

Featured Article

Three Paths to Constitutionalism – and the Crisis of the European Union

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There are three paths to constitutionalism in the modern world. Under the first, revolutionary outsiders use the constitution to commit their new regime to the principles proclaimed during their previous struggle. India, South Africa, Italy and France have followed this path. Under the second, establishment insiders use the constitution to make strategic concessions to disrupt revolutionary movements before they can gain power. Britain provides paradigmatic examples. Under the third, ordinary citizens remain passive while political and social elites construct a new constitution. Spain, Japan and Germany provide variations on this theme. Different paths generate different legitimation problems, but the EU confronts a special difficulty. Since its members emerge out of three divergent pathways, they disagree about the nature of the union's constitutional problem, not merely its solution. Thus the EU confronts a cultural, not merely an economic, crisis.

A NEW ANSWER TO WEBER'S QUESTION?

Law legitimates power. Constitutionalism is part of this larger project. But how do constitutions gain their claim to authority?

I will be exploring this question in the spirit of Max Weber, who famously distinguished three ways in which power seeks to legitimate its authority: by appealing to tradition, charisma or bureaucratic rationality. This famous list remains relevant, but it does not adequately enlighten the authority of constitutionalism in today's world. It's past time to move beyond Weber and build a new series of ideal types that does justice to constitutionalism's legitimating logics.¹

In making this effort, my aim is not to pass philosophical judgement on the merits of constitutionalism.² I am inviting you to embark on a sociological and historical inquiry into the ways in which elites, and the general public, may come to believe that their constitution has transformed the sheer exercise of power into the legitimate exercise of authority.

This is an ambitious task, but it should not be confused with an even more ambitious one. I am not trying to provide a complete causal account of the conditions under which a constitutional system will sustain itself over time. Even though a regime generates broad belief in its constitutional legitimacy, it may be crushed by military defeat or overwhelmed by economic depression. Or the opposite may be true: even though almost everybody believes that the constitution is a sham, they will continue to support the system as long as it delivers prosperity and national security.

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¹ For an incisive analysis of the sources of Weber's failure to confront constitutionalism, see Kalyvas (2008, 65–78).

² For an effort along these lines, see Ackerman (1980).

Nevertheless, the presence or absence of a widespread belief in constitutional legitimacy can play an important – sometimes, all-important – role in shaping political life. So the dynamics that may generate such commitments are worthy of sustained study.

THREE IDEAL TYPES

I begin by sketching three paths to constitutionalism. Under the first scenario, a movement of revolutionary outsiders mobilizes against the existing government at Time one. Many would-be revolutionaries are crushed at this point, but some have triumphed over the status quo.

This sets the stage for the founding of the new regime at Time two. During the period of struggle against the old order, the insurgents issued public declarations justifying their sustained acts of resistance. Now that they have gained power, they translate these declarations into a constitution that commits the new regime to their revolutionary principles and organizes power to prevent a recurrence of past abuses.

Since the revolutionaries challenge the status quo, they often gain ascendancy after a military struggle. For example, Nelson Mandela's African National Congress would never have gained power without decades of guerrilla warfare by the Spear of the Nation. Similarly, the political leaders who constructed the constitutions of Italy and the French Fourth and Fifth Republics won their popular authority to establish post-war constitutions on the basis of their support of the militarized struggle of the Resistance against the regimes of Petain and Mussolini.

But revolutionary movements also rely on more peaceful forms of civil disobedience – as in the case of Nehru and the Congress Party in India or Wałęsa and Solidarity in Poland. The key point is that the movement's sustained self-sacrifice during Time one produces broad public recognition of its legitimate authority to establish a new constitution in the name of the people at Time Two.

Insider Constitutionalism

Constitutions also emerge from a very different pathway. In this second ideal type, the political order is constructed by pragmatic insiders, not revolutionary outsiders. When confronting popular movements for fundamental change, the insider establishment responds with strategic concessions that split the outsiders into moderate and radical camps. When this strategy works, the insiders reinvigorate their authority by enacting landmark reform legislation that invites 'sensible' outsider groups to desert their more radical brethren and join the political establishment to govern the country.

