CONSTITUTIONALISM IN AN AGE OF SPEED

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> The fact of change has been so continual and so intense that it overwhelms our minds. We are bewildered by the spectacle of its rapidity, scope, and intensity.... Industrial habits have changed most rapidly; there has followed at considerable distance, change in political relations; alterations in legal relations and methods have lagged even more.... This fact defines the primary, though not by any means the ultimate, responsibility of a liberalism that intends to be a vital force.
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> —John Dewey, Liberalism and Social Action (1935)[1]

Defenders of constitutionalism would do well to heed Dewey's observation that the rapid-fire pace of contemporary social and economic activity poses considerable challenges. For sure, an impressive body of political and legal thought already addresses the nexus between constitutions and social and economic change. Both Progressive-era intellectuals and the Legal Realists, to some extent inspired by Dewey, harshly criticized the U.S. Constitution for its seeming inability to adjust effectively to twentieth-century social and economic conditions.[2] Since the late nineteenth century, advocates of social reform have repeatedly attacked Article V, arguing that its burdensome amendment procedures undermine possibilities for constitutional adaptation required by the changing realities of social and economic life. The left-wing journalist Daniel Lazare's recent characterization of the U.S. political system as subject to an anachronistic "frozen constitution" fundamentally inimical to reform is only the latest salvo in a series of harsh reviews of Article

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1. John Dewey, *Liberalism and Social Action* 57-58 (G.P. Putnam's Sons, 1935).

2. John R. Vile, *The Constitutional Amending Process in American Political Thought* 137-56 (Praeger, 1992).

V previously proffered by suffragists, supporters of a constitutional ban on child labor, and New Dealers who sought a formal amendment codifying the welfare state.[3] For their part, many liberals in the legal academy long have touted the merits of an elastic "living constitution," arguing that only flexibility in legal exegesis can keep the constitution attuned to the challenges of social and economic dynamism. They consider the literalist and originalist modes of interpretation propounded by conservative rivals wrong-headed in part because such views allegedly obscure constitutionalism's temporal presuppositions: Written constitutions are intended to remain a source of binding law for "an indefinite but presumably long future," but constitutions can fulfill this function only if we interpret their norms flexibly in order to allow for adaptability amidst "so continual and so intense" social change.[4]

In light of this rich tradition of intellectual debate, it might seem presumptuous to assert that scholars have failed to focus sufficiently on the threats generated by social and economic dynamism to constitutionalism. Nonetheless, I argue here that contemporary debates in social theory provide renewed significance to the familiar question of the nexus between social change and constitutionalism.[5] In 1935, when Dewey referred to the "rapidity, scope, and intensity" of social and economic change, he anticipated a core theme of recent social theory, according to which we can only make sense of present-day social and eco-

3. Daniel Lazare, *The Frozen Republic: How the Constitution Is Paralizing Democracy* (Harcourt Brace & Co., 1996); David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* at 216-314 (U. of Kansas Press, 1996).

4. Richard Kay, *Constitutional Chrononomy*, 13 Ratio Juris 31, 33 (2000).

5. The concept of constitutionalism is a complex and controversial one. For some of the difficulties at hand, see Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge U. Press, 1998); James Bryce, *Constitutions* (Oxford U. Press, 1901); Jon Elster and Rune Slagstad, eds. *Constitutionalism and Democracy* (Cambridge U. Press, 1988); Thomas Grey, *Constitutionalism: An Analytic Framework*, in John W. Chapman and J. Roland Pennock, eds., *Nomos XX: Constitutionalism* 189-209 (New York U. Press, 1979). As should become clear below, I take the *written* character of constitutional government seriously; I also believe there are good reasons for distinguishing between higher (constitutional) and lower (ordinary) legislation, and for conceptualizing constitutionalism in liberal democratic terms. But my account is meant to be applicable to a relative diversity of constitutional systems and normative interpretations thereof. My tendency to rely on U.S. examples is merely an expression of my own limitations, but is not intended to suggest the superiority of the U.S. status quo. On the contrary, a central theme of this essay is that the U.S. constitutional system is plagued by major ills. A recent study by Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale U. Press, 2001), also focuses on the temporal contours of modern constitutionalism. However, Rubenfeld's study neglects the problem of social and economic acceleration.

nomic affairs by focusing on their *high-speed* character. Ours is an epoch in which social and economic processes are undergoing a multi-pronged *acceleration* that raises many difficult questions for legal scholarship (I).[6] Social and economic acceleration challenges the noble aspiration to establish fundamental constitutional "rules of the game" capable of serving as an effective binding force on legal and political actors for a relatively long span of time. Conventional ideas about constitutionalism are predicated on achieving a modicum of legal constancy and clarity, but this task becomes increasingly difficult in a social world in which "the rapidity, scope, and intensity" of change becomes ever more significant (II).

After showing that the recent turn in social theory to provide "conceptual attention to the timing and spacing of human activities" raises tough questions for constitutionalism, I sketch the outlines of an institutionally-minded typology of how constitutional systems adapt, albeit typically "by drift and by temporary . . . improvisations," to social and economic acceleration.[7] Social and economic acceleration sheds fresh light on traditional debates about constitutional change. In addition, our high-speed social and economic environment privileges problematic modes of constitutional adaptation, thereby threatening the worthy ideal that fundamental constitutional reform requires substantial popular participation and deliberation (III). Finally, I conclude with some tentative suggestions for how we might counteract the alliance between speed and relatively undemocratic mechanisms of constitutional change. In order to do so, however, we will need to rethink temporal assumptions located at the very heart of modern liberal democracy (IV).

I. SOCIAL AND ECONOMIC ACCELERATION

Although political and legal scholars have been reluctant to pick up the baton, social theorists have been busily developing a perceptive analysis of why the *high speed temporal horizons* of social and economic activity are pivotal for understanding our contemporary situation. In a wide-ranging debate that has en-

6. This formulation is indebted to Henry Adams, who nearly a century ago diagnosed "a law of social acceleration" in order to make sense of the accelerated tempo of contemporary life. Henry Adams, *The Education of Henry Adams* 489-98 (Houghton Mifflin, 1918).

7. The first quote is from Anthony Giddens, *The Nation-State and Violence* 12 (U. of Cal., 1987); the second is from Dewey, *Liberalism and Social Action* 57 (cited in note 1).

gaged writers as diverse as Zygmunt Bauman, Anthony Giddens, David Harvey, Reinhart Koselleck, and Paul Virilio, a consensus appears to be emerging that ours is a world in which social and economic processes operate at an ever faster speed, and the tempo of even relatively significant social and economic change takes an increasingly rapid pace.[8] To be sure, distinct theoretical accounts of the institutional roots of the acceleration of social and economic life, not surprisingly, differ substantially. For example, whereas Giddens and Koselleck have identified a variety of institutional and conjectural sources for the growing importance of speed in social and economic affairs, others (most prominently, David Harvey) have tried to locate its origins chiefly in modern capitalism. For the Marxist Harvey, capitalism represents

> a revolutionary mode of production, always searching out new organizational forms, new technologies, new lifestyles, new modalities of production and exploitation and, therefore, new objective social definitions of time and space.... The turnpikes and canals, the railways, steamships and telegraph, the radio and automobile, containerization, jet cargo transport, television and telecommunications, have altered time and space relations and forced new material practices.... The capacity to measure and divide time has been [constantly] revolutionized, first through the production and diffusion of increasingly accurate time pieces and subsequently through

8. Zygmunt Bauman, *Globalization: The Human Consequences* 6-26 (Polity, 1998); Giddens, *The Nation-State and Violence* 173-74 (cited in note 7); David Harvey, *The Condition of Postmodernity* 201-326 (Blackwell, 1989); Reinhart Koselleck, *Zeitschichten* 150-202 (Suhrkamp, 2000); Paul Virilio, *Speed & Politics* (Semiotext, 1986). For a useful survey of the debate in social theory, see John Urry, *The Sociology of Space and Time,* in Bryan S. Turner, ed., *The Blackwell Companion to Social Theory* 369-95 (Blackwell, 1996). For two recent attempts to grapple expressly with social and economic acceleration from the standpoint of legal analysis, see William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. Pol. Phil. 81, 81-102 (2001); William Scheuerman, *Global Law in our High-Speed Economy,* in Richard Appelbaum, Wm. Felstiner, and Volkmar Gessner, eds., *Rules and Networks: The Legal Culture of Global Business Transactions* 103-21 (Hart, 2001). At least implicitly, the challenges posed by social and economic acceleration are addressed as well in the theoretical literature on statutory lawmaking, where scholars have linked the proliferation of statutes in the twentieth century (as well as the resulting dilemma of statutory obsolescence) to it. For example, Guido Calabresi notes that "the speed with which perceived economic crises have followed upon economic crises has brought forth legislative responses ... [S]tarting with the Progressive Era but with increasing rapidity since the New Deal, we have become a nation governed by written laws" (*A Common Law for Statutes* 5 (Harvard U. Press, 1982)). If I am not mistaken, many (conceptually underdeveloped) references to what I am describing here as social and economic acceleration can be found in legal scholarship. For an excellent general discussion of the nexus between social change and the law, see Alan Watson, *Society and Legal Change* (Scottish Academic Press, 1977).

> close attention to the speed and coordinating mechanisms of production (automation, robotization) and the speed of movement of goods, people, information, messages, and the like.[9]

Nonetheless, even those theorists who dispute Harvey's Marxist account of the origins of social and economic acceleration generally accept his observation that "the history of capitalism has been characterized by a speed-up in the pace of life."[10] Modern capitalism's structurally-rooted drive to reduce turnover time and accelerate the course of economic life for the sake of improving profitability undoubtedly constitutes a key feature of modern economic life; a number of studies—Marxist and otherwise—confirm the existence of an intimate relationship between capitalism and social and economic acceleration. Making effective use of ever more rapid forms of production and consumption is a proven strategy for business people to maintain profitability and defeat competitors; and capitalism's built-in tendency to speed up economic processes manifests itself in myriad ways.[11] The unanswered question in the social theory debate concerns the precise status of capitalism as a driving force behind social and economic acceleration, as well as its place as a causal factor among other institutional facets of modernity that constitute plausible sources of our high-speed social and economic world. Yet no serious social analyst questions the view that modern capitalism plays a significant role in generating pivotal facets of the "so continual and so intense" change described by Dewey.

