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RESTORATIVE CONSTITUTIONALISM

David Landau and Rosalind Dixon*

Cass Sunstein and other scholars have distinguished between two forms of constitutionalism – preservative constitutionalism, which looks to maintain the status quo, and transformative constitutionalism, which aims to transcend a flawed constitutional history and achieve a better future. In this article, we introduce a third, undertheorized mode of constitutionalism, which we call restorative. Restorative constitutionalism seeks a return to a lost, more authentic constitutional past, whether real or imagined. Restorative discourse in modern United States constitutionalism is dominated by conservative calls for originalist judicial interpretation. But originalism is only one subset of restoration, and indeed restorative discourse has been present at many moments in U.S. history, including in both the Trump and Biden administrations. We survey examples of restorative constitutionalism both inside and outside the United States, and show that it is a powerful and varied mode of change that can facilitate popular and elite consensus and repair damage wrought by anti-democratic political actors. Restoration is not without risks: it may restrict the horizons of constitutional imagination and be abused for authoritarian ends. Nonetheless, progressives would be well-served by engaging with restorative constitutional discourse, rather than treating it as a trap and allowing it to be monopolized by conservative constitutionalists.

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Contents

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INTRODUCTION

American conservatives are quick to remind us of the benefits of a return to the constitutional past. Modern constitutional conservatism has been dominated by originalism, which calls for constitutional change via judicial interpretation in order to return to true historical meaning of the United States constitution. The Trump presidency was likewise saturated with a restorative discourse, one which sought a return to a gauzy, romanticized, and perhaps illiberal past, most obviously encapsulated in the campaign slogan "Make America Great Again."

In this article, we argue that these movements are subsets of an undertheorized mode of constitutional discourse that we call "restorative constitutionalism." Cass Sunstein and others have distinguished two forms of constitutionalism, "preservative" and "transformative." Preservative constitutionalism aims at maintaining and protecting existing institutions and social ordering. Transformative constitutionalism tries to alter the status quo in pursuit of a constitutional vision saturated with social and political change.[1] We demonstrate that there is also a third, much less noticed mode of constitutionalism that is "restorative" in its aims or focus, and which attempts to return to a real or imagined constitutional past.[2]

While recent events in the United States demonstrate the power of a restorative discourse of constitutional change for the right, the appeal of restoration extends beyond conservative legal and political movements. The Biden administration has also been dominated by a

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[1] *See, e.g.,* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004); Karl Klare, *Legal Culture and Transformative Constitutionalism,* 14 S. AFR. J. ON HUM. RTS 146 (1998).

[2] There are some notable exceptions to the neglect of restoration in the comparative literature. *See, e.g.,* William Partlett, *Restoration Constitution Making*, 9 VIENNA J. CONST. L. 514 (2015); Symposium: Restoring Constitutionalism, VERFASSUNGSBLOG, Dec. 2021-Jan. 2022, at https://verfassungsblog.de/category/debates/restoring-constitutionalism/.

restorative constitutional project, one that can be seen as a dueling vision to Trump's restorative message, envisioning a very different kind of past. In contrast to the distant, romanticized past of Trump, Biden has called for a return to a pre-Trump America: he has focused on undoing the damage that (in Biden's telling) an allegedly abberant presidency wrought in the U.S. Historically as well, restorative rhetoric has been a surprising underpinning for progressive projects, including the making of the Reconstruction amendments after the Civil War, which were paradoxically defended in part as returning to the original meaning of the U.S. constitution.

Outside of the United States, restorative projects of constitutional change are also common and widely varied. In some contexts, such as in Colombia and Ecuador after strongmen presidencies and in India after Indira Gandhi's infamous "Emergency" in the 1970s, successors called for a return to the constitutional order that existed before democracy was damaged. In this sense, their projects and discourse were very similar to those of Biden. Restorative constitutionalism may be especially important as a response to countries trying to recover from an episode of democratic erosion or "abusive" constitutional change.[3] In contrast, in other contexts such as Hungary over the past decade or so, populists have called upon a romanticized, homogenous, and imagined past as justification for an illiberal and authoritarian regime. The Hungarian project, embodied in a new constitutional text, has some resonance with Trump's project.

Our survey of restorative forms of change yields important insights. Restorative thinking in the contemporary United States has often been dominated by a single project – originalist constitutional interpretation. But restorative projects at other times and places have focused on a much wide range of tools of constitutional change, including constitutional amendment and replacement, as well as legislative changes and various types of informal constitutional change. Originalism is, in fact, just one small subset in the vast toolkit of restorative forms of constitutional change.

Moreover, restorative projects make many different choices about

[3] David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); ROSALIND DIXON AND DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY (2021).

the kind of past that they identify, sometimes more concrete and recent, and other times more distant and romanticized, even imagined. The Trump and Biden presidencies, for instance, illustrate divergent uses of restoration in the United States – in the first a return to a gauzy, distant, and illiberal past, and in the second an effort to reverse perceived democratic erosion resulting largely from the Trump presidency itself.

The inherent malleability of restorative discourse, and the many different kinds of pasts that can be drawn upon, highlights a key point: while restorative discourse in the United States has been largely captured by the political right, restoration has no obvious political valence, and can be used to achieve a wide variety of political goals. Both historically and comparatively, all sorts of political movements, left and right, have made use of restorative constitutional discourse.

We argue that the reason for this widespread use is clear: restorative constitutional language has substantial appeal in many constitutional systems and contexts, and thus can offer advantages over other framings. Restorative discourse can help generate consensus among politically divided citizens and political elites, who may otherwise be unable to agree. At the popular level, a restorative framing may enhance the appeal of a project to the public, especially where the entrenched constitutional order has broad support. At the elite level, restorative goals may facilitate relative consensus in circumstances where agreement about future direction is more elusive. Linking projects of change to the constitutional past can be a powerful way to increase their resonance. In addition, restoration may help leverage nostalgic attitudes toward the past in support of constitutional change.

American progressives ignore the logic and appeal of restorative constitutional ideas at their peril. That is not to say that such appeals are without danger. For one thing, they can limit the reach of the constitutional imagination. That is, they can cramp the scope and ambition of necessary change, although we will argue that there are ways to mitigate that risk both by calibrating the vision of the past and by balancing restoration with other discourses such as transformation. Moreover, as both Hungary and Trump may show, restorative constitutional appeals can sometimes be used in service of illiberal,

anti-democratic ends, although all framings of constitutional change are sometimes abused in a similar way. Careful attention to the type of past and the context in which the restorative claim is made should help to identify and limit the abuse of restoration.

Despite these dangers, it is imperative that we pay greater attention to the forms, purposes, and prevalence of restorative constitutional discourse. While conservatives in the United States have embraced restoration openly, progressive projects may also benefit from wielding the malleable, multifaceted discourse of constitutional restoration in order to achieve their goals. Rather than viewing restorative rhetoric as a trap, as Ryan Doerfler and Samuel Moyn have recently suggested,[4] progressives may be better served by embracing its potential.

The rest of this article is divided into five parts. In Part I, we define and situate the concept of restorative constitutionalism and emphasize its character as a discourse or framing of constitutional change. We also demonstrate that restorative forms of constitutional change, like all forms, can be undertaken via a number of different pathways, of which originalist constitutional interpretation is only one possibility. Part II examines the uses of restorative discourse in the U.S., focusing on four moments – the Reconstruction period, the modern conversative development of originalism, the Trump presidency, and the Biden presidency. Part III briefly surveys restorative projects outside of the U.S., demonstrating its usefulness in recovering from prior regimes engaged in abusive, anti-democratic constitutional projects in Colombia, Ecuador, and India, as well as its use to facilitate an abusive constitutional project in Hungary. Part IV uses these case studies to draw out the power that a restorative framing of constitutional change can provide, but also identifies risks that can and have emerged. Finally, Part V concludes by emphasizing the malleability and multifaceted nature of restorative framings of constitutional change, and thus their potential value not just to the modern American right, but also to the progressive left.

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[4] *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021); Samuel D. Doerfler & Samuel Moyn, *Op-Ed: The Constitution is Broken and Should Not be Redeemed*, N.Y. TIMES, Aug. 19, 2022, at https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html.

I. SITUATING RESTORATIVE CONSTITUTIONALISM

In this section, we first define restorative constitutionalism in contrast to existing work that constructs a dichotomy between transformative and preservative constitutionalism. Then we explain the different ways in which restorative constitutionalism can occur.

A. Restorative, Transformative, and Preservative Constitutionalism

Scholarship in comparative constitutional law and constitutional theory have increasingly recognized different forms of constitutionalism. An important contribution occurred after the writing of the post-apartheid South African constitution of 1996. Scholars defined the South African constitution as a "transformative constitution," in contrast to what they thought of as the standard model of constitutionalism, which was viewed as preservative in nature.

In an influential article on South Africa, Karl Klare defined transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction." [5] He further argued that it involved "inducing large-scale social change through nonviolent political processes grounded in law."[6] And he set up a basic tension between the social transformation called for in the constitutional project and a formalist legal culture, arguing that this culture would be at least one major obstacle to the transformative project.

Klare's article sparked an outpouring of work on transformative constitutionalism, one which however has acknowledged serious difficulties defining the concept.[7] It seems commonplace to

[5] Karl Klare, *Legal Culture and Transformative Constitutionalism,* 14 S. AFR. J. ON HUM. RTS 146, 150 (1998).

[6] *Id.*

[7] *See, e.g.,* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2017) (noting that "there is no single

acknowledge that transformative constitutionalism entails a commitment to permanent, largescale social and political change. The particular changes sought often include reductions of material poverty or inequality, and/or increases in participation and inclusion from historically marginalized groups,[8] although they sometimes also include other goals such as increases in political accountability or deconsolidation of power.[9] A definition based on a particular substantive project seems impossible, since the project differs from case to case. One might say that transformative constitutionalism takes as a starting point a significant gap between reality and constitutional aspiration and seeks to close that gap over time.[10] The justification for transformative constitutional projects is future-oriented: to construct a different and better future than the country has today, or that it has in the past. As Sunstein emphasizes, transformative constitutional projects "set out certain aspirations that are emphatically understood as a challenge to longstanding practices" and they "are defined in opposition to those practices."[11]

Most work on transformative constitutionalism has stemmed from "global south" contexts and particularly the work of strong and creative courts that exist in countries such as India, South Africa, and Colombia. But as Michaela Hailbronner points out, transformation is not exclusively a global south phenomenon.[12] She focuses on the example of Germany after World War II, where aspects of the

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comprehensive comparative theory or concept of transformative constitutionalism"); Oscar Vilhena et al., *Some Concluding Thoughts on an Ideal, Machinery and Method, in* TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA 617, 620 (Oscar Vilhena et al. eds., 2013) (finding that no single concept emerges from the volume).

[8] *See, e.g.,* Hailbronner, *supra* note 7, at 533; CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado, ed., 2013) (focusing on socioeconomic rights, diversity, and access to justice).

[9] *See, e.g.,* Heinz Klug, *Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa*, 67 BUFF. L. REV. 701 (2019).

[10] *See id.* at 701 ("[T]hese constitutions are aspirational and are meant to empower the newly democratized state to make significant changes to the existing social and economic order.").

[11] *See* Cass R. Sunstein, *Social and Economic Rights?: Lessons from South Africa*, 11 CONST. FOR. 123, 125 (2001).

[12] *See* Hailbronner, *supra* note 7.

constitutional text itself, as well as the interpretations of the Constitutional Court and the work of elected political actors, instantiated a transformative project committed to increasing equality and deepening democracy.[13]

Scholarship discussing transformative constitutionalism draws an explicit or implicit contrast with preservative constitutionalism, although this latter concept has been much less elaborated in recent work. Comparatively, the contrast is often between the constitutional projects of "global south" jurisdictions and a (stylized and incomplete) rendering of constitutionalism in the United States,[14] which is used as a paradigm of a preservative rather than transformative constitution.[15] This account however seems to ignore the elements of U.S. constitutional history, both formal amendments and constitutional interpretation, that had transformative aspirations.[16]

Sunstein, contrasting transformation and preservation, defines a preservative constitution as one that would "seek to maintain existing practices, to ensure that things do not get worse."[17] So put, he views the U.S. constitution as a mix of preservative and transformative features, while viewing South Africa as the "world's leading example" of a transformative constitution.[18] Roux adds that the concepts of transformation and preservation should be viewed as end

[13] *See id.* at 541 ("If U.S. constitutionalism represents in important ways the model Southern jurisdictions aim to transcend, other Northern countries are much closer to the Southern paradigm.").

[14] The U.K. is sometimes portrayed as another example of preservative constitutionalism, although recent work has questioned this view. *See* Jo Eric Khushal Murkens, *Preservative or Transformative? Theorizing the U.K. Constitution Using Comparative Method*, 68 AM. J. COMP. L. 412 (2020).

[15] The comparison sometimes collapses, unhelpfully, into a broader debate about the relative outlier status of certain features of the U.S. constitution, such as its absence of socioeconomic rights, brevity and lack of detail, and rigidity. *See, e.g.,* Mila Versteeg and Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHIC. L. REV. 1641 (2014).

[16] *See* Hailbronner, *supra* note 6, at 539 (noting moments of transformative jurisprudence in U.S. history, for example during the Warren court).

[17] *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 216-17 (2004).

[18] Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FOR. 123, 125 (2000-2001).

points on a spectrum.[19]

Yet a typology that limits forms of constitutionalism to preservation and transformation is incomplete, both theoretically and as a description of real-world events. An alternative project we will call one of constitutional *restoration*, which we will define as a project that seeks to *return to a constitutional past*. That past, as we shall see, can take many different forms: some restorative projects focus on a relatively recent past – perhaps one damaged by an intervening authoritarian interlude – while others focus on a more distant past and seek the reversal of longer-term damage done by constitutional erosion or "constitutional rot."[20] Likewise, the past can be relatively concrete or historical, or it may be gauzier, more nostalgic, or even imagined.

Figure 1: Logics of Constitutional Change	
Transformative	Seeks change to challenge and alter longstanding practices; forward-looking
Preservative	Seeks to protect and prevent erosion of the status quo
Restorative	Seeks to restore or re-establish a real or imagined past; backward-looking

Figure 1 summarizes the basic typology. Restorative constitutionalism is distinguishable from transformative constitutionalism because, while both seek significant change, transformative constitutionalism looks forward while restorative constitutionalism looks backward. That is, transformative constitutionalism seeks to transcend long-standing social and political traditions; restorative constitutionalism instead seeks to return to the "authentic" constitutional tradition of the country, which is assumed to have existed at some point in the past. Restorative constitutionalism

[19] *See* Theunis Roux, *Understanding Grootboom – A Response to Cass R. Sunstein*, 12 CONST. FOR. 41, 43 (2002).

[20] *See* Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MARYLAND L. REV. 147, 151 (2017).

is also distinguishable from preservative constitutionalism, since the former seeks to restore a real or imagined past (or some combination of the two) that has been lost or damaged, while the latter seeks to maintain and protect the status quo. This does not mean, of course, that the various logics of change are always clearly distinguishable, or mutually exclusive – they overlap a great deal, and as we will see many projects combine different logics of change.

By adding the concept of a restorative constitutional project, we have thus completed a typology of the ways in which projects of constitutional change relate to *time*. They may seek to transcend the past with a better future (transformative), to preserve the present (preservative), or to return to a past that has allegedly been lost by intervening events (restorative). Furthermore, as we will show, backward-looking, restorative projects are quite common, and richly varied; they deserve at least some of the significant scholarly attention that has been devoted to transformation. Orientation towards time, of course, is not the only way to describe constitutional change, and we do not claim to have constructed a typology of all of the various ways or adjectives in which constitutional change can or should be described.

Restoration is a broad and inherently malleable concept, and as we have already noted it can encompass different kinds of pasts. Broadly speaking, one sees a dichotomy between pasts that are more recent and concrete, as opposed to pasts that are more distant and romanticized.[21] There may also be a third kind of use of the past, however – what Jack Balkin calls constitutional redemption. Redemption uses principles drawn from the past in order to seek "change that fulfills the promise of the past."[22] But it does not necessarily seek a return to the experience of the past, either real or imagined. All uses of restorative pasts, as we shall see, may allow openings for hybrid project that also include transformative change, but redemption as a way of understanding the past seems to lie most

[21] Although, logically, the temporal distance of the past and its concreteness or real/imagined nature can also be disentangled.

[22] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 5-6 (2011) (defining redemption further as "returning the Constitution we have to its correct past, pushing it closer to what we take to be its true nature" and making the Constitution "what it promised it would be but never was.").

clearly at the intersection of restoration and transformation.

Restorative constitutional projects seem to be deployed in several different kinds of contexts. They appear to be relatively common in contexts where political actors are seeking to recover from what they perceive as an attack on the constitutional order by a prior regime or administration. Thus, as we shall see in contexts like India, Colombia, and Ecuador, it is quite common for actors to seek restorative constitutional changes where prior regimes carried out "abusive" constitutional changes that used amendment, replacement, judicial interpretation, or other forms of constitutional change to damage constitutional democracy.[23] A restorative project, wielded after such an episode, aims to repair the damage and return constitutional democracy to good working order, which is assumed to be – broadly speaking – the way it worked before the authoritarian interlude.

But this is not the only context in which restorative arguments are deployed. Restoration also seems to be a relatively common project in contexts where political and social actors discern a longer-term degradation of the constitutional order, or a significant gap between the constitution as it once functioned and the constitution as it is functioning now. Perhaps this is closest to what Balkin has referred to as "constitutional rot": a "degradation of constitutional norms that may operate over long periods of time," and which is caused by factors like loss of trust, polarization, and economic inequality.[24]

Finally, restoration can sometimes be used to legitimate an illiberal or authoritarian project, rather than to repair damage from one. For instance, a democracy may witness progressive waves of change and activism that lead to the inclusion of previously marginalized groups. It may then experience a form of backlash against this process of liberalization, which leads to calls for the restoration of an earlier, less pluralist national identity.[25] The nature of a restorative discourse, particularly of the more nostalgic variant, may also (and ironically) lead to calls for consolidation of power, and

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[23] Landau, *supra* note 3; Rosalind Dixon & David Landau, *1989-2019: From Democratic to Abusive Constitutional Borrowing,* 17 INT'L. J. CON. L. 489 (2019).

[24] *See* Balkin, *Constitutional Rot*, *supra* note 20, at 151.

[25] On this distinction, see, e.g., WOJCIECH SADURKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

a reduction of checks on that power, so that the true constitutional order can be redeemed. We shall see, below, potential examples of these dynamics drawn from the U.S. and Hungary.

B. Restorative Constitutionalism as Discourse

There is also a more general conceptual point here brought out by our typology. The labels of "transformation" and "preservation" are normally applied as though they are objective descriptions of constitutions themselves. Sunstein, for example, draws a contrast between transformative and preservative *constitutions*.[26] But this is obviously too narrow; constitutions can be changed in many different ways, and one can usefully attach the labels developed in the typology to any project of constitutional change. When Sunstein notes, for example, that the U.S. constitution is a mix of transformative and preservative elements, this seems to be in part because it has accreted different amendments over time, with distinct goals, and at least some of the constitution's amendments seem very difficult to describe as efforts to preserve the status quo.[27] One might add that the U.S. constitution has experienced many forms of informal change over time, through judicial interpretation, the passage of major statutes, and changes to practices or constitutional constructions.[28] At least some of these seem transformative as well, while others, we will argue below, can be at least partially understood as restorative.

Even if one broadens the use of these categories beyond constitutions as such to include projects of constitutional change, there is something strange about treating these labels (transformative, preservative, restorative) as capturing objective, substantive characteristics of the projects themselves. Rather, at least in large part, the various discourses – preservative, transformative, and restorative – are framings, discourses, or justifications for projects of constitutional change. Consider, for example, the difficulty that the literature has had in defining transformative constitutionalism based on concrete aspects of design, such as socioeconomic rights or social

[26] *See* Sunstein, *supra* note 18, at 125.

