the constitution that resulted from the exercise of constitutional politics.

In particular, we will also see how a constitution that is formally adopted as an exercise of constitutional politics by way of a highly democratic, public, participatory, popular, and socially transcendental process of creation has the strongest normative case as to legitimacy and authority, independent of legality.<sup>35</sup> A constitution created by this type of process will, in turn, have a better chance to endure and will require a similar exercise to change it.<sup>36</sup>

For now, the main point is to recognize the important distinction between ordinary politics and constitutional politics. While this distinction will be relevant to all stages of constitutional existence, it seems beneficial to include this analysis at the creation stage. How a constitution is created, and whether it is the result of a legitimate exercise of constitutional politics, will impact its entire lifespan. The type of constitutional project I wish to focus on in this article is premised precisely on the exercise of constitutional politics from the very beginning. Revolutionary constitutions tend to be adopted through an illegal or extralegal process of creation, so their legitimacy will depend on the level of legitimacy and authority generated by the democratic exercise of constitutional politics.<sup>37</sup> In other words, when a constitution is created illegally or extra-legally it will be crucial, in order to achieve legitimacy and authority and thus be regarded as valid by the community, that it was adopted through the exercise of constitutional politics;<sup>38</sup> In particular, if that exercise can be characterized as democratic and socially transcendental.

### 3. Formal Adoption

<sup>31</sup> Colon-Rios, *supra* note 14, at 17-18.

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

<sup>33</sup> Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1012, 1022 (1984).

<sup>34</sup> When this happens, “[a] constitutional majority need not be an eternal political one; it is entitled to lose a few elections now and then. The crucial question lies elsewhere: if the majority that adopted the constitution is actually a constitutional one or merely a temporary political one that simply coincided with the constitution-making process”. Farinacci-Fernós, *supra* note 1, at 47. I will return to this issue when discussing constitutional endurance.

<sup>35</sup> See generally Zachary Elkins, Tom Ginsburg & Justin Blount, *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361 (2008). See also Blount et al., *supra* note 24; Arato, *supra* note 22; Farinacci-Fernós, *supra* note 1.

<sup>36</sup> Blount et al., *supra* note 24, 50-53. See also Elkins et al., *supra* note 35, at 362.

<sup>37</sup> Blount et al., *supra* note 24, at 40 n.5. See also Lau, *supra* note 9, at 44-45.

<sup>38</sup> Lau, *supra* note 9, at 216.

The exercise of constitutional politics can come in many shapes and sizes, many of them informal, and be present in different stages of constitutional existence.<sup>39</sup> But when it comes to actual constitutional *creation*, as the first stage of that existence, we must focus on processes of creation that actually culminate with the formal adoption of a new constitution. The same applies at the very end of a constitution's existence when it is replaced by a new one. Here, the final stage ends with the beginning of a new cycle of constitutional existence, with all the normative implications that entails, particularly in light of the model discussed in this article.<sup>40</sup>

In other words, while this model allows for exercises of constitutional politics that do not necessarily result in the formal adoption of a new constitution, in order to have a complete analysis of constitutional creation, endurance, and modification, we must focus our attention to processes that do result in the adoption of a formal constitution.<sup>41</sup> By doing so, we are able to better test the normative validity of the model and fully appreciate the full picture of constitutional existence from beginning to end and back to a new beginning.

#### 4. Process of Creation and Revolutionary Constitutions

When a new constitution is created, the previous legal system—normally structured through a constitution—is replaced.<sup>42</sup> This is particularly true in the context of revolutionary processes of constitutional creation that result in the formal adoption of a new constitution, which can be characterized as illegal or extralegal.<sup>43</sup> As such, constitutional creation can be seen as the culmination of a process of change *and*, simultaneously, as the start of a new one. In that sense, one constitution's end is another's beginning.<sup>44</sup>

Constitutional creation has several moving parts.<sup>45</sup> In order to have a complete picture of what this entails, we must focus on both (1) issues of process and structure and (2) the political, historical, and social forces that drive it. These two sets of factors interact in every stage of constitutional creation but are particularly vital during the creation stage.<sup>46</sup>

In the particular context of the exercise of revolutionary constitutional politics, the creation process begins even before the first drafter is selected or first word written.<sup>47</sup> This is what Blount, Elkins, and Ginsburg call the *pre-drafting stage*, which includes “the mobilization of interests (and counter interests) prior to the preparation of a text.”<sup>48</sup> When this happens, the formal framing process becomes the *culmination* of a broader social phenomenon.<sup>49</sup> As such, the actual framing process becomes inherently linked with the pre-drafting stages, particularly as it relates to the social and historical forces that drove it.<sup>50</sup> When the pre-

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<sup>39</sup> See generally *id.*

<sup>40</sup> See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle of Legal Theories*, 83 U. CHI. L. REV. 1819, 1835-43 (2016).

<sup>41</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 53 (2009).

<sup>42</sup> Vicky C. Jackson, *What's in a Name? Reflection on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1260 (2008).

<sup>43</sup> There could be instances in which a revolutionary process decides to use legally available tools to establish a new constitutional order. Historically, that has not been the case. But it is conceptually plausible that this may happen. See generally *id.* Cf. Blount et al., *supra* note 24.

<sup>44</sup> This would complete the circle of constitutional existence, by which the normative elements used to analyze one constitution's end will coincide with the normative elements used to analyze its replacement's beginning. See Elkins et al., *supra* note 35, at 64.

<sup>45</sup> “Constitution making is as ubiquitous as it is mysterious.” Blount et al., *supra* note 24, at 31.

<sup>46</sup> See Blount et al., *supra* note 24, at 34. See generally Elkins et al., *supra* note 35.

<sup>47</sup> Farinacci-Fernós, *supra* note 1, at 45.

<sup>48</sup> Blount et al., *supra* note 24, at 34-35.

<sup>49</sup> *Id.* at 35.

<sup>50</sup> Farinacci-Fernós, *supra* note 1, at 46.



drafting stage amasses legitimacy and authority, the framing and ratification stages benefit from it and acquire even more normative force.<sup>51</sup>

In terms of the actual process and structure, this pre-drafting stage includes determinations related to actors,<sup>52</sup> timing, and the actual operation of the adoption mechanism itself.<sup>53</sup> In terms of the role of the relevant political, historical, and social forces, the pre-drafting stage will be critical.<sup>54</sup> It is here that the *nature* and *orientation* of the constitutional process will be decided.<sup>55</sup>

As Blount, Elkins, and Ginsburg propose, other stages of constitutional creation include drafting, consultation, deliberation, adoption, and ratification.<sup>56</sup> This includes the actual selection of the drafting delegates, the operation of the deliberative body, and the roles the People will play during the entire process.<sup>57</sup> This can span from passive observation to active participation, including mandates to the delegates, periodic consultation, sending direct proposals, and eventual popular ratification.<sup>58</sup>

The pre-drafting stage will be the critical moment where the process will be able to acquire legitimacy and authority, particularly if it's highly democratic, participatory, and popular.<sup>59</sup> In revolutionary contexts, the pre-drafting stage will be the direct result of the political force generated by the social movement that brought about the revolutionary situation.<sup>60</sup>

## 5. Clean Slate vs. Continuity

As Vicky Jackson suggests, “[c]onstitutions are written under a wide range of circumstances.”<sup>61</sup> In terms of their role in a particular community’s legal system, a constitution is either the first of its kind or it replaces a previous one.<sup>62</sup> And even when it is the first one adopted by a particular community—like what happens immediately after national independence, for example—it rarely, if ever, means that there was no previous governing source or device that the new constitution will replace.<sup>63</sup> New constitutions always replace something that came before them.<sup>64</sup>

As such, the adoption of a new constitution, in varying degrees, represents the end of a previous legal order and the birth of a new one. This is so even when the new constitution is compatible with the previous order and does not constitute a clean break with, or rejection of, the past system.<sup>65</sup>

Jackson identifies three types of circumstances in which a new constitution takes effect: (1) a clean break from the previous order, which includes so-called constitutional moments;<sup>66</sup> (2) a more incremental process of constitutional change; and (3) transitional constitutions.<sup>67</sup> For his part, Andrew Arato proposes other circumstances in which constitutions are adopted, including gradual, legal, and extralegal processes.<sup>68</sup>

<sup>51</sup> See Eugene D. Mazo, *The Upstream Problem in Constitutionalism*, 50 WAKE FOREST L. REV. 795, 827-828 (2015) (proposing a spectrum as to the different versions of constitutional creation).