The social theory discussion also continues to focus on questions of historical periodization. Most agree that the ascent of industrial capitalism in the nineteenth century unleashed a particularly intense period of social and economic acceleration, though some have complicated this widely-endorsed account by linking social and economic acceleration to features of the modern world that clearly predate industrial capitalism.[12] But the

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9. David Harvey, *Justice, Nature & the Geography of Difference* 240-41 (Blackwell, 1996).

10. Harvey, *The Condition of Postmodernity* 240 (cited in note 8).

11. On the centrality of speed to contemporary economic life, see James R. Beniger, *The Control Revolution: Technological and Economic Origins of the Information Society* (Harvard U. Press, 1986).

12. E.P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, 38 Past and Present 56, 56-97 (1967). Koselleck underscores key facets of early modern history, including innovations in transportation and communications inspired by mercantilism. Koselleck, *Zeitschichten* at 157-58 (cited in note 8). In some contrast to both Thompson and Koselleck, the cultural historian Stephen Kern places special emphasis on techno-

dominant view seems to be that we have experienced a relentless speed-up of key social and economic processes for well over 150 years now, resulting most immediately from a series of economically-generated technological innovations (including the railroads, telegraphs, airplanes, and computers) that have worked continuously to alter the temporal contours of social and economic life. Some writers have elaborated on this periodization to claim that recent decades have exhibited a further intensification of this long-term trend, as evinced by growing reliance on information and communication technologies that provide economic actors with dramatically improved opportunities to make use of simultaneity and instantaneousness. In this vein, Harvey has tried to demonstrate that economic crises are intimately linked to relatively intense bouts of social and economic acceleration. The worldwide economic downturn of the 1970s paved the way for a reorganization of capitalism in which fresh possibilities for the successful exploitation of information, communication, and transportation technologies came to play a crucial role in economic life. Improved rates of commercial and organizational innovation, directly linked to novel technologies (for example, high-speed computers), constitute core features of a "post-Fordist" economy that has emerged in the last two decades. For Harvey, post-Fordism is driven by high-speed technologies that place a "premium on 'smart' and innovative entrepreneurship, aided and abetted by all the accouterments of swift, decisive, and well-informed decision making."[13] Post-Fordism means that the pace of both everyday economic life and relatively significant economic innovations is dramatically heightened vis-a-vis earlier forms of capitalism. According to this account, a privileged status for speed makes up a permanent attribute of capitalism, yet acceleration has taken an *especially* intense form since the 1970s.

This is not the appropriate place for a full-fledged critical summary of the ongoing social theory debate. For our purposes here, it suffices to note that participants in the debate are describing a collection of phenomena that can be fruitfully grouped into three categories. Although the empirical borders between them are typically blurred, and notwithstanding the fact that all three "ideal-types" of social and economic acceleration are caus-

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logical innovations that took place at the end of the nineteenth and beginning of the twentieth centuries. Stephen Kern, *The Culture of Space and Time, 1880-1918* (Harvard U. Press, 1983).

13. Harvey, *The Condition of Postmodernity* at 157 (cited in note 8).

ally interrelated as well (and thus can be plausibly interpreted as constituting different elements of a single social trend), conceptual clarity demands that we try to distinguish among them.[14]

First, we find evidence for an intense process of *technological acceleration*, according to which key technical processes (particularly in communication, transportation, and production at large) now take place at a vastly faster pace than in earlier historical periods. Communication transpires between distant geographical points at an unprecedented rate, travel times have been dramatically cut, and the time necessary for the production of even relatively complex commodities undergoes constant reduction. Many recent innovations in information technology (for example, the Internet) constitute obvious examples of this facet of social and economic speed. Under this rubric we can include the heightened pace of technological *innovation*, as the half-life of many new forms of technology undergoes rapid decline. As the social philosopher Hans Jonas noted over twenty-five years ago, technological development in modern times quickly came to embody "a *principle* of innovation in itself which made its constant further occurrence mandatory."[15] This type of acceleration can be measured and quantified with relative ease, and its existence has been documented by many empirical studies.[16]

Second, the pace of significant *social change or transformation* exhibits evidence of acceleration as well. Relatively far-reaching shifts in economic and social life now take place at a rapid pace. Forms of economic organization and occupational patterns, for example, change *intra*-generationally rather than over the course of whole generations. One familiar result of this alteration in the temporal horizons of social life is that our contemporaries may change jobs many times during the life-course, whereas our early modern historical predecessors often were destined to follow occupations identical to those of their parents and even grandparents. And even those of us who do not shift jobs are likely to find ourselves in workplace settings where constant organizational restructuring or "rationalization" constitutes the norm and not the exception. Technological changes can help

14. The tripartite conceptualization that follows is taken directly from Hartmut Rosa, *Temporalstrukturen in der Spaetmoderne: Vom Wunsch nach Beschleunigung und der Sehnsucht nach Langsamkeit, Handlung, Kultur*, 10:3 Interpretation (2001). I am indebted to Rosa's concise discussion of the ongoing debate about the social phenomenon of speed; his conceptual clarity is something of an exception in the literature.

15. Hans Jonas, *Philosophical Essays: From Ancient Creed to Technological Man* 51 (Prentice-Hall, 1974).

16. For a superb survey, see Rosa, 10:3 Interpretation (cited in note 14).

produce relatively dramatic changes in economic and social organization in a short span of time; within a mere two decades, new informational technologies have generated far-reaching shifts in many arenas of contemporary economic production and consumption.[17] The example of computerization also reminds us that the process of social change or transformation tends to be related to technological acceleration. As the pace of technological innovation increases, the rate of major social and economic change tends to grow as well, as new forms of technology oftentimes, though by no means necessarily, encourage experimentation with novel forms of social and economic organization. Maybe this is why Dewey could make such an easy transition from describing the "rapidity, scope, and intensity" of social change *in general* to discussing changes in "industrial habits;" perhaps he understood how the relentless revolutionizing of industrial technologies is often tied to the pace of significant social and economic change.

Finally, the social and economic acceleration of contemporary society includes the *heightened tempo of everyday life*, according to which substantial empirical evidence points to an objectively-measurable intensification of activities that we nowadays engage in during a given unit of time. We eat, walk, and talk (or at least communicate) faster than most of our predecessors; we also manage to pull this off even though we typically sleep less than they did. When Dewey in *The Public and Its Problems* alluded to contemporary society's "mania for motion and speed," it was most likely this facet of our high-speed social and economic world that he had in mind.[18] We should probably see this final element of acceleration as most directly linked to technological acceleration, which constitutes the immediate fount for the ever faster pace of everyday life. However, the relative rapidity with which broader social and economic patterns of social life now undergo change may also be tied to it. In recent years, this third face of speed has attracted the attention of a number of popular authors, who worry that the imperatives of an accelerated everyday existence threaten to overwhelm human capacities for absorbing information and coordinating our lives in a meaningful and coherent manner.[19]

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17. See Manuel Castells, *The Rise of Network Society* (Blackwell, 1996). See also Richard Sennett, *The Corrosion of Character: Personal Consequences of Work in the New Capitalism* (W.W. Norton & Co., 1998).

18. John Dewey, *The Public and Its Problems* 140-41 (Ohio St. U. Press, 1972).

19. See, e.g., Jeremy Rifkin, *Time Wars: The Primary Conflict in Human History*

II. THE DILEMMA OF CONSTITUTIONAL OBSOLESCENCE

How then does social and economic acceleration impact on constitutionalism? Written constitutions represent exacting forms of *prospective* lawmaking, according to which constitution-makers are asked to foresee future social and economic trends in order to funnel the operations of state power as effectively as possible. Of course, ordinary legislators are also asked to predict social patterns. Distinctive about written constitutions is that their architects typically aspire to do so for "an indefinite but presumably long future," however.[20] Statutes may require relatively frequent alteration or fall into disuse, as evinced by the growing reliance on sunset laws and other devices that implicitly concede their limited half-life.[21] But constitutional lawmakers traditionally are expected to achieve stable "rules of the game" well-suited to myriad future settings. John Locke, one of the intellectual forces behind modern liberal constitutionalism, went so far as to argue that the "fundamental Constitutions of Carolina" should "remain the sacred and unalterable form and rule of government of Carolina for ever," and anyone who peruses Locke's "fundamental Constitutions" will search in vain for amendment procedures.[22]

Later generations modified Locke's extreme notion of an unalterable constitution and also challenged his apparent preference for a detailed, code-like constitutional document.[23] At least since 1789, many written constitutions have contained relatively abstract language ("due process," for example, or "cruel and unusual punishment"), and this innovation has served as a useful mechanism for constitutional architects struggling to achieve a successful legally-binding set of norms able to guide future generations. In the U.S. case, as in many others, "[t]he very language of the Constitution suggests that the Framers . . . recognized that the Constitution is . . . a majestic charter for government, intended to govern for ages to come and to apply to both unforeseen and unforeseeable circumstances."[24] Nonetheless, constitutional lawmakers are still expected to possess im-

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(Henry Holt, 1987).

20. Kay, 13 Ratio Juris at 33 (cited in note 4).

21. Calabresi, *A Common Law for the Age of Statutes* at 59-65 (cited in note 8).

22. John Locke, *Fundamental Constitutions for Carolina,* in David Wootton, ed., *Political Writings of John Locke* 232 (Mentor, 1993).

23. Locke's *Fundamental Constitutions for Carolina* is lengthy and detailed.

24. Stephen Macedo, *The New Right v. The Constitution* 18 (Cato Institute, 1986).

pressive powers of foresight. Even the most elastic constitutional language is supposed to help guide and bind the activities of subsequent political and legal actors, though the task at hand then inevitably takes on additional difficulty.