[27] *See* Roux, *supra* note 19, at 43.

[28] *See* BRUCE A. ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS (1991) (exploring constitutional changes outside of formal Article V procedures during the New Deal and Civil Rights eras).

inclusion.[29] These are, to be sure, elements of many (if not most) transformational constitutional projects. But the concept of transformation is at once more abstract and more contextual: it refers to changes that are defined in opposition to at least some of a country's longstanding political, social, or cultural practices, and which seeks to transcend them. Likewise, restoration is best defined as change that seeks to repair constitutional degradation associated with a status quo and return to a (real or imagined) past. These are characteristics that will not inhere – or at least not only inhere – in the substantive nature of the project, but also in the ways in which it is presented and justified.

Put another way, projects of constitutional change are malleable. A project with similar content could be framed as transformative, preservative, or restorative, depending on the context. In theory, the same project could be presented as a break with a longstanding tradition, as an attempt to protect a vulnerable status quo, or as an effort to restore or redeem a lost, real or imagined, past. Thus, political and social actors have some choice as to how their proposals for constitutional change will be framed and may be able to choose framings that they believe are particularly powerful in a given context. There may be, of course, limits to the plausibility of a given framing or justification. Moreover, as acknowledged by Sunstein and others, constitutional projects can (and commonly do) mix different kinds of justifications. It is fairly common, as the examples below will show, for political actors to justify their attempts at constitutional change in part by using restorative language, but also in part by using the language of transformation and the language of preservation.

We will save a full accounting of the promise and peril of restorative constitutionalism as a form of constitutional change below, after we give some examples drawn from the U.S. and elsewhere around the world. For now, it is sufficient to note that a restorative discourse may have some important advantages over other framings of change, at least in certain contexts. For example, a rhetoric of restoration may do important work in signalling the illegitimacy and

[29] *See* Hailbronner, *supra* note 7, at 528 (arguing that transformative constitutionalism is not just a project about combatting poverty, and that it seems to pursue a number of different goals).

inauthenticity of the intervening constitutional order.[30] As well, drawing off of a real or perceived past may help to increase popular support for a particular set of changes, especially where references to past constitutional tradition resonate with the public. Additionally, it may help to overcome bargaining or transaction costs between elites that would otherwise make agreement impossible.[31] In some cases, it may be relatively easy for elites to agree on rolling back a set of changes and restoring a prior status quo, rather than reaching consensus on a set of changes that would depart from it. Finally, for some international and domestic audiences, it may be especially important to signal political and constitutional continuity with the prior order, rather than suggesting a radical break with that order.[32]

C. The Many Pathways of Restorative Constitutional Change

Constitutional changes are complex processes that can occur in many ways, and restorative constitutional change is no exception. Change can occur incrementally, through a series of small-scale changes, or else in a more compressed timeframe, through a single, large-scale constitutional amendment or replacement.[33] Constitutional change can also occur through a number of different mechanisms. The classic forms, those most commonly associated with constitutional change, are formal amendment of the existing

[30] *See* Gábor Halmai, *Restoring Constitutionalism in Hungary,* VERFASSUNGSBLOG (Dec. 13 2021), at https://verfassungsblog.de/restoring-constitutionalism-in-hungary.

[31] *See* Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance,* 15(4) INT. J. CONST. L. 988 (2018).

[32] For example, some regional governance bodies such as those in Latin America and Africa now contain "democracy clauses," which sanction an "unconstitutional interruption of the democratic order" or an "unconstitutional change of government." *See* Inter-American Democratic Charter, art. 19; African Charter on Democracy, Elections, and Governance, art. 23. These were originally anti-coup clauses but are now deployed in a broader range of circumstances. For discussion of the application of the OAS clause to democratic erosion in Venezuela without a military coup, see Antonio F. Perez, *Democracy Clauses in the Americas: The Challenge of Venezuela's Withdrawal from the OAS*, 33 AM. U. INT'L L. REV. 391 (2017).

[33] *See, e.g.,* David S. Law and Ryan Whalen, *Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison, in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 74 (Xenophon Contiades & Alkmene Fotiadou eds., 2020).

constitution or wholesale replacement of the existing constitutional order via a constitution-making process.[34]

But essentially all theorists of constitutional change acknowledge that these formal mechanisms are not the only way to change the existing constitutional order. Just as in the United States, constitutions around the world change in many different ways that do not involve formal amendment. These alternative mechanisms include judicial interpretation, passage of important laws or other sub-constitutional norms, or changes in informal practices that make up part of the interpretation or "construction" of the existing constitutional order.[35]

Change can also occur in ways not contemplated at all by existing constitutional procedures. Replacement of an existing constitution often occurs in such a way, with stakeholders wielding a doctrine of "constituent power," or something similar, to replace the text.[36] Sometimes, actors also claim to rely on new paths to change the constitution, not set out in the original document, but which derive political legitimacy from a process of popular participation and ratification.[37] The messiness and diversity of these forms of constitutional change, which is sharpened by comparative analysis, can make it difficult to figure out where a constitutional change ends and ordinary politics begins.

As we will show below, restorative constitutional change can take all of these forms. Perhaps most obviously, changes to judicial interpretations of constitutional norms can be used to restore a past

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[34] *See id.* (developing a quantitative measure that differentiates amendment from constitution-making). S*ee also* Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Logic, in* COMPARATIVE CONSTITUTIONAL LAW 96 (Tom Ginsburg & Rosalind Dixon, eds., 2013)

[35] *See* Dixon, *supra* note 34. *See also* ROSALIND DIXON AND DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING 23-36 (2021) (describing forms of change).

[36] *See, e.g.,* ANDREW ARATO, THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS? (2017).

[37] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991). A famous comparative example of a formal amendment carried out by such a route occurred in France in 1962, when the Constitutional Council allowed De Gaulle to hold a referendum on whether to allow direct election of the president, even though such a procedure was not contemplated in the constitutional text. *See* David B. Goldey, *The French Referendum and Election of 1962: The National Campaigns*, 11 POL. STUDS. 287 (1963).

that has been degraded or lost. Contemporary legal discourse associated with modern conservativism has focused at times on these kinds of goals.[38] Comparative research on originalism also demonstrates attempts by judiciaries to restore a (real or imagined) past. In Turkey, for example, the Constitutional Court wielded a strong version of secularism, associated with the creation of the modern Turkish state and its founder, Mustafa Kemal Atatürk, in order to try and reverse perceived slippage from those norms by political actors.[39] Statutory changes by political actors, or even informal changes, can also carry out restorative constitutional goals.[40]

Formal amendment can serve both obvious and subtler objectives associated with a restorative project. Where a prior regime is perceived as carrying out constitutional changes that damage the existing constitutional order, amendment can be used to reverse those changes, for example by undoing attempts to court-pack or court-curb, or extensions of presidential term limits.[41] Less obviously, formal amendments might be used to reemphasize aspects of the existing constitutional order that have been degraded by other means, or to carry out changes that rebalance institutions that have been damaged.

Perhaps most paradoxically, restorative constitutionalism can involve the wholesale replacement of an existing constitution. In some cases in Eastern Europe, as Partlett shows, Soviet-era constitutions were voided and pre-Soviet constitutions brought back to life.[42] Or consider Argentina, where Juan Peron, after ascending to power in the 1940s, replaced the existing 1853 constitution with a new text in 1949. The new text was "transformative," containing new social rights and extensive labour rights, but it also consolidated presidential power,

[38] *See infra* Part II.

[39] *See* Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2011).

[40] *See, e.g.,* Roberto Gargarella, *Restoring the validity of law in democratic societies,* VERFASSUNGSBLOG, Jan. 4, 2022, at https://verfassungsblog.de/restoring-the-validity-of-law-in-democratic-societies/. (emphasizing non-textual modes of constitutional restoration); Cem Tecimer, *Restoration without the Constitution,* VERFASSUNGSBLOG, Jan. 11 2022, at https://verfassungsblog.de/restoration-without-the-constitution/ (noting ordinary laws, policies, and unwritten norms as part of the restorative toolkit).

[41] *See infra* Part III.

[42] *See* William Partlett, *Restoration Constitution Making*, 9 VIENNA J. CONST. L. 514 (2015).

eliminating term limits and thus allowing Peron to potentially stay in power indefinitely. After Peron was pushed out of power, his opponents did not write a new constitution, but instead the reforms of 1957 primarily reinstituted the 1853 text.[43] More broadly, Tushnet has argued that the partial reinstatement of a prior constitutional order, through the invocation of a form of extra-legal authority or original constituent power, might be an appropriate way to restore democratic governance after an authoritarian regime.[44]

This means, of course, that restorative projects of constitutional change face a choice of pathways. The toolkit that can potentially be used to restore a constitutional order is the same toolkit that might have been used to degrade that order in the first place. But this does not necessarily mean that restorers must use the same pathways that were initially used to degrade the constitutional order; they can choose to focus on the same pathways, or instead different ones. Formal constitutional amendments, for example, might be reversed either by restorative amendments or by judicial interpretations that either interpret the norm narrowly or, more exotically, use something like the unconstitutional constitutional amendment doctrine to deprive them of effect.[45] Likewise, changes at the national constitutional level may be reversed either at that same level or via the overlay of supra-national constitutional norms, which oust or pre-empt domestic constitutional change.[46]

The optimal choices are likely to depend heavily on context. Countering formal changes with formal change may provide a rule of

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[43] ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM, 1810-2010: THE ENGINE ROOM OF THE CONSTITUTION (2013).

[44] Mark Tushnet, *Restoring Self-Governance*, VERFASSUNGSBLOG (Dec. 14 2021), at https://verfassungsblog.de/restoring-self-governance/.

[45] On this doctrine, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS (2019), Rosalind Dixon & David Landau, *Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment,* 13 INT. J. CONST. L. 606 (2015).

[46] *See, e.g.,* Armin von Bogdandy & Luke Dimitrios Spieker, *How to Set Aside Hungarian Cardinal Laws,* VERFASSUNGSBLOG, Mar. 18 2022, at https://verfassungsblog.de/how-to-set-aside-hungarian-cardinal-laws/; Kim Lane Scheppele, *Escaping Orbán's Constitutional Prison*, VERFASSUNGSBLOG, Dec. 21 2021, at https://verfassungsblog.de/escaping-orbans-constitutional-prison/.

law benefit, which may affect the degree of support for that change both domestically and internationally.[47] Moreover, the very process of re-enacting a constitution in a way that follows the formal rules may help signal a desire and willingness on the part of political elites to respect rule of law constraints, where often they have been eroded by prior informal modes of change.[48]

At the same time, in some cases there may be little practical chance of formal restoration of a prior constitutional order.[49] Super-majority voting rules may be too onerous to satisfy for those seeking to achieve restorative changes. And a prior regime may have also made changes that are effectively self-entrenching and difficult to reverse. In these cases, informal or sub-constitutional changes, acting as a kind of "constitutional workaround,"[50] may be the only way to restore previously desirable constitutional norms and institutions.[51] But one risk of these moves is that they may affirm the validity of extra-legal modes of change in ways that compound rather than countering constitutional erosion.[52] And this may also feed into "abusive" uses of rule of law discourses in aid of authoritarian

[47] *See* Tushnet, *supra* note 44.

[48] *See* Dmitry Kurnosov, *Beware of the Bulldozer,* VERFASSUNGSBLOG, Jan. 07 2022, at https://verfassungsblog.de/beware-of-the-bulldozer/; Beata Bakó, *Why Throw a Constitution out of the Window Instead of Making it Work?,* VERFASSUNGSBLOG, Dec. 23 2021, at https://verfassungsblog.de/why-throw-a-constitution-out-of-the-window-instead-of-making-it-work/.

[49] For a pragmatic account of how best to maximize effective constitutional restoration and change, see, for example, Ece Göztepe, Silvia von Steinsdorff & Ertuğ Tombuş, *A Matter of Pragmatism rather than Principle,* VERFASSUNGSBLOG, Dec. 30 2021, at https://verfassungsblog.de/a-matter-of-pragmatism-rather-than-principle/.

[50] *See* Mark Tushnet, *Constitutional Workarounds,* 87 TEX. L. REV. 1499 (2009).

[51] *See* Sanford Levinson, *The Iron Cage of Veneration,* VERFASSUNGSBLOG, Dec. 27 2021, at https://verfassungsblog.de/the-iron-cage-of-veneration/; Andrew Arato & András Sajó, *Restoring Constitutionalism,* VERFASSUNGSBLOG, Nov. 17 2021, at https://verfassungsblog.de/restoring-constitutionalism/.

[52] *See* Kurnosov, *supra* note 48; Bako, *supra* note 48. For arguments that this may lead to destabilization of translation rule of law regimes, see also Csaba Győry, *Governance or Revolution?,* VERFASSUNGSBLOG, Dec. 16 2021, at https://verfassungsblog.de/governance-or-revolution/.

preservation.[53]

II. RESTORATIVE CONSTITUTIONALISM IN THE UNITED STATES

Restorative movements of constitutional change appear to be common in the United States. To be clear, our claim here is certainly not that all such movements have a restorative element. There are many examples of significant movements that are based almost entirely on forward-looking transformation, rather than looking backward to the Founding.[54] So our claim is a more modest one – restorative forms of constitutional change are significant in the United States. To substantiate the claim, we look briefly at two movements with restorative elements: the abolitionist movement and making of the Reconstruction amendments, and modern conservative constitutionalism. Then we turn to the present, tracing the "duelling" role of restorative discourse in the Trump and Biden presidencies.

A. Abolitionist Discourse and the Reconstruction Amendments

Ideas about restoration played a prominent role in debates around the time of the Civil War, and during reconstruction. Actors opposed to reconstruction, in the South and elsewhere, relied on a racist form of restoration to oppose it.[55] More interestingly, some of those

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[53] András L. Pap, *Four Recommendations for Constitutional Restoration in Hungary,* VERFASSUNGSBLOG, Dec. 19 2021), at https://verfassungsblog.de/four-recommendations-for-constitutional-restoration-in-hungary/; On the abusive uses of rule of law rhetoric, see Rosalind Dixon, *Rule of Law Teleology: Against the Misuse and Abuse of Rule of Law Rhetoric*, 11 HAGUE J. RULE OF L. 461 (2019); ANDRÁS SAJÓ, RULING BY CHEATING: GOVERNANCE IN ILLIBERAL DEMOCRACY (2021); Alvin Y. H. Cheung, Measuring the Measures: Rule of Law Indices and Abusive Legalism, (2019) (unpublished dissertation), *available at* https://osf.io/preprints/lawarxiv/8r5zb/.

[54] For an example, see Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006) (explaining how a forward-looking women's equality movement led to changes in constitutional interpretation of the equal protection clause).

[55] The language of redemption was used to defend attacks on the project of Reconstruction, though modern conservatives claim an anti-racist rather than racist

supporting the Reconstruction amendments also relied on a form of restoration to legitimate those constitutional changes. The use of restoration here may approach what we have above called (following Balkin) constitutional redemption – the use of principles found in the past to achieve change that fulfills the promise of the past.

In the pre-Civil War period, many abolitionists (such as William Lloyd Garrison) argued that the U.S. constitution was a deeply flawed, if not evil, document that contemplated and legitimated slavery.[56] As support for this view, they cited various clauses in the document, including the three-fifths clause, the reference to the slave trade, and the fugitive slave clause.[57] Garrison famously called the U.S. constitution a "covenant with Death" and an "agreement with Hell."[58] This tendency pushed many abolitionists of the Garrison wing out of U.S. electoral politics completely, as a form of total opposition to the current political order. A second wing of the abolitionist movement worked within the legal system, making "mainstream" constitutional and legal arguments that furthered the cause, which dealt with issues like circumscribing slavery in the territories and placing procedural safeguards around the Fugitive Slave Act.[59]

However, there was also a third wing of the abolitionist movement that argued the U.S. constitution, properly understood and despite its various references to slavery, in fact prohibited slavery. Cover calls these actors "utopians,"[60] and Wiecek "radicals,"[61] in contradiction to

conception of redemption. See KENNETH KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 368-69 (2019).

[56] *See, e.g.*, ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 150-54 (1975).

[57] *See id.* at 151-52 (pointing also to the part of the Guarantee clause obliging the federal government, on application of a state, to take action to suppress "domestic violence").

[58] *See, e.g.,* Paul Finkelman, *Garrison's Constitution: The Agreement with Death and How it was Made*, 32 PROLOGUE (2000), available at https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html#f1/.

[59] *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 202 (1977) (referring to this group as "moderate constitutionalists").

[60] *See* COVER, *supra* note 56, at 155.

[61] *See* WIECEK, *supra* note 59, at 249.

the more "mainstream" legal arguments outlined above. But the view encompassed a number of leading abolitionists, including Lysander Spooner and Frederick Douglass. The latter began his career in the Garrison wing, but after 1851 gravitated towards the position that the U.S. constitution was an anti-slavery document and that contemporary politics had lost touch with the U.S.'s founding ideals.[62] The arguments made by this group were multifaceted. They relied primarily on three clauses in the text – the due process clause, the privileges and immunities clause, and the guarantee clause – as grounding for their arguments.[63] Behind these specific arguments based on the text, the "radicals" also "partially exculpated" the founders by arguing that slavery was an "anomaly" that was inconsistent with the sweep of the project and that they expected to end shortly, and that they wrote the text to "avoid any inference that the Constitution secured slavery."[64] Further, the radicals read the Constitution against a backdrop of natural law, based on documents like the Declaration of Independence.[65]

Later, these perspectives influenced the making of the Reconstruction amendments. In framing the 13th amendment, for example, some proponents argued that the economic and social actors upholding slavery had caused the war by "perverting democracy and liberty," and that the purpose of the amendment would be to "return the nation to its original order," where the "federal government could again regulate freedom among the people in a fair manner."[66] Senator Charles Sumner argued that the 13th Amendment recognized the anti-slavery character that was already in the constitution, while abolitionist Geritt Smith stated that the 13th amendment would restore the "literal" constitution – its true meaning – while repudiating the "cunning and wicked substitution" that had developed over time in the imagined "historical" constitution that had taken shape before the

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[62] *See id.* at 251.

[63] *See id.* at 265-70.

[64] *See id.* at 264.

[65] *See id.* at 259-60 (arguing that while Garrisonian legal thought was based on positivism, radical constitutional thought was instead grounded in the "legally binding force of natural law").

[66] *See* MICHAEL VORENBURG, FINAL FREEDOM: THE CIVIL WARS, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENt 95 (2001)

Civil War.[67] In different ways, both of these arguments, and some others made by abolitionists and Republicans in Congress, viewed the 13th amendment as "declaratory" of congressional powers already implicit in the Constitution.[68]

Smith's argument above is indicative of the nuance and complexity of arguments surrounding the 13th amendment. Many politicians and abolitionists argued in more transformative terms, selling it as a correction or advance over a flawed text. Indeed, the amendment power was emphasized by some proponents exactly as a way to make these corrections, and in that sense the Reconstruction amendments pointed the way towards a more active use of the amendment power and transformative use of constitutional change.[69] But the debate over the Reconstruction amendments – and the 13th amendment in particular – nonetheless shows that the selling of a formal constitutional amendment at least in part as a restorative act is not paradoxical. At least one reason the restorative framing was used during the debate over the 13th amendment is that some opponents raised the strange possibility of an unconstitutional constitutional amendment – the argument that the amendment would exceed implicit boundaries of constitutional change.[70] Proponents of the amendment responded by arguing, in various ways, that the amendment actually brought the Constitution in line with the wishes of the founders.

Restorative ideas wielded by the "radical" constitutional abolitionists also influenced the Fourteenth Amendment, although perhaps in even a more complex and partial way. The ideas of the radical abolitionists focused, as noted above, on the privileges and immunities outlined in the comity clause, as well as due process and a concept of equal protection that they found to be implicit within the constitution, bundled within an overarching conception of citizenship.