<sup>52</sup> Actors can be early-stage, later-stage, or exercise veto power. Blount et al., *supra* note 24, at 35.

<sup>53</sup> *Id.* at 34.

<sup>54</sup> Farinacci-Fernós, *supra* note 1, at 46.

<sup>55</sup> Mazo, *supra* note 51, at 829.

<sup>56</sup> Blount et al., *supra* note 24, at 34. Cf. Jennifer Widner, *Constitution Drafting in Post-Conflict States Symposium: Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1522 (2008).

<sup>57</sup> Blount et al., *supra* note 24, at 35.

<sup>58</sup> See generally Blount et al., *supra* note 24.

<sup>59</sup> See generally *id.* See also Widner, *supra* note 56.

<sup>60</sup> Jackson, *supra* note 42, at 1258.

<sup>61</sup> See *id.* at 1260.

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

<sup>64</sup> See generally Jackson, *supra* note 42. See also Lau, *supra* note 9, at 117.

<sup>65</sup> Jackson, *supra* note 42, at 1265-67.

<sup>66</sup> I will return to the issue of constitutional moments when addressing the change stage. For now, it's worth pointing out that constitutional moments are the exercise of constitutional politics that generate a change, however informal, to the current constitutional system. For purposes of the creation stage, I will employ the broader term of *constitutional politics*. Ackerman, *supra* note 33, at 1022.

<sup>67</sup> Jackson, *supra* note 42, at 1260.

<sup>68</sup> Arato, *supra* note 22, at 194.

A clean break occurs when the new constitutional order totally replaces the previous one, including the adoption of a new system of government and an alternative outlook as to the development of society.<sup>69</sup> This type of clean break can be found in countries that have recently gained national independence or as the result of a revolutionary process that topples the *ancien régime* of a particular society.<sup>70</sup> In these circumstances, the new constitution represents a rejection of the previous system and its that system's conscious replacement by a different one. Clean breaks are normally, though not inherently, done through illegal or extralegal processes of creation.<sup>71</sup> Once the existing legal order loses its authority and generates the historical conditions for its replacement, the new order will not likely adhere to the previous one's structures for constitutional replacement.<sup>72</sup>

Another possibility is that the new constitution merely serves as an *update* that enhances and develops, but does not structurally change, the previous legal order.<sup>73</sup> In these instances, there is an unbroken chain between both constitutions. While a new constitution may be adopted, a new system is not.<sup>74</sup> As such, this type of replacement does not constitute a paradigm shift and will most likely be done through legally recognized channels.<sup>75</sup> While it is possible that more informal or extralegal mechanisms are also used, this type of constitutional creation is done within the existing legality.<sup>76</sup>

In terms of the main normative proposal of this article, I will focus mostly on constitutions that represent a clean break from the previous system, *particularly those that were created by an extralegal or illegal revolutionary process*. Precisely because they are clean breaks, these constitutions *tend* to be created outside the legally recognized channels of constitutional change or adoption.<sup>77</sup> Revolutionary constitutions are hardly ever the result of legality.<sup>78</sup> But, as we've seen, they almost always are the result of a process that generates enough legitimacy and authority to trump its illegal or extralegal nature.<sup>79</sup> Blount, Elkins, and Ginsburg's reference to constitutions that are created in moments of *crisis* is applicable here.<sup>80</sup> This also applies in the context of *revolutionary processes that result in the formal adoption of a new constitution*.<sup>81</sup>

## 6. Normative Factors

### i. *Legality vs. Legitimacy of Process as the Main Source of Authority*

As we saw, legality does not equal legitimacy.<sup>82</sup> And illegality does not automatically entail illegitimacy.<sup>83</sup> In that sense, the link between legality and legitimacy is incidental, not inherent.

First of all, if the current legal order is eroded, weakened, or outright challenged, legality becomes irrelevant.<sup>84</sup> In these circumstances, not only does legality stop generating legitimacy, it can actually

<sup>69</sup> Jackson, *supra* note 42, at 1260.

<sup>70</sup> *See id.*

<sup>71</sup> Lau, *supra* note 9, at 248 (“Revolutionary disobedience creates a constitutional moment by first breaking into illegality, by means of which it defines the higher law of the land”).

<sup>72</sup> *See id.* at 226. *See also* Widner, *supra* note 56, at 1521.

<sup>73</sup> Jackson, *supra* note 42, at 1265-67.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> Lau, *supra* note 9, at 248-49.

<sup>78</sup> *See id.* at 248.

<sup>79</sup> Lau, *supra* note 9, at 248.

<sup>80</sup> Blount et al., *supra* note 24, at 39, 42 (“[C]onstitutions are typically adopted during moments of crisis, and so likely to produce more attention to the general welfare and less likely to be dominated by special interests”). *See also* Lau, *supra* note 9, at 220.

<sup>81</sup> Blount et al., *supra* note 24, at 40.

<sup>82</sup> Lau, *supra* note 9, at 213.

<sup>83</sup> *See id.* at 213, 248.

<sup>84</sup> *See id.* at 226.

generate illegitimacy.<sup>85</sup> In other words, there are situations where following the rules of a dying legal order can actually be perceived as undemocratic and illegitimate by the public.<sup>86</sup> By the same token, ignoring those rules can actually command popular support and approval.<sup>87</sup>

However, I must concede that if the current legal order still commands sufficient public acceptance, then legality can bolster the case for legitimacy and illegality can breed illegitimacy.<sup>88</sup> *But that is a relative situation.* It merely means that, in these circumstances, legality *can* generate *some* legitimacy.<sup>89</sup> But that reality can be overridden by the superior normative force that can be generated by an illegal or extralegal exercise of constitutional politics.<sup>90</sup> In other words, the more legitimacy the current legal order has (legality), the stronger the normative force of the illegal or extralegal process needs to be.<sup>91</sup>

As such, legality, even when it can generate some legitimacy, *is not legitimacy's main source.* On the contrary, I propose that the main, though not exclusive, source of legitimacy as to the adoption of a new constitutional order is the *nature of the process that generates that new constitutional order.*<sup>92</sup> In particular, I propose that a revolutionary constitutional adoption process (that can be characterized as democratic, public, participatory, popular, and socially transcendental) *starts out with almost irresistible legitimizing force.* This is so, because “[p]ublic involvement in constitutional making is increasingly considered to be essential for the legitimacy and effectiveness of the process.”<sup>93</sup>

In other words, when the People exercise constitutional politics through a democratic, public, participatory, popular, and socially transcendental process of creation, legitimacy almost necessarily follows.<sup>94</sup> This type of adoption process constitutes the strongest version as to the exercise of constitutional politics that will command the greatest public support and acceptance, precisely because of the nature of popular involvement in the creation process.<sup>95</sup>

And this will be independent of whether that process was legal, extralegal, or even illegal.<sup>96</sup> If a new constitution is generated by a process that is accepted by the public, then *it becomes legal.*<sup>97</sup> When a new constitutional order is adopted by a self-governing people, *a new legality is born.*<sup>98</sup>

As a result, we can conclude that: (1) *legitimacy* is the most important factor of constitutional creation; (2) the *process of creation* can be a crucial source of legitimacy; and (3) *democratic, public, participatory, popular, and socially transcendental* processes have the strongest case for legitimacy and, thus, authority. In that sense, authority is the result of legitimacy and not legality. This authority allows the new constitution to be accepted as valid by the political community and for a new constitutional order to begin.