Great Britain provides a paradigmatic example. During the Napoleonic Wars, its governing elite repudiated revolution as a model for legitimate change. But over the next generation, the establishment reached out to 'sensible' outsiders by enacting the Reform Act of 1832. This set the stage for further acts of strategic concession at later moments of popular confrontation. During the twentieth century, perhaps the most salient example was the Parliament Act of 1911, which legitimated the politics of redistribution characteristic of the modern welfare state.

Such landmarks represent fundamental elements of the British constitution, but they lack ringing statements of principle comparable to those found, say, in the South African Bill of Rights. Nor were they adopted in the name of a mobilized movement for a revolutionary redefinition of political identity. They emerge instead as strategic concessions adopted through the pragmatic adaptation of pre-existing lawmaking institutions.³

³ Murkens 2014.

These great reform statutes seem so different from revolutionary constitutions that scholars often deny that the British have a Constitution at all. This claim might make sense if 'constitutionalism' were a label designating a 'one-size-fits-all' model of legitimation. But this is precisely what I want to deny. Countries travelling down the insider track do indeed place great value on achievements like the Parliament Act. As later generations are socialized into the governing elite, they are trained to use these *precedents of responsible government* as reference points for legitimate action when confronting the populist challenges of their own time.

Britain's relative success in the art of pragmatic adaptation has influenced many parts of the Commonwealth – most notably Australia, Canada and New Zealand – which share a disdain for abstract constitutional principles and emphasize the importance of prudent adaptation.

Elite Constructions

Both ideal types emerge out of high-pitched struggles, but generate different outcomes. Under the insider scenario, the political establishment makes strategic concessions that undermine outsider momentum; under the outsider scenario, the establishment fails in its attempts at repression or co-optation and is overwhelmed by the revolutionary constitutional order.

But regime change sometimes occurs without the pressure of a massive popular uprising, and this requires us to add a third ideal type: elitist constitutionalism. Under this scenario, the old system of government begins to unravel but the general population stays on the sidelines in relative passivity. The emerging power vacuum is filled instead by previously excluded political and social elites, who serve as a principal force in the creation of a new constitutional order.

Sometimes the new elite constitution allows the old elites to retain a significant share of power, and sometimes it doesn't. But whatever the particularities, the key point is that the new regime is an elite construction, not a revolutionary creation.

Elite constructions are also distinguishable from insider constitutions. Under the insider scenario, the political establishment remains in control of the situation – making strategic concessions that take the wind out of the sails of the insurgent movement. In the third model, the existing regime is experiencing such a severe crisis that political insiders can only hope to retain a share of power by making an elaborate compact with outside elites.

This insider-outsider deal generates a constitution that looks very different from the pragmatic reform statutes that serve as precedents of responsible government in the insider model. The constitution emerging from the third pathway is typically an elaborate document in which both sides define, and commit themselves to, the new rules of the game.

In developing these texts, the protagonists may often borrow heavily from provisions originating elsewhere – often from constitutions that have previously emerged from the revolutionary pathway. Following these models, elite constructions will typically claim to speak in the name of the People. Despite such lofty appeals to the *pouvoir constituant*, however, their constitutions have not in fact been propelled into existence by any comparable revolutionary movement.

Spain provides a revealing example. Franco's death propelled the Falangist regime into a succession crisis. Haunted by memories of the Spanish Civil War, moderates led by King Juan Carlos pre-empted another revolutionary upheaval by reaching an accommodation with Franco's bitterest enemies. Resisting hard-line pressures, the young king appointed Adolfo Suarez prime minister, who reached out to bitter opponents – most notably Santiago Carillo, leader of the illegal Communist Party. With the support of the army chief of staff and the leader of the Spanish Church, Suarez prevailed upon the Falangist legislature to pass a Law for Political Reform, setting the stage for free elections that included the Communists. When the electorate gave left and right

extremists low levels of support, moderates were in a position to elaborate a democratic constitution, which was overwhelmingly approved by the voters in a referendum.