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[67] *See id.* at 192-93. During consideration of the 13th amendment, a meeting of black leaders in Syracuse, including Douglas, unanimously took a "radical" read of the Constitution as encompassing commitments to anti-slavery but also to equality in civil and political rights. *See id.* at 159.

[68] *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 152-53 (1951).

[69] *See* VORENBURG, *supra* note 66, at 196-97.

[70] *See id.* at 107 (quoting Democratic Senator Garrett Davis as arguing that the amendment "would invest the amending power with the faculty of destroying and revolutionizing the whole Government").

As Barnett and Bernick have recently shown, the drafters of the 14th Amendment drew on these ideas in drafting it.[71] And during debates, some members of Congress again presented the 14th amendment in "declaratory" terms, as recognizing rights that were implicit in the Constitution already but had been lost or undermined.[72] For example, one Republican member of the House argued that the amendment was "very little different" from the comity clause and other rights found in the existing constitution, but that it did give "force, effect, and vitality" to those principles, and revitalized them because they had been "trampled under foot."[73] Another argued that the amendment would merely "reinvigorate a primitive and essential power of the Constitution" that had lain "dormant" by giving Congress power to "defend the rights, liberties, privileges, and immunities" of all citizens.[74] Debates surrounding the 14th Amendment in fact seem to mix all of the discourses of constitutional change identified above – they were obviously heavily transformative in nature, but also combined aspects of restoration and even preservation.[75]

B. Modern Constitutional Conservativism

Modern constitutional conservatism offers an example of a movement with a more straightforward element of restoration. The concept of the "constitution in exile," although mainly used pejoratively by opponents rather than proponents, captures these elements at an intuitive level.[76] Some conservatives have suggested jurisprudence that would restore, in part of in full, aspects of the pre-1937 constitutional order, including a smaller federal government, greater responsibility on the part of Congress compared to federal

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[71] *See* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT 90-102 (2021). *See also* James Oakes, *Forward*, in *id.* at ix, xi ("[T]he original meaning of the Fourteenth Amendment is to be found in the antislavery constitutionalism that was developed by abolitionists in the decades between the Revolution and the Civil War….").

[72] *See* TENBROEK, *supra* note 68, at 193.

[73] *See id.* (quoting Rep. William Higby of California).

[74] *See id.* (quoting Rep. William D. Kelley of Pennsylvania).

[75] On the preservative nature of the privileges and immunities clause, see BARNETT & BERNICK, *supra* note 71, at 240.

[76] *See* William Forbath, *The New Deal Constitution in Exile*, 51 DUKE L. J. 165 (2001); William Alstyne, *Foreword: The Constitution in Exile: Is it Time to Bring It in from the Cold?*, 51 DUKE L. J. 1 (2001).

agencies; and stronger protections for property and contract rights. The underpinnings of this approach are in part based on libertarian economic and political philosophies. But these are intertwined with a project that is, in Ken Kersch's words, often "restorationist and redemptivist".[77]

As scholars have suggested, much modern constitutional conservativism constructs a close relationship between three things: a backwards looking constitutional project aimed at restoring the authentic meaning of the constitution, originalism as a methodology of constitutional interpretation, and conservative goals. The three concepts have developed a close relationship in the U.S., but also one that is far more contingent than it would at first appear. There are versions of modern conservative constitutionalism that are not tied to originalism. "Common good" constitutionalism comes to mind, with its suggestion for a substantive reading of the constitution in light of values such as authority, hierarchy, and subsidiarity, and in opposition to individualism, regardless of what original understanding happens to be.[78] Indeed, in a recent article the leading proponent of common good constitutionalism, Adrian Vermeule, explicitly placed his theory in opposition to originalism, arguing that conservatives need to move beyond the "defensive crouch of originalism" to instead advance their own substantive commitments.[79] Common good constitutionalism seems identifiably "restorative," based on ideas like a revival of traditional morality associated with Catholicism, but it is certainly not originalist.[80]

Likewise, there are variants of originalism that are not particularly restorative. Jack Balkin's "living originalism" project, which is linked to his conception of constitutional redemption, is a striking example.[81]

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[77] *See* KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINGING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 382 (2019); Forbath, *supra* note 76, at 196-197.

[78] *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

[79] *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC, Mar. 31, 2020, at https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[80] For a very critical reply by two prominent originalists of Vermeule's project, see William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, __ HARV. L. REV. __ (forthcoming 2023).

[81] *See* JACK M. BALKIN, LIVING ORIGINALISM (2011).

Balkin argues that interpreters should look at original public meaning of clauses like equal protection and due process to understand what the drafting generation of those clauses thought that they meant. But he also argues that the clauses were intended to be read at a high level of abstraction, and moreover he draws an important distinction between the original meaning of the clauses and their original expected application, arguing that the second can be useful guides for constitutional interpretation, but are not binding on later interpreters.[82] The result of this is a variant of originalism that is often more transformative and progressive than it is restorative in nature. Indeed, Balkin's project draws attention to the range of meanings that could be attached to originalist interpretation, depending in part on questions like the level of abstraction at which constitutional provisions are to be read and understood.

So, where has the seemingly tight relationship between originalism, restoration, and modern conservatism come from? Evidence suggests it was a result of choices by key actors in light of the political and legal context in which the claims were advanced. Facing the wilderness after the decisive triumph of progressive ideas during and after the New Deal, and the relative consensus that surrounded those ideas, a fragmented set of conservative legal and political thinkers searched for a counter-narrative, which did not emerge all at once. Nixon, for instance, relied on ideas like "strict constructionism" and "law and order" to express opposition to liberal legal ideas and to Supreme Court decisions disliked by the right.[83] Later conservatives, during and after the Reagan administration, decried the crudeness of the earlier efforts can made calls for more sophisticated concepts, which were developed and promoted by an increasingly robust conservative legal infrastructure.[84]

Some key conservative actors initially held a decidedly ambivalent relationship with the U.S. founding. Many Catholic conservatives, for example, were extremely wary of the religious

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[82] *See id.* at 101 (arguing that originalists have "tended to conflate original meaning with constructions derived from original expected application").

[83] *See* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 96 (2005).

[84] *See id*. at 134-37. On the infrastructure, see, for example, STEPHEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR THE CONTROL OF THE LAW (2008).

views of the founders. Some instead drew back much further in history, to feudal Europe "where things had been properly ordered."[85] Yet, most conservative thinking centered on the constitution eventually coalesced around originalism and around an ideology that would redeem the principles and values of the founding. In so doing, they also "re-imagine[d] and re-narrate[d]" the country's constitutional history in ways that were concordant with conservative goals.[86]

Originalism, in turn, served as a useful tool that could mediate between multiple groups, including the legal elite needed to shift constitutional interpretation and popular audiences, and advance conservative goals. At the elite or intellectual level, modern conservativism is composed of a number of different strands: libertarians, traditionalists, and anti-communists, later joined by other groups including neo-conservatives and the religious right (itself made up of many different groups).[87] For the most part, a focus on redeeming the Constitution as a key part of conservative "heritage," and originalism as a methodology, have done a good job of holding these different strands together.[88] Siegel and Post have demonstrated how originalism has also allowed for mediation between elite and popular views, in a way that has been both responds to and creates popular mobilization.[89] For example, early originalists like Raoul Berger were highly critical of *Brown v. Board of Education*, whereas later originalists have developed sophisticated defences of Brown as an originalist decision.[90] Original meaning has also seemed to play

[85] *See* KERSCH, *supra* note 77, at 321 (paraphrasing the views of Richard Weaver).

[86] *See id.* at 357.

[87] *See* GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945, at 376 (1976).

[88] *See id*. at 213 (explaining how the Constitution became part of the "viable" heritage for the right); KERSCH, supra note 77, at 382 (arguing that originalism has allowed for an "overlapping consensus" among conservative groups).

[89] *See* Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORD. L. REV. 545, 565 (2006).

[90] *See, e.g.,* O'NEILL, *supra* note 83, at 201; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VIRG. L. REV. 947 (1995). Similarly, as Siegel and Post note, "[n]o one paid any attention" to Lino Graglia's "not implausibl[e]" argument that the 5th amendment due process clause could not be read in its original understanding to require school desegregation in Washington,

less role in right-leaning jurisprudential thought in areas, such as race-based affirmative action, where a strong originalist case can be constructed for constitutionality.[91]

Likewise, understandings of the Second Amendment changed over time, as originalist scholarship and judging moved to converge on the position that the Second Amendment contained an individual right to bear arms that limited gun control measures and similar regulations, at both the federal and state levels.[92] These ideas, of course, have borne concrete fruit in *District of Columbia v. Heller* and its progeny and have also shaped political understandings around the country.[93] Changed understandings of the meaning of the Second Amendment in turn reflected mobilization by right-wing actors like the NRA.[94] In a 2000 speech, then-Vice President of the NRA Charlton Heston concluded his speech to the group's annual convention by using restorative rhetoric:

> It's the same blueprint our founding fathers left to guide us. Our enemies see it as the senile prattle of an archaic society. I still honor it as the United States Constitution…."[95]

Heston portrayed gun owners as losers in the "culture wars" who were being victimized by progressive groups deviating from the

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DC, and therefore that Bolling v. Sharpe was decided incorrectly. *See* Post & Siegel, *supra* note 89, at 558.

[91] *See* Post & Siegel, *supra* note 89, at 564; Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

[92] *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 222-26 (2008).

[93] 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to keep and bear arms, and striking down a handgun ban and certain other restrictions in the District of Columbia). *See also* McDonald v. Chicago, 561 U. S. 742 (2010) (holding that the right to bear arms was incorporated into the 14th amendment and thus could be enforced against the state as well as federal governments); New York State Rifle & Pistol Association, Inc. v. Bruen, 142 S.Ct. 2111 (2022) (striking down a New York law requiring that citizens show "proper cause" to get a concealed carry license).

[94] *See* Siegel, *supra* note 92, at 207-12.

[95] *See id.* at 234 (quoting Charlton Heston, Address at the Free Congress Foundation's 20th Anniversary Gala, Dec. 7, 1997).

original understanding of the U.S. constitution.[96]

Two points stand out. The first is the nature of the past. Both the modern right and earlier movements in the United States often seem to refer to a past that is gauzy, romanticized, at times even imagined. Levin argues that the restoration of the modern right is more about "heritage" than actual history, one which promises an "immediate and authentic encounter with the past" and which sees the past "as an idealized state."[97] Part of this may be explained by the age of the U.S. constitution and nature of these movements, which tend to look back a long way towards the founding for inspiration. The desire to restore aspects of a deep past may explain the heavy aspects of mythmaking in restorative constitutional movements in the United States.

The second point is about the utility of a restorative framing of constitutional change as a political instrument. At least in part, actors will select restoration as a discourse for legitimating constitutional change when it serves their interests to do so. During the framing of the 13th amendment, a restorative framing sometimes seemed to serve instrumental goals for proponents, such as reassuring opponents of the limited nature of change or rebutting the charge that proposed change was somehow an "unconstitutional constitutional amendment." Talking about the restoration of the United States constitution, in turn, allowed those developing legal ideas on the modern right to link legal projects with broader political movements, especially those seeing a decline in U.S. society and the loss of an idealized past. Originalism, likewise, has served as a sophisticated way to advance conservative goals in the courts, while also developing a powerful discourse of popular constitutionalism. More concretely, discourses around originalism and restoration developed in a period in which right-wing political actors had lost faith in Article V as instrument for carrying out political change, after repeated failures to change the constitution in accord with their goals in the 1950s, 1960s, and 1970s.[98] The Director of the Center for Judicial Studies, James McClellan, argued

[96] *See id.* at 233.

[97] *See* Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 L. & SOC. INQ. 105, 107-08 (2004).

[98] *See* Siegel, *supra* note 92, at 219 (quoting the director of the Center for Judicial Studies, James McClellan, calling on conservatives to "kick the habit" of relying on Article V and stating that "there is something fundamentally wrong with our system if we are driven to amend the Constitution so as to restore" it).

in an op-ed that "there is something fundamentally wrong with our system if we are driven to amend the Constitution so as to restore its original meaning," and instead calling for changes in judicial selection, interpretation, or jurisdiction.[99]

Comparative research shows that actors pick the mechanisms of constitutional change on which they will rely in part in light of alternative opportunities and pathways of change.[100] The project of relying heavily on originalism as an interpretive project was appealing in part because it allowed actors to pursue a mode of change that relied on judicial appointment, rather than constitutional amendment or even legislation, both of which were very difficult on social issues in the 1980s. Moreover, a rhetoric of restoration suggested that change could properly be pursued without making any formal changes to the text of the U.S. constitution, since the right ideas were already there – once the document had been properly understood and properly interpreted.

C. The Biden and Trump Presidencies – Duelling Visions of Restoration

The two most recent presidencies have both relied heavily on restorative rhetoric, although in quite different ways. At the very core of the Trump presidency was a deeply restorative message: the slogan "Make America great again." The message laid out a narrative of decline, but one which could be redeemed, and hearkened back to an imagined past of American unity, prosperity, and greatness, one which resonated with many Trump voters.[101] Moreover, Trump offered his supporters a list of foes who had contributed to that decline – undocumented immigrants, the media and allied cultural and

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[99] *See* James McClellan, *Kicking the Amendment Habit*, BENCHMARK, Jan.-Feb. 1984, at 1, 2. For discussion of this op-ed in context, see Siegel, *supra* note 92, at 219.

[100] *See, e.g.,* David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1337-38 (explaining judicial (re-)interpretation as one of several tools of constitutional change that can be used for anti-democratic ends and explaining how regimes might decide to rely on some tools more heavily than others).

[101] *See* Robert J. Shiller, *Making America Great Again Isn't Just About Money and Power*, N.Y. TIMES, Jan. 12 2017, https://www.nytimes.com/2017/01/12/upshot/make-america-great-again-isnt-just-about-money-and-power.html.

educational elites, and the deep state, for instance. Both explicitly and implicitly, he promised to take action against these groups as part of his project of constitutional restoration.

In key respects, the Trump project reflected a continuation of the longer-term conservative project of restoration. It is certainly true that it picked up themes of moral, political, and social decline that have long been present in that movement. And in some respects, it hewed closely to conservative understandings. Trump's three appointments to the Supreme Court, for example, reflected (now well-worn) Republican priorities. The former White House counsel, Donald McGahn, stated that the "Trump vision of the judiciary could be summed up in two words: 'originalism' and 'textualism.'"[102] The effort achieved a significant goal of the movement in 2022, when the Court reversed *Roe v Wade* and held that the constitution contained no right to abortion.[103] The decision was presented by its proponents as a triumph of originalism and as "constitutional restoration."[104]

In other respects, there were elements of Trump's project that were more distinctive, or at least had greater emphasis than in prior right-wing constitutional discourse. Distrust of the federal bureaucracy as a left-wing, anti-majoritarian enclave, for example, was nothing new for a conservative administration, but Trump carried this into the heart of the national security state, including the FBI, CIA, and the military, where prior administrations had been less willing to trod.[105] Immigration had become a significant (and divisive) issue on the right, but Trump reoriented the Republican party by making it a defining issue, from the first moment of his campaign

[102] *See* Emily Bazelon, *How Will Trump's Supreme Court Remake America?* THE N.Y. TIMES MAGAZINE, Feb. 27, 2020, at https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html.

[103] *See* Dobbs v. Jackson Women's Health, 142 S.Ct. 2228 (2022).

[104] *See* Reva Siegel, *The Trump Court Limited Women's Rights Using 19th-Century Standards*, WASH. POST, Jun. 25, 2022, at https://www.washingtonpost.com/outlook/2022/06/25/trump-court-limited-womens-rights-using-19th-century-standards/.

[105] *See* Beverly Gage, *"Nut Job," "Scumbag," and "Fool": How Trump Tried to Deconstruct the FBI and the Administrative State – and Almost Succeeded, in* THE PRESIDENCY OF DONALD J. TRUMP: A FIRST HISTORICAL ASSESSMENT 298, 299-300 (Julian E. Zelizer, ed., 2022).

through the end of his presidency.[106]

What is difficult to discern about Trump's project is not the extent to which it was restorative, but rather the extent to which it was truly *constitutional*, beyond the obvious example of nominations to the Supreme Court. As we have already outlined, the line between constitutional change and ordinary politics can become unavoidably thin. Like other recent administrations, the Trump administration undertook no serious effort at formal constitutional change via Article V. Nor were there really legislative achievements of a constitutional character. The extent to which constitutional change (outside the judiciary) occurred, then, relied on two intertwined routes – executive action and informal changes to norms.

Immigration policy is an area where, by both statutory design and judicial interpretation, the president has particularly expansive (although unevenly distributed) powers to make policy unilaterally.[107] And President Trump did – through, for example, a ban on entry on foreign nationals from certain countries, repurposing of funds to build portions of a wall on the Southern border, sweeping restrictions on the number of refugees and the asylum process, and attempts to withhold federal funds for so-called sanctuary jurisdictions.[108] Some but not all of these measures were blocked by the judiciary, and the Biden administration rapidly moved to reverse others.[109] But when seen in full, they seem like an attempt to fundamentally restructure the way the system, through fifteen major executive orders and over 1000 bureaucratic actions.[110]

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[106] *See* Mae Ngai, *Immigration Policy and Politics under Trump, in* THE PRESIDENCY OF DONALD J. TRUMP: A FIRST HISTORICAL ASSESSMENT 144, 144 (Julian E. Zelizer, ed., 2022) ("Extreme racial nativism was a fundamental, defining ideological feature of Trumpism.").

[107] *See, e.g.,* Adam B. Cox and Cristina B. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

[108] *See* Ngai, *supra* note 106, at 150-59.

[109] *See, e.g.,* City and County of San Francisco v. Trump, 897 F.3d 1225 (9th Cir. 2018) (blocking enforcement of an executive order that would have allowed the administration to withhold funds from sanctuary jurisdictions); Sierra Club v. Trump, 929 F.3d 670 (9th Cir. 2019) (upholding district court injunction against administration's repurposing of money for a wall on the Southern border). But see Trump v. Hawaii, 138 S. Ct. 2392 (2018) (upholding the administration's restrictions on travel from people from a number of countries).

[110] *See* Ngai, supra note 106, at 151-52.

The Trump administration also took a series of actions aimed at changing the nature of the administrative state. Former White House Chief Strategist Steve Bannon famously called for the "deconstruction of the administrative state," while Trump called for draining "the swamp."[111] In part, this proceeded through a series of actions that seemed to have as at least one intent the demoralization of existing agency personnel. The Department of the Interior, for instance, was reorganized by planning to relocate many employees out of DC and to the West Coast;[112] at the Department of State, career personnel quit because of concerns about the administration and the Department.[113] Coupled with a hiring freeze and other moves, this according to observers "broke" the Department.[114] Some agency leaders, such as Scott Pruitt at the EPA and Mick Mulvaney at the CFPB, seemed to have goals that ran counter to the underlying purpose of the agency.[115]

In October 2020, just before the 2020 elections, the administration issued a rule that would have allowed agencies to move many employees to positions classified as Schedule F, without civil service protection.[116] While Biden again quickly reversed this move upon taking office,[117] Trump allies are exploring ways to reinstate and

[111] *See* Gage, supra note 105, at 299.

[112] *See, e.g.,* Juliet Eilperin & Lisa Rein, *Interior to Move Most of Bureau of Land Management's D.C. Staff Out West as Part of Larger Reorganization Push*, WASH. POST, Jul. 15, 2019, at https://www.washingtonpost.com/climate-environment/2019/07/15/interior-move-one-fifth-bureau-land-managements-dc-staff-out-west-part-larger-reorganization-push/.

[113] *See* Reid Wilson, *Diplomats Describe All-Time Low in Morale at State Under Trump*, THE HILL, Oct. 21, 2019, at https://thehill.com/homenews/administration/466538-diplomats-describe-all-time-low-in-morale-at-state-under-trump/.