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<sup>85</sup> See *id.* at 247.

<sup>86</sup> See *id.* at 213.

<sup>87</sup> See *id.* at 248.

<sup>88</sup> See *id.* at 210, 214.

<sup>89</sup> See *id.* at 213.

<sup>90</sup> See *id.* at 226.

<sup>91</sup> See *id.* at 226, 247.

<sup>92</sup> Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 756 (2011) (proposing that “authority depends on perception.”).

<sup>93</sup> See generally Elkins et al., *supra* note 35. See also Blount et al., *supra* note 24, at 50 (“The loss of design consistency may be offset by resultant gains in legitimacy”). Yet, the same authors suggest caution (“The claim that participatory design processes generate constitutions with higher levels of legitimacy and popular support has been subject to only limited study”) *Id.* at 51. But the key is to transcend the focus on *procedure* and *structure*, and focus more on the *entire social process* that impacts constitutional creation. That is why I’ve added other important normative features like the democratic, public, popular and socially transcendental nature of the framing process. It is from the *combined effect* of these factors, including participation, that we can identify the resulting normative force and legitimizing effect.

<sup>94</sup> See Blount et al., *supra* note 24, 50-53. See also Arato, *supra* note 22, at 192 (“[N]on-democratic procedures of constitution making cannot be justified today”).

<sup>95</sup> See Farinacci-Fernós, *supra* note 1, at 41 (“When writing a constitution, the people tend to be more involved, engaged, interested, attentive, and vigilant”).

<sup>96</sup> Lau, *supra* note 9, at 24-25, 45.

<sup>97</sup> See *id.* at 19, 45.

<sup>98</sup> See *id.* at 18.

ii. *Illegitimate Entrenchment*

As we previewed when discussing the distinction between constitutional politics and ordinary politics, a key factor when analyzing the formal adoption of a constitution—and its direct impact on endurance and possible future modification—is whether the constitution that was created accurately reflects the popular will and the policy preferences of the social majority.<sup>99</sup> While I believe *process* will be the main factor as to legitimacy and authority at the creation stage, *substance* will also be critical for two reasons. First, because it will either confirm or weaken the legitimacy and authority generated by the creation process, and second, because it will determine the level of connection and fidelity required for the constitution to endure in time.

As such, it is imperative that the democratic, public, participatory, popular, and socially transcendental process of constitutional creation—which by itself generates considerable normative force—*also* manages to produce a constitution that actually reflects the *deep-seeded* views of the social majority.<sup>100</sup> In other words, the actual content of the constitution can be described as the direct result of the exercise of constitutional politics by a self-governing People.<sup>101</sup> This will be key for the endurance stage.

There is always a risk that a constitution will adopt the policy preferences of a temporary majority that just happened to control the framing body,<sup>102</sup> instead of the widely-held views of the social majority that will survive passing political fluctuations.<sup>103</sup> When this occurs, the *process* may still be considered legitimate, but not necessarily its substantive outcome.<sup>104</sup> As John Elster suggests, “[i]n a constituent assembly, a small partisan majority may be able to impose its preferences not only on the current majority, but also on a posterity in which it may itself be in a minority.”<sup>105</sup>

But this risk is inherent to *any* constitutional creation process.<sup>106</sup> I strongly believe that this risk is considerably minimized when the constitution was generated as the result of a democratic, public, participatory, public, and socially transcendental process of creation. This is so, because this is the type of process that is more likely to reflect the substantive policy preferences of the majority.<sup>107</sup> As we will see shortly, this is crucial as to the issue of constitutional endurance.<sup>108</sup>

A. *Endurance*

1. Introduction

This section asks two important questions: (1) *should* constitutions endure; and (2) *why* they endure. I will also analyze how different *types of constitutions* interact with the overall issue of endurance and longevity. From a purely empirical point of view, “most constitutions die young.”<sup>109</sup> But before analyzing

<sup>99</sup> Elkins et al., *supra* note 35, at 374-75. *See also* Farinacci-Fernós, *supra* note 1, at 15, 38.

<sup>100</sup> *See generally* Elkins et al., *supra* note 35. (“[R]emarkably little empirical evidence of the impact of participation on outcomes.”). Yet it is not hard to envision that when the People directly participate in the constitutional creation process, it will result in a constitution that faithfully reflects the substantive policy views of the social majority. Historically, this has resulted in the creation of progressive constitutions that reflect the views of the People and not the elites.

<sup>101</sup> *See id.* at 381.

<sup>102</sup> *See* DIANA KAPISZEWSKI, GORDON SILVERSTEIN & ROBERT KAGAN, INTRODUCTION TO CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 8 (Diana Kapiszewski, Gordon Silverstein & Robert Kagan eds., 2013).

<sup>103</sup> *See* Farinacci-Fernós, *supra* note 1, at 38-39.

<sup>104</sup> *See* John Elster, *Clearing and Strengthening the Channels of Constitution Making*, in *COMPARATIVE CONSTITUTIONAL DESIGN*, *supra* note 56, at 15, 18.

<sup>105</sup> *See id.* at 18. *See also* Farinacci-Fernós, *supra* note 1, at 40 (“When a dying political movement entrenches its program in a constitution, there is a democratic deficit that must be addressed”).

<sup>106</sup> *See* Farinacci-Fernós, *supra* note 1, at 47.

<sup>107</sup> *See id.* at 45.

<sup>108</sup> *See infra* p. 26.

<sup>109</sup> Elkins et al., *supra* note 35, at 1.

the more normative questions, which require an application of the normative factors discussed in part II, we should first explain what we mean by constitutional endurance.

Endurance means operational longevity; in other words, if the original constitution has stood the test of time and still functions as the supreme source of law.<sup>110</sup> For his part, Richard Albert proposes an important distinction between constitutional resilience and endurance.<sup>111</sup> While endurance relates to the formal continuity of the constitutional text, resilience, defined by the author as “endurance plus,” refers to the uninterrupted normative operation of that text.<sup>112</sup> Both concepts are within the scope of this analysis.

## 2. Should Constitutions Endure?

There is no one-size-fits-all answer to the normative question of whether constitutional endurance is a good thing.<sup>113</sup> The general answer seems to be: it depends.<sup>114</sup> It would seem self-defeating to adopt a constitution that will have the same shelf-life of ordinary legislation. As Elkins, Ginsburg, and Melton suggest, “[w]e assume that constitutions are bargains among elites that are meant—at least by their authors—to be enduring.”<sup>115</sup>

While others have identified common empirical elements shared by constitutions that have achieved longevity,<sup>116</sup> I propose that the *main source* to locate an answer lies in factors such as legitimacy and authority, as well as connection and fidelity. In particular, I believe that when a constitutional creation process enjoys legitimacy and authority, and when the resulting content maintains a connection with future generations, thus commanding its fidelity, then constitutional endurance *should* be sought.