Social and economic acceleration conflicts with the traditional expectation that constitutional lawmakers can be expected to predict future trends with some measure of competence. The foresight of even the most adept constitutional architect suffers in the context of an environment subject to the dictates of speed, as the scope of "both unforeseen and unforeseeable circumstances" expands dramatically. The half-life of every original constitutional agreement is subject to decay in a social and economic environment where "so continual and so intense" change becomes pervasive. Rapid changes in the social and economic circumstances inevitably presupposed by even the most farsighted constitutional lawmakers exacerbate the hardships of their already difficult tasks. Not even abstract language appropriate to its status as a "majestic charter" can circumvent the necessity of fundamentally updating the constitution in order to adjust to social and economic change. As the legal scholar Richard Kay rightly notes, "[h]uman history tells us that sooner or later every constitution will begin to chafe," and fundamental departures from an original constitutional agreement inevitably occur.[25] At some juncture, an unmistakable "misalignment between the constitution and the social and political realities which any system of government must take into account" appears; even the most pliable constitutional language will need to take on novel and unexpected meanings in order to allow for fundamental ruptures with the constitutional status quo.[26] Social and economic acceleration provides the dilemma of constitutional obsolescence with special significance. Recall from our discussion above that core facets of social and economic acceleration include the intensification of technological innovation, as well as the closely-related process whereby broader patterns of social and economic life (occupational patterns, for example, or workplace organization) now undergo relatively rapid transformations. Any constitutional system that intends to employ state authority effectively for the sake of grappling with social and economic life faces the problem that constitutional lawmakers, to a decreasing degree, can realistically succeed in anticipating

25. Kay, 13 Ratio Juris at 41 (cited in note 4).
26. Id.

the vast unprecedented changes likely to confront future generations. In relatively static social and economic settings, the specter of constitutional obsolescence typically remained distant; perhaps this is why Enlightenment political and legal thinkers like Locke tended to conceive of written constitutions as fundamentally timeless documents, unlikely to require amendment or alteration. Like so many other features of our high-speed world, however, constitutions risk becoming "out of date" at an ever faster rate. No constitution can remain unchanged for long in a world where "[a]ll fixed, fast-frozen relations, with their train of ancient and venerable prejudices and opinions, are swept away, all new-formed ones become antiquated before they can ossify. All that is solid melts into air, all that is holy is profaned . . . ."[27]

If the diagnosis described in the first part of this essay is correct, social and economic acceleration also includes the heightened frequency of relatively substantial forms of social and economic change: We now find ourselves in a social and economic world where far-reaching transformations occur at a rapid-fire pace. Thus, the enigma at hand is not merely that we require constitutional systems to provide a modicum of flexibility so that future generations can tinker with their basic structure in order to adapt to minimal forms of social change. Instead, constitutions must accommodate frequent and relatively far-reaching social and economic transformations. Yet fundamental social changes are likely to require no less frequent shifts in many areas of constitutional practice. Just as alterations in the assumptions about factual social and economic circumstances underlying any given statute threaten to render it obsolescent,[28] so too does the dramatically heightened pace of change in core features of social and economic life suggest an increased possibility of constitutional obsolescence. Every constitutional system is intimately intermeshed with the course of social and economic life, and the acceleration of the latter requires adaptation by the former. As Martin J. Sklar points out, law "is not some 'reflection' of, or 'superstructure' hovering above, capitalist property and market relations; it is an essential mode of existence . . . of those relations. When those relations are undergoing substantial change, so will the law. . . ."[29] As the pace of social and economic

27. Friedrich Engels to Karl Marx, *Manifesto of the Communist Party*, in Robert C. Tucker, *The Marx-Engels Reader* 469 (W.W. Norton & Co., 1972).

28. Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 174-75 (Harvard U. Press, 1990).

29. Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-*

activity accelerates, so too does the tempo of legal change. Thus, the traditional question of *constitutional change* necessarily takes on greater significance than traditional liberal democratic theory anticipated. Social and economic acceleration implies the necessity of a relatively dynamic mode of constitutionalism able to adapt to "so continual and so intense" social and economic change.[30]

In the following section, I outline various paths by which constitutional systems struggle to deal with the difficulty of adjusting to a high-speed world. Before doing so, we need to be clear about the fundamental tensions at hand. Constitutional lawmakers are supposed to achieve a relatively coherent document able to provide a basis for *some*, however minimal, measures of constancy and clarity in the law. For the moment, we can bracket the difficult questions of how much constancy or clarity is required, the appropriate legal character that they should take, as well as their substantive aims and goals. Nonetheless, the very idea of a written constitution is predicated on the idea that its norms should *bind* and thereby coordinate social and political actors with some degree of constancy if they are to serve as a meaningful source for a standing body of jurisprudence concerned with the fundamental "rules of the game." Acknowledging this point hardly requires fidelity to an overly cramped brand of legal formalism.[31] Written constitutions are also conceived as cogent public statements providing "fair warning" and orientation to political and legal actors about the basics of political life. Although himself an admirer of the "unwritten" British constitution, even James Bryce conceded that written constitutions were

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1916 at 89 (Cambridge U. Press, 1988). Historical support for this general claim is amply provided by Kermit L. Hall, *The Magic Mirror: Law in American History* (Oxford U. Press, 1989) and Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2nd. ed., 1985).

30. This conclusion overlaps with James Tully's call for a dynamic mode of constitutionalism, though I worry about preserving traditional liberal-democratic legal virtues to a greater extent than Tully. See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge U. Press, 1995).

31. Dewey acknowledged this point, when he referred to the "undoubted need for the maximum possibility of stability and regularity of expectation" in the law (*Logical Method and Law* (1924), in Wiliam W. Fisher, et al., eds., *American Legal Realism* 191 (Oxford U. Press, 1993)). For a balanced discussion of the merits (and also limits) of constancy and clarity in the law, see Lon L. Fuller, *The Morality of Law* 63-65, 79-81 (Yale U. Press, 1964). Only extreme views of legal indeterminacy are inconsistent with my attempt to take the notion of a written constitution, as well as the traditional legal virtues of constancy and clarity, seriously. For a critique of such views, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 462-503 (1987).

better attuned to the democratic temper of contemporary life: "the democratic man . . . is pleased to read and know his Constitution for himself. The more plain and straightforward it is the better. . . ."[32]

Without presupposing some version of these conventional ideas, it becomes unclear why we need written constitutions in the first place. Alas, contemporary conditions require constitutions exhibiting enormous flexibility; they now must leave room for a vast and constantly expanding range of novel social and economic experiences, many of which are likely to prove momentous. Although social and economic acceleration thus calls for heightened constitutional adaptability, it is by no means self-evident how we can simultaneously achieve a sufficient dose of constancy and clarity in constitutional law. A permanently altering, highly adaptable constitutional system risks opening the door to legal inconstancy and opaqueness. Two rejoinders come immediately to mind: First, it might seem as though the specter of constitutional obsolescence should only concern systems dedicated to the pursuit of expansive forms of state activity in the economy. Constitutions based on "free market" or *laissez-faire* ideals might be relatively immune to constitutional obsolescence to the extent that they are less committed to regulating fast-paced forms of social and economic activity, and thus would be less subject, for example, to the impermanence of our high-speed capitalist economy. Their half-life would remain relatively substantial. This argument gains some initial empirical support from the fact that constitutional systems expressly supportive of far-reaching state intervention in the economy are precisely those where the problem of obsolescent norms and clauses has long been most intensely discussed. For example, U.S. state constitutions provided a legal framework for active intervention relatively early on (that is, by the mid-nineteenth century). Yet an impressive body of scholarship suggests that the easy amendability of state constitutions burdened them with detailed norms concerning state economic intervention, many of which (for example, specific provisions concerning railroads and the nitty-gritty of commerce and trade) soon were out of date.[33] Nonethe-

32. Bryce, *Constitutions* at 80 (cited in note 5).

33. For some of the details, see Albert L. Sturm, *The Development of American State Constitutions*, 12 Publius 57, 57-98 (1982); see also John Dinan, *'The Earth Belongs Always to the Living Generation': The Development of State Constitutional Amendment and Revision Procedures*, 62 Rev. of Pol. 645, 645-74 (2000); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237-74 (Princeton U. Press,

less, this rejoinder is unconvincing. Constitutional systems committed to free market ideals also require adaptation to the ever-changing contours of social and economic change. Governments committed to free market policies engage in significant forms of state activity in economic and social affairs, as demonstrated by the examples of Thatcher's Great Britain and Pinochet's Chile. Even a diehard libertarian judge who pursues free market interpretations of a specific constitutional clause (for example, due process) will find herself forced to adapt the clause to social and economic change, and she is likely to engage in a series of creative reinterpretations in order to assure its relevance to the breakneck pace of social and economic life. Laissez-faire constitutional systems operate within, and thus must react to, the challenges of social and economic acceleration, no less than constitutional systems committed to the welfare and regulatory states.[34]

Second, perhaps we should see constitutions as expressive of a broadly-defined set of abstract *moral principles*, along the lines proposed by Ronald Dworkin and others who have taken seriously the fact that written constitutions often consist of open-ended, moralistic clauses strikingly different from the code-like general rules favored by defenders of a traditional model of legality.[35] From this perspective, founding fathers (and mothers) simply do not intend their offspring to be interpreted in the same way as conventional legal rules or statutes. The argument presented above fails to do justice to the special features of constitutional law. Constitutions should be read as elastic "living" documents, offering statements of abstract principle that should prove relatively immune to changing social and economic conditions. For sure, the ban on "cruel and unusual punishment" may imply a different set of concrete legal answers in 2089 than 1789, yet at the level of abstract principle, "cruel and unusual punishment" possesses a sufficient degree of moral and legal coherence and stability according to which constitutions can maintain the requisite measures of constancy and clarity over time. From this perspective, the dilemma of social and economic acceleration turns out to be a pseudo-problem since constitutions consist of

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34. This rejoinder is inspired by the provocative reflections of Stephen Griffin, who attributes many of the problematic facets of recent U.S. constitutional development to the emergence of the interventionist and welfare states. Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* (Princeton U. Press, 1996).

35. For Dworkin's distinction between rules and principles, see his *Taking Rights Seriously* (Harvard U. Press, 1977).

abstract principles able to guarantee their identity and legally binding force for "an indefinite but presumably long future."