[114] *See* Robbie Gramer et al., *How the Trump Administration Broke the State Department*, FOREIGN POL., Jul. 31, 2017, at https://foreignpolicy.com/2017/07/31/how-the-trump-administration-broke-the-state-department/.

[115] *See, e.g.,* Michael Goldhaber, *Scott Pruitt versus the Environmental Protection Agency*, IBA GLOBAL INSIGHT, June/July 2018, at https://www.ibanet.org/article/41B50BFA-F214-453A-8A7B-30883352A8C1.

[116] *See* E.O. 13957, 85 FR 67631 (Oct. 21, 2020).

[117] *See* E.O. 14003, 86 FR 7231 (Jan. 22, 2021).

expand it should he win the presidency in 2024.[118] Here as elsewhere, many of the most consequential changes or attempted changes worked at the level of norms – consider Trump's bombshell firing of FBI Director James Comey (and comportment towards the Director before that firing) – which did not seem to violate the law since the Director can be removed at all, but which nonetheless cut against strong norms protecting FBI independence.[119]

One could give other examples that also worked at a complex admixture of formal executive actions and changes to more informal norms, such as Trump's attempt to reorient U.S. foreign policy in an isolationist direction that reflected an undermining of the post-war consensus. One of the most striking "constitutional" events occurred at the end of the Trump presidency, with the January 6, 2021, insurrection at the Capitol. While commentators have tended to affix constitutional significance to this event, they have also viewed it in strongly anti-constitutional terms, as a wholesale repudiation of constitutionalism in the United States.[120] President Trump told his supporters that day to "fight like hell" or "you're not going to have a country anymore" and told them to "protect our country, support our country, support our Constitution, and protect our constitution."[121] He argued that "our country has been under siege for a long time" and stated that he would "restore the vital civic tradition of in-person voting on Election Day."[122] In a particularly odd passage, he compared the 2020 election to alleged attempts to rename or remove the Washington, Jefferson, and Lincoln memorials.[123] In comparative terms, the January 6 insurrection and its surrounding events resemble

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[118] *See, e.g.,* Paige Hopkins, D*.C.'s Federal Workforce Fears Schedule F*, AXIOS, Aug. 17, 2022, at https://www.axios.com/local/washington-dc/2022/08/17/dc-federal-workforce-schedule-f; Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE, Aug. 12, 2022, at https://www.lawfareblog.com/schedule-f-unwelcome-resurgence.

[119] *See, e.g.,* Gage, supra note 105, at 308.

[120] *See, e.g.,* Jonathan Rauch, *The Five Trump Amendments to the Constitution*, THE ATLANTIC, Feb. 22, 2021, at https://www.theatlantic.com/ideas/archive/2021/02/five-trump-amendments-constitution/618097/.

[121] *See* Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR, Feb. 10, 2021, at https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial.

[122] *See id.*

[123] *See id.* ("We will not cancel culture.").

"abusive" forms of constitutional change, where incumbents seek to use forms of legal and constitutional change to undermine rather than bolster the democratic order.[124] The rhetoric justifying these actions was backward-looking and restorative in nature, imagining a catastrophic decline that could only be arrested by stopping the certification of the 2020 election.

The Biden administration took office in January 2021 with a different kind of restorative constitutional project. Biden named his agenda the "build back better" framework, suggesting an attempt to undo damage.[125] But President Biden and his advisors framed their program in large part in contrast to the Trump administration's policies and changes. On the administrative state, Biden promised during his campaign to "provide agencies with the funding they need, respect the independence and rely on the expertise of career civil servants, and highlight their work as crucial to our government's functioning."[126] On immigration, his campaign stated that Trump had "waged an unrelenting assault on our values and our history as a nation of immigrants," and that a Biden administration would "[t]ake urgent action to undo Trump's damage and reclaim America's values."[127] On foreign policy, Biden emphatically stated on his first major speech that "America is back" and that the administration would "repair our alliances and engage with the world once again."[128] And on the first anniversary of January 6, Biden argued that Trump had held "a dagger at the throat of America, of American

[124] *See* David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

[125] *See* Press Release, The White House, President Biden Announces the Build Back Better Framework, Oct 28 2021, at https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/.

[126] *See* Eric Katz, *The Rival: Rebuilding the Bureaucracy*, GOV. EXEC., Sept. 21, 2020, at https://www.govexec.com/management/2020/09/rival-rebuilding-bureaucracy/168571/.

[127] *See* The Biden Plan for Securing Our Values as a Nation of Immigrants, Biden/Harris 2020, at https://joebiden.com/immigration/# (last visited Aug. 2022).

[128] *See* Joe Biden, Remarks by President Biden on America's Place in the World, Feb. 4, 2021, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/02/04/remarks-by-president-biden-on-americas-place-in-the-world/.

democracy."[129] He argued that the Founding Fathers…set in motion an experiment that changed the world," that Trump and his allies "could not be further away from the core American values," and that the former president wanted to "ruin what our country fought for at Lexington and Concord; at Gettysburg; at Ohama Beach; Seneca Falls; Selma, Alabama."[130] To put the point simply, Biden has framed much of his agenda as an attempt to repair damage done during the Trump presidency, and to restore the country to its authentic state and traditions, as they existed before Trump took office.

The Biden administration issued a flurry of executive orders reversing Trump-era policies, in many cases within a few days of assuming the presidency. These Executive Orders quickly reversed the Trump administration's creation of a "Schedule F" category exempt from many civil service laws,[131] its "Muslim ban" on entry of nationals from certain countries,[132] its crackdown on sanctuary jurisdictions,[133] its declaration of emergency to build a wall on the southern border,[134] and its suspension of the U.S. refugee admissions program.[135] Biden also quickly re-joined the Paris Climate Agreement, which Trump had withdrawn from.[136] These rapid reversals of Trump-era policies suggested the brittleness of large chunks of his program, which depended heavily on executive action.[137]

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[129] *See* Joe Biden, Remarks By President Biden To Mark One Year Since The January 6th Deadly Assault On The U.S. Capitol, Jan. 6, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/06/remarks-by-president-biden-to-mark-one-year-since-the-january-6th-deadly-assault-on-the-u-s-capitol/.

[130] *Id.*

[131] *See* E.O. 14003, 86 FR 7231 (Jan. 22, 2021).

[132] *See* Proclamation 10141, 86 FR 7005 (Jan. 20, 2021).

[133] *See* E.O. 13993, 86 FR 7051 (Jan. 20, 2021).

[134] *See* Proclamation 10142, 86 FR 7225 (Jan. 20, 2021).

[135] *See* E.O. 14013, 86 FR 8839 (Feb. 4, 2021).

[136] *See* Paris Climate Agreement: Acceptance on Behalf of the United States of America, Jan. 20, 2021, *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/.

[137] Some aspects of Trump's program, especially dealing with immigration, have proven harder to reverse because of judicial intervention. For example, the end of Trump's "remain in Mexico" policy for refugees was delayed until August 2022, after the Supreme Court ruled that Biden had power to end the program. *See* Biden v. Texas, 597 U.S. __ (2022).

As noted above, much of the perceived damage done during the Trump presidency was more informal or norm-based. Biden has presented himself as a restorative figure who would undo some of the damage to the office of the presidency. His cabinet nominees were also presented in part as ways to restore normalcy to the functioning of demoralized agencies. Biden's nominee for Secretary of State, Tony Blinken, for example, vowed in the opening statement at his confirmation hearing to "reinvigorate the Department" and "revitalize American diplomacy."[138] It is difficult, of course, to judge the effectiveness of these kinds of changes in discourse and personnel. Commentators reported widespread problems with State Department personnel persisting well into President Biden's term.[139]

It is perhaps most fruitful to consider the more structural aspects of Biden's program, which have often been meant to tackle long-standing problems stretching beyond the Trump presidency. Take voting. The administration's rhetoric here has combined restorative and transformative rhetoric in interesting ways. Biden's first address to Congress, in April 2021, referred to January 6 as "the worst attack on our democracy since the Civil War" and asserted that "we have to prove democracy still works."[140] He called on Congress to pass two major pieces of voting legislation, the John Lewis Voting Rights Advancement Act and the For the People Act of 2021.[141] The former would reauthorize and update the Voting Rights Act after the Supreme Court struck down key parts of the law in *Shelby County v. Holder*;[142] the latter is a sweeping piece of legislation that would create minimum standards for early voting in federal elections, take measures to limit partisan gerrymandering, and enact campaign finance and ethics

[138] Prepared Statement of Antony J. Blinken, Nomination of Hon. Antony J. Blinken to be U.S. Secretary of State, Comm. For. Rel., U.S. Senate, Jan. 19, 2021, at https://www.govinfo.gov/content/pkg/CHRG-117shrg43890/html/CHRG-117shrg43890.htm.

[139] *See* Amy Mackinnon & Robbie Gramer, *Study Finds Nearly 1 in 3 U.S. Diplomats Eyeing the Door*, FOR. POL'Y, Jul. 2, 2021, at https://foreignpolicy.com/2021/07/02/study-state-department-morale-management-trump-foreign-service-attrition/.

[140] Jose Biden, Remarks by President Biden in Address to a Joint Session of Congress, Apr. 29, 2021, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/.

[141] *See id.*

[142] 570 U.S. 529 (2013).

reforms.[143] This second bill was later repackaged, in a somewhat narrower form, as the Freedom to Vote Act.[144]

In a subsequent statement containing a more detailed statement of the administration's plan for voting rights and democracy, and released in conjunction with the administration's 2021 Summit for Democracy, Biden elaborated on the need to pass measures that will "restore and strengthen American Democracy."[145] He linked the domestic agenda, which focused on the two major pieces of voting rights legislation and interlinked executive action, to an effort to "sustain[] democracy…against a backdrop of a rise in authoritarianism and increasing threats to democracy around the world."[146]

In an early 2022 speech from Atlanta, Biden stated that "Jim Crow 2.0 is about two insidious things: voter suppression and election subversion."[147] He hearkened back to the struggles of the Civil Rights Era, where a bipartisan majority passed the Civil Rights Act and the Voting Rights Act and "each successive generation continued that ongoing work."[148] "But then," he added, the January 6 insurrection occurred, an attempt "for the first time in American history…to stop the peaceful transfer of power."[149] In calling on Congress to pass the John Lewis Act, Biden framed it as a way to "restore the strength of the Voting Rights Act of '65."[150] He also called upon Republicans to "restore the bipartisan tradition in voting rights," which he argued had been "restored" and "abided by" by a list of Republican presidents

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[143] *See* H.R. 1, 117th Congress, Jan. 4, 2021.

[144] *See* S. 2747, 117th Congress, Sept. 14, 2021.

[145] Press Release, The White House, Fact Sheet: The Biden-Harris Administration is Taking Action to Restore and Strengthen American Democracy, Dec. 8, 2021, at https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-the-biden-harris-administration-is-taking-action-to-restore-and-strengthen-american-democracy/.

[146] In conjunction with the Summit, the administration announced new funding and initiatives promoting democracy and voting rights, as well as attempting to stymie use of digital technologies by authoritarian actors. *See id.*

[147] Joe Biden, Remarks by President Biden on Protecting the Right to Vote, Jan. 11, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/.

[148] *Id.*

[149] *Id.*

[150] *Id.*

running from Nixon to George W. Bush.[151] And he called upon Republicans to "restore the institution of the Senate the way it was designed to be" because it had been rendered "a shell of its former self."[152] He argued that changing the Senate filibuster to allow a majority to vote for pro-democracy legislation would, in effect, be a restorative change. These calls have not, to date, borne fruit, and the administration has instead settled for a modest list of accomplishments on voting rights, including a 2021 Executive Order with limited practical impact.[153]

Consider also the administration's orientation towards the Supreme Court. Biden as a presidential candidate said that the Supreme Court had gotten "out of whack,"[154] but he also suggested opposition to court-packing (reiterating a position he has held at least since the 1980s) and explicitly stated that he was "not going to attempt" to impose term limits on the justices.[155] He has continued to lodge similar critiques at the Court, with increasing vehemence, since *Dobbs* overturned *Roe v. Wade*. In a speech the day the decision came down, Biden called it "the culmination of a deliberate effort over decades to upset the balance of our law," and argued that "the Court has done what it has never done before: expressly take away a constitutional right…."[156] He called on Congress to "secure…the balance that existed" and to "restore the protections of *Roe v. Wade* as federal law," noting that there were limits to what he could do by executive action.[157] Two weeks later, while concluding a speech on executive action he had taken in response to the decision, Biden

[151] *Id.*

[152] *Id.*

[153] *See* E.O. 14019, 86 FR 13623 (Mar. 7, 2021).

[154] *See Biden Proposes Panel to Study Reforming "Out of Whack" U.S. Judiciary*, REUTERS, Oct. 22, 2020, at https://www.reuters.com/article/us-usa-election-biden-court/biden-proposes-panel-to-study-reforming-out-of-whack-u-s-judiciary-idUSKBN277238.

[155] *See Biden Rules Out Term Limits for Supreme Court Justices*, BLOOMBERG LAW, Oct. 26, 2020, at https://news.bloomberglaw.com/us-law-week/biden-rules-out-term-limits-for-supreme-court-justices.

[156] Joe Biden, Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade, Jun. 24, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/24/remarks-by-president-biden-on-the-supreme-court-decision-to-overturn-roe-v-wade/.

[157] *Id.* ("[T]he Court now — now — practically dares the women of America to go to the ballot box and restore the very rights they've just taken away.").

similarly called the Court "out of control" and labelled this "the moment to restore the rights that have been taken away from us and the moment to protect our nation from an extremist agenda that is antithetical to everything we believe as Americans."[158]

As a candidate, the main action President Biden promised to take on the Supreme Court was to appoint a commission to study reforms.[159] In April 2021, he appointed a 36-member Commission composed of law professors, former judges, and others with a range of views and partisan affiliations.[160] The Executive Order creating the Commission charged it with producing a report that would give an account of contemporary debate on the role of the Court and legal and policy arguments for and against Supreme Court reform, as well as the "historical background of other periods in the Nation's history when the Supreme Court's role and the nominations and advice-and-consent process were subject to critical assessment and prompted proposals for reform."[161] The Commission, after months of meeting and public testimony from a wide range of actors with both U.S. and comparative perspectives, voted unanimously to issue its final report in December 2021, but that unanimous vote masked a considerable amount of internal dissensus.[162]

The final report gives a thorough grounding of the history of controversies surrounding the Supreme Court and contemporary debates. While ably explaining the pros and cons of major reform proposals and potential routes to implementation, it takes no position on the three major areas – changing the size of the Court, imposing term limits on justices, or curbing the jurisdiction and power of the Court, although it does make stronger recommendations on lesser

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[158] Joe Biden, Remarks by President Biden on Protecting Access to Reproductive Health Care Services, Jul. 8, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/.

[159] *See* Biden Proposes Study, supra note 153.

[160] *See* E.O. 14023, 86 FR 19569 (Apr. 9, 2021).

[161] *See id.* at 19569.

[162] *See* Madeleine Carlisle, *Behind The Scenes of President Biden's Supreme Court Reform Commission*, TIME, Dec. 10, 2021, at https://time.com/6127632/supreme-court-reform-commission/.

issues, such as an advisory code of conduct for justices.[163] It also noted, without making a recommendation, that "[a]mong the proposals for reforming the Supreme Court," non-renewable term limits have "enjoyed considerable, bipartisan support," and it noted the prevalence of limits for high courts comparatively.[164] In media interviews, the Commissioners described the exercise as valuable, but one also expressed "surprise[] by the amount of deference to the status quo" and "[t]he idea that we shouldn't try to improve things because it would destabilize the system, which I heard from liberals."[165] Two also expressed frustration with the charge, wishing that the mandate had been different and focused on coming up with solutions rather than merely analysing the debate.[166] In the aftermath of the report's issuance, and even since *Dobbs* was handed down, Biden has not put forth a concrete proposal on Supreme Court reform. His Press Secretary said after the decision was issued that expanding the size of the Court is something that he "does not agree with."[167]

Thus Biden, like Trump, has had his constitutional project dominated by a backward-looking discourse that we have called "restorative." But of course, this similarity is overshadowed by stark differences between the two projects. One important difference is about the nature of the past, as well as the plausibility of a link between the projects and that past. Biden's account of restoration is dominated by damage wrought during the Trump presidency, and and attempt to repair what the administration perceives as legal and normative changes during that presidency. The past is thus rendered in a relatively concrete way, although this account of short-term damage is also linked to a fuzzier, longer-term narrative of deviation from an authentic U.S. tradition, perhaps driven by increased political

[163] *See* Presidential Commission on the Supreme Court of the United States, Final Report, Dec. 2021, at https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

[164] *See id.* at 111.

[165] *See* Carlisle, *supra* note 162.

[166] *See id.*

[167] *See* Diana Glebova, *Biden Remains Opposed to Court-Packing Despite Roe Reversal, White House Confirms,* NAT. REV., Jun. 27, 2022, at https://www.nationalreview.com/news/biden-remains-opposed-to-court-packing-despite-roe-reversal-white-house-confirms/.

polarization and decreased frequency of cross-party compromise.[168] These longer-term, structural changes are much more challenging to reverse than the relatively short-term actions taken by a one-term president. President Trump's account of the past is very different, resting more on an imagined or romanticized past, one fuelled by nostalgia but also by the exclusion of groups like immigrants and minorities. So understood, the Trump vision of the past has much in common with that of European right-wing populist parties, as we will examine in more detail below.[169]

A second difference is about the nature or mixture of discourse. The Trump administration's rhetoric was almost exclusively backward-looking and nostalgic, even when the President was taking actions – such as January 6 – that would be considered by many actors to be sharply at variance with U.S. history and tradition. Biden's justifications have been more mixed – heavily restorative, but also at times transformative in a manner that has come to characterize the modern U.S. left. His administration's December 2021 statement on voting rights, for example, includes a paean to "restoring" the right to vote, but also emphasizes that "[d]emocracy is always a work-in-progress, a constant striving to build a more perfect union."[170] It foregrounded "inclusion and the advancement of fundamental rights."[171] And the President has returned repeatedly in his public speeches to a phrasing that began as his campaign slogan in 2019, and which captures that melding: "Our best days lie ahead."[172]

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[168] *See, e.g.,* Hanna Trudo & Sam Stein, *Joe Biden Bets it all on Nostalgia*, THE DAILY BEAST, Nov. 1, 2020, at https://www.thedailybeast.com/joe-biden-bet-it-all-on-nostalgia-and-sanityit-just-might-work.

[169] *See, e.g.,* Sven Schreurs, *Those Were the Days: Welfare Nostalgia and the Populist Radical Right in the Netherlands, Austria and Sweden*, 37 J. INT'L & COMP. SOC. POL'Y 128 (2021); Manuel Menke & Tim Wulf, *The Dark Side of Inspirational Pasts: An Investigation of Nostalgia in Right-Wing Populist Communication*, 9 MEDIA & COMM. 237 (2021).

[170] Fact Sheet: The Biden-Harris Administration is Taking Action to Restore and Strengthen American Democracy, supra note 144.

[171] *Id.*

[172] See *Joe Biden Bets on Being the Anti-Trump Candidate,* THE NEW YORKER, June 12 2019, at https://www.newyorker.com/news/our-columnists/joe-biden-bets-on-being-the-anti-trump-candidate; Anders Hagstrom, *Biden Says America's "Best Days Still Lie Ahead" in July 4th Message*, FOX NEWS, Jul. 4, 2022, at https://www.foxnews.com/politics/biden-says-best-days-still-lie-ahead-july-4th-

III. RESTORATIVE CONSTITUTIONALISM OUTSIDE THE UNITED STATES

In this Part, we gain further insight on the nature of restoration by considering similar movements for constitutional change outside the U.S. As in our comparison between Biden and Trump, we highlight two different kinds of "restoration": the repairing of relatively concrete forms of damage, especially after significant episodes of democratic erosion, and the gauzier, longer-term focus on a romanticized past.