But there are more general reasons why some sort of substantial constitutional longevity can be characterized as positive.<sup>117</sup> According to Ozan Varol, these include issues like: (1) promoting stability; (2) avoiding negative changes; and (3) facilitating social consensus.<sup>118</sup> In that sense, constitutional endurance “is not necessarily undesirable from a normative perspective.”<sup>119</sup> For their part, Elkins, Ginsburg, and Melton suggest that constitutional longevity can encourage democratic participation, economic development, national unity, and political stability.<sup>120</sup>

As we can see, stability is a recurring theme. And as a general rule, it seems correct, but with an important caveat: that the constitution still commands legitimacy, authority, connection, and fidelity.<sup>121</sup> In that sense, the key normative issue is context-specific: does the original constitutional consensus still hold? This refers to both the question of legitimacy and authority as to process, as well as connection and fidelity as to substantive content.<sup>122</sup> Stability becomes undemocratic and counter-revolutionary when the present

<sup>110</sup> See generally *id.* at 5-6.

<sup>111</sup> Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 80 (2018) [hereinafter *Constitutional Amendment*].

<sup>112</sup> See *id.*

<sup>113</sup> See Elkins et al., *supra* note 35, at 7.

<sup>114</sup> See *id.* at 7, 208. See also Varol, *supra* note 20, at 906-07; TOM GINSBURG, *Constitutional Endurance*, in COMPARATIVE CONSTITUTIONAL LAW 112, 112-13 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>115</sup> Elkins et al., *supra* note 35, at 7.

<sup>116</sup> See Elkins et al., *supra* note 35, at 8. According to the authors, among these empirical traits are inclusiveness, flexibility, and specificity.

<sup>117</sup> See Varol, *supra* note 20, at 907.

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*; see also Ku, *supra* note 16, at 538 (stating that constitutional change should be rare).

<sup>120</sup> Elkins et al., *supra* note 35, at 5; see also Ginsburg, *supra* note 114, at 113 (discussing the positive aspects of stability).

<sup>121</sup> See discussion *supra* Subsections II.B-C; see also Elkins et al., *supra* note 35, at 75 (stating there can be concerns of legitimacy and therefore the endurance of a constitution when “conditions change.”); Elkins et al., *supra* note 35, at 211 (discussing how connection helps to integrate “new social forces,” thereby increasing the endurance of a constitution).

<sup>122</sup> In fact, Elkins, Ginsburg, and Melton hint at this combination by identifying content and drafting process as factors that go into constitutional design. I go further and propose that the drafting process, by way of legitimacy and authority, and content, by way of connection and fidelity, will play a critical role on terms of a constitution’s endurance.

society no longer feels bound by the constitution.<sup>123</sup> Stability should only be an overriding factor when there is doubt as to whether the original social consensus still holds.<sup>124</sup>

If the original social consensus still holds, then endurance should be encouraged and characterized as positive from a normative standpoint.<sup>125</sup> If the consensus has broken, then the constitution *should not* endure, and its longevity should be characterized negatively.<sup>126</sup> Here, stability does not justify constitutional endurance. As we will see, this social consensus in terms of endurance is inherently linked with the process of creation, and if the constitution that was originally adopted still reflects the basic or overarching views and preferences of the social majority.<sup>127</sup>

As previewed, if the element of connection and fidelity fades or weakens, then the stronger the sense of legitimacy and authority the process must be; and vice versa.<sup>128</sup> Eventually, the need for substantive connection will prevail, triggering the need for constitutional change.<sup>129</sup> On the other hand, if the constitutional structure manages to create or enhance the social consensus behind it, constitutional endurance will be beneficial and should be encouraged as a normative matter.

### 3. Why Constitutions Endure?

This brings us to the next issue: *why do constitutions endure?* As previewed, I believe constitutions endure when the current society views the original process as legitimate and authoritative,<sup>130</sup> and the current society shares enough agreement with the constitution's substantive content to produce social connection and fidelity. As we saw, this social connection and fidelity exists when the constitution's substantive content still adequately reflects the popular will and the policy preferences of the social majority, or there is, at least, a critical level of it.<sup>131</sup>

If one of these two sets of factors are eroded or weakened, there must be a corresponding strengthening of the other. Between these two sets, I believe the deciding factor will be connection and fidelity,<sup>132</sup> because eventually the current social majority will want the constitution to reflect its own policy preferences, independent of their acceptance of the validity of the constitution's creation. In that sense, I agree with Elkins, Ginsburg, and Melton when they state that “[a] constitution will be maintained only if it makes sense to those who live under its dictates, so a crucial quality of any successful constitution is that it be self-enforcing.”<sup>133</sup>

For example, if the current society has begun to drift away from the substantive content of the constitution, there must be a stronger sense of legitimacy and authority in terms of process of creation. In this instance, the current society, while disagreeing with some or even most of the policy content of the

<sup>123</sup> See Farinacci-Fernós, *supra* note 1, at 38, 40. See also Elster, *supra* note 104 (implying that the partiality of a constitution created by a minority is “tyrannical”).

<sup>124</sup> See generally *infra* notes 155-59 and accompanying text.

<sup>125</sup> Farinacci-Fernós, *supra* note 1, at 40 (“[S]ometimes the real defeat of democracy is actually the frustration of the popular will reflected in the constitutional text, as long as that popular will, of course, holds.”).

<sup>126</sup> See *id.* at 38-39.

<sup>127</sup> See *infra* notes 130-31, 133 and accompanying text and pp. 30, 33.

<sup>128</sup> See *supra* notes 122-24 and accompanying text.

<sup>129</sup> See *infra* notes 130-31, 133 and accompanying text.

<sup>130</sup> Blount et al., *supra* note 24, at 15-16 (“public involvement in constitutional adoption... was positively correlated with constitutional life span, at least for democracies”); Kay, *supra* note 92, at 715 (“Long-term acceptance of a constitution requires a continuing regard for the process that brought into being”).

<sup>131</sup> Ku, *supra* note 16, at 539 (stating that the continued legitimacy of a constitution will depend on whether it still represents the will of the People as a whole).

<sup>132</sup> See Blount et al., *supra* note 24, 52 (“Legitimacy is conditional on factors other than process”). But this requires two caveats. First, that as to the stage of constitutional creation, *process is the main source of legitimacy*. Second, that it is during the endurance stage that process begins to lose some of its normative force, thus requiring the additional normative weight provided by substantive connection and fidelity.

<sup>133</sup> See Elkins et al., *supra* note 35. See also, Farinacci-Fernós, *supra* note 1, at 43 (“In the end, constitutions are as strong as the social consensus behind them”); Jorge M. Farinacci-Fernós, *Looking for the Correct Tool for the Job: Methodological Models of Constitutional Interpretation and Adjudication*, 52 REV. JURIDICA UNIVERSIDAD INTERAMERICANA DE P.R. 213, 218-19 (2018) (“The success of a constitution rests on constituted popular acceptance, if not of each and every word contained in the document itself, *of the constitutional project itself*) (Emphasis in original); Ginsburg, *supra* note 114, 116 (“Constitutions must... be self-enforcing” through a democratic system of citizen self-government).

constitution, will still recognize it as valid because of the sheer legitimizing force generated by its process of creation. On the other hand, if the current society starts questioning the legitimacy and authority of the original process of creation, a stronger substantive connection to its content will be needed to ensure endurance.