Even if we concede the controversial view that we should read constitutions as embodying abstract moral principles, however, the phenomenon of temporal acceleration can hardly be disposed of so quickly. At the very least, social and economic acceleration implies that *interpretations* of abstract constitutional principles will be forced to change at a no less high speed rate than social and economic life itself. The intensified rate of technological change, for example, points to the likelihood of regularly reinterpreting what "cruel and unusual punishment" means in policy and legal terms. In a similar vein, the legal implications of a constitutional "right to privacy" will probably have to be revised in the face of permanent innovation in information technology. From the bird's eye view of the legal or moral philosopher, "cruel and unusual punishment" or the "right to privacy" may seem to embody relatively constant principles; from the perspective of the legal or political actor "on the ground," the necessity of constantly reinterpreting them represents the more noteworthy facet of the enigma at hand. Social and economic acceleration seems to require a speed-up of the process by which constitutional norms undergo reinterpretation probably no less intense than the general acceleration in social and economic affairs at large.

At some point constitutional *interpretation* shades off into fundamental constitutional *alteration*. Even the most abstract constitutional principle forecloses some set of imaginable interpretations, and one hardly must endorse an unduly narrow model of legal interpretation in order to recognize the virtue of maintaining a distinction between the interpretation of a preexisting constitutional principle and the invention or creation of a new one. Moreover, we can readily concede that the line between constitutional interpretation and alteration is hard to draw in legal praxis, while maintaining that there are good normative and institutional reasons for preserving it. We can also admit that there are legitimate differences of opinion about the best theoretical account of the distinction between interpretation and alteration. Nonetheless, formal constitutional amendment procedures presuppose the possibility of drawing a distinction between constitutional interpretation and modification. Stripped of this distinction, the constitutional commitment to formal

amendment—a core feature of most constitutional systems—makes no sense.[36]

As noted above, social and economic acceleration heightens the need for relatively frequent fundamental constitutional change. The breakneck pace of major social and economic transformation means that the imperatives of constitutional change increasingly tend to explode the confines of legal interpretation. Abstract constitutional principles will have to undergo relatively frequent fundamental alteration in order to adapt effectively. Judicial actors who adjust constitutional norms to novel social conditions may claim that their decisions represent examples of "mere" legal interpretation. A closer examination, however, is likely to reveal that their rulings often entail fundamental constitutional alteration.

This is no mere thought-experiment. It is now something of a cliché among scholars that constitutional courts periodically engage in constitutional lawmaking nearly as ambitious as the original act of constitutional founding. Under the auspices of interpreting Articles Four and Five, many dramatic twists and turns have occurred in the fundamental understanding of criminal procedure, in part as responses to rapidly changing social conditions. The open-ended "underlying focus of the law" in this arena, namely "the idea that the Constitution places great value on one's ability to keep information out of the government's hands," has been subject to a rich diversity of restatements, and a careful analysis of the jurisprudence of Articles Four and Five belies robust claims about their purported constancy over time.[37]

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36. Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (c) 27; (D)>27: Accounting for Constitutional Change*, in Levinson, ed., *Responding to Imperfection* 14-24 (cited in note 33). Levinson offers an excellent starting point for developing a conceptual account of how we might delineate constitutional interpretation from constitutional alteration: the former is "linked in specifiable ways to analyses of the text or at least to the body of materials conventionally regarded as within the ambit of the committed constitutionalist," whereas the latter "signifies something out the ordinary, something truly *new*." Id. at 15. The distinction between interpretation and alteration introduced here also overlaps somewhat with Joseph Raz's delineation of "conserving" from "innovatory" constitutional interpretation (*On the Authority and Interpretation of Constitutions*, in Alexander, *Constitutionalism* at 182 (cited in note 5)).

37. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L. J. 393, 395 (1995). As Stuntz notes, "the substantive issues that shaped Fourth and Fifth Amendment law are long since settled. . . . We have taken a privacy ideal formed in heresy cases and railroad regulation disputes, an ideal that had no connection to ordinary criminal law enforcement, and used it as the foundation for much of the vast body of law that polices the police. Predictably, the combination has not worked out very well." Id. at 396.

Some constitutional courts undertake what Robert Lipkin bluntly but aptly describes as "revolutionary adjudication," in which judges engage in fundamental reinterpretations of the basic constitutional "rules of the game" so as to alter core elements of the political system's legal and political identity.[38] Constitutional courts take on the authority of the *constituent power* by initiating ambitious forms of fundamental constitutional alteration. Traditional (oftentimes politically conservative) legal commentators typically attribute the exercise of the *constituent power* by courts to power-hungry judges, or the endorsement of problematic models of flexible legal interpretation.[39] From the vantage point of the diagnosis developed here, however, matters look more complicated. Whatever its normative and legal faults, the universal tendency for powerful courts to undertake frequent constitutional alteration represents a practical adaptation to a fundamental institutional dilemma: How can we achieve the frequent constitutional change called for by the breakneck pace of social and economic acceleration?

III. CONSTITUTIONAL ADAPTATION IN AN AGE OF SPEED

Activist constitutional courts represent only one possible institutional adaptation to social and economic acceleration. In this section, I offer a preliminary typology of constitutional change, oriented towards demonstrating that the experience of social and economic acceleration provides a starting point for making sense of some of its most widely-discussed dilemmas.[40] Social and economic acceleration also helps us conceptualize

38. Robert Justin Lipkin, *The Anatomy of Constitutional Revolutions*, 68 Neb. L. Rev. 701, 701-806 (1989). It has become relatively commonplace to point out that constitutional courts often operate as the *constituent or constitution-making power*. For an excellent discussion of this trend and its implications for institutional reform, see Andrew Arato, *The New Democracies and American Constitutional Design*, 7 Constellations 333 (2000).

39. In this vein, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 47 (Princeton U. Press, 1997).

40. Cass Sunstein points out that *statutory* obsolescence rests on various sources, including the possibility that "a statutory provision may no longer be consistent with widely held social norms," and "the legal background [to a particular statute] may have changed dramatically as a result of legislative and judicial innovations." Sunstein, *After the Rights Revolution* at 174 (cited in note 28). Similarly, constitutional obsolescence undoubtedly has diverse roots. Nonetheless, the phenomenon of social and economic acceleration makes up an important source of the problem, and thus my emphasis on it here. What Sunstein describes as changing "factual assumptions" underlying an original legal norm (for example, the introduction of new technology) is contained in the notion of social and economic acceleration as used here.

enigmas whose existence hitherto has only been vaguely appreciated. Most important, it underscores the existence of a paradox at the very heart of contemporary constitutionalism. Social and economic speed risks favoring insufficiently democratic mechanisms for constitutional adaptation. Relatively democratic modes of constitutional change appear to mesh poorly with the imperatives of social and economic acceleration, thereby potentially robbing constitutionalism of the democratic legitimacy which its most persuasive defenders rightly consider indispensable. The most well-trodden paths of constitutional change have entailed institutional adaptation primarily via (A) the "dualistic" system of formal amendment initiated by the U.S. founders, (B) courts, (C) legislatures (most famously, the U.K. system of constitutional reform via parliamentary statute), and (D) the executive.[41]

(A) Bruce Ackerman has recently reminded us of what arguably was the greatest invention of the U.S. framers, namely a system of *constitutional dualism* in which the activities of "ordinary" lawmaking are separated from "higher" constitutional legislation. In this view, the U.S. founders rightly abandoned Locke's notion of a basically unalterable constitution, but they simultaneously insisted that fundamental constitutional reform would be required to take an arduous and time-consuming path.[42] In the U.S. system, higher legislation involves making

41. One might also add a further option to this list, namely the possibility that popular revolution is the only appropriate response to the inevitable decay of all constitutions. During the U.S. Revolution, some radical republicans endorsed this approach. Michael Lienesch, *New Order of the Ages: Time, the Constitution, and the Making of Modern American Political Thought* 67 (Princeton U. Press, 1988). I neglect it here for the reason that social and economic acceleration suggests that revolutions of this type would have to be a more-or-less permanent affair, given the intense pace of social change and the necessity of frequent constitutional adaptation and revision. Surely, no defender of liberal-democratic constitutionalism wants permanent revolution. Two additional caveats should be kept in mind. First, constitutional change always involves a variety of institutional and political actors, and any conceptual typology risks obscuring the messy empirical realities of constitutional change. The typology offered here (inspired by Albert L. Sturm, *Thirty Years of State Constitution-Making* 18 (National Municipal League, 1970)) aims at underscoring the fundamental institutional and normative challenges posed by the necessity of a relatively dynamic mode of constitutional adaptation. Second, the social theory debate suggests that social and economic acceleration represents a long-term (that is, since the industrial revolution) process, but also that the speed-up of social and economic life continues to intensify. Although I cannot adequately demonstrate this empirical claim here, this leads me to believe that the dilemmas posed by social and economic acceleration for constitutionalism have increased in the last century and are likely to continue to so in the future.

42. For the historical and philosophical background, see Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* at 19-109 (cited in note 3); Vile, *The Constitutional Amending Process in American Political Thought* at 23-78 (cited in

"supreme law in the name of the People," and it does so by assuring a greater level of democratic legitimacy than typically found in the ordinary course of political decision making. Constitutional reform should not take place at the level of everyday politics, because the heightened democratic legitimacy required for constitutional lawmaking simply cannot be demonstrated by an electoral victory, for example, or the domination of one branch of the government by a single political party or candidate. In order for constitutional change to be legitimate, it "must take to the specially onerous obstacle course provided by a dualist Constitution for purposes of higher lawmaking,"[43] since the U.S. founders believed that fundamental change to the constitutional system should exhibit a high degree of popular consensus. For this reason, they placed enormous burdens on the process of formal constitutional amendment: Future generations would be permitted to alter the original constitutional compact, but they

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note 2). The procedural core of Article V reads as follows:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

U.S. Const., Art. V.

Notwithstanding its seeming clarity, Article V continues to inspired heated disagreements. See Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment* as well as Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, both in Levinson, ed., *Responding to Imperfection* at 89-115, 163-90 (cited in note 33); Frank I. Michelman, *Thirteen Easy Pieces*, 93 Mich. L. Rev. 1297, 1297-1332 (1994).