A. Overreaching Presidencies in Colombia and Ecuador

A relatively common scenario worldwide occurs where political leaders with authoritarian leanings carry out an "abusive" constitutional program that erodes democracy, but that actor then loses power to another leader who seeks to re-establish liberal democracy. In some cases, these may be what Ginsburg and Huq have called "near misses": cases where a democratic regime almost slipped into an authoritarian or hybrid regime, but the course was corrected in time.[173] In others, the damage may be deeper, but new leadership is nonetheless attempting to re-establish a liberal democratic regime. In these circumstances, restorative programs of constitutional change have obvious appeal. An attempt at backward looking restoration may be especially appealing where two conditions are met – first, the damage to the liberal democratic order is relatively short-term and not too deep, and second, the memory of the former liberal democratic regime is relatively strong.

Consider two interesting examples of presidents who commentators largely agree posed at least some kind of significant danger to democracy: Colombia's Alvaro Uribe (2002-2010) and Ecuador's Rafael Correa (2006-2017). The moves made by both have

message; Joe Biden, Instagram, Nov. 3, 2020, at https://www.instagram.com/p/CHHwFaNrKt-/?hl=en.

[173] *See* Tom Ginsburg & Aziz Huq, *Democracy's Near Misses*, 29 J. DEMOC. 16 (2018).

been fairly well-studied in the literature, and do not need an extensive recounting here.[174] In Colombia, Uribe gained extensive popularity through cultivating an image as a tough leader who would pursue an aggressive military strategy, deemed "democratic security," against the FARC and other guerrilla movements.[175] The perceived success of this strategy made Uribe a very popular president. Reports of significant human rights abuses (such as a "false positives" scandal where dead civilians were passed off as guerrilla fighters) and harsh rhetorical attacks on unfavorable judicial decisions made little dent on his image.[176]

Uribe twice sought constitutional amendments to extend his term in office. In 2006, Uribe used his standing in Congress to push through a constitutional amendment allowing for two consecutive terms in office, a break from the longstanding tradition over the course of Colombian history limiting presidents to only one four-year term. In the leadup to the 2010 election, after having won re-election in 2006, Uribe again sought to change the constitution to allow a *third* consecutive term in office. This time, however, the Constitutional Court stepped in, holding that Uribe's attempt was invalid both on procedural grounds (irregularities in the process through which the proposed amendment passed Congress), and substantive grounds (the amendment was an unconstitutional constitutional amendment because it replaced, rather than merely amending, basic principles in the existing constitutional text).[177] Uribe obeyed the decision and did not stand for office in 2010. The winner of the 2010 election, Juan Manuel Santos, was allied with Uribe's movement and had been in his Cabinet, but turned against Uribe shortly after winning office and relied on a very different policy program and governance style.

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[174] *See, e.g.,* SAM ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015) (analyzing Colombia under Uribe); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 200-03, 207 (2013) (examining Colombia and Ecuador).

[175] *See* Ann Mason, *Colombia's Democratic Security Agenda: Public Order in the Tropics*, 34 SEC. DIALOGUE 391 (2003).

[176] *See, e.g.,* Ernesto Cardenas & Edgar Villa, *La política de seguridad democrática y las ejecuciones extrajudiciales,* 31 ENSAYOS SOBRE POLÍTICA ECONÓMICA 64 (2013).

[177] *See* Decision C-141 of 2010, *translated in* MANUEL JOSE CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 352 (2017).

The story in Ecuador is fairly similar. Correa won office in 2006 promising to replace the existing constitution and re-found the country, in a manner reminiscent of Hugo Chavez in Venezuela. Correa indeed managed to replace the existing constitution, in a process that was marred by significant legal irregularities and was dominated by Correa's supporters.[178] The 2008 constitution is a fascinating document, one which combined significant innovations in constitutional rights – such as recognition of nature as a legal personality enjoying rights – with a sharp consolidation of power in the hands of the president.[179] It lengthened the time presidents could serve by allowing them to win two consecutive terms in office rather than one as under other recent constitutions, but it did initially leave a presidential term limit in place. Correa relied on a range of formal and informal tools, such as control over the media and plentiful defamation lawsuits heard by allied judges, to supress opposition groups and maintain power.

As his second term neared its end, Correa like Uribe sought a constitutional amendment to allow him to remain in office, in this case by simply eliminating the term limit. Correa clearly had control over enough votes in Congress to pass the amendment, especially after a favorable Constitutional Court decision allowed him to use a relatively undemanding route for constitutional change, one which did not require a popular referendum. However, in the face of largescale popular protests organized by the opposition, Correa's allies made a significant change to the amendment – they would still eliminate the presidential term limit, but would add a transitional provision that would make the change take effect only after the 2017 election, so that

[178] *See, e.g.,* Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOC. 46 (2008).

[179] Elsewhere, we have argued that the innovative environmental rights provisions in the Ecuadorian constitution served as payoffs to domestic and international civil society groups in return for its authoritarian tendencies, and also that those provisions constituted "shams" that Correa had no real intention of implementing. *See* ROSALIND DIXON AND DAVID LANDAU, ABUSIVE CONSTITUTIONAL DEMOCRACY: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY 74-79 (2021). *See also* Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 641 (2018).

Correa would need to leave office at least temporarily.[180] The 2017 election was instead won by his handpicked successor and Vice President Lenin Moreno. But Moreno, like Santos in Colombia, turned against his predecessor and pursued a different political path, with Correa in turn labelling Moreno a "traitor."[181]

The broad outlines of the "abusive" constitutional programs of Uribe and Correa, as stated above, are well known; less well understood are the "restorative" constitutional projects of their successors. Both Santos and Moreno moved to correct the term limit expansions of their predecessors. In Ecuador, Moreno quickly called a referendum with seven questions.[182] Two of these expanded environmental protections by restricting zones for oil drilling and mining, and one eliminated the statute of limitations for sex crimes involving children. But these were coupled with three questions that struck at Correa's regime. One amended the Constitution so that people convicted of acts of corruption would be unable to participate in political life – this was seen at least in part as an attempt to restrict the pathways of some former Correa officials back to power, including another of Correa's former vice-presidents seen as a formidable rival for the presidency.[183] A second amended the constitution to change the composition of the Council of Citizen Participation and Social Control and fired its existing officials, effectively allowing Moreno to remove an influential group of holdovers from Correa's regime. The newly constituted, transitional body would have broad powers to remove personnel from "control" institutions such as the National Electoral Council and the national

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[180] *See Ecuador: Aprueban enmiendas a la Constitución que incluyen la autorización de la reelección indefinida*, BBC MUNDO, Dec. 4, 2015, at https://www.bbc.com/mundo/noticias/2015/12/151203_ecuador_asamblea_reeleccion_ep.

[181] *See* Stefania Gozzer, *Arresto de Julian Assange, fundador de WikiLeaks: por qué supone la "ruptura definitiva" de Lenín Moreno con la herencia de Rafael Correa*, BBC NEWS, Apr. 11, 2019, at https://www.bbc.com/mundo/noticias-america-latina-47893539.

[182] *See, e.g., Ecuador's President Lenín Moreno Tries to Bury the Legacy of his Predecessor*, THE ECONOMIST, Feb. 2, 2018.

[183] For a perspective that is deeply critical of the use of criminal law against Correa allies by the Moreno administration, see Javier Calderón Castillo, Nery Chaves García, Constanza Estepa y José Roberto Ruiz, *Lawfare Recargado en Ecuador*, CELAG, Apr. 5, 2021, at https://www.celag.org/lawfare-recargado-en-ecuador/.

ombudsperson, as well as certain courts and judicial bodies, which had previously been dominated by Correa supporters.[184]

And the third asked whether citizens agreed to amend the Ecuadorian constitution so that presidents would only be able to run for re-election for one consecutive term, "recovering the mandate of the Constitution of [2008] and leaving without effect the indefinite re-election approved by amendment for the National Assembly on December 3, 2015."[185] Moreno promoted the reform by arguing that it would correct a "political aberration." And he promised that with the referendum his administration would "return to [and] recover the essence" of the 2008 constitution, which "consecrates a very rich set of rights" and is a "reference for the democracy of many countries."[186] The Moreno administration was concerned that the Constitutional Court would strike down the term limits reimposition by holding that it could only be done by Constituent Assembly, and he therefore sent the question to the National Electoral Council without a Constitutional Court ruling after he claimed (problematically) that the 20-day period for the Court to rule had elapsed. [187] All seven questions, including

[184] *See, e.g.*, José María León Cabrera, *Consulta en Ecuador: Moreno consolida su poder y Correa no volverá a ser presidente*, N.Y. TIMES, Feb. 4, 2018, at https://www.nytimes.com/es/2018/02/04/espanol/america-latina/consulta-en-ecuador-moreno-consolida-su-poder-y-correa-no-volvera-a-ser-presidente.html. After the referendum was successful, a transitional Council was selected by the National Assembly from lists sent by the President and led what the *Economist* called a "purge" of Correa-dominated institutions. *See Julio César Trujillo is Ecuador's second-most powerful man*, THE ECONOMIST, Aug. 30, 2018, at https://www.economist.com/the-americas/2018/08/30/julio-cesar-trujillo-is-ecuadors-second-most-powerful-man. A new permanent Council was elected in 2019, but the Assembly (with Moreno's support) impeached and removed four members only a few months later, in part for interfering with the transitional Council's work. *See* Estefania Celi, *El sacerdote José Tuárez y otros tres vocales quedaron fuera del Consejo de Participación*, PRIMICIAS, Aug. 14, 2019, at https://www.primicias.ec/noticias/politica/juicio-politico-vocales-participacion/.

[185] Consejo Nacional Electoral, Memorando No. CNE-SG-2017-2674-M, at 5 (question 2).

[186] *See Lenín Moreno: La alternabilidad es necesaria en el ejercicio del poder*, EL COMERCIO, Sept. 25, 2017, at https://www.elcomercio.com/actualidad/leninmoreno-alternabilidad-consultapopular-onu.html.

[187] *See* Mauricio Guim & Augusto Verduga, *Ecuador's "Unstoppable" Constitutional Referendum*, Int'l J. Const. L. Blog, Dec. 16, 2017, at http://www.iconnectblog.com/2017/12/ecuadors-unstoppable-constitutional-referendum.

the reimposition of a term limit, were approved by a wide margin in early 2018.[188]

In Colombia, Uribe's successor Santos also had the 1991 Constitution amended to remove Uribe's lengthening of the presidential term limit. Santos, another deeply consequential president who served in office from 2010 until 2018, sent a package of proposed amendments dealing with the separation of powers to Congress shortly after winning a second term in office. One of his key proposals reinstated the four-year, one-term lifetime limit on presidents. In announcing the proposal, Santos argued that "amendment by amendment, the equilibrium expected in the Constitution of '91 had been affected," and therefore that to abolish reelection "is the entry door to the reestablishment of the equilibrium of powers in our country."[189]

Congressional debates focused in part on the country's traditions, and the fact that historically, presidential reelection had been extremely rare across the country's several different constitutions since independence.[190] During passage, members of Congress added a provision to protect the reinstated term limit against attempts like Uribe's, by requiring a Constituent Assembly or referendum to make any future constitutional change to the limit.[191] Thus the final version of the reinstated term limit contained what we have elsewhere called a "tiered constitutional design," where particularly sensitive provisions or principles are protected by making them especially difficult to change.[192] The final vote in favor of the provision reflected a broad consensus, with only the party of ex-president Uribe voting against the proposal and Uribe himself calling it an act of "political

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[188] *See* Cabrera, *supra* note 184.

[189] *See Se confirma que el periodo presidencial se queda en cuatro años: La reelección de todos los funcionarios se acabará. Se elimina el voto preferente en las elecciones*, EL TIEMPO, Sept. 3, 2014, at https://www.eltiempo.com/archivo/documento/CMS-14478996.

[190] *See* Laura Ardila Arrieta, *Santos nunca cerró con llave la puerta de la reelección, pero el Congreso se impuso*, LA SILLA VACIA, Dec. 11, 2014, at https://archivo.lasillavacia.com/historia/santos-nunca-cerro-con-llave-la-puerta-de-la-reeleccion-pero-el-congreso-se-impuso-49273.

[191] *See id.*

[192] *See* Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438 (2018).

vengeance."[193]

President Santos's program on political change was more mixed than that of Moreno, combining restorative discourse with transformation. After the term limit amendment had been finalized, Santos thanked the Congress in a major speech and said that "Colombian democracy had proven it was capable of reforming itself…restoring the necessary equilibrium of powers."[194] However, he also pointed forward to major initiatives that he intended to pursue in his second term. One of these was the finalization of the peace process with the FARC guerrilla group in 2016. In pursuing peace to end Colombia's long-running internal armed conflict, Santos was aiming to achieve perhaps the foremost underlying (and unmet) purpose of the 1991 Constitution, which refers to peace throughout and states that "peace is a right and a duty of mandatory compliance."[195] Santos was also staking out a very different policy on the internal armed conflict than Uribe, by pursuing peace talks instead of a military solution. The peace agreement resulted in sweeping new legislation and constitutional amendments, including agreements on restitution and reparations for victims, the reincorporation of the members of the FARC into civil and political life, initiatives on rural development, and the creation of a new court system and special rules to try former members of the FARC.[196] In this light, it is interesting that Santos waited until his second term – that is, until he had been reelected – to "restore" the country's traditional one-term limit. Reelection almost certainly helped to stabilize the peace agreement,

[193] *See Eliminaron la reelección por una venganza política: Uribe*, EL ESPECTADOR, Jun. 18, 2015, at https://www.elespectador.com/politica/eliminaron-la-reeleccion-por-una-venganza-politica-uribe-article-567070/.

[194] *See Santos quiere ser recordado como el presidente que eliminó la reelección en Colombia*, EL ESPECTADOR, Jul. 20, 2015, at https://www.elespectador.com/politica/santos-quiere-ser-recordado-como-el-presidente-que-elimino-la-reeleccion-en-colombia-article-573891/.

[195] COLOM. CONST., art. 22 (1991).

[196] *See* THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT (Jorge Luis Fabra-Zamora, Andrés Molina-Ochoa, & Nancy C. Doubleday, eds., 2022); TED PICCONE, PEACE WITH JUSTICE: THE COLOMBIAN EXPERIENCE WITH TRANSITIONAL JUSTICE (2019), available at https://www.brookings.edu/wp-content/uploads/2019/06/FP_20190708_colombia.pdf; David Landau, *The Causes and Consequences of a Judicialized Peace Process in Colombia*, 18 INT'L J. CONST. L. 1303 (2020).

which took over five years from the beginning of talks until final agreement (2011-2016), and many more years to implement. Santos's successor as president (Iván Duque Márquez) was an Uribe ally who was very critical of the peace process, but he was unable to derail a process that had gained solid ground by 2018.[197]

In short, Ecuador and Colombia make up two fairly similar stories of countries responding to presidents with authoritarian tendencies. In both cases, successors successfully carried out "restorative" programs of constitutional change that focused on reinstating presidential term limits. In Ecuador, Moreno did relatively little beyond reinstating the term limit; critics questioned whether he was actually "restoring" the true spirit of the progressive, 2008 constitution, or instead "restoring" the neoliberal order of the 1990s, a time to which many Ecuadorians did not want to return because it was associated with political instability and economic austerity.[198] In Colombia, Santos more adeptly combined a restorative agenda with a broader one that was largely forward-looking and transformative in character, focused on achieving peace.

B. Overcoming an Authoritarian Interlude in India

In India, the most infamous period in the country's modern constitutional history was the 21-month period of Emergency rule, between 1975 to 1977. During the Emergency, elections were postponed, Parliament suspended, and Prime Minister Indira Gandhi given broad power to rule by executive decree.[199] Judicial review and civil liberties were sharply curtailed, with widespread preventative detention and limits on press freedom and opposition rights.[200]

A number of these practices were entrenched by the 42nd

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[197] *See, e.g.,* Shauna N. Gillooly, *Colombia's Elections in May Could Determine the Fate of the Peace Deal*, WASH. POST, Apr. 28, 2022, at https://www.washingtonpost.com/politics/2022/04/28/colombia-election-peace-accord-farc/ (noting however that Duque has done his best to "slow" implementation).

[198] *See, e.g.,* Javier Calderón Castillo, *Lenín y la restauración neoliberal en Ecuador*, CELAG, Aug. 17, 2019, at https://www.celag.org/lenin-y-la-restauracion-neoliberal-en-ecuador/#_ftn1.

[199] Shah Comm'n of Inquiry, *Third and Final Report* (1978) (India).

[200] *Id.*

Amendment passed in 1976, during the Emergency.[201] The 42nd amendment consisted of 59 clauses and amended numerous articles of the constitution. The amendment increased the emergency powers of the prime minister by increasing power to suspend rights and the doubling the time during which an emergency could remain in effect without parliamentary approval from six months to one year. It also increased federal power to disqualify state legislators. It instructed that the Constitution's Directive Principles, laying out duties of the state to provide development objectives and other goals, should take priority over fundamental rights. And it curtailed judicial review over key areas directly as well, withdrawing it from election disputes and constitutional amendments (therefore attempting to reverse the Supreme Court's basic structure doctrine stemming from *Kesavananda Bharati v. State of Kerala*),[202] and requiring a two-thirds majority of the bench to strike down a law.

Taken collectively, and in conjunction with the legislative and informal practices pursued during the Emergency, these measures were widely viewed as a serious threat to Indian democracy. In the 1977 general election, the main opposition Janata party released an election manifesto promising to repeal the 42nd amendment and to "restore" fundamental freedoms and the "authority of the judiciary," and to "re-establish the rule of law."[203] It promised to fulfill the true meaning of the path laid out by Mahatma Gandhi and framed the election as a stark choice between "democracy and dictatorship."[204] The manifesto also promised to create a "new society" by reducing poverty, tackling illiteracy and other social problems.[205] Thus the manifesto, as we have seen in other cases, thus combined restorative and transformative rhetoric.

The 1977 elections constituted a "critical juncture," with the

[201] The Constitution (Forty-second Amendment) Act, 1976 (India).

[202] (1973) 4 SCC 225; AIR 1973 SC 1461.

[203] *See* SANJAY RUPARELIA, DIVIDED WE GOVERN: COALITION POLITICS IN MODERN INDIA 67 (2015).

[204] *See id.*

[205] *See id.* at 68 (noting vows in the manifesto to "eradicate illiteracy, universalize access to safe drinking water, public housing and social security, and guarantee the rights of the poorest by creating new statutory commissions, establishing public ombudsman bodies such as Lok Pal and Lokayukta, and enhancing greater legal aid").

opposition parties dominating and Indira Gandhi's Congress party swept out of power.[206] The Janata party won 270 of 542 seats, while the Congress party won only 153, and Prime Minister Indira Gandhi herself lost her seat.[207] Morarji Desai of the Janata party became the first non-Congress party Prime Minister of India, taking over from Gandhi. In an important speech upon taking office, Desai attacked the rationale for the Emergency by asserting that "freedom and bread are not competitive even in a developing society," and said that "the clouds of fear and uneasiness have lifted…by a revolution of the people to restore democracy."[208]

Most commentary sees the Janata party as successful at carrying out its goal of restoring the constitutional system. The 43rd and 44th amendments repealed major portions (although not the entirety) of the 42nd amendment. The 43rd Amendment, passed in 1977, repealed provisions of the 42nd Amendment authorizing Parliament to enact laws against anti-national activities and restricting the power of the Supreme Court and High Court to review state and federal laws (such as the requirement of a two-thirds supermajority to hold laws unconstitutional).[209]

The 44th Amendment of 1978 limited emergency powers in light of Gandhi's Emergency by providing increased procedural safeguards, eliminating the ability to suspend the right to life, and curbing preventative detention. It also restored additional powers of the courts, such as the ability of the Supreme Court to review elections of the President and Vice-President and the ability of the High Courts to issue writs.[210] Legal changes in both amendments also reduced the ability of the central government to intervene in state governments (a longstanding issue exacerbated by Indira Gandhi's government), and the Janata regime behaved with relative restraint in this area, although it did use constitutional powers to remove nine state governments run

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[206] *See id.* at 69.