In that sense, constitutional endurance “is neither inevitable nor irreversible.”<sup>134</sup> It depends. Instead of looking for context-free universal answers, the desirability of constitutional longevity lies in the normative factors we’ve analyzed in this article.<sup>135</sup> In that sense, “[w]hile constitutions no doubt require continuous reenactment through ongoing practices, they also involve self-conscious institutional choices that can become quite sticky once adopted.”<sup>136</sup>

As such, *there is a critical link between legitimacy and authority on the one hand and connection and fidelity on the other*. This link, while not causal, can be re-enforcing: a legitimate and authoritative constitution can actually condition society into accepting its substantive content, thus generating the crucial connection and fidelity necessary for constitutional longevity.<sup>137</sup> On the other hand, a transcendental break with the current constitutional order can actually lead the People to conclude, retroactively, that the original creation process *can now be seen as lacking legitimacy and authority*.<sup>138</sup>

#### 4. Endurance and Constitutional Types

Revolutionary processes of constitutional creation tend to generate constitutions full of revolutionary substantive content.<sup>139</sup> Many of these constitutions can be characterized as teleological and post-liberal.<sup>140</sup> As it relates to the issue of endurance, these types of constitutions face an interesting challenge. If they accurately reflect the deeply-held policy preferences of the social majority, and that consensus remains substantially unaltered, then the constitution has a greater chance of surviving the passage of time.<sup>141</sup> This can create a self-reinforcing cycle of the constitution as the reflection of the policy preferences of the social majority and as the generator of those preferences.<sup>142</sup>

*But*, unlike the more “neutral framework” constitutions that mostly deal with setting up the structures of governments and the basic liberal procedural rights that make them work,<sup>143</sup> these constitutions, *precisely because they take a position as to substantive public policy positions*, are permanently at risk of polarization.<sup>144</sup> In other words, there will always be sections of the population that strongly disagree with some of those entrenched policy positions and will see the constitution as an obstacle to their world view.<sup>145</sup> If the social majority or their preferences weaken, then the social support for the constitution is bound to erode as well. When this happens, the continued endurance of the constitution becomes an open question.<sup>146</sup> But framework constitutions, because they do not take these positions, can just as easily work for the benefit of opposing policy views, so neither side may be eager to replace it, thus allowing for greater endurance.<sup>147</sup>

<sup>134</sup> Varol, *supra* note 20, at 907.

<sup>135</sup> *See supra* Section II.

<sup>136</sup> Blount et al., *supra* note 24, at 10.

<sup>137</sup> *See* Elkins et al., *supra* note 35, at 80.

<sup>138</sup> *See* Lau, *supra* note 9 at 248-49; *see also Unconstitutional Constitutions, supra* note 44, at 171.

<sup>139</sup> *See* Farinacci-Fernós, *supra* note 1, at 34-35, 40.

<sup>140</sup> *See id.* at 35.

<sup>141</sup> *See id.* at 34.

<sup>142</sup> *See id.* at 35, 37.

<sup>143</sup> *See id.* at 37.

<sup>144</sup> *See* Elster, *supra* note 104, at 18.

<sup>145</sup> *Cf.* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 656 (2008).

<sup>146</sup> *Cf.* Farinacci-Fernós, *Post-Liberal Constitutionalism, supra* note 1, at 40, 43 (evaluating whether, when the majority or its policy preference changes, a substantive constitution will break).

<sup>147</sup> *See id.* at 28-29.

## B. *Change*<sup>148</sup>

### 1. Introduction

All constitutional systems deal with the dead hand problem<sup>149</sup>: “No interpretive method avoids the dead hand issue because no reputable method disregards constitutional text.”<sup>150</sup> This is inherently linked to the issue of what Professor Lee Strang calls “challenge of change.”<sup>151</sup> The problem of change is inevitable.<sup>152</sup> As I previewed, I believe that connection and fidelity will be the overriding factors in terms of when and how a constitution is changed, whether partially or completely.<sup>153</sup> How a constitution is changed will also depend on the legitimacy and authority of the process used to accomplish that change.<sup>154</sup>

When a constitution reflects the current views of society—meaning that the original constitutional project is still valid and adhered to for the most part—<sup>155</sup>the constitution becomes a majoritarian instrument that allows the people to defend themselves against the malfunctions of ordinary politics.<sup>156</sup> As such, “the dead cannot literally govern our choices . . . . The living bear responsibility for continuing or discarding old arrangements.”<sup>157</sup> In the end, it is still up to us. As Adam Samaha explains, “a law may properly extend across generations if the current generation retains the power to repeal [it].”<sup>158</sup> The question we will address shortly is *how* that repeal power can and should be exercised.

Alternatively, when the social consensus breaks and majoritarian policy preferences shift decisively, the constitution can become an obstacle to democratic self-rule, since it entrenches policy preferences that are no longer held by the social majority.<sup>159</sup> This takes us back to the issue of illegitimate entrenchment. In this instance, while the original act of entrenchment was legitimate *at that time*, a change in the policy preferences of the social majority breaks the necessary connection and fidelity needed to maintain the original constitutional project and its content.<sup>160</sup>

The greater the legitimacy and authority generated by the original constitutional creation process, the greater the loss of connection and fidelity must be in order to conclude that the original constitution must be substantially changed.<sup>161</sup> In the end, no matter how legitimate and authoritative the original process was, eventually, the overriding factor will be connection and fidelity<sup>162</sup>. However, the new exercise of constitutional politics will determine the form of the necessary change: replacement of interpretive method, discrete amendment, substantial overhaul, outright replacement, or a combination of two or more of these methods.<sup>163</sup>

<sup>148</sup> Some, though by no means all or even most, of the issues discussed in this section are based on a chapter of the author’s S.J.D. Dissertation *Original Explication and Post-Liberal Constitutionalism: The Role of Intent and History in the Judicial Enforcement of Teleological Constitutions* (Georgetown University Law Center, 2017).

<sup>149</sup> See Samaha, *supra* note 145, at 609 (“[F]ollowing an ancient constitution amounts to dead generations governing the living.”).

<sup>150</sup> *Id.* at 615-16.

<sup>151</sup> Lee J. Strang, *Originalism and the “Challenge of Change”: Abduced-Based Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L. J. 927, 928 (2009). For an ‘originalist’ approach to legal change, see Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. OF L. & PUB. POL’Y 817 (2015). Professor Sachs recognizes that “[i]n any real-world legal system, the law is a product of both authorized and unauthorized changes.” *Id.* at 843. He tends to identify formal amendment and other legally sanctioned procedures as modes of authorized change.

<sup>152</sup> See James A. Gardner, *Practice-Driven Changes to Constitutional Structures of Governance*, 69 ARK. L. REV. 335, 337-38 (2016).

<sup>153</sup> See *supra* p. 2.

<sup>154</sup> See generally *infra* notes 159-62 and accompanying text.

<sup>155</sup> See Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1374 (1998); Strang, *supra* note 151, at 932.

<sup>156</sup> Ackerman, *supra* note 33.

<sup>157</sup> Samaha, *supra* note 145, at 622; Accord Ackerman, *supra* note 33, at 1051.

<sup>158</sup> Samaha, *supra* note 145, at 620.

<sup>159</sup> See generally Ackerman, *supra* note 33, at 1014-15, 1047.

<sup>160</sup> See Elster, *supra* note 104, at 18.

<sup>161</sup> See Ku, *supra* note 16, at 538 (arguing that constitutional change should be by “supermajority”); See also Samaha, *supra* note 145, at 651 (stating that maintaining a constitution is a moral, or a connection and fidelity, issue as opposed to an issue of authority, or legitimacy and authority).

