

# Against Constitution by Convention

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The Constitution emerged from a convention—a convention of the states. State popular conventions, by ratifying it, made it law. Though it was meant to “form a more perfect union,” no one could have supposed the Philadelphia Convention’s proposal was anything close to perfect. Indeed, the Constitution’s terms refute any blithe confidence in its flawlessness. Article V mentions two conventions of change: constitutional conventions to propose amendments and conventions of the people to ratify them.<sup>1</sup> Hence, the Constitution contains the seeds of change within its DNA. In the first year under the new Constitution, politicians used Article V to send twelve amendments to the states, ten of which the states swiftly adopted.<sup>2</sup> In total, 26 (or 27 or 28) Article V amendments<sup>3</sup> have navigated the Constitution’s demanding amendment process.

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1. U.S. CONST. art. V.

2. Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1896, 13, 34, 44 (1897).

3. See Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1283 (2019) (calling into question the Twenty-Seventh Amendment’s ratification because the Amendment’s proposal and ratification did not occur within a reasonable time).

Yet for decades, politicians and judges have amended the Constitution via far less arduous means. In particular, many perceptive observers recognize, and indeed celebrate, a plethora of informal modifications, primarily to the Bill of Rights and the Constitution's first three Articles.<sup>4</sup> Some, like David Strauss, have argued that these informal amendments are more momentous than their formal counterparts and that a failure to appreciate this leads to a distorted view of what one might call our "lived Constitution," the one that actually governs our state and federal governments.<sup>5</sup>

One means of informally amending the Constitution is to identify and exalt patterns and practices, treating such conventions as constitutional adjustments, revisions, and improvements. For instance, the example of early presidents, each of whom ran for reelection no more than once, eventually led some to assert that the Constitution barred presidents from serving more than two four-year terms. At the time, no constitutional text barred a third term for chief executives.<sup>6</sup> Nonetheless, some supposed that the practice had hardened into a constitutional bar on three terms.<sup>7</sup>

Dean Trevor Morrison's Jorde Lecture, and his accompanying article with Professor Samuel Issacharoff—*Constitution by Convention*<sup>8</sup>—is an earnest defense of treating practice as a legitimate means of amending the federal Constitution. It meshes well with Dean Morrison's other work in this field, authored with Professor Curtis Bradley.<sup>9</sup>

Morrison & Issacharoff ("the Conventionalists") have done a commendable job of defending the idea of informal constitutional amendments grounded on practice. Yet I find the notion unappealing and cannot subscribe to it. I do not believe we should excuse, much less laud, the practice of pols, fleeting agents of We the People, usurping powers no one ever plausibly gave them. And I certainly do not wish to reconceive transgressive acts as entirely legitimate once they exceed some threshold. *Practice does not make perfect*, because practices and conventions cannot perfect or complete a constitutional amendment.

This essay makes five points. Each is inspired, in some way, by *Constitution by Convention* and the accompanying Jorde Lecture. First, one cannot cabin a theory of convention and thereby hope to distinguish rights from structure. If practice can change our structural Constitution, practice can likewise amend constitutional rights. In particular, if we are to judge what is realistic or practical by reference to our lived Constitution, no one can doubt that practice

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4. See DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 52–53, 120–21 (2010).

5. See *id.* at 120–25.

6. The Twenty-Second Amendment did not become part of our Constitution until 1951.

7. For a brief discussion of this phenomena, see Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1855–57, 1867–68.

8. Samuel Issacharoff & Trevor W. Morrison, *Constitution by Convention*, 108 CALIF. L. REV. 1913 (2020).

9. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

has transformed constitutional rights, at least as many understand them today. Some constitutional rights have taken on new and different meanings while others have been stripped of import and importance. If a citation to our lived Constitution defeats originalist conceptions of our Constitution, as the Conventionalists suppose, then the lived Constitution must likewise trump any rights claims that are inconsistent with the lived Constitution. No theory grounded on the glosses that life has placed on the Constitution can hope to neatly separate structure from rights and insist that practice is dispositive but only with respect to structure. Or, put another way, the reality slap that works against originalists must work equally well against those hoping to reform or abolish old rights and invent new ones.

Second, constitutional powers are not the private property of the transients in federal offices. For instance, an incumbent President does not own the pardon power in fee simple, meaning he cannot alienate it. The same holds true for the right of Senators to vote in the Senate; they cannot transfer their votes to others. More generally, the Constitution's allocations of powers are not some set of default distributions to be traded in a Coasean fashion to reach supposedly Pareto optimal allocations.<sup>10</sup> For similar reasons, our agents cannot amend, much less toss aside, their assigned duties in service of personal or public agendas. Finally, our constitutional rights should not be hostage to the games politicians play, with rights shrinking and expanding as our temporary agents see fit.