[207] *See* GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION 395 (1999).

[208] *See id.* at 403.

[209] The Constitution (Forty-third Amendment) Act, 1977 (India).

[210] The Constitution (Forty-fourth Amendment) Act, 1978 (India).

by the Congress party.[211] More broadly, and less formally, the Janata regime made a sincere effort to adopt a more democratic style of politics in India, one which it associated with the pre-Emergency past. Although it made a clumsy and ultimately unsuccessful effort to prosecute Indira Gandhi, it also gave more status to the political opposition, now occupied by Gandhi's Congress party, and it raised the status of the leader of the opposition party to a Cabinet position.[212]

The judiciary also played a significant role in India's constitutional restoration. The key case was *Minerva Mills v. Union of India* (1980), where the Supreme Court used the basic structure doctrine[213] to strike down two key clauses of the 42nd amendment, one of which accorded the Directive Principles priority over fundamental rights, and the other of which abolished the ability of the judiciary to review constitutional amendments for constitutionality (ie. to wield the basic structure doctrine itself).[214]

However, the Janata party's restorative project was complicated by two factors. The first was disagreement over the scope of restoration itself. The 43rd and 44th amendments overturned parts of the 42nd amendment piecemeal, but also left some key elements of the 42nd amendment in place. Moreover, some members of the new coalition wanted to go further in changing the constitution in light of the recent past, believing for example that Indira Gandhi's emergency

[211] *See* RUPARELIA, *supra* note 203, at 80. The parliamentary debates on both amendments also demonstrate the dominance of a restorative framing. *See* Lok Sabha Debates, *Constitution (Forty Fourth Amendment)* Bill, Sixth Series Vol. VIII No. 12, 19 December 1977, at https://eparlib.nic.in/bitstream/123456789/2201/1/lsd_06_03_19-12-1977.pdf (last visited May 19 2022) 289; Lok Sabha Debates, *Constitution (Forty Fourth Amendment)* Bill, Sixth Series Vol. VII. No. 23, 16 December 1977, at https://eparlib.nic.in/bitstream/123456789/2162/1/Lsd_06_03_16-12-1977.pdf (last visited May 19 2022) 303.

[212] *See* AUSTIN, *supra* note 207, at 403-04.

[213] On the UCA generally, see, for example, Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L. J. CON. L. 606 (2015); YANIV RONZAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (OUP 2016); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L. J. CON. L. 460 (2006). On India specifically, see also I.C. Golaknath v. State of Punjab, A.I.R. 1967 S.C. 1643 (India).

[214] *Minerva Mills v Union of India,* AIR 1980 SC 1789 (India).

required much sharper restrictions on emergency powers and an end to the President's Rule procedure through which the central government had intervened in the states.[215] These more ambitious changes were not adopted. The second factor was that although the coalition's restorative project had considerable success, its transformative project did not. Granville Austin noted that the coalition had only "minimal" success on its broader goals of enacting new social legislation.[216]

In the end, the Janata coalition fell after only 16 months, beset by internal tensions and united primarily by a desire to overcome Gandhi's Emergency and by dislike of Gandhi herself.[217] Indira Gandhi in fact returned to power as Prime Minister after the 1980 election.[218] However, her second stint in power (ended by her 1984 assassination) put less pressure on democracy than her first and did not contain the sweeping erosion of democracy that occurred during the Emergency.

C. Nostalgia, Authoritarianism, and the Restoration of the Past in Hungary

In Eastern Europe, restorative constitutional discourse played a key role in the post-1989 transition from communist to liberal democratic rule. A key problem was reckoning with the legitimacy and meaning of Communist era constitution. In several countries, as Partlett has shown, leaders denied the legitimacy of the Communist constitution and instead "restored" older constitutions, which were said to reflect the authentic constitutional tradition of the country.

In Latvia, for example, there was wide ranging debate among pro-independence groups in 1980s as to whether to pursue constitutional

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[215] *See* AUSTIN, *supra* note 207, at 423.

[216] *See id.* at 404.

[217] *See id.* at 402 ("Once democracy had been restored through amendments to the Constitution, [the coalition] was not strong enough to withstand the differences among individuals and the factionalism the parties brought with them from their years in the political wilderness.").

[218] *See id.* at 408.

restoration or incremental reform to the Communist constitutions.[219] But in 1990, the Supreme Council of Latvia published a declaration calling for independence and the wholesale restoration of the 1922 Latvian Constitution, claiming that the intervening Soviet regime was illegitimate and that there was legal continuity between the 1918 government and the 1990 reform efforts.[220] After independence had been achieved, the newly elected legislature (which now called itself the Saeima in light of the country's traditional legislative body) unanimously voted to restore the 1922 constitution in full.[221] The legislature subsequently adopted important amendments to the 1922 constitution to modernize and update it, but the restored constitution itself served as the base for these reforms.

The literal restoration of pre-Communist constitutions played a role elsewhere in the Baltics as well, although not to the same degree as in Latvia, and generally in a more temporary and partial manner. In Estonia too, the independence movement based itself on wanting to re-establish the 1938 constitutional order, and during the independence movement restored five of the first six articles of the articles of the 1938 constitution, although it later adopted a different approach.[222] In Lithuania, the Supreme Soviet also restored the 1938 constitution during the transition, although it did so only for one hour, and then adopted a different, Provisional Basic Law until a new constitution was written.[223] In these cases, restoration played a symbolic role in legitimating the legislative bodies engaged in constitution-making and in marking a break with the Soviet past.[224]

Elsewhere in Eastern Europe, the path was different. Rather than restoring pre-Soviet constitutions, for example, transitional actors in Hungary and Poland opted for a pragmatic approach that left

[219] *See* Andrejs Gusachenko & Vineta Kleinberga, *The Emergence and Restoration of the State: Latvia in 1918 and 1990,* 11 TALTECH J. OF EUR. STUD. 55 (2021).

[220] *See id*. *See also* Jānis Lazdiņš et al., *Legal and Historical Elements of Latvia's Restoration of Independence,* 19 BALTIC YEARBOOK OF INT. L. 27 (2021).

[221] *See* William Partlett, *Restoration Constitution-Making*, 9 VIENNA J. CONST. L. 514, 530-31 (2015)

[222] *See id.* at 532.

[223] *See id.* at 532-33.

[224] *See id.* at 533 (arguing that "elements of restoration helped to lend important legitimacy to the existing legislative institutions at the center of these processes").

communist constitutions in place. For many post-communist leaders, as Andras Sajo notes, the aim was to repudiate revolutionary discourse and modes of politics. And this meant repudiating the idea of *democratic* as well as anti-democratic constitutional revolutions, and instead turning to more incremental, backward-looking accounts of democratic change – or promoting the idea of a "return to the golden glorious past and the 'correct and normal European tradition.'"[225]

In both Hungary and Poland, 1989 roundtable talks between communist and opposition leaders led to the preservation of the existing communist-era constitutions, alongside a series of pro-democratic constitutional amendments paving the way for free and fair elections.[226] In Poland, these changes were enshrined in amendments to the constitution prior to the first democratic elections, whereas in Hungary, the election of a newly democratic government in 1990 led to the passage of further amendments.[227] The aim was for this amended constitution to be interim only.[228] In Poland, this process worked and was completed by the writing of a permanent, new democratic constitution in 1997.[229]

In Hungary, however, the constitution-making process was never completed. An attempt to write a permanent constitution in the Parliament foundered in the 1990s, stymied in part by a demanding rule that required four-fifths approval of norms in the text.[230] Perhaps too, the effort was undermined by the very success of the interim constitution, and by a strong Constitutional Court that played an active role in seeking to fill holes found in the temporary constitution by

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[225] *See* András Sajó, *Preferred Generations: A Paradox of Restoration Constitutions, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 335 (Michel Rosenfeld ed., 1994).

[226] *See* Istvan Szikinger, *Hungary's Pliable Constitution, in* DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE VOLUME 1: INSTITUTIONAL ENGINEERING (Jan Zielonka ed., 2021); John Schiemann, *Pact-Making in Hungary: The 1989 Hungarian Roundtable Talks, in* THE POLITICS OF PACT-MAKING (2005).

[227] Tomasz Tadeusz Koncewicz, *Understanding Polish pacted (r)revolution(s) of 1989 and the politics of resentment of 2015-2018 and beyond,* 17 INT. J. CONST. L. 695 (2019); Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?* 26 S. AFR. J. ON HUM. RTS 19 (2010).

[228] *See* Arato, *supra* note 227.

[229] For a defence of the 1997 Constitution and the earlier 1989 amendments on pragmatic grounds, *see* Koncewicz, *supra* note 226.

[230] *See* Arato, *supra* note 227.

construction of an "invisible constitution" informed by broader principles.[231]

After the Fidesz party won a two-thirds majority in the 2010 elections, this failure to complete the constitution-making process became significant. Party leaders adopted a heavily restorative discourse to legitimate sweeping constitutional change, and shortly thereafter the adoption of an entirely new constitution. Their argument, simply stated, was that the transition had never been completed, and the Communist interlude never truly repudiated. The constitutional promise of Fidesz was to complete the transition by restoring the "authentic" Hungarian constitutional tradition.

Consider the preamble of the 2011 Hungarian constitution, called the "National Avowal."[232] It references to the "historical constitution" of Hungary, its "constitutional continuity," which it traces back to Saint Stephen and foregrounds as a symbol the Holy Crown.[233] It states that it does not recognize the "suspension" of the historical constitution due to the "foreign occupation[s]" of the Nazi Socialist and Communist regimes, and further states that "[w]e do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule, therefore we proclaim it to be invalid."[234] It dates "the restoration of our country's self-determination," lost in 1944, to May 2, 1990, the end of the Communist regime.[235] Finally, it refers to the twentieth century as a time which led to "a state of moral decay," and states that the country had an "abiding need for spiritual and intellectual renewal": "our children and grandchildren will make Hungary great again with their talent, persistence, and moral strength."[236]

The Avowal's vision of Hungarian history is carefully crafted to

[231] *See* Gabor Halmai, *Silence of Transitional Constitutions: The "Invisible Constitution" Concept of the Hungarian Constitutional Court*, 16 INT'L J. CONST. L. 969 (2018) (concluding that the "invisible constitution" did not help to build constitutional culture, but that there was no alternative in the 1990s to build up constitutionalism in Hungary).

[232] CONST. HUNGARY, National Avowal (2011).

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See id.*

serve Fidesz's ideology and interests. Sajo has noted that speaking of a Hungarian constitutional tradition to restore is a complex matter – the post-1920 period he describes as a "series of unconstitutional arrangements"; an earlier period relied heavily on unwritten constitutions.[237] This creates a temptation to rely on an "imaginary past."[238] Scheppele refers to the Fidesz constitutional project as one of "constitutional nostalgia."[239]

What goals does this project carry out for the regime? First, it links to Fidesz's nationalist project, and ultimately its leader's explicit embrace of "illiberalism."[240] The kind of past restored by Fidesz, both in the 2011 constitution and elsewhere, is a "glorious past."[241] The vision is a relatively thick, historical one. In recent years, the Hungarian regime has used the concept of "constitutional identity" to resist European Union measures, particularly those involving refugees.[242] A 2018 constitutional amendment added language to the National Avowal imposing a duty on all public authorities to "protect our self-identity rooted in our historical constitution," and contained provisions limiting the delegation of power to the EU.[243] The amendment also contained new provisions limiting immigration, including one that stated "no alien population shall be settled in Hungary" and which limited rights of asylum seekers.[244] The

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[237] *See* Andras Sajo, *Preferred Generations: A Paradox of Restoration Constitutions, in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 335, 346 (Michel Rosenfeld, ed., 1994).

[238] *See id.*

[239] *See* Kim Lane Scheppele, *Constitutional Nostalgia*, Hungarian Spectrum, Feb. 8, 2012.

[240] In a prominent 2014 speech, Prime Minister Viktor Orban defined his vision for Hungary as an "illiberal" democracy, stated that Western liberalism had failed, and denounced NGOs as foreign impositions. *See Full Text of Viktor Orbán's Speech at Baile Tusnad (Tusnadfurdo) of 26 July 2014*, THE BUDAPEST BEACON, Jul. 29, 2014, at https:// budapestbeacon.com/ full-text-of-viktor- Orbáns-speech-at-baile-tusnadtusnadfurdo- of- 26- july-2014/.

[241] *See* Sajo, supra note 237, at 342.

[242] *See* Gabor Halmai, *Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E)(2) of the Fundamental Law*, 43 REV. C.E. EUR. L. 23 (2018); ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING 146-47 (2021).

[243] Const. Hung., 7th amendment (2018), available at https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf.

[244] *See id.*

explanatory note accompanying the amendment stated that its goal was to prevent Hungary from becoming an "immigrant country."[245] Thus, Fidesz's rendering of the constitutional past serves a kind of dual purpose, carrying out nationalist and illiberal goals at home while also creating ideological space to resist European Union oversight.

The Fidesz rendering of the past also serves authoritarian goals. It has been widely observed that the regime, before, during, and after promulgating the 2011 constitution, has significantly eroded democracy in Hungary.[246] The 2011 constitution consolidated power in the hands of the party and weakened or allowed the majority to capture checks on its power, such as the ordinary courts, Constitutional Court, and ombudspersons. Subsequent amendments took the project further. The vision of history laid out in the National Avowal and elsewhere puts the post-Communist, pre-2011 constitutional history in an ambiguous position, as representing an unfinished transition still tainted by Communist rule.[247] Fidesz, for example, has relied heavily on the fact that the initial transition contained a relatively weak form of lustration, arguing that this allowed Communist influence to persist.[248] The 4th amendment to the Constitution also nullified all of the Constitutional Court's caselaw from before the Fidesz constitution went into effect,[249] alongside overturning many of the Court's decisions from the prior year (before it was fully captured by the regime) and placing new limits on its

[245] *See id.*

[246] *See, e.g.,* Miklós Bánkuti Gábor Halmai, & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOC. 138 (2012).

[247] *See* Miklos Konczol, *Dealing with the Past in and Around the Fundamental Law of Hungary*, *in* LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 246, 258-59 (Uladzislau Belavusau & Aleksandra Gliszczynska, eds., 2017) (noting the "absence of the transition" of 1990 from the Avowal, and examining its ambiguous meaning).

[248] *See* CONST. HUNG., 4th amendment (2013), art. 3, available at https://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment%20to%20the%20FL%20-Eng%20Corrected.pdf (creating new civil and criminal measures dealing with the Communist past).

[249] *See id.* art. 19 ("Decisions and their reasoning of the Constitutional Court prior to the coming into force of the Fundamental Law cannot be used for interpreting the Fundamental Law.").

powers to review constitutional amendments.[250] As Scheppele observes, the wholesale invalidation of the Court's activist pre-2011 caselaw was a way of striking against the prior liberal and western constitutional order itself.[251]

Another example is the way the government has used its nostalgic vision of the past to manipulate voting rights in ways that have increased its electoral power and made it harder to dislodge. After the 2011 constitution was issued, the government offered both citizenship and voting rights to people of Hungarian descent living outside of Hungary and elsewhere in Eastern Europe (many of whom were in Romania) and undertook an aggressive campaign of affiliated civil society groups to encourage these new registrations.[252] This connects to the regime's concept of a historical "greater Hungary" or Hungarian kingdom, with broader boundaries referenced explicitly in the National Avowal. More than one million people have received citizenship in this way, which is a large number in a country of about 10 million, and the Fidesz party has thus gained a large tranche of loyal voters.[253] In the 2014 election, for instance, the regime won more than 95 percent of the votes located abroad, but only 45 percent of the vote overall (which nonetheless won it more than two-thirds of seats).[254] The regime has bolstered this strategy, as we have explained elsewhere, by expanding voting rights selectively – voters who have never lived in Hungary and have no address there, which includes most of the new citizens from elsewhere in Eastern Europe, can vote by mail, while expat voters who are largely living in Western Europe and are much more likely to be opposed to the government must vote in person at an Embassy, which makes turnout far more difficult.[255]

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[250] *See* Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution, in* CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW, AND POLITICS IN HUNGARY AND ROMANIA 111, 112 (2015).

[251] *See id.* at 117.

[252] *See* Valentina Jovanovski, *Hungary Seeks New Voters Abroad to Shape Elections at Home*, CHR. SCI. MONITOR, Sept. 3, 2013, at https:// www.csmonitor.com/ World/ Europe/ 2013/ 0903/ Hungary- seeks- new- voters- abroad-to- shape- elections- at- home>.

[253] *See* Balazs Majtenyi, Aliz Nagy, and Peter Kallai, *"Only Fidesz": Minority Electoral Law in Hungary*, VERFASSUNGSBLOG, Mar. 31, 2018, at https://verfassungsblog.de/only-fidesz-electoral-law-in-hungary/.

[254] *See id.*

[255] *See id.*

Thus, Fidesz's nostalgic vision of the past has bolstered a nationalist, illiberal, and authoritarian constitutional project. Ironically, those in opposition are also now dreaming about a constitutional restoration, one which would undo the damage wrought by Fidesz's constitutional project.[256]

IV. THE PROMISE AND PERIL OF RESTORATIVE CONSTITUTIONALISM

As we demonstrated in the last two parts, restorative projects appear to be powerful within the U.S. and also at least fairly common around the world. Drawing on these case studies, this part seeks to gain insight on two questions. The first is – what is the appeal of a restorative project, and why might it be a wise framing for those seeking constitutional change? The second is – what are the perils, or risks, posed by restorative projects?

Throughout, of course, it is worth emphasizing both the difficulty and variety of restorative projects. It is not easy, as we have seen, to reach agreement on exactly what constitutional steps need to be taken in order for restoration to occur. Likewise, restorers make reference to very different types of constitutional pasts, usually with some mix of the more or less recent, the more or less concrete, and the more or less imagined.

A. The Appeal of Restoration

Restoration as a framing of constitutional change can have great appeal, although these benefits are obviously not evenly distributed across political and constitutional contexts. Broadly speaking, it is worth noting the different kinds of audiences for constitutional change – the public, domestic political elites, and international actors. Restorative projects can have advantages at each of these levels.

In terms of the public at large, restorative projects would seem to depend on a positive evaluation of some constitutional past, to which

[256] *See e.g.* Kim Lane Scheppele, *Escaping Orbán's Constitutional Prison*, VERFASSUNGSBLOG, Dec. 21 2021, at https://verfassungsblog.de/escaping-orbans-constitutional-prison/.

the project promises to return. Constitutional restoration is in some sense a form of constitutional "nostalgia".[257] And while psychologists have long debated whether nostalgia is an adaptive or maladaptive personality trait, there is powerful evidence that people differ in the degree to which they are susceptible to nostalgic emotions or appeals.[258] In 1995, Kyrstine Batcho developed a "nostalgia inventory" to test individuals' susceptibility to nostalgic appeals. [259] In 2014, Hepper et al also found that there were clear differences across cultures, or different groups of countries, in the degree to which individuals were likely to score highly on a nostalgic inventory.[260]

But probably more important are specific perception of the previous constitutional status quo. In some constitutional systems, there may be a perception that a prior legal and political order was unjust, corrupt, or dysfunctional. The constitution itself may thus be designed to repudiate or overcome that past. In those circumstances, previous constitutions may be seen as an "aversive" or "negative" rather than positive model for future constitutional development.[261].

In other systems, previous constitutional experiences (whether past or present) may be seen a more positive light. The earlier constitutional order may have coincided with important legal or political milestones, such as the achievement of national independence or decolonization, new forms of peace and prosperity, or successful legal and political struggle for democracy or human rights.

The age of a constitution may have at least some relationship with

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[257] *See* Kim Lane Scheppele, *Constitutional Nostalgia*, HUNGARIAN SPECTRUM (Feb. 8 2012), at https://hungarianspectrum.org/2012/02/08/kim-lane-scheppele-princeton-university-constitutional-nostalgia/.