<sup>162</sup> See Samaha, *supra* note 145, at 659.

<sup>163</sup> See Gardner, *supra* note 152, at 346-47; See also *Constitutional Amendment*, *supra* note 111, at 3-5, 8.



Change comes in many shapes and sizes. Not every update constitutes change in the constitutional system.<sup>164</sup> An obvious method of change is amendment or replacement.<sup>165</sup> Depending on the procedural and structural aspects of a particular constitutional system, this can be a difficult or relatively easy process.<sup>166</sup> It would seem that the stronger the social movement to replace the constitution is, the easier it will be. As such, constitutional change is possible only when there is a significant shift in *constitutional politics*.<sup>167</sup> This serves as a middle point between an unmovable dead hand and the instability of ordinary politics which is premised upon temporary majorities. Constitutional change requires more than just a temporary majority; change should be available but should not be so easy.<sup>168</sup> Shifts in constitutional policy preferences must be decisive in order to replace the prior consensus.<sup>169</sup>

Except for important issues of stability and institutional maturity, constitutional change is not inherently bad or something that should be avoided as a general rule. Social majorities evolve and policy preferences change.<sup>170</sup> Once an issue, set of issues, or an over-arching political goal transcends ordinary politics and becomes the focus of constitutional politics, constitutional replacement or amendment is appropriate.<sup>171</sup>

But straight-out constitutional replacement is the weapon of last resort in the arena of constitutional change. There are other, less formal, avenues for change.<sup>172</sup> And here is where it gets tricky. After all, the point of clearly written and carefully drafted constitutions that serve as higher law is to provide certainty and allow a people to self-govern without powerful minority forces sabotaging those efforts by way of informal devices such as under-enforcement.<sup>173</sup> It is also meant to constrain courts in terms of substituting democratic preferences with their own.<sup>174</sup> Yet, any model of constitutional adjudication must address the issue of change outside formal amendment.<sup>175</sup> Constitutional politics force that approach.<sup>176</sup> It can't be an all-or-nothing scenario. Decontextualized rigidity should be avoided; there is still a central role for politics to play, but it should be constitutional instead of ordinary.

There are four important avenues for change: (1) informal and extralegal change in interpretive methodology; (2) formal and legal amendment; (3) formal and legal overhaul; and (4) formal replacement, which can be legal, extralegal, or even illegal.<sup>177</sup> Each tool should be considered in this order, depending on the strength of the remaining social consensus. Less drastic methods of change should be used, unless a momentous shift has occurred, as with the exercise of constitutional politics or the presence of a constitutional moment.

A combination of all of these can also occur. For example, an informal and extralegal change in interpretive methodology can be accompanied by formal and legal discrete amendments that remove the greatest textual obstacles and allow the courts to implement the new interpretive models.<sup>178</sup> The Portuguese

<sup>164</sup> Ackerman, *supra* note 33, at 1015; Calabresi, *supra* note 155, at 1385.

<sup>165</sup> See Varol, *supra* note 47, at 901.

<sup>166</sup> See *id.* at 906.

<sup>167</sup> See Elkins et al., *supra* note 35, at 8, 73, 82.

<sup>168</sup> See Elster, *supra* note 104.

<sup>169</sup> See Lau, *supra* note 9, at 233.

<sup>170</sup> Daron Acemoglu, Georgy Egorov, and Konstantin Sonin, *Political Model of Social Evolution*, 108 (Supp. 4) 21292-21296 Proceedings of the National Academy of Science 1 (Dec. 22, 2011), <https://doi.org/10.1073/pnas.1019454108>, archived at <http://perma.cc/H9B7-R88X>.

<sup>171</sup> David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1461 (2001).

<sup>172</sup> See *id.*

<sup>173</sup> See *id.* at 1503.

<sup>174</sup> See Ackerman, *supra* note 33, at 1030.

<sup>175</sup> See Strauss, *supra* note 171, at 1469.

<sup>176</sup> See *id.* at 1461.

<sup>177</sup> See *id.* at 1459. See also Elkins et al., *supra* note 35, at 74 (explaining that constitutional replacement is more costly than either reinterpretation or amendment).

<sup>178</sup> See Elkins et al., *supra* note 35, at 74.

experience of the 1970s and 1980s is the perfect example for this type of combined exercise of constitutional politics.<sup>179</sup>

## 2. Constitutional Moments and new exercises of Constitutional Politics

Constitutional politics can be exercised legally, extralegally, or even illegally.<sup>180</sup> Of course, the closer it comes to extralegal or illegal actions, the stronger the exercise of constitutional politics must be.<sup>181</sup> A revolutionary and democratic process can generate the normative force to overcome this lack of legality.<sup>182</sup> As we saw when analyzing constitutional creation, this normative force will create a new legality that will allow the subsequent structures to be accepted as valid by the political community.<sup>183</sup>

This takes us to professor Ackerman's proposal of *constitutional moments*.<sup>184</sup> These constitutional moments are mostly extralegal, since they do not engage the legally available formal devices of constitutional amendment but are not directly illegal.<sup>185</sup> These constitutional moments are the result of the extralegal exercise of constitutional politics by the social majority.<sup>186</sup> The main consequence of these constitutional moments is *a change in the interpretive methodology used by courts to apply the constitutional text*.<sup>187</sup>

## 3. Tools of Constitutional Change

### i. Changes in Interpretative Methodologies

The least disruptive avenue of bringing about constitutional change is through the adoption of a new *method* of interpretation.<sup>188</sup> In other words, the constitution does not formally change as with an amendment, overhaul, or replacement.<sup>189</sup> The main result will be a new approach to constitutional construction in terms of the normative and legal effects of the text.<sup>190</sup> This alternative is informal and can be mostly characterized as extralegal.<sup>191</sup>

The decision to *adopt* a particular methodological model of interpretation in the first place is directly related mostly to the issue of legitimacy and authority, particularly right after the process of creation. The decision to *maintain* that model is a combination of legitimacy and authority as to process on the one hand, and connection and fidelity as to substance and content on the other.<sup>192</sup>

The same logic applies to the decision to *abandon* a particular method of interpretation and to adopt a *new* one. As Adam Samaha explains, "the best interpretive method might well vary over time."<sup>193</sup> This

<sup>179</sup> See generally António Costa Pinto, *Constitution-Making and the Democratization of Portugal: An Enduring Legacy*, 34 no. 1 PORTUGUESE STUD. 35 (2018) (providing an explanation of formal and informal constitutional changes in Portugal since 1976); ELKINS ET AL., *supra* note 35, at 74 (a general reference to a combined exercise of textual amendment and changes in interpretive methodologies).

<sup>180</sup> See generally Sujit Choudry, *Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures*, INT'L J. CONST. L. (2008) 6 (2): 193 (summarizing Ackerman's identification of the various exercises of constitutional politics).

<sup>181</sup> See *id.* at 229–30; Lau, *supra* note 9, at 248–49.

<sup>182</sup> Choudry, *supra* note 180, at 206.

<sup>183</sup> See Blount et al., *supra* note 24, at 52–53; Elkins et al., *supra* note 35, at 362.

<sup>184</sup> Ackerman, *supra* note 33, at 1022. For a very illustrative analysis of the operation of Ackerman's constitutional moments model, see Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 363, 372 (2015).

<sup>185</sup> Choudry, *supra* note 180, at 197–98.

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* at 198.

<sup>188</sup> Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1518 (2009).

<sup>189</sup> Benvindo, *supra* note 184, at 406–07.