These votes were important, but they should not be confused with the kind of mass mobilization that serves as the primary engine of revolutionary constitutionalism. It was instead the decisive action by the king, who thwarted a military coup against the elected government in 1981, that began the generation-long process of constitutional consolidation.⁴

I emphasize this point because elite constructions confront very different legitimation problems from those emerging from the first two ideal types. Our next job is to diagnose these differences.

DIFFERENT TYPES, DIFFERENT PROBLEMS

Let's start again with revolutionary constitutionalism. The great problem looming down this pathway is the specter of totalitarian dictatorship. Lenin and Mao, no less than Nehru and Mandela and De Gasperi and De Gaulle, gained power after revolutionary challenges to the ancien regime. Yet the constitutions generated by the Communist Party have served as mere propaganda devices for Stalinist/Maoist terrors, and have failed to seriously constrain the subsequent authoritarianisms of a Khrushchev or a Xi Jinping.

During the Cold War, these Communist shams were viewed as almost-inevitable consequences of serious revolutionary takeovers. But this is Cold War distortion. In a series of intensive case studies, I mean to elaborate the rich constitutional legacy left behind by twentieth-century revolutions.⁵

Consider India. Its pervasive poverty, illiteracy and caste system seem to be a recipe for authoritarianism. Indeed, the country doesn't even have a common language. Yet its constitutional order has, for all its imperfections, sustained a remarkably vital democratic life for almost three-quarters of a century.

How did this happen?

Any sensible answer must recognize the key role of the Congress Party – the revolutionary movement led by Gandhi and Nehru that sealed its success with the promulgation of the constitution of 1950. Despite many differences in detail, South Africa is the scene of a similar success story. These case studies provide a new perspective on European exercises in revolutionary constitutionalism in places like France, Italy and Poland. As our worldwide comparison proceeds, a common pattern emerges.

I call it the *constitutionalization of charisma* – to suggest an analogy to a similar, but different, process that Weber famously portrayed in describing the *bureaucratization of charisma* over time.

Constitutionalizing Charisma

For present purposes, it must suffice to sketch two fundamental aspects of the constitutional dynamic: one political, the other legal.

Let's begin with the political. During its first generation, the constitution reinforces the legitimacy of revolutionary leaders who initially gained power only after making great personal sacrifices – spending years in prison or exile before triumphing over the old regime. As this generation dies off, it is replaced by lots of opportunists who see the old revolutionary parties as

⁴ Fernandez-Miranda and Fernandez-Miranda 1995; Linz and Stepan 1996. Maravall (1982) emphasizes the role of mass strikes in pushing the process forward, but does not challenge my basic claim.

⁵ Ackerman forthcoming.

springboards to power. These aging movement parties may also attract second-generation activists seeking to reinvigorate old ideals. But even they can't claim the charismatic authority earned by their predecessors.

After all, the first generation didn't just talk revolution; they actually won the struggle. But the second generation can't make a similar claim. Except in extraordinary circumstances, political authority moves in the direction of *the normalization of revolutionary politics*.

The opposite is true among the lawyers, and other professionals, who seek to interpret the enduring meaning of the constitution. During the first generation, these professionals are all too aware that the revolutionary text is a strange legal creature, which they haven't yet domesticated through decades of disciplined argument. This predisposes them to avoid sharp confrontations with the charismatic leaders who stand at the helm of the republic. Nevertheless, their tentative legal interpretations lay the foundation for succeeding generations, who increasingly view constitutional law as an established part of their professional repertoire.

As an increasingly confident judiciary confronts an increasingly normalized political system, the two sides engage in an intensive struggle over competing claims to serve as the ultimate guardian of the revolutionary constitutional inheritance. These struggles take very different forms in different places.

But for now, it is enough to emphasize one key point: these political-legal struggles for supremacy are categorically different from those arising in polities that are travelling down the other two paths to legitimacy.

Elitist Problematics

Consider the insider paradigm of responsible government. Within this framework, it makes no sense for constitutional courts to assert guardianship of the revolutionary principles established by the founding text – since the very idea that the people can speak during moments of revolutionary upheaval is treated as populist claptrap.