[258] *See* Krystine Batcho, *Nostalgia: Retreat or Support in Difficult Times?* 126 AM. J. PSYCHOLOGY 355 (2013).

[259] *See* Krystine Batcho, *Nostalgia: A Psychological Perspective*, 80 PERCEPTUAL & MOTOR SKILLS 131 (1995).

[260] *See* Erica G. Hepper et al, *Pancultural nostalgia: Prototypical conceptions across cultures,* 14 EMOTION 733 (2014),

[261] *See, e.g.,* Kim Lane Scheppele, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, 1(2) INT'L. J. CON. L. 296 (2003); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought,* 106 YALE L.J. 423 (1996) (describing these same modes of engagement in a comparative context).

the popular power of restoration – older constitutions may be more likely to have developed popular attachments that will make such a discourse more powerful. Even where a country has gone through multiple prior constitutions, the popular perception of a common "constitutional tradition" may have a similar effect.[262]

The foundation story, or myth, of a constitution may likewise be significant. Constitutions may be drafted by leading public figures, or instead by little-known technocrats. They may likewise be debated publicly or else drafted behind closed doors.[263] Americans often conceive of all constitution-making as following the template of constitutional debate at Philadelphia. But the reality is often quite different. Many current constitutions are the product of a negotiated peace and involve significant forms of transnational input and advice.[264] Instead of being drafted by an elite body, and ratified by democratic majorities, modern constitutions are also often drafted by a popularly elected body – that is then given final authority to adopt a constitution.[265] These dimensions to the origin story of a constitution may bear on the place of that constitution in the popular imagination. The more "heroic" the founders, the more the story of constitutional creation may resonate in the popular imagination. The more public the drafting process, and the more the public knows about and is involved in that process, the more invested it may be in the final product.

Finally, we emphasize that the appeal of restoration will wax and wane within a constitutional system over time, in response to broader social and political trends. Above, we showed that restorative projects of constitutional change are an enduring feature of U.S.

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[262] On the idea of constitutional half-lives and the influence of prior constitutions more generally, see Tom Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution,* 7 INT'L. J. CONST. L. 83 (2009).

[263] *See* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L. J. 364 (1995).

[264] *See* Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008); Hanna Lerner, *Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach,* 16 NATIONS AND NATIONALISM 68 (2010).

[265] *See* REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES (Gabriel L. Negretto ed. 2020).

constitutionalism.[266] This does not mean, though, that they are equally apparent in all periods. Restoration may, for example, have been a less apparent (if still present) theme of the New Deal and post-New Deal period, where backward looking forms of law and politics took a back seat to a more transformative style. But presently in the United States – and perhaps globally – we seem to live in an age of restoration, where restorative constitutionalism has become the *dominant* discourse. Exactly why is unclear, but may have something to do with eroding trust or confidence in the ability of politics, society, and culture to fix new problems or to achieve progress.[267] At such moments, backward-looking appeals may be especially potent.

That said, the comparative evidence presented in the prior parts suggests the complex and varied circumstances in which a restorative framing of change may have appeal. The U.S. is perhaps a fairly obvious case for a restorative framing – the constitution is old, venerated, associated with important principles, and surrounded by popular mythology. Thus, constitutional culture is strong in a way that makes a restorative message resonate, and the constitutional project offers many different kinds of pasts to which actors might seek a return.

The Indian constitution shares at least some relevant similarities. It is likewise an enduring document influenced or drafted by highly admired figures in Indian political history – including Gandhi and Ambedkar.[268] But the other constitutional orders explored above are quite different. Colombia and Ecuador, for example, are much newer constitutions, written in 1991 and 2008, respectively. Neither drafting process is associated with a particularly strong mythology. Colombia has a fairly strong history of constitutionalism, but such a tradition is harder to discern in Ecuador, which has cycled through constitutions

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[266] *See supra* Part II.

[267] *See, e.g.,* Lee Rainee and Andrew Perrin, Key Findings About Americans' Declining Trust in Government and Each Other, Pew Research Center, Jul. 22, 2019, at https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/ (reporting a long term trend of declining trust in government in the United States).

[268] *See, e.g.,* MADHAV KHOSLA, INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY (2020).

frequently.[269] In Colombia, the 1991 Constitution has built up popular respect, in many ways because of its transformative impact in increasing respect for socioeconomic rights and (ultimately) helping to achieve peace. In Ecuador, the 2008 constitution, although dominated by a president with authoritarian leanings, has been taken as a point of pride by many because of its innovative nature on environmental and other rights.[270] Even though the Ecuadorian and Colombian constitutions are new documents, they have developed levels of popular attachment that made a restorative framing resonate.

The most perplexing case is Hungary, where the presence of a written constitutional tradition before the Communist regimes is faint. Unlike the Baltic countries, where constitutionalism had deeper roots and pre-Communist constitutions could literally be brought back into effect, no such pathway was available in Hungary.[271] The immediate transition therefore took an odd path, repurposing and amending the Communist constitution as a transitional document that was never replaced with a permanent text, and also relying, via both design and constitutional jurisprudence, on Western Europe as a source of transformation. Fidesz nonetheless has claimed to restore the "authentic" constitutional tradition in Hungary, one which was interrupted by the Communist regime.[272] That the story is largely fictitious does not matter. It resonates with nationalist values and seems to be widely shared by Hungarians.

The upshot is that the appeal of restoration is complex and context sensitive. The (small) literature on comparative originalism is useful in that it tends to destabilize the stock reasons generally given for the appeal of originalism in U.S. constitutional law – the age and durability of the constitution, for example, or veneration of the founding.[273] Comparative work shows that originalism can thrive in surprising contexts outside the U.S., and with very different

[269] *See* Daniela Salazar, *The Constitutional History of Ecuador: Twenty Constitutions and Counting, in* THE OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA 174 (Conrado Hübner Mendes, ed., 2022).

[270] *See id.*

[271] *See* Sajo, supra note 237.

[272] *See supra* Part III.C.

[273] *See* Jamal Greene, *On the Origins of Originalism,* 88 TEX. L. REV. 1 (2009).

constitutional cultures and traditions.[274] So here, we would not expect to find a simple set of characteristics where restorative arguments would tend to resonate with the public. Suffice it to say, however, that the U.S. seems to be one national context where these arguments have power, particularly at our present moment.

Domestic political elites are also an important audience for constitutional projects. Here too, a restorative framing of a project may offer important advantages. In some circumstances, focusing on restorative goals may facilitate the process of reaching consensus. It may be easier for political actors to agree on undoing past damage and reviving the constitutional past than to agree on a future vision. This difficulty, of course, is also not evenly distributed across contexts. It may be especially important where there is a high degree of political polarization, [275] or where political actors are working under significant time constraints.[276]

Many of the case studies above illustrate this dynamic. In India, for example, the coalition that replaced Indira Gandhi agreed on very little other than their dislike of her program. They were remarkably successful in carrying out a restorative agenda that replaced key parts of Gandhi's constitutional changes surrounding the emergency. Even parts of Gandhi's Congress party agreed that the excesses of the Emergency needed to be reversed. But they could agree on little else, and the coalition's initially ambitious transformative agenda bore little fruit. The coalition itself collapsed after the restorative pieces had been passed.

Likewise, in both Ecuador and Colombia, it is remarkable how easily successor presidents were able to reverse the extensions of term

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[274] *See* Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239 (2012); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2013-2014).

[275] On the difficulties of constitution-making under polarization, see Johanna Fröhlich, *Do We Want a Constitution?,* VERFASSUNGSBLOG, Dec. 20 2021), at https://verfassungsblog.de/do-we-want-a-constitution/.

[276] On time constraints and constitutional drafting and deferral, *see* Rosalind Dixon & Tom Ginsburg, *Deciding Not to Decide: Deferral in Constitutional Design,* 9 INT. J. CONST. L. 636 (2011); Rosalind Dixon, *Constitutional Design Deferred, in* COMPARATIVE CONSTITUTION MAKING 165 (David Landau & Hanna Lerner, eds., 2019).

limits (as well as some other changes) carried out by their predecessors. This is particularly striking since both Correa and Uribe were extremely popular presidents. Yet, sweeping majorities voted to reinstate term limits in both countries, not long after they had left power. In Colombia, all members of Congress other than those in Uribe's own party, which was a piece of his former coalition, supported the reinstatement; in Ecuador, about two-thirds of voters supported bringing term limits back in the constitutional referendum.[277] This suggests again that there was broad agreement about restoration, even among elements of the former presidents' own coalitions and erstwhile allies.

The U.S., which is a highly – and increasingly – polarized political system, would be one context where restorative appeals may be especially appealing because they may increase the odds of reaching elite consensus. Reaching agreement on any major constitutional issue is extremely difficult given modern U.S. politics, but it may be somewhat easier to reach agreement on the restoration of past arrangements than to reconcile divergent visions of the future. The unsuccessful effort to convict and disqualify former President Trump at his second impeachment trial, which could be viewed as a restorative effort to prevent a dangerous actor from returning to politics, nonetheless received a number of Republican votes in the House and Senate. Republicans have also suggested, historically, more interest in the effort to restore the Voting Rights Act than they have in more sweeping or transformation-based legislative efforts like the For the People/Freedom to Vote Act, although both initiatives, to date, have stalled.[278] At the least, the Biden administration has seemed to bank in large part on a restorative framing to ground major initiatives. Whether this has been a successful strategy is a question we take up in more detail in the next section.

[277] *See, e.g., Ecuador Votes to Limit Presidents' Terms in Blow to Rafael Correa*, THE GUARDIAN, Feb. 5, 2018, at https://www.theguardian.com/world/2018/feb/05/ecuador-votes-to-limit-presidents-terms-in-blow-to-rafael-correa/.

[278] *See* Susan Sullivan Lagon, *Will Congress Restore the Voting Rights Act?* The Government Affairs Institute, Georgetown University, at https://gai.georgetown.edu/will-congress-restore-the-voting-rights-act/ (last visited Aug. 2022).

B. Balancing Restoration and Transformation

At least in many contexts, transformative strategies that are presented exclusively as sharp breaks from a country's constitutional traditions, rather than as (at least in part) continuations or restorations of that tradition, pose risks. The recent, failed Chilean constitution-making process poses an interesting example. The effort to replace the 1980 constitution (which had been written by a military dictatorship) was sparked by massive street protests in 2019, which led the center-right president to call a referendum on whether to replace the constitution. Following that referendum, in which about 80 percent of Chileans voted for a new constitution, the country held elections to elect a Constitutional Convention. The traditional parties fared poorly in that election, especially those on the right; thus the Convention had both a markedly left-wing tilt by Chilean political standards and a large number of independents not affiliated with a major party.[279]

The Convention's rhetoric was dominated by a rhetoric of transformative break, rather than restoration or preservation. The constitutional draft was an innovative document, which contained much stronger social rights, recognition of the Plurinational nature of the Chilean state along with significant autonomy and power for the country's *pueblos originarios*, and sweeping environmental rights along the lines of the Ecuadorian constitution.[280] It also contained important changes to political representation, such as the decentralization of the state, reserved seats for members of the *pueblos originarios*, and gender parity in most state institutions, including Congress.[281]

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[279] *See, e.g.,* Cristóbal Bellolio, *Does the Left's Landmark Victory in Chile's Constitutional Elections Signal a New Age of Representative Constitution-Making?* Oxford Foundation for Law, Justice, and Society Blog, at https://www.fljs.org/does-lefts-landmark-victory-chiles-constitutional-elections-signal-new-age-representative (last visited July 2022); David Landau, *The New Chilean Constitutional Project in Comparative Perspective*, Int'l J. Const. L. Blog, July 16, 2022, at http://www.iconnectblog.com/07/16/the-new-chilean-constitutional-project-in-comparative-perspective/.

[280] *See* Landau, supra note 279; Catherine Osborn, *Chile Unveils its Proposed New Constitution*, FOR. POL'Y, Jul. 5, 2022, at https://foreignpolicy.com/2022/07/08/chile-new-constitution-rewrite-boric-protests-pinochet-dictatorship-referendum/.

[281] *See* Osborn, *supra* note 280.

The Convention emphasized a break with Chile's constitutional past, however, even in some cases where the actual scope of the change was more modest. For example, in one of its most dramatic votes, the Convention abolished the Senate, replacing the upper house of the legislature that had existed for the 200 years since independence with a new body called the Chamber of Regions. The Senate and Chamber of Regions were not identical bodies – the latter had a new composition reflecting the decentralized state, and was also somewhat weaker than the country's traditional Senate, no longer holding the same level of power as the lower house.[282] Proponents of the change argued that the Senate had long been an inefficient body and an oligarchical one where power was concentrated in a few hands.[283] However, the change also allowed opponents of the project to argue that the Convention was destroying the "bicameral tradition" of the country.[284]

More broadly, opponents of the constitutional draft, including some members of center and center-left parties, argued that the Convention was an unwise attempt to "refound" the Chilean state in a way that ignored its "long and rich" constitutional tradition.[285] In making this argument, they focused on continuity with the 1925 constitution and its predecessors, rather than emphasizing the largely

[282] *See, e.g.,* Nick Burns, *Chile's Proposed Constitution: 7 Key Points*, AMERICAS Q. Jul. 7, 2022, at https://www.americasquarterly.org/article/chiles-proposed-constitution-7-key-points/.

[283] *See id.*

[284] *See, e.g.*, Claudia Valencia Cerda, *Arturo Squella Ovalle, abogado, ex diputado y docente de Derecho Constitucional de la Universidad San Sebastián: "No creo conveniente cambiar la tradición bicameral del Congreso Nacional,"* DIARIO CONSTITUCIONAL, May 6, 2022, at https://www.diarioconstitucional.cl/entrevistas/arturo-squella-ovalle-abogado-ex-diputado-y-docente-de-derecho-constitucional-de-la-universidad-san-sebastian-no-creo-conveniente-cambiar-la-tradicion-bicameral-del-congreso-nacional/.

[285] *See* Eugenio Rivera Urrutia, *Los "Amarillos" y la Convención Constitucional. ¿Voces del pasado?* EL MOSTRADOR, Feb. 23, 2022, at https://www.elmostrador.cl/destacado/2022/02/23/los-amarillos-y-la-convencion-constitucional-voces-del-pasado/ (noting arguments of opponents that the Convention wanted to "start from zero"); Editorial, *El Rechazo es la mejor opcion para el pais,* LA TERCERA, Aug. 20, 2022, at https://www.latercera.com/opinion/noticia/el-rechazo-es-la-mejor-opcion-para-el-pais/QBLT7TTWXVE7ZGTK6P6YL3QSKY/ .

discredited 1980 constitution.[286] The argument that the new draft was isolated from Chilean constitutional traditions was part of the opposition's broader framing of the project as radical and out of touch with Chilean society. Some opponents fanned false rumors that the new constitution would change the flag, anthem, or even name of the country.[287] These arguments landed with a broad segment of the public, and ultimately the draft was rejected by a large margin in an exit referendum held on September 4, 2022.[288]

The Chilean case is interesting, then, in highlighting risks that may be associated with a transformative discourse that does not draw connections to the constitutional past, but instead self-consciously eschews those links. Even in a context where the current constitution was written by a dictatorship, constitutional drafters and their allies may have weakened their case with the public. In addition, a wholly transformative strategy may have made it more difficult to build bridges with right-wing, center-right, and even centrist elites from traditional political parties.[289]

Yet there is also a countervailing concern: a purely restorative framing may unduly limit or inhibit the political or constitutional imagination. That is, that the desire to pursue reforms only to return to some prior sense of "normalcy" or "balance" may limit what constitutionalism can achieve.

Consider recent efforts at Supreme Court reform in the United States, which were picked up by the Biden administration after being a major issue in the Democratic primaries for the 2020 elections, and

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[286] *See, e.g.,* Jaime Arancibia Mattar, CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE: EDICION HISTÓRICA – ORIGEN Y TRAZABILIDAD DE SUS NORMAS DESDE 1812 HASTA HOY (2020) (presenting evidence that most material in the 1980 constitution dated from earlier constitutional texts).

[287] *See* Juan Carlos Ramirez Figueroa, *Chile: las fake news toman la agenda a un mes del plebiscito por la Constitución*, EL MUNDO, Aug. 5, 2022, at https://www.pagina12.com.ar/446902-chile-las-fake-news-toman-la-agenda-a-un-mes-del-plebiscito-.

[288] *See A una semana del plebiscito en Chile, encuestas apuntan a rechazo de nueva Constitución*, FRANCE24, Aug. 27, 2022, at https://www.france24.com/es/minuto-a-minuto/20220827-a-una-semana-del-plebiscito-en-chile-encuestas-apuntan-a-rechazo-de-nueva-constituci%C3%B3n.

[289] *See* Landau, *supra* note 279.

which have continued to resonate well into his term.[290] The debates here are multifaceted. Biden has echoed a dominant, restorative narrative, referring to the Court as "out of control" and "out of whack," and calling on Congress to "restore" rights taken away by the Court.[291] The narrative is that events in recent years have made the Court a more partisan and polarized body than at any other point in recent memory, and that this was largely a product of recent political events and "hardball" decisions, such as the Senate majority leader to refuse to hold a vote on a replacement after Justice Scalia's death before the 2016 election, and President Trump's decision to rapidly fill the vacancy left by Justice Ginsburg's death before the 2020 election.[292]

However, this dominant, restorative discourse coexists alongside scholarship that suggests a need for more sweeping changes to the U.S. judiciary. These include arguments that are restorative in nature but encompass a broader timeframe and deeper set of causes, such as Aziz Huq's claim that the remedial architecture of U.S. constitutional law has collapsed since about the 1970s.[293] They also include transformative arguments drawn from comparative inspiration, like claims by Jamal Greene and Vicki Jackson that the U.S. should adopt proportionality review as used in many countries around the world.[294] Or similar claims that the U.S. should adopt either designs or

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[290] *See* Mark Sherman, *Some Dems, Not Yet Biden, Talk of Expanding Supreme Court,* ABC NEWS, Sep. 23 2020, at https://abcnews.go.com/Politics/wireStory/dems-biden-talk-expanding-supreme-court-73172652>; Ian Millhiser, *Nine Ways to Reform the Supreme Court Besides Court-Packing*, VOX, (Oct. 21 2020) <https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights>.

[291] *See Biden Proposes Panel to Study Reforming "Out of Whack" U.S. Judiciary*, REUTERS, Oct. 22, 2020, at https://www.reuters.com/article/us-usa-election-biden-court/biden-proposes-panel-to-study-reforming-out-of-whack-u-s-judiciary-idUSKBN277238; Joe Biden, Remarks by President Biden on Protecting Access to Reproductive Health Care Services, Jul. 8, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/08/remarks-by-president-biden-on-protecting-access-to-reproductive-health-care-services/.

[292] *See* Mark V. Tushnet, *Constitutional Hardball,* 37 JOHN MARSHALL L. REV. 523 (2004).

[293] *See* AZIZ HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 87-97 (2021).

[294] *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2016).

jurisprudential tools to adopt variants of dialogical or "weak-form" judicial review.[295] Or, finally, to use Ryan D. Doerfler and Samuel Moyn's terms, that reformers should seek to "disempower" the Court by stripping its jurisdiction or adopting supermajority requirements for certain decisions, in order to create space for progressive political change via democratic channels.[296]

The Presidential Commission on the Supreme Court did a thorough job of hearing a wide range of arguments, based on oral and written testimony from U.S. and comparative scholars.[297] Its final report is careful and meticulously documented. However, it has a relatively narrow focus. Most space is spent on the two most prominent proposals in the U.S. context, adding new justices to the Court (ie. court-packing) and adopting term limits.[298] The Commission spent limited time on other proposals touching the structure of the Court, such as allowing the legislature to override judicial decisions, or adopting supermajority requirements for judicial decisions.[299]

The Commission's discussion of its reform proposals is cautious. As noted above, it makes its strongest recommendations on collateral issues, such as adopting an ethics code for Justices.[300] On the more exotic proposals, the Commission's tone is relatively sceptical.[301] On the major issues, the Commission comes closest to making a recommendation on term limits. Even here, it eschews an explicit endorsement, instead noting the "considerable, bipartisan support" for a proposal imposing term limits on justices. And it encourages a constitutional amendment if such a route were pursued, noting that a

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[295] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS (2008).