<sup>190</sup> See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 111 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL'Y 65, 69–70 (2011).

<sup>191</sup> See Strauss, *supra* note 171, at 1469.

<sup>192</sup> See generally Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005)

<sup>193</sup> Samaha, *supra* note 145, at 612.

happens when there is a significant shift in constitutional politics short of formal amendment or replacement.<sup>194</sup> Thus, when the original social consensus that (1) gave legitimacy and authority to the constitutional project because of its process of creation and (2) was supported by continued connection and fidelity as to the content of the constitution itself erodes or partially breaks, there are grounds for switching interpretive methodologies.<sup>195</sup>

A change in interpretive methodology represents a shift in constitutional allegiance.<sup>196</sup> When that happens, the link between text (and its accompanying history and explication) and legal effect and doctrine is weakened, *precisely because the constitutional project has weakened*.<sup>197</sup> If the constitutional project is finally broken or abandoned, then formal amendment, overhaul or replacement ensues.<sup>198</sup> As such, the level of continued allegiance and fidelity to the original constitutional project, or lack thereof, will determine the type of method of interpretation used by courts and, in particular, *the authoritativeness of the framers*.<sup>199</sup> For example, a loss of connection and fidelity with the original constitutional project will most likely result in the abandonment of methods of interpretation that privilege adoption history and intent. The Chilean experience of the 1980s and 1990s is a good example of this dynamic.<sup>200</sup>

However, sometimes courts resist changing their interpretive methodologies.<sup>201</sup> Also, there are situations in which even a change in interpretive approach will not be sufficient to accommodate the new constitutional situation.<sup>202</sup> When this happens, more formal and direct tools of constitutional change may be needed, such as amendment or overhaul.

## ii. Amendment

By definition, amendments are necessarily formal and legal.<sup>203</sup> The end-result is the subtraction, modification, or addition of text to the formal constitution.<sup>204</sup> Amendments can remove problematic or anachronistic provisions that no longer carry sufficient popular support.<sup>205</sup> They can also add new policy provisions that can impact the entire constitutional project.<sup>206</sup> The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution after the Civil War are an example of this type of paradigm-shifting constitutional amendment.<sup>207</sup> The characterization of that process as a constitutional moment strengthens the normative impact of the Amendments to the overarching content of the constitution.<sup>208</sup>

<sup>194</sup> *Id.* at 668–69.

<sup>195</sup> *See* Strauss, *supra* note 171, at 1461.

<sup>196</sup> *See* Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209 (2010) (“[A]uthentic constitutional reasoning can include consideration of strongly held public opinions as one of its constituent parts, so long as ‘strongly held public opinion’ means something approaching consensus rather than simply the views of the majority.”).

<sup>197</sup> *See* Bernal, *supra* note 10, at 494–95; Kay, *supra* note 92, at 757.

<sup>198</sup> *See* Kay, *supra* 92, at 728 (For example, the constitutional project of the Articles of Confederation was broken or abandoned, resulting in its replacement.).

<sup>199</sup> *See* Ackerman, *supra* note 33, at 1015 (“[W]e must transcend the Framers’ vision if we are to make our Constitution fit the needs of a modern democratic society. [There is an] urgent need for heroic reconceptualization of the Constitution in general, the Supreme Court in particular. [T]he task for constitutional law is to define a role for the Supreme Court . . .”).

<sup>200</sup> *See generally* Druscilla L. Scribner *Distributing Political Power: The Constitutional Tribunal in Post-Authoritarian Chile*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE (Diana Kapiszewski et al. eds. Cambridge University Press 2013).

<sup>201</sup> Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules*, in COMPARATIVE CONSTITUTIONAL DESIGN, *supra* note 56, at 195 (“Changing social circumstances and understandings will often make specific constitutional modes outmoded, yet in most countries, courts do not respond to this by changing their interpretation of such rules.”).

<sup>202</sup> *See* Cain & Noll, *supra* note 188, at 1518.

<sup>203</sup> Dixon & Holden, *supra* note 201, at 195.

<sup>204</sup> *See Constitutional Amendment*, *supra* note 111, at 11; Strauss, *supra* note 171, at 1458 (quoting *Ullman v. United States*, 350 U.S. 422, 428 (1956)).

<sup>205</sup> *See* Farinacci-Fernós, *supra* note 1, at 40.

<sup>206</sup> *See* Strauss, *supra* note 171, at 1460.

<sup>207</sup> Dixon, *supra* note 201, at 97.

<sup>208</sup> *See id.* at 98.

As Rosalind Dixon explains, “[f]ormal provision for constitutional amendment is now a near universal feature of national constitutions.”<sup>209</sup> One reason for this is constitutional self-preservation.<sup>210</sup> In other words, the constitution includes a pressure release valve that allows the community to make alterations to the document as opposed to throwing it away when there has been a shift in constitutional preferences.<sup>211</sup> In these circumstances, the constitution entices the community to consider discrete change to radical substitution.<sup>212</sup>

### iii. Overhaul

While technically done through the amendment process, constitutional overhaul requires separate analysis.<sup>213</sup> While amendments can be discrete and limited, constitutional overhaul tends to be much more substantial and comprehensive.<sup>214</sup> In this context, amendments are overarching and multiple.<sup>215</sup> When the process is complete, the constitution may be somewhat unrecognizable, but its basic core and essence are still intact. Many overhauls can combine legal, extralegal, illegal, formal, and informal mechanisms and elements.<sup>216</sup>

Of course, some overhauls are so wide-ranging that they become the functional equivalent of replacement.<sup>217</sup> Full-scale revisions are an example of this phenomenon.<sup>218</sup> Yet the overhaul should not be discarded as an alternative to outright replacement, *particularly when the reason for avoiding replacement is to preserve some of the legitimacy and authority of the original constitutional project*. As such, constitutional overhaul recognizes that the existing constitutional order has weakened considerably but still possesses enough redeeming qualities.<sup>219</sup> An example of this can be that the new political community lacks sufficient connection and fidelity to the old constitutional order, but still accepts its legitimacy and authority and wishes to maintain or build on it.

This difficult balance between amendment and replacement leaves room for constitutional overhaul to be either legal or, on the contrary, extralegal or even illegal.<sup>220</sup> The closer the overhaul is to discrete amendment, the more likely the process will be carried out through existing legal processes, structures, and channels.<sup>221</sup> On the other hand, the closer the overhaul is to outright replacement, the more likely that extralegal or illegal processes, structures, and channels will be deployed.<sup>222</sup> The same thing applies as to the formal-informal dichotomy.

### iv. Replacement

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<sup>209</sup> See *id.* at 96.

<sup>210</sup> See *id.* at 97 (“[F]ormal constitutional amendment procedures therefore serve not only to promote the chances of large-scale constitutional change, but also to increase the chances that such change will occur . . . within existing constitutional frameworks, rather than via processes of whole-scale constitutional revision or overthrow.”).

<sup>211</sup> Elkins et al., *supra* note 78, at 55 (“Amendments . . . forestall constitutional death . . .”).

<sup>212</sup> *Id.*

<sup>213</sup> See Elkins et al., *supra* note 35, at 55 (“For example, South Korea’s six republics have each involved complete constitutional overhauls adopted through the formal process of amendment of the previous constitution.”).

<sup>214</sup> *ee* Tom Ginsburg & Richard A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1610 (2010).

<sup>215</sup> See *id.*

<sup>216</sup> See Elkins et al., *supra* note 35, at 55, 59 (South Korea’s overhauls were adopted via formal, legal processes).