The proper role of courts is understood very differently. Rather than preserving the People's will against the depredations of political opportunists, the judges offer themselves as useful collaborators in clarifying the evolving tradition of elite rule – proposing insightful ways of modifying historical precedents in light of current challenges. This collaborative path is precisely the one that courts have pursued in Britain and other Commonwealth countries over the past half-century.⁶

Insider regimes also confront different challenges to their ongoing authority. In contrast to their revolutionary counterparts, the threat isn't party dictatorship. It is the gradual erosion of the public's confidence in the elite's capacity for statesmanship – with grass-roots movements gaining increasing success in portraying the establishment as blundering snobs who are unworthy of respect. The recent rise of referenda in Britain and the Commonwealth may well be a danger signal in this regard.

Let's move onward to consider the distinctive problems confronting our third ideal type. For starters, elite constructions lack the legitimation resources provided by either of the preceding paradigms. On the one hand, they can't point to the broad popular legitimacy earned by revolutionary constitutionalism; on the other, they lack the long history of successful statecraft through which an established elite gains popular respect. How, then, is the elitist constitution to establish its authority to the broader population?

With difficulty.

⁶ Gardbaum 2013; Stephenson 2014.

Call it the authenticity problem. We see it on display in Spain today. Despite its relatively good performance over the past generation, the post-Franco constitution has failed to convince many Basques and Catalans of its legitimacy – generating the current conflict between Madrid and Barcelona over the terms of a referendum for Catalan independence.

There is a broad analogy between this stand-off and the recent confrontation between Westminster and Scotland, which also revolved around a vote on national independence. But the legal form of the referendum has very different meanings within different ideal types. The British establishment characteristically muddled its way to a compromise, which permitted the referendum to proceed to a No vote on independence.

The Madrid government, with the support of the constitutional court, insists that the very effort to hold a referendum is unconstitutional. The Catalan regime has responded by announcing plans to hold an ‘informal’ – aka illegal – referendum on its own authority. If this results in a Yes vote, will the government in Barcelona use it as a sign that the mobilized People of Catalonia demand a revolutionary breakthrough to a new constitutional identity?

The current confrontation on the peninsula only serves to introduce the authenticity problems confronting other elite constructions. At least the Spanish constitution was written by indigenous elites. In contrast, those of post-war Germany and Japan were constructed under military occupation by the Allies; moreover, these elite constitutions were adopted without any effort to obtain the consent of ordinary voters in a referendum. In such cases, why should the general public respect their legitimacy after the military occupation comes to an end?

Sometimes, this question has no answer. Consider the collapse of the constitutions of occupied Iraq and Afghanistan as the military occupations come to an end.

Sometimes the question only arises after a long period of quiescence. Consider today’s Japan – where the Abe government is challenging the Peace Article of the constitution imposed by General MacArthur after the war. If Abe succeeds, this will be the opening salvo in his larger campaign for a sweeping repudiation of the MacArthur constitution as an inauthentic expression of Japanese values.⁷

Which leads to an obvious question: How has Germany avoided a similar reckoning with its Basic Law?

The role of the Allied occupation wasn’t as overwhelming as in Japan. But it was still very significant, beginning with the conditions laid down by Britain, France and the United States in the London Protocol.

Two of the protocol’s key demands were, first, that the Parliamentary Council draft a document called a constitution and, second, that the council submit its proposal to the German people for approval in a referendum. The precise point of these demands was to safeguard the constitution against later charges of inauthenticity.

The London Protocol was addressed to the leaders of the newly created governments in each of the occupied zones. But the rising West German political elite rejected these demands. To emphasize its provisional character, they called their initiative a ‘Basic Law’ instead of a constitution. Indeed, the Final Article of their document proclaimed that a truly authentic constitution could be promulgated only when the citizens of the East joined the Westerners at a new Constituent Assembly.

They also defied the Allies by refusing to submit their Basic Law to a referendum because: (1) it might have lost in Bavaria, (2) Hitler had degraded such Volkish appeals and (3) they feared that it would legitimate a parallel Soviet effort to construct a constitution for East Germany.⁸

⁷ Ackerman and Matsudaira 2014.