Third, as the Conventionalists understand, there can be no hard-and-fast rules about the making of informal amendments. For a host of reasons, rules are difficult to follow. They are even harder to respect when there are none, save for the patterns perceived in the minds of distant observers. Again, if we are to judge the Constitution's meaning by what it has become, we must accept the hard truth that attempting to codify rules of informal change is hopeless, for they will never fully capture how the Constitution has changed in the past. They will never make complete sense of how we arrived at our current, lived Constitution. Further, even if we could encapsulate the diverse mechanisms of prior constitutional change and reduce it to a complicated formula, we would discover that future constitutional changes would occur without satisfying our derived formulation. Practice has a way of undermining scholarly theorizing about practice and, indeed, any attempt to lay down rigid rules about practice. Prescribing rules about practice-based amendments to the Constitution is akin to laying down rules about the running of the bulls in Pamplona, Spain. Needless to say, the bulls are unlikely to pay any heed to any rules. Likewise, the future makers and discoverers of informal amendments will not honor whatever rules or rubrics we lay down today. Indeed, there is something strange about attempting to formalize the "proper" means of informal constitutional change.

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10. Pareto efficiency exists when no person can be made better off without making another worse off.

Fourth, a practice-based theory of our Constitution makes the presidency the most powerful agent of informal constitutional change. The unitary executive is best poised to act with energy, decision, and secrecy, and thereby establish new conventions related to federal powers, duties, and rights, and thereby manufacture the building blocks of new constitutional conceptions. Our presidents also are best able to persuade their electoral coalition, the public at large, and their co-partisans in Congress and on the bench, to recognize, adopt, and defend new constitutional understandings. Certainly, no other federal actor is better poised to amend the Constitution via informal means.

Finally, and relatedly, a convention-based theory of constitutional change turbocharges the presidency. In particular, it makes it relatively easy for presidents to augment their office. A presidency that can change via the acts of its occupants is one capable of acquiring any power and shedding any duty. Indeed, if one compares the modern presidency with its eighteenth-century counterpart, the radical transformations to the office are striking. Anyone who defends or celebrates a Constitution by Convention must recognize that we have not reached the end of history or the end of informal amendments. As sure as the sun will rise in the east, greater presidential power will be on the horizon as new presidential conventions replace the old. Hence, Constitution by Convention is a recipe for an Imperial Presidency by Convention.

## I.

### CONSTITUTIONAL RIGHTS BY CONVENTION

Although conservatives tend to see virtue in following customs, originalists are apt to regard a living Constitution, even one grounded in practice, and squawk in horror. A living Constitution that can neutralize the Contract Clause,<sup>11</sup> contrive a bypass of the Treaty Clause,<sup>12</sup> spawn a parallel presidential power to declare war,<sup>13</sup> and transform the Commerce Clause into a catch-all legislative power<sup>14</sup> is a malleable Constitution that can mean anything and may, therefore, in the cauldron of politics, mean nothing. The Constitution's provisions become the playthings of federal officialdom to be tweaked, twisted, and transmuted to

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11. See, for example, *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), in which the court virtually read the Contract Clause out of the Constitution.

12. Presidents bypass the treaty clause via four instruments/processes: congressional-executive agreements, congressional delegation of authority to make treaties in advance of any negotiation, sole-executive agreements, and "nonbinding" commitments. See SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* 192–204 (2020); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 183–206 (1998).

13. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).

14. The Supreme Court has expanded the Commerce Clause to encompass a power to regulate essentially all aspects of American life. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (applying the substantial effect principle in upholding Congress's ability to set a quota on wheat raised and consumed on plaintiff's own farm).

further the political and policy goals of the branches. While some may resist these incipient presidential amendments in the early stages of change, practice eventually blesses and sanctifies that which was formerly unconstitutional, making it the new supreme law.

To be clear, I do not object to the common assertion that early practices in the wake of a formal constitutional change shed light on original meaning. When the first Congress regulated wages and conditions of merchant seaman, that shed light on the Commerce Clause's original scope.<sup>15</sup> Likewise, when George Washington vetoed a bill on policy grounds, he underscored that his power to object to bills extended beyond the realm of constitutional objections.<sup>16</sup>

Nor do I have a bone to pick with practices that do not infringe the Constitution. Should Congress consistently steer clear of potential breaches of constitutional rights, it commits no foul for nothing is amiss with a custom of extra protection for individual liberties. Similarly, I have no constitutional misgivings with a practice of modern presidents choosing, for personal or policy reasons, to serve but one term. In these situations, each branch is forbearing the exercise of power and not transgressing (much less changing) existing constitutional rules. So long as no one recasts these practices as binding constitutional amendments, I have no objections.