43. Bruce Ackerman, *We the People: Foundations* 6 (Harvard U. Press, 1991). Ackerman's views have generated a wide-ranging debate which, unfortunately, I cannot discuss here. See Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Rowman & Littlefield, 2000); see also 104 Ethics No. 3 April, 1994 (a special issue devoted to Ackerman's work). For now, let me just say that I find the outlines of Ackerman's model of constitutional dualism appealing, especially Arato's insight that there are "important reasons why constitutional politics can and therefore should involve a wider and more democratic form of participation than normal politics." Arato, *Civil Society, Constitution, and Legitimacy* at 135-38. Nonetheless, there are many reasons for criticizing Ackerman's own defense of the manner in which constitutional dualism in the U.S. has taken unexpected institutional paths. We need to separate Ackerman's core intuitions about constitutional dualism from the particular form it has taken in the U.S. The latter has been more problematic than Ackerman concedes. Like Arato, I am more skeptical than Ackerman of constitutional adaptation "outside of legality," and my discussion here presupposes a normatively and institutionally more appreciative view of legal paths to constitutional change. Arato, *Civil Society, Constitution, and Legitimacy* at xiv. Of course, my sympathy for Ackerman's position raises fundamental normative questions about the relationship between democratic legitimacy and the idea of dualist constitutionalism. Unfortunately, I cannot address those questions here, though I should note that Arato's study does a fine job investigating many of them.

would have to do so in accordance with the tough procedures outlined in Article V.

Not only does constitutional dualism minimize the perils of leaving the authority to change the fundamental "rules of the game" to those immediately involved in the political game (for example, legislators), but it is simply mistaken to assert "that the winner of a fair and open election is entitled to rule with the full authority of We The People."[44] No single institution (Congress, for example, or the executive) can legitimately claim to speak for "the people" as a whole, and we can only reasonably determine that a proposed change to the constitutional system possesses the requisite democratic legitimacy if it has successfully withstood a lengthy series of institutional tests. Of course, alternative liberal democratic models of constitutional change also presuppose that fundamental constitutional change should rest on a high degree of democratic legitimacy. But special about the U.S. innovation is the intuition that the achievement of a sufficient democratic basis for constitutional reform presupposes a relatively lengthy period of intense political debate and mobilization, as well as 1) express support from a broad range of political institutions, and 2) passage of a series of time-consuming institutional tests in order to assure that popular support for constitutional amendment is sufficiently deliberate and well-considered.

Unfortunately, social and economic acceleration defies the temporal preconditions of this admirable vision of constitutional reform. A key "desideratum" of higher lawmaking is that "it proceed slowly and deliberately," and the toilsome procedures of Article V were clearly intended by the framers to *decelerate* popular debate and exchange in order to assure its reasonable character.[45] They envisioned Article V as requiring that constitu-

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44. Ackerman, *We the People: Foundations* at 9 (cited in note 43).

45. David R. Dow, *The Plain Meaning of Article V*, in Levinson, ed., *Responding to Imperfection* at 128 (cited in note 33); see also Donald S. Lutz, *Toward a Constitutional Amendment* in Levinson, ed., *Responding to Imperfection* at 239 (cited in note 33). The inflexibility of Article V in part derives from the fact that the founders may have been closer to Locke's notion of an "unalterable" constitution than many modern commentators acknowledge. Philip Hamburger has argued plausibly that the founders were deeply hostile to constitutional change, tending to envision Article V as a device for *completing* or *perfecting* what they conceived as a fundamentally timeless doctrine. By no means did they picture Article V as an instrument for adapting the constitution to social and economic change. Philip A. Hamburger, *The Constitutions's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 301 (1988). Morton Horwitz has also emphasized that the U.S. Constitution was long conceived as a fundamentally immutable document; only in the twentieth century was this view subjected to major criticism. Morton J. Horowitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv. L. Rev. 30, 30-117 (1993).

tional reform would be subject to a series of *temporally drawn-out* institutional checks, in part because they believed that the reasonableness of popular debate and exchange could only be achieved by guaranteeing that it offered a fair hearing to a rich diversity of views, as well as a meaningful opportunity to acknowledge the pluralism of interests found in modern society. Practiced in anything more than a small group, however, this meant that deliberation would have to be a slow-going affair.[46] Within the U.S. system, the process of ordinary legislation thus includes a number of mechanisms (bicameralism, for example, and the executive veto) aimed in part at decelerating decision making and thereby contributing to its deliberative merits.[47] From the perspective of the founders, it made no less sense to create amendment procedures significantly more complex and time-consuming than the rules of everyday legislative politics. How better to assure the correspondingly higher level of reasonable democratic consensus called for by the vastly weightier tasks of higher lawmaking than by dramatically decelerating the process of constitutional change via cumbersome obstacles to formal amendment?

The result of the founders' reflections was a system of amendment now widely seen as one of the most slow-going in the world.[48] The framers were so effective at decelerating constitutional reform via formal amendment that they arguably helped paralyze the U.S. system of formal amendment altogether; a vast range of scholarly studies describes the virtual impossibility of

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46. For example, note Madison's famous claim in *Federalist 10* that in a large republic, "communication is always checked" (or *slowed-down*), which presumably should contribute to the reasonable character of popular deliberation in the proposed American republic. Excessive speed in popular debate, it seems, is not conducive to well-considered outcomes. Federalist 10 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 83 (Mentor, 1961).

47. For David Hume, for example, bicameralism represented an instrument for preventing a "mere mob" from being easily influenced, and thus a way to help assure well-considered legislative decisions. David Hume, *Idea of a Perfect Commonwealth*, in Hume, *Political Essays* 153 (Bobbs-Merrill, 1953). More generally on the role of institutional design in "cooling" (and decelerating) popular deliberation, see Cass Sunstein, republic.com 38-39 (Princeton U. Press, 2001).

48. Article V allows as few as thirteen of ninety-nine state legislative bodies to defeat the ratification of a proposed amendment, and "[t]he requirement for such extraordinary majorities means that, in the case of structural amendments, any significant political bloc possesses an effective veto." James L. Sundquist, *Constitutional Reform and Effective Government* 17 (The Brookings Institution, 1992). For an empirical demonstration of the enormous obstacles created by Article V, see Lutz, *Toward a Theory of Constitutional Amendment*, in Levinson, ed., *Responding to Imperfection* at 237 (cited in note 33).

undertaking meaningful institutional reform via Article V.[49] The diagnosis of contemporary society outlined above helps shed fresh light on this familiar quagmire. Social and economic acceleration implies that the amendment procedures of Article V increasingly have operated in the context of a social and economic universe characterized by rapid-fire change and innovation. Our high-speed social and economic world conflicts with the time-consuming procedures outlined in Article V, generating a misfit between the temporal horizons of formal constitutional amendment and social and economic affairs. Of course, much of the existing critical literature on Article V laments its laggard character. What that literature obscures is that "slowness" *per se* is no failing, particularly in a system of constitutional dualism where deliberateness is indispensable to higher lawmaking. Indeed, for the U.S. founders as for the mainstream of Enlightenment political thought, slowness was generally a virtue to be aspired for in popular deliberation, whereas rapidity in mass politics typically could be taken as prima facie evidence of its irrationality.[50] Slowness only becomes a handicap in a social and economic world where speed is at a premium, and social change takes places at an ever more intense pace.

Not surprising, the deliberate process of democratic constitutional reform outlined by Article V has suffered from neglect.[51] Social and economic acceleration means that political actors repeatedly find themselves forced to adapt the constitutional system to incessant and oftentimes substantial social and economic change, and the procedures of Article V understandably appear to strike many of them as little more than a quaint leftover from a simpler world fundamentally irrelevant to the real-life institutional tasks of contemporary politics. Accord-

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49. This is a theme of many of the essays collected in Levinson, ed., *Responding to Imperfection* (cited in note 33). The rigidity of Article V was anticipated by some of the Anti-Federalists, Federal Farmer, *Letter IV*, in Herbert J. Storing, ed., *The Complete Anti-Federalist: Writings by Opponents of the Constitution* 59-60 (U. Chicago Press, 1981).

50. In this vein, recall again Madison's hope that a large republic would "check" (or decelerate) mass debate, thereby contributing to its reasonableness, as well as Locke's famous discussion of the "dissolution of government" in the *Second Treatise*, where he suggests that revolutionary politics is only well-considered after a tyrannized people has patiently tolerated a "long train of abuses." Patience and even procrastination are essential preconditions of reasonable popular deliberation John Locke, *Second Treatise* in *Two Treatises of Government* ¶ 223 (Cambridge U. Press, 1988).

51. Again, see the essays collected in Levinson, ed., *Responding to Imperfection* (cited in note 33). Revealingly, the most important amendments (XIII-XV) were approved during the Reconstruction period, and were arguably forced upon the southern states by northern bayonets and rifles.

ingly, some of the most blunt assessments of the temporal misfit between Article V and contemporary society have come from perceptive politicians. During the heyday of the New Deal, proposals to pursue a formal amendment in order to establish a sturdy constitutional basis for the emerging welfare state generated a terse response from President Roosevelt: referring to the lengthy time period it would surely take to alter the constitution, Roosevelt seems to have anticipated the temporal flaws of Article V when he announced, "We can no longer afford the luxury of twenty-year lags."[52] Why waste scarce political energy on a fight for a formal amendment whose advantages might only accrue decades down the road?

To be sure, Article V outlines an unusually laborious set of amendment procedures, and the fundamental core of constitutional dualism is undoubtedly consistent with somewhat less time-consuming methods of formal amendment. As we will see, Ackerman and others have proposed substantial modifications to Article V which nonetheless would preserve constitutional dualism. By the same token, it would be a mistake simply to chalk up the temporal misfit between formal constitutional amendment and contemporary society to the idiosyncrasies of the U.S. Constitution, or to suggest that alternative systems for formal amendment might easily overcome the dilemmas posed by social and economic acceleration. Social and economic acceleration implies that *every* system of formal amendment resting on dualistic constitutional principles, and thus committed to broad-based, time-consuming popular deliberation via lengthy institutional tests, is likely to find itself forced to deal with the temporal misfit described above. To the extent that contemporary society also evinces a built-in intensification of social and economic acceleration, even those constitutional systems possessing amendment procedures significantly less cumbersome than Article V may be destined to struggle, to an increasing degree, with problems akin to those which have long plagued constitutional adaptation in the United States.