[296] *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

[297] Presidential Commission on the Supreme Court of the United States, Final Report 1 (2021).

[298] *See id*. at 67-151.

[299] *See id.* at 169-202.

[300] *See id.* at 217 ("A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code.").

[301] For example, the Commission emphasizes the "many complications" that would arise from a supermajority voting rule to hold laws unconstitutional. *See id.* at 174.

statutory attempt would be contestable and could prove "unstable."[302]

It is also useful to look at the language used by the Commission. The key focus is on the idea of "enhancing" the functioning of the Court and the constitutional system. (The word "enhance" is used 12 times).[303] The word "restore" (or restoration) appears six times, compared to three references to the word "transform" (or transformation).

Figure 1. – Language of Presidential Commission on the Supreme Court of the United States

All of the references to transformation are either negative or in the past tense. The Report notes that the "highly polarized politics of the current era threaten to *transform* this already high-stakes process into one that is badly broken,"[304] "[t]he Civil War and Reconstruction launched a series of constitutional *transformations* that were accompanied by fundamental changes in the operation of the federal judiciary,"[305] and the "judicial power of the United States was… profoundly *transformed*" during the Reconstruction era.[306]

The language of restoration, in contrast, is used as justification for reform. For instance, the Commission notes that "Proponents of expansion" of the size of the Court argue that this could "help *restore* the balance on the Court that was disrupted by significant norm violations in the confirmation process, thus protection the legitimacy

[302] *See id*. at 144.

[303] We are grateful to John Lidbetter for assistance in collating this data and the world cloud drawn from it.

[304] Final Report, *supra* note 297, at 18.

[305] *Id*. at 46.

[306] *Id.* at 48.

of the Court",[307] or "*restore* the Court's role as ensuring the representativeness of government and the operation of democracy."[308]

There are of course many reasons for the rather cautious nature of the Final Report, including the difficulty of reaching consensus on controversial issues in a multimember body. The charge given to the Commission also played a role. The Commission was given a historically grounded mission, and one which Commissioners interpreted as asking it to canvas arguments rather than make recommendations or find solutions.[309] After the Report had been delivered, several Commissioners expressed frustration with this limited charge. At least one also noted a broader environment favoring maintenance of the status quo and against radical change, express "surprise[] by the amount of deference to the status quo" and stating that liberals had warned against change because it might "destabilize the system."[310] As Doerfler and Moyn observe, the dominant lens through which Supreme Court reform has been viewed, even on the left, is one of historical memory and a desire to "preserve or restore the Supreme Court's role as a nonideological institution."[311] This has crowded out more fundamental reevaluations, and made them seem more dangerous.

Beyond the problem of limiting the horizon of potential change, it has also been difficult to assess whether a given reform proposal will or will not have a restorative impact on the Supreme Court. The Commission report, for example, noted a wide divergence about the impact of expanding the Court. It noted that proponents of expansion argued that expansion "could help restore the balance on the Court that was disrupted by significant norm violations in the confirmation process" in recent years, such as after the deaths of Justices Scalia and Ginsburg, and more broadly would "restore the Court's role as ensuring the representativeness of government and the operation of democracy."[312] However, it also noted that critics alleged those

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[307] *Id.* at 76.

[308] *Id.* at 78.

[309] *See* E.O. 14023, 86 FR 19569 (Apr. 9, 2021).

[310] Madeleine Carlisle, *Behind The Scenes of President Biden's Supreme Court Reform Commission*, TIME, Dec. 10, 2021, at https://time.com/6127632/supreme-court-reform-commission/.

[311] *See* Doerfler and Moyn, supra note 296, at 1732.

[312] *See* Final Report, *supra* note 297, at 76, 78.

changes would "pose considerable risk to our constitutional system" and would break with "an enduring bipartisan norm against Court packing," which instead should be "reaffirmed and protected."[313]

Although we will not belabour the point, one could perhaps tell a similar story about voting. One of the major focuses of the Democrats has been on the John Lewis Voting Rights Advancement Act, which President Biden has emphasized would "restore" the parts of the Voting Rights Act gutted by the *Shelby County* decision.[314] The other major voting rights bill, the Freedom to Vote Act, is broader and more multifaceted, but it also focuses in large part on restoring a prior status quo where both money and gerrymandering played a less significant role in U.S. politics.[315] Ideas like mandatory voting, or changes in the electoral system, less readily make it to the top of the political conversation.[316]

The broad point, then, is that a restorative framing can limit the scope of constitutional imagination. One way to combat this risk is to blend restorative rhetoric with a significant elements of transformation. The comparative evidence is consistent with this basic point. We have noted for example the dominance of restorative ideas in the Janata party's agenda after Indira Gandhi's Emergency. The restorative project bore important fruit under difficult circumstances, particularly in rolling back some of the most constitutionally noxious

[313] *See id.* at 80. Cf. Joshua Braver, *Court-Packing: An American Tradition*, 61 B.C. L. REV. 2747 (2020) (arguing that the risks of court-packing outweigh any benefits, and political actors should find other ways to reform the Supreme Court).

[314] President Joe Biden, Remarks by President Biden on Protecting the Right to Vote, Jan. 11, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/11/remarks-by-president-biden-on-protecting-the-right-to-vote/.

[315] For the People Act, H.R.1., 117th Cong. (2021); see discussion in Marc Tracy, *By Choice and Circumstance, Democrats Put Voting Rights on the Ballot*, N.Y. TIMES, Jul. 13 2021, https://www.nytimes.com/2021/07/13/us/politics/democrats-for-the-people-act.html.

[316] *See* EUGENE J. DIONNE JR & MILES RAPOPORT, 100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING (2022). *See also* Didi Kuo, *The case for mandatory universal voting,* THE WASHINGTON POST, Mar. 25 2022, https://www.washingtonpost.com/outlook/2022/03/25/case-mandatory-universal-voting/. *See also* Rosalind Dixon and Anika Gauja, *Australia's Non-populist Democracy? The Role of Structure and Policy*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark Graber, Sanford Levinson & Mark Tushnet, eds., 2018).

constitutional amendments pursued by Gandhi.[317] But the emphasis on restoration may have crowded out more ambitious constitutional ideas, including some – like sharper curbs on emergency powers and an end to the President's Rule procedure under which central Indian governments have pursued interventionist and partisan measures in the states – that may have helped to prevent future abuses.[318] But robust emergency powers and President's Rule were part of the original Indian constitution, and therefore were more difficult to frame as restorative responses to the distortions of Gandhi's Emergency.

Ecuador, where Moreno focused his program almost entirely on re-establishing term limits and preventing Correa and his allies from returning to power, illustrates a related risk. There Moreno was put in a difficult position, because those associated with Correa and his program argued that Moreno was actually hostile to Correa's constitutional project, rather than seeking to protect or restore it. Moreno deepened this impression by failing to make more than token steps to advance the major goals found in the "transformative" 2008 constitution. Moreno's referendum contained two minor measures to advance environmental rights, but there was little substance or meat to the proposals.[319] So while Moreno claimed that his actions were aimed at restoring the 2008 constitution, opponents gained considerable traction by arguing that Moreno's actual interests were in reversing the constitutional project and in returning to the "neo-liberalism" that characterized Ecuador's difficult and unstable constitutional past.[320]

In Colombia, Santos was more successful in combining an argument to restore the authentic spirit of the 1991 constitution by reversing Uribe's abuses, along with advancing a core unrealized principle of the 1991 constitution – the achievement of peace by

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[317] *See supra* Part III.B.

[318] *See* AUSTIN, *supra* note 207, at 423.

[319] *See* Consejo Nacional Electoral, Memorando No. CNE-SG-2017-2674-M, at 9-10 (containing referendum questions to undertake constitutional amendments and legal changes to prohibit mining in protected areas and to expand protected areas in which oil exploration was prohibited).

[320] *See, e.g.,* Javier Calderón Castillo, *Lenín y la restauración neoliberal en Ecuador*, CELAG, Aug. 17, 2019, at https://www.celag.org/lenin-y-la-restauracion-neoliberal-en-ecuador/#_ftn1.

successfully pursuing a peace process with the FARC.[321] We would not argue, in other words, that the limitations of a restorative framework are necessarily a reason to eschew restorative modes of change, but we would suggest that the most successful restorative projects will likely find ways to integrate transformative framings and goals.

Moreover, as we have stressed throughout this paper, the past is malleable, and can be envisioned and presented in many different ways. Some pasts are more concrete, while others are gauzier and more romanticized. There is also choice, especially in older constitutional orders like the U.S., of which moment to seek a return to. The plasticity of the past, we think, also counsels against overreacting to the limits that a restorative framing may place on the constitutional imagination, particularly where scholars and academics are able to think creatively about how to rely on the past.

Consider two recent examples by progressive scholars in the United States. First, Kermit Roosevelt has recently argued that U.S. constitutional thought puts too much emphasis on the drafting of the original constitution, and too little attention to the Reconstruction period. In essence, Roosevelt calls for shifting discussion to a different kind of past, one that is more conducive to progressive values like inclusion and equality.[322] Second, Joseph Fishkin and William Forbath's recent book seeks to uncover an anti-oligarchical and "democracy of opportunity" tradition that they argue was central throughout much of U.S. constitutional history (starting before the Founding) but was largely forgotten in the latter part of the 20th century and should be "reclaim[ed]."[323] The richness and complexity of U.S. constitutional history may generally make it a very fruitful ground for nourishing – rather than constraining – the constitutional imagination, in the name of all kinds of constitutional projects.

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[321] *See supra* Part III.A.

[322] *See* KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 12 (2022) (calling for replacement of the "standard story" of U.S. constitutional history with a "better story").

[323] *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 3 (2022).

C. Legitimating Illiberal or Antidemocratic Change

Restorative forms of constitutionalism can be abused. Restorative projects often have pro-democratic aims, where they seek to restore liberal democracy after episodes of abusive constitutional change as in India, Ecuador, and Colombia. But the Hungarian case, and the U.S, under Trump, also demonstrate ways in which illiberal or anti-democratic goals may be pursued under the guise of restoration.

Nostalgia has been linked by scholars to right-wing variants of populism that have in turn been viewed as having illiberal and potentially authoritarian agendas. A restorative discourse can be used to invoke return to a perceived golden age, or the "good old days," before the country was corrupted by elites and by outsiders. The vision of constitutional restoration adopted by Trump fit within a vein of modern conservative thought in presenting the U.S. and Western civilization generally as facing "imminent collapse" and called for the "restoration and redemption of American constitutional government" and Western values in response.[324] Fidesz used the 2011 Constitution, and accompanying discourse, to present a restoration of a largely mythical Hungarian constitutional tradition. This restoration erases the Communist regime as a "foreign occupation," corrects what it alleged to be a distorted and failed liberal democratic transition of the 1990s, and seeks a return to a glorious, ancient, and unbroken past of a greater Hungarian state and nation.[325] In both cases, the narrative not only includes a nostalgic vision of the past, but also a story of national decline caused by prior democratic erosion, authoritarianism, or threat, and finally a promise of national renewal.

In both the U.S. under Trump and Hungary, such a discourse fuelled a nationalist and anti-immigrant agenda, one which presented immigrants and refugees as a threat to the authentic national tradition and as contributors to national decline. Trump further used a restorative discourse to justify "deconstruction" of the administrative state and, ultimately, to legitimate the insurrection of January 6, where he argued that action must be taken to overturn the 2020 election or "you're not going to have a country anymore."[326] The Fidesz regime

[324] *See* KERSCH, *supra* note 77, at 376-79.
[325] *See supra* Part III.C.
[326] *See* Naylor, *supra* note 121.

in Hungary also utilized a backward-looking, restorative discourse to consolidate power, attack perceived regime opponents (such as universities and NGOs) who were labelled not authentically Hungarian, and to expand voting rights selectively to people of Hungarian descent outside Hungary to bolster the regime's power.[327]

One could conclude from these examples – and others, both inside and outside United States constitutional history – that restorative discourses of constitutional change are particularly dangerous. But any of the discourses of constitutional change – restorative, preservative, or transformative – can be abused, and it is not clear that any one discourse is more susceptible to such abuse than others. Transformation can be used to argue that checks on presidential and regime power should be weakened or eliminated to facilitate goals like the reduction of poverty and economic development. This kind of transformative discourse has often been linked to left-wing variants of populism in Latin America, for example. In Ecuador under Correa and Venezuela under Chavez, leaders argued that "elites" staffing institutions like courts and legislatures who opposed the regime needed to be sidelined, and they ultimately argued that term limits needed to be eliminated so leaders could remain in power to complete their vital projects.[328]

A more careful and more plausible claim is that the *kind of past* being invoked for a restorative project makes a difference. We have, broadly speaking, differentiated more concrete claims about the often recent past, from more nostalgic and gauzier claims that are often about a more distant past. Indeed, one of the most interesting findings of our examples is how malleable claims about the past often are.

The more concrete, more recent kind of past is often invoked in restorative efforts to recover from episodes of democratic erosion or abusive constitutionalism. Consider India after Indira Gandhi's Emergency, Colombia after Uribe, Ecuador after Correa, or the United States after Trump. All defined their projects primarily in light of concrete damage done by the immediately preceding regime; all were authentic attempts to reverse prior damage to liberal democratic

[327] *See supra* Part III.C.

[328] *See* David Landau, *Populist Constitutions*, U. CHI. L. REV. 521, 539-40 (2018).

constitutionalism. In contrast, the gauzier or more nostalgic vision of the past seem in a least some cases to have an affinity with right-wing variants of populism that themselves pose a threat to liberal democracy.[329] The danger of abuse often seems to be less where proponents of restorative projects point to relatively clear, concrete understandings of a past set of practices that existed but have been damaged, and greater where the past is more idealized or ambiguous.

Still, we should be careful not to dismiss the potential utility of the more nostalgic or distant variant of the past. Nostalgia, by itself, does not necessarily activate authoritarian tendencies, and indeed conservatives may use nostalgia in ways that defend rather than attacking a democratic status quo.[330] For progressives, the more distant, nostalgic, or even imagined past may offer a broader set of resources to propose ambitious reform proposals, as opposed to responding to concrete, short-term damage. Indeed, the problem of restorative change limiting horizons, which we surveyed in the last section, may be most acute precisely where the past being restored is the most short-term and concrete.

We also referred above to a "redemptive" vision of the past, which re-envisions the past as something more like a set of principles than a lived experience.[331] Some abolitionists before the Civil War used U.S. constitutional history this way, and their vision in turn fed some discourses surrounding the Reconstruction amendments.[332] The redemptive vision of the past is a point where restorative constitutionalism may most clearly meet transformative constitutionalism, and it can clearly be a useful tool for a wide range of constitutional projects, progressive or conservative.

V. CONCLUSION: CONSERVATIVES, PROGRESSIVES, AND RESTORATIVE CONSTITUTIONALISM

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[329] On the affinity between romanticized, nostalgic visions of the past and right-wing populist parties with anti-democratic ambitions, see Schreurs, *supra* note 168; Menke and Wulf, *supra* note 168.

[330] Karen Stenner & Jonathan Haidt, *Authoritarianism is Not a Momentary Madness, but an Eternal Dynamic Within Liberal Democracies, in* CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA 175 (Cass R. Sunstein ed., 2018).

[331] *See supra* Part I.A.

[332] *See supra* Part II.A.

In this paper we have examined an under-noticed mode of constitutional change, both within the U.S. and globally: restoration. Restorative projects of constitutional change, which attempt to repair damage or return to a (concrete or fictitious) constitutional past, appear to be common in the U.S. and also in other countries around the world. They appear to use many different tools of constitutional change – including constitutional amendment and replacement, and less formal modes of change – and they are used in a number of different contexts, and for different kinds of ends, both pro- and anti-democratic. Contra to what a narrow focus on the contemporary United States might suggest, restorative discourses of modes of change are not exhausted by originalism, and may instead rely on many other forms of formal and informal constitutional change.

Restorative discourses of constitutional change can be powerful, although their appeal will vary across contexts. Restoration may help to build both popular and elite support for an agenda of change, especially where there is a shared sense of respect or veneration for a constitutional past, and a sense of damage or degradation to that past. In some cases too, there may be a higher level of agreement about a shared sense of a positive past, and more disagreement about directions for future change. In those cases as well, a more restorative discourse may have important advantages over a more transformative one, although the two modes are not, as we have emphasized throughout, mutually exclusive.

Right now in the United States, restoration seems to be a dominant discourse with strong resonance among both the public and political elites. Yet reliance on restoration is notably asymmetric. Conservative constitutional thinkers tend to emphasize restorative language via originalism and related tools, while progressive constitutional thought demonstrates far more conflict and ambivalence over restorative framings of change.

Indeed, progressives sometimes suggest that the language of restoration is a rhetorical trap, one which limits the horizons of what can be achieved and inexorably bends U.S. constitutional projects towards conservativism. Consider Doerfler and Moyn's argument to abandon attempts to restore a more balanced or authentic Supreme Court, and instead focus on transcending the institution to make space

for progressive politics.[333] Likewise, in a recent N.Y. Times op-ed, Doerfler and Moyn call the constitution "broken" and argue that progressives should abandon efforts to "reclaim" it because those efforts inhibit achievement of left-wing goals.[334] But our analysis suggests that efforts to eschew restoration may be a serious tactical error. Given the power of restorative appeals in the contemporary U.S. political imagination, progressive projects may be put at a rhetorical disadvantage. We have marshalled evidence to suggest that purely transformative framings, such as Doerfler and Moyn's calls to transcend the U.S. constitutional tradition, may have more difficulty in assembling popular and elite support.

Moreover, we have shown that restorative constitutional discourse does not have any necessary ideological valence. Everything depends on the context within which claims are made, and the kind of past that is alluded to. Given the malleability and richness of the United States's long constitutional past, claims about the past may be used to support many different kinds of projects, including of course progressive ones. Consider several examples. The post-*Dobbs* moment is one where President Biden's calls to "restore the protections of *Roe v. Wade* as federal law" are powerful, especially when combined with more transformative discourses.[335] Likewise, as we noted above, Kermit Roosevelt has recently attempted to shift the emphasis of constitutional origins in the United States from 1787 to the Reconstruction period, in a fascinating effort to discuss, as he calls it, a "better" past that is more freighted with progressive values.[336] Finally, also as alluded to above, Joseph Fishkin and William Forbath have called upon a "democracy of opportunity" tradition in U.S.

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[333] *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021).

[334] *See* Ryan D. Doerfler & Samuel Moyn, *Op-ed: The Constitution is Broken and Should Not be Reclaimed*, N.Y. TIMES, Aug. 19, 2022, at https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html.

[335] *See* Joe Biden, Remarks by President Biden on the Supreme Court Decision to Overturn Roe v. Wade, Jun. 24, 2022, at https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/06/24/remarks-by-president-biden-on-the-supreme-court-decision-to-overturn-roe-v-wade/.

[336] *See* KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 12 (2022) (calling for replacement of the "standard story" of U.S. constitutional history with a "better story").

constitutionalism that should be reclaimed.[337] Once gain, Fishkin and Forbath's project suggests the inherent contestability and malleability of restorative projects, particularly in constitutional traditions as long and rich as those found in the United States.

All of this is not to argue that restorative discourses are without risks or downsides, or that restoration should supplant transformation as the sole rhetoric of constitutional change. Our ambition is more modest – to show that restoration is and rightly ought to be a part of many constitutional projects, both in the United States and elsewhere around the world.

[337] *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 3 (2022).