⁸ Ackerman 2008.

These acts of defiance had a profound impact. As Donald Kommers explains, ‘Opinion polls showed that...a majority of the respondents were not even aware of the Parliamentary Council’s existence. In May of 1949, a survey found that two-thirds of them were not sure what the Basic Law was...West German voters were denied the chance to approve the constitution, depriving them of the knowledge they might have gained...had a popular campaign for ratification taken place’.⁹

Within this context, the Basic Law’s famous ‘eternity clauses’ have a very curious ring. What does it mean for an emphatically provisional document to proclaim the ‘eternal value’ of human dignity? What does it mean for it to proclaim ‘democracy’ as an eternal value when its proponents refuse to submit the Basic Law to a vote?

The authenticity problem arose once again in 1989. With East German demonstrators chanting *Wir Sind das Volk*, the vice president of the West German Constitutional Court, Ernst Gottfried Mahrenholz, insisted that the government was under a high obligation to convene a Constituent Assembly of the entire German people to hammer out a true constitution.¹⁰ While Mahrenholz presented the case most persuasively, many others made similar demands to redeem the Final Article and transform the Basic Law into a constitution through an authoritative act of popular sovereignty.

Helmut Kohl, however, was not among them. The last thing he wanted was a lot of East German Communists and West German leftists entering a Constituent Assembly to challenge the legitimacy of his government. He refused to heed the Final Article, and engineered reunification through one of the most curious international agreements in legal history. A standard treaty is negotiated by sovereign states to regulate future relationships with one another. But the Reunification Treaty extinguished the existence of the DDR at the very moment it signed the agreement.

Yet a quarter century later, Germany has managed to forget the fact that, in both 1949 and 1989, its political elite refused to place the constitution before the voters for their considered judgement.

How to account for this act of collective amnesia?¹¹

During the 1950s and 1960s, it was the economic miracle, not the Basic Law, which played the central role in legitimating the rise of the Federal Republic from the ashes of the Nazi catastrophe. If there was a single pre-eminent symbol of the New Germany during this period, it was the deutsche mark, not the ‘eternity clauses’. But over time, the German Constitutional Court successfully made the Basic Law into a central element of political identity – to the point that the replacement of the mark by the euro in the 1990s could occur without the national trauma that would have accompanied a similar displacement in the 1960s.

But once again, the court’s role in Germany was very different from those played by judiciaries emerging out of the previous two scenarios. It did not root the Basic Law in the revolutionary achievements of the constitutional past, since there weren’t any. Nor did it engage in a modest collaborative enterprise with the established political branches, as in Great Britain and the Commonwealth. Instead, the court projected itself into the public space as the pre-eminent guardian of the new Germany’s foundational commitments to fundamental rights and Enlightenment values. Of course, the way the court has gained public acceptance for its claim to constitutional supremacy is a complicated matter, which deserves sustained discussion.¹²

⁹ Kommers forthcoming, 1, ch. 3.

¹⁰ Mahrenholz 1992.

¹¹ For a powerful critique, see Jaggi (2012).

¹² Collings 2016; Hailbronner 2014.

But for now, let's stand back and return to the larger implications of my claim that there are three, not one, distinct paths to 'constitutionalism'. To drive this point home, consider how my trinitarian view adds up to a special trilemma for the European Union (EU) at its present moment of vulnerability.

THE EU CRISIS: A CULTURAL DIAGNOSIS

There is an ongoing disagreement over the nature of the EU. Some believe it is broadly comparable to other great federations – most notably the United States. Others view it as unique.

My argument pushes me into the uniqueness camp, but for a distinctive reason. The leading nations of Europe come to the union along different paths: the constitutions of Germany and Spain are elite constructions; France, Italy and Poland are revolutionary achievements; and Great Britain emerges from an insider tradition.

Little wonder, then, that these countries have trouble finding a common pathway to a more perfect union. The French and Italians and Poles are open to transformative appeals to the People of Europe; the British prefer muddling through; and the Germans are utterly perplexed by the very idea that either political elites or mobilized movements may legitimately repudiate foundational constitutional commitments.