Perhaps this is why there has not only been a significant revival of scholarly interest in the question of constitutional change, but also why so many legal scholars today seem unconvinced that *any* formal amendment could ever serve as an ade-

52. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* at 306 (cited in note 3) (quoting Franklin D. Roosevelt, *Public Papers and Addresses* 4 (Randon House, 1938).

quate device for achieving peaceful constitutional change.[53] At the very least, social and economic acceleration raises difficult questions for those of us sympathetic to the worthy liberal democratic ideal that constitutional adaptation via formal amendment not only should take a deeply democratic form, but that we need to assure its deliberate and well-considered character by means of time-consuming institutional tests.

(B) Courts also update the constitutional system in accordance with changing social and economic realities. As noted above, social and economic acceleration implies the necessity of continuously reinterpreting constitutional norms, as well as frequent alterations to key elements of the constitutional system. Not only does social and economic acceleration thereby help muddy any real-life border we might draw between "law" and "politics," but constitutional courts also will probably tend to modify the constitution and take on the role of stealth *constituent power*.[54] The U.S. innovation of judicial review has provided institutional possibilities for constitutional change which undoubtedly would have surprised the founders: U.S. Supreme Court decisions often have impacted more profoundly on the fundamental operations of the political system than many of the formal amendments achieved via Article V.[55]

In 1921, Justice Cardozo captured the underlying rationale for this path to constitutional change when he observed that in contemporary society "[n]othing is stable. Nothing absolute. All is fluid and changeable. We are back with Heraclitus."[56] For Cardozo, the "perpetual flux" of social and economic relations defies formalistic modes of constitutional exegesis. Jurists would do well to offer a "more plastic, more malleable" reading of the

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53. Griffin notes that "constitutional scholars have become increasingly aware of the importance of developing a theory of constitutional change." Griffin, *American Constitutionalism* at 10 (cited in note 34). A revealing illustration of the pervasive skepticism towards formal amendment found among contemporary (especially left-liberal) legal scholars is a lengthy article by Morton Horwitz on constitutional change in one of the nation's premier legal reviews, where formal amendment is ignored altogether. Horowitz, 107 Harv. L. Rev. at 30-117 (cited in note 45). Of course, this neglect contains a certain amount of plausibility if one endorses the radical notions of legal indeterminacy (occasionally) embraced by Horwitz.

54. The distinction between constitutional interpretation and constitutional alteration introduced above might be taken as one way by which we might delineate law (interpretation) from politics (alteration). Of course, any attempt to salvage this distinction entails complex issues than I am unable to address in the confines of this essay.

55. For a slew of plausible examples, see Lipkin, 68 Neb. L. Rev. at 734-39 (cited in note 38).

56. Benjamin N. Cardozo, *The Nature of the Judicial Process* 28 (Yale U. Press, 1921).

U.S. Constitution in order to guarantee its relevance to the changing exigencies of the times.[57] Judges should minimize the impact of precedent in order to allow themselves room for creative readings of the law; the fidelity to the past intrinsic to *stare decisis* decreasingly makes sense given the profound fluidity and alterability of twentieth-century social and economic affairs.

A few decades earlier, astute observers of the U.S. system had already attributed the growing tendency among American jurists to engage in creative constitutional interpretation to the weaknesses of Article V. In his influential essay on "Flexible and Rigid Constitutions," Bryce grouped the U.S. under the latter rubric, arguing that American judges often aspired to overcome the problem of constitutional rigidity, deriving in part from Article V, by pursuing open-ended interpretations of constitutional law that their more formalistic British legal peers found shocking. The case of the American Republic suggested that rigidity in formal amendment procedures might be compensated for by flexibility within constitutional exegesis.[58]

From the perspective of social and economic acceleration, constitutional adaptation via judicial interpretation exhibits a number of advantages vis-a-vis formal amendment. It allows for the recurrent reinterpretation of constitutional norms; since many of those reinterpretations do *not* possess the status of fundamental modifications or alterations to the constitution, this practice performs a vital function for a political system faced with "so continual and so intense" change. By not burdening constitutional adaptation with the time-consuming procedures called for by formal constitutional amendments, flexible constitutional exegesis permits courts to respond more quickly to many difficult constitutional conflicts. To be sure, decision making by higher courts is hardly a paragon of speed or efficiency, and their deliberate character is guaranteed by a slow-going

57. Id. at 161. Jerome Frank similarly observed that "we have practically insisted on a flexible construction of its words to permit of the legalization of social changes which were never contemplated by our forefathers who drafted and adopted the sacred instrument" of the U.S. Constitution. Jerome Frank, *Law and the Modern Mind* 300 (Doubleday, 1930). There are reasons for suspecting that the U.S. founders would have been skeptical of the trend towards court-based constitutional adaptation via flexible exegesis. See Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 363-64, 377-80 (Harvard U. Press, 1977). Unfortunately, "originalists" who make this point ignore the challenges of social and economic acceleration altogether. They may be right to worry about the tendency to "morph" the constitution for the sake of adjusting to social and economic change, but the dilemmas at hand will not vanish simply by kowtowing to the founders.

58. See Bryce, *Constitutions* at 72-73 (cited in note 5).

process of legal niceties only moderately less arduous than formal amendment. Nonetheless, in many situations the judiciary seems better suited than formal constitutional amendment to the temporal imperatives of our high-speed world. As Cardozo anticipated in 1921, the widespread tendency among twentieth-century jurists, especially in the U.S., to pursue supple constitutional interpretation and downplay precedent has often provided jurists with the flexibility called for by a constantly changing social and economic environment.

Echoing earlier critics of the anti-formalistic course of twentieth-century American jurisprudence, the legal theorist Brian Bix correctly notes that the most influential present-day U.S. legal philosopher, Ronald Dworkin, "emphasizes the possibility of revision too much and the likeliness of settledness too little . . . [His theory] celebrates the notion of the great individual judge rethinking whole areas of the law. . . ."[59] Whatever its faults from the standpoint of traditional liberal jurisprudence, Dworkin's theory meshes nicely with the structural dictates of a no less dynamic social and economic world. Indeed, the same can probably be claimed for many of the anti-formalistic trends influential in twentieth-century American legal thought. The universal phenomenon of social and economic acceleration may be one of the reasons why both the U.S. innovation of judicial review and U.S. legal thought have proven so influential abroad in the last half century.[60] Social and economic speed generates difficult institutional challenges for *every* political system, and the U.S. example of powerful courts engaging in flexible interpretation offers proven devices for grappling with its consequences.

However well-trodden, the court-driven path of constitutional adaptation to social and economic acceleration suffers from serious flaws. Despite its temporal Achilles' heel, constitutional lawmaking via formal amendment is conducive to relatively impressive levels of legal constancy and clarity. Higher lawmaking by means of formal amendment not only implies that constitutional norms are unlikely to change rapidly, but major constitutional shifts will have to be achieved via express constitutional lawmaking, where a relatively broad set of political constituencies debates and gains familiarity with the issues at hand. In contrast, the tendency to minimize precedent and condone

59. Brian Bix, *Jurisprudence: Theory and Context* 86 (Sweet & Maxwell, 2d ed. 1999).

60. Louis Henkin and Albert J. Rosenthal, eds., *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia U. Press, 1990).

flexible constitutional interpretation indicates likely reductions in legal constancy, and the practice of continuously adjusting constitutional norms to social and economic conditions risks diminishing the clarity of constitutional law as well. U.S. experience suggests that judges will tend to disguise even fundamental constitutional reform as conventional legal interpretation; a highly complex body of constitutional jurisprudence is the most likely consequence. The enhanced difficulty of predicting beforehand which constitutional norm may be applicable to a specific legal scenario poses tough questions for those of us who take the notion of a written constitution seriously.[61]

Just as troublesome, constitutional change via judicial action suffers from democratic deficits. We hardly need endorse a simplistic majoritarian conception of democratic politics in order to worry about the specter of constitutional courts regularly acting as the *constituent power*, or the potential dangers to popular accountability when courts are so overwhelmed by social and economic change that they are unable to distinguish between constitutional interpretation and fundamental constitutional alteration in the first place. Nor does the narrow case-centered character of judicial decision making always leave courts "well suited to confront many of the constitutional problems of modern life."[62] There are good normative and institutional reasons for judicial review. Whether present-day institutional versions of judicial review are well-suited to the enormous tasks of constitutional adaptation posed by our high-speed world, however, remains a legitimate concern. Constitutional dualism resists the notion that any single institution should speak in the name of "the people." The fact that social and economic acceleration probably has helped transform constitutional courts into a "kind of Constitutional Assembly in continuous session" should worry us.[63]

(C) Elected legislatures often serve as the institutional focus for constitutional change, either by dominating the process of formal constitutional amendment, or by discarding the formal distinction between ordinary and constitutional legislation altogether. Examples of the former include numerous political sys-

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61. In this vein, see the excellent comments in Kay, 13 Ratio Juris at 44-47 (cited in note 4).

62. Bruce Ackerman, 2 *We the People: Transformations* 406 (Harvard U. Press, 1998).

63. Hannah Arendt, *On Revolution* 201 (Greenwood Press, 1963) (quoting Woodrow Wilson). Arendt seems rather enamored of this ambivalent model of constitutional change.

tems where formal amendment procedures place special emphasis on a positive (oftentimes supermajority) vote of the central legislature, while Great Britain represents the classical example of the latter.[64] From the perspective of constitutional dualism, parliament-motored constitutional adaptation represents an ambivalent normative response to social and economic acceleration. When they undertake fundamental alterations to the constitutional system, legislatures risk succumbing to the illusion that they can effectively stand in for "the people" as a whole. By the same token, their broad-based representative character arguably makes elected legislatures better suited to many relatively mundane aspects of constitutional adaptation than courts, and the fact that they need not focus on resolving individual legal disputes often provides their activities with the general scope missing from judicial rulings.

No less ambiguous are the temporal qualities of parliamentary constitutional change. Stephen Holmes and Cass Sunstein have recently defended parliament-based constitutional adaptability for the emerging democracies of eastern Europe, arguing that in the context of dramatic social and economic transformations, "a good deal of [constitutional] flexibility and 'ad hockery'" represent the *sine qua non* of political survival.[65] Given the turbulence of social and economic affairs in the new democracies, "a general presumption in favor of flexible amending procedures dominated by the established powers, especially the legislature," is necessary to assure a sufficient level of institutional adaptability.[66] For our purposes here, Holmes's and Sunstein's view is revealing for two reasons. First, there is no need to downplay either the special facets or manifest severity of the enigmas faced by the eastern Europeans in order to acknowledge that Holmes's and Sunstein's suggestive comments implicitly underscore a more general dilemma: As we have seen, social and economic acceleration indicates that constitutional systems *everywhere* require heightened adaptability. Second, there are

64. In Ackerman's terminology, this model of constitutional change represents the paradigmatic case of "constitutional monism," for which "the British design captures the essence of democracy." Ackerman, *We the People: Foundations* at 8 (cited in note 43).