<sup>217</sup> See Ginsburg & Posner, *supra* note 214, at 1610; Cain & Noll, *supra* note 188, at 1521–24.

<sup>218</sup> *Id.*

<sup>219</sup> See Varol, *supra* note 20, at 938 (status quo bias may be another reason why at least some redeeming qualities of the prior constitution are deemed worth keeping).

<sup>220</sup> See Elkins et al., *supra* note 35, at 55, 59.

<sup>221</sup> *Id.*

<sup>222</sup> See Kay, *supra* note 92., at 725, 728, 735 (arguing that a significant departure from the current constitution must be grounded on the illegal or extralegal actions of a constituent authority and providing the example of the extralegal or illegal replacement of the Articles of Confederation with the U.S. Constitution).

Unlike amendment and overhaul, replacement constitutes a displacement of the previous constitution.<sup>223</sup> While the new one may replicate some of the content of its antecessor and offer other avenues of continuity, as a conceptual matter, the new constitution is wholly independent of the previous one.<sup>224</sup> As a result, the previous constitution loses all of its independent normative power. It can only live on as a supplementary guide to interpret the new constitution in situations where the latter emulated or copied the former.<sup>225</sup>

In that sense, “the distinction between an amendment and replacement is important.”<sup>226</sup> Also, while amendments are necessarily adopted through existing legal processes, structures, and channels, constitutional replacement can be legal, extralegal, or illegal.<sup>227</sup> If it is done through processes, structures, or channels that are extralegal or illegal, the move to replace the constitution must satisfy the normative elements we discussed earlier when analyzing the creation stage.<sup>228</sup> In other words, it must be a real exercise of constitutional politics that generates its own legitimacy and authority, so that the replacement action is seen as valid, even if contrary to the previous legality.

As a result, replacement brings the stages of constitutional existence full circle. If constitutional creation constitutes one constitution’s end is another’s beginning, then constitutional replacement means that one constitution’s beginning is another’s end. When this happens, the stages of constitutional existence starts once again, and the new constitution must attempt to survive its birth, endure over time, and resist future replacement challenges.<sup>229</sup>

### C. Connection between Stages

There is no *inherent* link between a constitution’s creation, its endurance, and its eventual modifications, including replacement.<sup>230</sup> Constitutions that were the result of a highly democratic and popular process of creation that generated a substantial level of legitimacy and authority, sometimes fail to produce sufficient connection and fidelity with future generations so as to survive unscathed.<sup>231</sup> Portugal is an example of this.<sup>232</sup> On the other hand, constitutions that were adopted by elites through less than democratic means manage to endure because they manage to receive acceptance by the population.<sup>233</sup> The United States is a partial example of this.<sup>234</sup>

But, there is a connection between the normative factors that are present in each stage.<sup>235</sup> For example, a constitution that was adopted by a highly democratic, public, popular, participatory, and socially transcendental process of creation will generate considerable legitimacy and authority that will carry it on to the endurance stage.<sup>236</sup> Now, in order for this constitution to fail at the endurance stage, there must be a significant gap between its substantive content and the views of the community.<sup>237</sup> In other words, in order to defeat a constitution that carries such a high level of legitimacy and authority, an equally substantial lack of connection and fidelity is required to negate the normative force of that legitimacy and authority and

<sup>223</sup> See *Constitutional Amendment*, *supra* note 111, at 9–10.

<sup>224</sup> See Elkins et al., *supra* note 35, at 59; Ackerman, *supra* note 33, at 1038.

<sup>225</sup> See Mazo, *supra* note 51, at 838–40 (arguing that the old constitution serves not only as a starting point for the new constitution but also as a reference for making future changes); Samaha, *supra* note 145, at 363 (making the case that the Articles of Confederation are used to interpret the U.S. Constitution).

<sup>226</sup> Elkins et al., *supra* note 35, at 55.

<sup>227</sup> See *Constitutional Amendment*, *supra* note 111, at 11 (stating that an amendment that is created outside the authority of the constitution is effectively a new constitution, drawing the inference that the replacement was created extralegally or illegally).

<sup>228</sup> See *id.* at 16 (suggesting that a replacement constitution must be legitimated by constituent power).

<sup>229</sup> See generally Ku, *supra* note 16.

<sup>230</sup> See generally Lau, *supra* note 9.

<sup>231</sup> See generally Pinto, *supra* note 179.

<sup>232</sup> *Id.*

<sup>233</sup> See Ackerman, *supra* note 33, at 1020, 1022; Kay, *supra* note 92, 756.

<sup>234</sup> See *Constitutional Amendment*, *supra* note 111, at 24.

<sup>235</sup> See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning* (1997), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1102&context=facpub>, archived at <https://perma.cc/GLH3-R5PN>

<sup>236</sup> See generally Blount et al., *supra* note 24.

<sup>237</sup> *Id.*

condemn the constitution to a short life. At the same time, a constitution that lacks a considerable initial level of legitimacy and authority will need substantial connection and fidelity to survive the next phases that follow creation. As such, we can conclude that the stronger the level of legitimacy and authority generated by the process of creation, the higher the chances of endurance (and thus the lower the chances of early modification or replacement), *unless* the constitutional project fails to generate sufficient substantive connection and fidelity *or* there is a new exercise of constitutional politics of equal legitimacy and authority that displaces the original project. Also, the weaker the level of legitimacy and authority generated by the creation, the lower the chances of endurance (and thus the higher the chances of early modification or replacement), *unless* the constitutional project is able to generate sufficient substantive connection and fidelity *and* there is no new exercise of constitutional politics that displaces it.

In summary: (1) legitimacy and authority will be crucial during creation; (2) both legitimacy and authority, on the one hand, and connection and fidelity, on the other, will interact as they relate to endurance; and (3) connection and fidelity will be the determining factors as to the issue of change.<sup>238</sup> In the end, legitimacy and authority only take you so far, generating *initial acceptance*. As time goes by, the *continued acceptance* of the constitutional project will depend more and more on connection and fidelity. As a result, there is a sliding scale between authority and legitimacy on one side, and connection and fidelity on the other.<sup>239</sup>

#### IV. FINAL THOUGHTS

The model of constitutional stages discussed in this article has both general application to *all* constitutions and particular application to *revolutionary* constitutions. This revolutionary characterization mostly relates to both the process of creation and the substantive content of the constitution itself.

Revolutionary constitutions face particular challenges as to their creation, endurance, and modifications.<sup>240</sup> The revolutionary character of the constitutional project will, in turn, interact with the different normative features we discussed earlier, such as legality, legitimacy, fidelity, and formality, among others. As such, the success of any revolutionary constitutional project will depend on the presence of these normative elements during all stages of constitutional existence. As we have seen, (1) the legitimacy and authoritative status of the creation process, and (2) the continued level of connection and fidelity between future generations and the original constitutional project will determine how revolutionary constitutions are created, why they are able to endure, and how they interact with the different possibilities relating to change. As a result, revolutionary constitutions represent one of the most intense exercises of constitutional politics.

The success of a revolutionary constitution will depend, in the end, on a continued exercise of constitutional politics, spread out in time and through different generations. More importantly, it will depend on how the revolutionary constitution is created and whether it has been able to actually transform society, thus maintaining the all-important connection. A truly successful revolutionary constitution will not only endure; it will directly aid a self-governing People in the process of radically transforming society.

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<sup>238</sup> See generally Ku, *supra* note 16.

<sup>239</sup> See generally Ku, *supra* note 16.

<sup>240</sup> See generally Elkins et al., *supra* note 35.