No similar disagreement exists in the United States. From the founding through the Civil War, the New Deal and Civil Rights Revolutions, the American constitution has been repeatedly transformed by mobilized outsiders under the leadership of George Washington, Abraham Lincoln, Franklin Roosevelt, and the team of Martin Luther King and Lyndon Johnson – or so I argue in my *We the People* series.¹³

Behold, then, a paradox: while present-day Americans bitterly disagree on the legitimacy of the welfare state, they do not disagree on the appropriate way to resolve this escalating dispute. Quite simply, if a Tea Party Republican wins the White House in 2016, the new president will unite with his right-wing allies in Congress to revolutionize the constitution by transforming the personnel of the Supreme Court. As liberal justices retire, their replacements will join their conservative brethren to sweep away, by a series of seven to two votes, many of the hard-won achievements of the New Deal-Civil Rights revolutions.¹⁴

If the voters should choose to propel this judicial revolution forward in the coming election, I will certainly join the cadre of progressive lawyers who will be desperately trying to limit its doctrinal impact. But as a scholar, I won't be able to deny that President Tea Party's effort to pack the Supreme Court with disciples of Antonin Scalia will look very similar to the court-packing maneuver used by Franklin Roosevelt to transform the court with progressive appointments like Felix Frankfurter and Robert Jackson.

There is, of course, an irony here – if Republicans emerge victorious in 2016, they will predictably repudiate the New Deal through the very technique of transformative judicial appointment that constitutionalized the New Deal in the first place.¹⁵ But defenders of the American welfare state have better things to do with their time than muse over the ironies of history. If they hope to preserve the revolutionary achievements of the New Deal, their presidential candidate had better win the 2016 election.

Europeans are in a very different situation. They are not presently raising fundamental challenges to their social democratic legacy. But because they emerge from disparate

¹³ Ackerman 1991, 1998, 2014.

¹⁴ Ackerman 2014, 311–40.

¹⁵ Ackerman 1988.

constitutional cultures, they are having a tough time dealing with the politics of regional redistribution that is a standard feature of all (con)federations. In America, for example, the rich North and the poor South have been battling over the distribution of federal money for a very long time. But these disputes don't risk unravelling the revolutionary constitutional heritage built up over the centuries.

In contrast, the EU may well disintegrate as grass-roots movements in the South mobilize against the austerity programs imposed by Brussels and Frankfurt. If the union's political and banking institutions fail to respond constructively to outsider challenges by Syriza and other left-wing movements, the resulting impasse will make it even more difficult for it to confront the disruptive challenges from nationalist movements in the coming British and French elections.

These emerging struggles would have been framed differently if recent European history had taken a different turn. A decade ago, the member states met in Brussels to launch an appeal to the Peoples of Europe to constitutionalize their political identity through the ratification of a constitutional treaty. If this campaign had succeeded, Europe would have been in a much better position to deal with current grass-roots challenges threatening union-wide legitimacy.

This point is ignored by scholars who emphasize that the substantive provisions of the Constitutional Treaty were largely endorsed by the Lisbon Treaty, which currently provides the basic framework for the union. But Lisbon, and more recent agreements, were elite constructions that avoided, as much as possible, self-conscious consideration by the People(s) of Europe at referenda. This decade of evasion is allowing rising protest movements to present the union and the bank as alien forces dominated by harsh technocrats, with union politicians serving as pseudo-democratic ornaments.

Is there a way out of this impasse?

I do not know.

My aim here is diagnosis, not cure.

There is some consolation, however, in reflecting on a basic limitation of my analysis. As Weber emphasized, no real-world polity perfectly expresses any ideal type. One type may predominate – in the case of the EU, elite constitutionalism – but particular historical experiences generate counter-themes from competing paradigms. I hope that this essay provokes Europeans to think more deeply about the distinctive mix of constitutional cultures currently prevailing on the continent – and to develop the cross-cultural themes that have the greatest promise to sustain the legitimacy of the union at this dangerous moment in its history.

Only one thing is clear: it is better to be self-conscious about the union's cultural trilemma than to blunder forward blindly in the hope that top-down impositions will suffice.

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