65. Stephen Holmes and Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in Levinson, ed., *Responding to Imperfection* at 285 (cited in note 33). Holmes' and Sunstein's defense of legislatively-based constitutional reform is also endorsed by Jeremy Waldron, *Precommitment and Disagreement*, Constitutionalism, 292-95.

66. Holmes and Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in Levinson, ed., *Responding to Imperfection* at 295 (cited in note 65).

indeed good reasons for claiming that elected legislatures may respond more adeptly to social and economic acceleration than certain competing institutional mechanisms. However, we should not overstate the temporal virtues of the legislative mode of constitutional change. Since Montesquieu, liberal political thought has typically envisioned legislative politics as predicated on a wide-ranging process of deliberative exchange involving a relatively diverse and representative sample of public opinion, and liberal writers have repeatedly underscored the unhurried prerequisites of deliberate (and thereby legitimate) legislative decision making.[67] Only if the legislature "takes its time" by engaging in a relatively lengthy period of free-wheeling deliberation is it deserving of the privileged place attributed to it by traditional liberal democratic theory: In accordance with this basic intuition, *Federalist 70* notes that the "differences of opinion" and "jarring of parties" found in elected legislatures mean that "promptitude of decision is oftener an evil than a benefit" there.[68]

Real-life legislatures may very well succeed in rapidly adjusting the constitutional system to changing social and economic realities. However, the traditional view implies that they risk doing so at the price of abandoning those slow-going deliberative attributes which justify their privileged status in the first place. The less-than-stellar record of legislative-based constitution-making suggests that this anxiety deserves to be taken seriously.[69] In addition, parliamentary constitutional adaptation may ultimately prove less flexible than Holmes and Sunstein assume. They acknowledge that the parliamentarization of constitutional adaptation obscures the distinction between higher and ordinary law. Yet they miss the most obvious temporal dilemma generated by the tendency to reduce constitutional lawmaking to a subset of statutory legislation. As constitutional law comes to resemble an easily revised legal code, constitutions are likely to be filled with provisions no less detailed than those found in statutory law. From one perspective, this trend seems advantageous,

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67. The liberal account of the legislature as a deliberative body was influenced by Montesquieu, 11 *The Spirit of the Laws* 165 (Hafner Press, 1949). Within liberal democratic theory, deliberation has been conceptualized in many different ways, but the fundamental notion of a deliberative legislature has been well-nigh universal, at least until the advent of "realist" democratic theory in the twentieth century.

68. Federalist 70 (Hamilton) in Rossiter, ed., *The Federalist Papers* 426-27 (cited in note 46).

69. For example, see Andráas Sajó's comments on contemporary Hungary. Andráas Sajó, *Limiting Government: An Introduction to Constitutionalism* 39-40 (Central European U. Press, 1999).

since it potentially indicates that constitutional law is undergoing an express and public revision of its fundamental norms in accordance with evolving social and economic realities. However, the easy amendability of constitutional law generates a troubling unintended consequence. Statutory law books are already filled with badly out-of-date rules and standards, in part because the half-life of ordinary legislation tends to decline in the face of social and economic acceleration. The legislative path to constitutional adaptation risks exacerbating the general problem of legal obsolescence by allowing for rapid-fire amendments to a constitutional document that increasingly will be pictured by lawmakers as nothing more than an extension of ordinary legislation. The paradox is that the constitution's easily amendable character simultaneously increases the likelihood of a legal system unduly burdened by legal norms which soon appear far less relevant than they did at the time of their promulgation. Parliament-based constitutional change inadvertently loads the constitutional system with norms embodying quick legislative interventions whose significance may very well prove short-lived. Hence, this mode of constitutional adaptation also seems destined to increase the complexity of constitutional law, which hardly bodes well for the quest to preserve sufficient doses of legal constancy and clarity.

A century ago, Bryce adamantly defended the parliamentary model of constitutional change, favorably contrasting Great Britain's "flexible constitution" to the rigidity of the U.S. system. In some contrast to contemporary defenders of this approach, Bryce was forthright enough to suggest that easy legislative changes to the constitutional system would engender a comparably complicated and even "mysterious" system of constitutional law.[70] Social and economic acceleration increases the likelihood of that undesirable consequence.

(D) Recent history includes sufficient examples of executive-driven constitutional reform, including France (1958), Yeltsin's Russia (1993) and Menem's Argentina (1994).[71] The authoritarian German jurist Carl Schmitt, who advised the Weimar government during the republic's final crisis-ridden hours, is probably the most impressive theorist of this path to constitu-

70. Bryce, *Constitutions* at 13, 22 (cited in note 5).

71. Arendt had this path in mind when she observed that "Napolean Bonaparte was only the first in a long series of national statesmen who, to the applause of the whole nation, could declare 'I am the *pouvoir constituant.*'" Arendt, *On Revolution* at 162 (cited in note 63).

tional change. Schmitt argued that in socially and politically divided political systems, only a popularly-backed executive typically proves capable of initiating major constitutional reform. Amidst crisis scenarios in which the necessity of fundamental constitutional change becomes most pressing, amendment procedures are typically reduced to easily manipulated partisan political weapons, constitutional courts mask their fundamentally political preferences in the disingenuous language of the "rule of law," and pluralistic legislatures find themselves unable to decide on anything meaningful whatsoever. Only a mass-based executive, ruling on the basis of a plebiscite consisting of "an unorganized answer which the people, characterized as a mass, gives to a question which may be posed only by an authority whose existence is assumed," is likely to possess the institutional integrity required by the weighty tasks of constitutional reform.[72]

Schmitt was so enamored of this path because he believed that it could help dismantle the liberal-democratic institutions which he so loathed. The fact that many who disagree fundamentally with his normative and political preferences nonetheless agree that executive-based constitutional reform contains authoritarian implications suggests that he may have been onto something. Constitutional dualism reminds us that no single political institution can legitimately speak in the name of "the people" as a whole. The executive's attempt to claim the mantle of the constituent power is always especially dubious: Whereas a broadly based, *multi-vocal* legislature can sometimes plausibly represent a sizable portion of the diverse views and interests found in society, a single *uni-vocal* executive generally cannot do so.[73] In addition, executive-driven constitutional reform is often accompanied by the specter of political violence, as other political organs are forced to cede their formal authority over constitution-making and accept purely advisory roles. Andrew Arato rightly wonders whether any elected legislature that allows the executive to monopolize constitution-making authority would reasonably do so as "anything other than implicit response to the

72. Otto Kirchheimer, *Constitutional Reaction in 1932*, in Frederic S. Burin and Kurt L. Shell, eds., *Politics, Law & Social Change: Selected Esays of Otto Kirchheimer* 78 (Columbia U. Press, 1969). Schmitt's key arguments on executive-based constitutional change are found in his *Der Hueter der Verfassung* (Mohr, 1931); *Legalitaet und Legitimitaet* (Duncker & Humblot, 1932).

73. This is one of the more familiar reasons for the privileged legislative status of elected representative bodies vis-a-vis the executive in traditional liberal democratic theory.

threat of force."[74] The crisis-situations that serve as the most common terrain for executive-based constitutional change rarely prove conducive to broadly-based popular deliberation and reflection. On the contrary, the executive justifies clamping down on civil liberties and minimizing parliamentary participation because the dictates of the emergency situation allegedly conflict with the luxury of time-consuming deliberation.

The crisis rhetoric often exploited by would-be executive constitutional reformers is revealing. Since Machiavelli, executive power has been intimately associated with the possibility of rapid-fire *agere* in juxtaposition to slow-going *deliberare*.[75] In this spirit, *Federalist 70* notes that only by placing executive authority in the hands of "one man" can unity "conducive to energy," as well as "decision, activity, secrecy, and dispatch," be assured.[76] Montesquieu's observation that a plural executive conflicts with the main purpose of executive power, namely its capacity to act with "dispatch," was already well on its way to becoming dogma by the time Hamilton outlined the basic structure of the U.S. President.[77] The association of the executive with "dispatch" (or speed) remains a crucial feature of contemporary liberal democratic thinking as well. For example, in a pivotal 1936 Supreme Court decision that dramatically enhanced executive authority in foreign policy, Justice Sutherland described the President as the only institutional actor who "can energize and direct policy in ways that could not be done by either Congress or his own bureaucracy. His decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."[78] Executives who aspire to under-

74. Arato, *Civil Society, Constitution, and Legitimacy* at 234 (cited in note 43).

75. See William E. Scheuerman, *Emergency Powers and the Compression of Space and Time* in Yoram Dinstein, ed., *Israel Yearbook on Human Rights* (Kluwer Law Int'l, 2002).

76. Federalist 70 (Hamilton) in Rossiter, ed., *The Federalist Papers* at 424 (cited in note 46).

77. Montesquieu, 11 *The Spirit of the Laws* at 156 (cited in note 67).

78. Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, 119 (Yale U. Press, 1990). *United States v. Curtiss-Wright Export Co.* helped redefine the constitutional structure of U.S. foreign policy making. 299 U.S. 304 (1936). Of course, this example reminds us that executive-based constitutional change is oftentimes assisted by other institutions (for example, the courts). In this way, my typology of constitutional change tends to minimize the empirical complexity of most cases of constitutional change. The same notion of an "energetic" rapid-fire executive paved the way for vast executive discretion in international economic policy. As Ackerman and David Golove note, New Dealers helped provide the U.S. President with heightened authority over foreign trade by arguing that the "country's chief rivals were constitutionally equipped for rapid action. Their chief executives could act promptly. . . It followed that Congress must empower the executive branch to move decisively to make the most of the

take major constitutional reform obviously have much to gain by using, manufacturing, or even simulating crises, since emergencies cry out for rapid-fire responses and the executive is purportedly best suited to initiate such responses.

Fundamental constitutional alteration obviously represents a key aspect of constitutional change. However, constitutional norms are also adapted to social and economic acceleration in less dramatic ways. Social and economic acceleration risks transforming the executive into a privileged site for constitutional adaptation, fundamental or otherwise. Earlier in the essay I noted that the intensification of social and economic change not only requires a more-or-less permanent reinterpretation of constitutional norms, but frequent alterations to the fundamental rules of the constitutional system as well. I also suggested that social and economic acceleration makes it increasingly difficult to draw a clear line between constitutional interpretation and fundamental alteration. These points are important for understanding executive-driven constitutional change as well. If I am not mistaken, there are pressing reasons for expecting the executive to gain most from the process of social and economic acceleration. Our traditional preconceptions about executive power imply that executive-based constitutional adaptation is best suited to social and economic acceleration. If 1) the executive is institutionally best-equipped to undertake rapid-fire action, and 2) ours is a social world in which the need for rapid-fire responses to changing social and economic realities is at a premium, then 3) the executive would seem especially well-adapted to many facets of constitutional adaptation. To the extent that social and economic acceleration implies both *incessant* reinterpretations and *frequent* alterations to the constitutional system, substantial doses of executive-driven constitutional change might seem to represent a perfectly sensible institutional adaptation, notwithstanding its potential normative and political ills. Just as the distinction between interpretation and fundamental alteration so often becomes unclear in legal practice, so too the difficulty of distinguishing between the executive's reinterpretation of the constitutional "rules of the game" and its fundamental modification or alteration of those rules is likely to grow.

Only systematic empirical research can demonstrate whether social and economic acceleration actually contributes to

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nation's economic opportunities" *Is NAFTA Constitutional?* 48 (Harv. U. Press, 1995). This type of argument has been more commonplace than I can demonstrate here.

the amplification of executive authority long observed by political scientists and legal scholars. Nonetheless, there are good reasons for suspecting that the speed-up of social and economic relations represents a neglected part of the familiar story of the growth of executive authority along with the corresponding decay of traditional legal virtues—including constancy and clarity—entailed by executive discretion.[79] Especially in foreign policy, the necessity for "dispatch" functions as a ready justification for undertaking substantial executive-driven alterations to the constitutional status quo.[80] Economic and social crises, and even the relatively ordinary tasks of economic management, also risk increasing the scope of executive prerogative, since the executive seems best equipped to provide the rapid-fire institutional responses required by the high-speed dynamics of contemporary capitalism.[81] In light of the "rapidity, scope, and intensity" of social and economic change, the traditional association of the executive with speed potentially paves the way for unparalleled exercises of executive power.

IV. REVITALIZING CONSTITUTIONALISM?

How then might we combat the tendency of social and economic acceleration to dismantle constancy and clarity in constitutional law, as well as privilege insufficiently democratic modes of constitutional adaptation? A number of proposals on the table suggest that we need not throw our hands in the air in desperation. Ackerman favors streamlining the U.S. system of amendment by minimizing the authority given the state governments by Article V. In his proposal, a successfully re-elected President would be authorized to initiate amendments, which would then be subject to congressional ratification as well as popular approval by means of referenda taking place in the fol-

79. Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (W.W. Norton & Co., 1969).

80. On the growth of executive power in U.S. foreign policy, see the excellent study by Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford U. Press, 1997). On its challenges to traditional liberal conceptions of the law, see Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385, 1400-21 (1989).

81. Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy*, 21 Cardozo L. Rev. 1825, 1825-68 (2000); D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986); William E. Scheuerman, *The Economic State of Emergency*, 21 Cardozo L. Rev. 1869, 1869-95 (2000).

lowing two presidential election years.[82] While liberating the U.S. system of a key source of its extreme laggardness, namely the necessity for ratification by a supermajority of state legislatures or constitutional conventions, Ackerman's proposal nonetheless strives to preserve the basic contours of constitutional dualism. In an analogous spirit, Arato points out that the new democracies in eastern Europe have institutionalized formal amendment rules whose temporal requirements position them between the "extremely rigid American or the totally flexible British constitution" in order to assure a healthy balance between legal constancy and adaptability.[83] Recent constitutional framers have perceptively tried to avoid the excessively static character of the U.S. system of formal amendment as well as the potential ills of undue constitutional fluidity. Arguing that the U.S. finally needs to borrow from recent constitutional innovations abroad, Arato advocates "a new, more differentiated amendment rule" which would allow for easier changes to political institutions, while insulating certain features of the constitutional system (most important, the Bill of Rights and judicial independence). A differentiated amendment mechanism purportedly would allow for greater institutional adaptability while also protecting elements of the constitution where excessive flexibility is disadvantageous. By exposing the Supreme Court to heightened possibilities of override, an additional virtue of this proposal would be its potential prowess as a check on the Court's problematic tendency to act as *constituent power*.[84]

Whatever their particular merits, proposals of this type illustrate how we might begin to outfit constitutionalism more effectively for the exigencies of social and economic acceleration.[85] A central implication of the argument offered above is that any serious discussion of constitutionalism needs to provide adequate room for the phenomenon of social and economic acceleration. Worthy normative and institutional ideas about constitutionalism remain of limited value unless we can demonstrate their suitability to our high-speed world.

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82. Ackerman, *We the People: Transformations* at 410-14 (cited in note 62).

83. Arato, *The New Democracies and American Constitutional Design* at 324 (cited in note 38).

84. Id. at 334-35.

85. Obvious concerns are that Ackerman's proposal unduly downplays the federal structure of Article V; the key role of the executive in initiating amendments also raises the specter of excessive plebiscitarianism. In a recent article, Ackerman seems to acknowledge the latter danger. Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 634, 634-729 (2000).

If such institutional reflections are to bear fruit, however, they will also have to reexamine a traditional pair of assumptions that played a crucial role in much of the argument developed above. At various junctures I referred to the presupposition, widely shared among modern liberal democratic theorists, that deliberation involving anything more than a small number of individuals is necessarily time-consuming: When a relatively substantial group of participants engages in cognitively sophisticated deliberation where a broad array of views is formulated and acknowledged, and a no less rich array of interests expressed, deliberation will have to be measured and unhurried. In order to take a reasonable and thereby legitimate form, deliberation *takes time*, and this holds for both political life at large (for example, in civil society) and for those formal institutions (most important, the legislature) intended to be representative and broad based in character. As we saw above, this assumption is indispensable for understanding the U.S. model of constitutional dualism, as well as the conception of formal amendment deriving from it; the framers of the U.S. Constitution burdened subsequent generations with the demanding procedures of Article V in part because they wanted to encourage a high level of circumspection in higher constitutional lawmaking. This assumption is also crucial for understanding the failure of the existing U.S. instantiation of constitutional dualism to deal adequately with social and economic acceleration; formal amendment has been neglected in part because of its temporal misfit with high-speed social and economic activity. As I also tried to argue in the previous section of this essay, some important institutional attempts at constitutional adaptation can be understood as compensatory adjustments to that temporal misfit.

We also saw that the orthodox picture of the "energetic" executive as capable of rapid-fire action continues to play a significant role in liberal democratic thinking. I suggested that this presupposition potentially opens the door to an executive-dominated system of constitutional adaptation, and that legal and political appeals to the executive's high-speed character have helped justify its increasingly impressive powers. Although empirical verification is still called for, this assumption likely constitutes one source of the enormous expansion of executive authority in the twentieth century. The dictates of speed cry out for flexible, rapid-fire institutional responses, and the classical temporal portrait of the executive easily leads political and legal

actors to deem the executive best attuned to tackling the imperatives of constitutional adaptation in an age of speed.

But what if the traditional contrast between slow-going *deliberare* and high-speed *agere* no longer makes sense? What if we need presuppose neither a misfit between popular deliberation and social and economic acceleration, nor the superior suitability of the executive to the imperatives of speed? In fact, the modern executive is a complex institutional entity, made up of a host of (oftentimes competing) administrative units, and the emphasis in traditional reflections on the unitary and even solitary nature of executive power obscures the empirical realities of executive decision making. Even when the executive branch acts unilaterally, relatively simple undertakings can still prove arduous and time-consuming, as anyone familiar with the less-than-efficient operations of most executive-based dictatorships can attest.[86] Uncritical reliance on Hamilton's concretistic description of the executive as "one man" meshes poorly with the decision-making realities of modern executive power and the modern administrative state. Similarly, traditional temporal accounts of popular deliberation require reexamination as well. For example, early modern discussions of popular deliberation arguably presuppose underdeveloped forms of transportation and communication; well into the nineteenth century, elected representatives were forced to engage in time-consuming travel in order to meet their colleagues, and correspondence or news might require weeks or even months to reach its target. In an age of instantaneous communication and high-speed travel, the temporal presuppositions of popular deliberation are dramatically different than in the days of Alexander Hamilton or even John Dewey, as new technologies allow huge numbers of people to exchange views at unparalleled speed. The association of popular deliberation with "slowness" no longer deserves the self-evident character that it possessed for so many of our historical predecessors.

These concluding observations raise numerous unanswered questions, not the least of which concerns the difficulty of achieving reasoned and well-considered deliberation in an era of high-speed communications technology.[87] But they also point to

86. For an account highlighting the sluggishness and inefficiency of an executive-based state, see Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933-44* (Oxford U. Press, 1942).

87. For example, see the lively exchange on the question *Is the Internet bad for democracy?* including contributions by Cass Sunstein, Shanto Iyengar, Ronald Jacobs, Henry Jenkins, Robert McChesney, Jay Rosen, and Michael Schudson (26 Boston Rev.

the prospect that social and economic acceleration contains positive implications for liberal democracy neglected in the story recounted above. Although social and economic acceleration risks disabling democratic modes of constitutional adaptation and contributing to the decay of constancy and clarity in constitutional law, it may also open up new possibilities for renewing liberal democratic constitutionalism. If liberal democracy is to become a progressive and forward-looking "vital force" as Dewey hoped in 1935, we will need to think hard about how the age of speed not only threatens constitutionalism, but potentially points the way to its revitalization as well.

4-24 (Summer 2001)). See also generally Darin Barney, *Prometheus Wired: The Hope for Democracy in the Age of Network Technology* (U. Chicago Press, 2000).