Contrary to this approach, Conventionalists of all sorts rely upon what Georg Jellinek called the “[n]ormative [f]orce of the [f]actual.”<sup>17</sup> There is a tendency to infer rules from practices and hence some observers will perceive some portion of today's practices as constitutional rules. Conventionalists are apt to conclude that when these new rules are inconsistent with prior readings of the Constitution, the modern rules supersede or displace older conceptions of the Constitution. In sum, our Constitution is what most people perceive it to be today, and not what observers perceived in 1789, or 1870, or so the Conventionalists tell us.

And yet, *Constitution by Convention* argues that conventions—our lived experience—should not establish the contours and understandings of individual liberties.<sup>18</sup> The reason is that the practice concerning rights may not be “a practical accommodation among institutional repeat players but [may reflect] the oppression of relatively disempowered individuals or groups.”<sup>19</sup> True enough. But a practical accommodation among our highest federal institutions also can result in oppression. One of the reasons for separated powers is a conviction that

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15. See 1st Cong., 2 Stat. 131 (2d Sess. 1790).

16. See Letter from George Washington to the House of Representatives (Feb. 28, 1797), in 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, 405, 405–06 (John C. Fitzpatrick ed., 1940) (listing policy objections).

17. See generally THE NORMATIVE FORCE OF THE FACTUAL: LEGAL PHILOSOPHY BETWEEN IS AND OUGHT (Nicoletta Bersier Ladavac et al. eds., 2019) (discussing the interrelation of facts and norms against the background of Jellinek's “Normative Force of the Factual.”).

18. Issacharoff & Morrison, *supra* note 8, at 1919 n. 23 (2020).

19. *Id.*

the separation of powers fosters liberty. As Baron de Montesquieu argued, amalgamating powers makes it possible for tyrannical laws to be tyrannically executed with no moderation.<sup>20</sup> He further claimed that when the legislator is also the executive and the judge, this “may justly be pronounced the very definition of tyranny.”<sup>21</sup> Montesquieu’s point about separation of powers remains true today. If our modern conventions evolve and judges regularly rubberstamp executive acts, tyranny might result. Likewise, if Senators reached a “practical accommodation” of deference to presidents, we might have oppressive officers on the federal bench and repressive treaties.

In any event, if we are to judge the meaning and scope of the separation of powers by reference to practice, in part because it is unrealistic to jump into the time machine and return to earlier conceptions, then that point can be no less true of individual rights. If a return to original meanings is improbable and, more importantly, inconsistent with our lived experience, so are outdated conceptions of federal rights dating back to the Warren, Burger, or Rehnquist Courts. What matters for free speech, criminal procedure, or, for that matter, any claimed constitutional right, is what our lived experience reveals today. If more people wish to suppress speech that was formerly free and erect practices that buttress this illiberal perspective, their narrow conception of rights will prevail.

Relatedly, if the Constitution is what we take it to mean today, then it cannot matter that certain groups might be oppressed as a result of such readings. Either the power of practice overwhelms prior understandings of the law or it does not. If presidential wars are constitutional despite any coercion or oppression that might arise from them, it cannot be that novel conceptions of rights are unconstitutional merely because of oppression.

For the Conventionalists to be right, the amendatory power of practice cannot turn on the consequences of changed constitutional conceptions. If the amendatory power of conventions did turn on their consequences, however, we ought to evaluate *all constitutional claims* by their consequences, without regard to current practices or, for that matter, original meaning. In other words, if the Conventionalist argument against Constitutional Rights by Convention is that individual rights shaped by certain conventions would (or might) lead to bad, even horrific consequences, then Constitution by Convention is really an argument for Constitution by Consequences. The Conventions do not matter, except as they constitute rather imperfect evidence of consequences.

The Conventionalists bestride two horses at once. One steed—the separation of powers mount—is intensely realistic, focused as it is on current practices. The other steed—rights—is rooted in consequences and eschews practice, going so far as to denounce it. The Conventionalists need to pick a horse

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20. 1 BARON DE MONTESQUIEU, *THE COMPLETE WORKS OF M. DE MONTESQUIEU* 195 (1777).

21. *THE FEDERALIST NO. 47*, at 245 (James Madison) (Ian Shapiro ed., 2009).

and stick to it. One cannot ride two horses for long, as they will eventually peel away in different directions.

## II.

### TRADING POWERS, FILCHING AUTHORITY, AND SLOUGHING OFF DUTIES

In life, people accommodate each other all the time. Property owners may allow a neighbor to traverse their property. A lessee may make minor repairs rather than rely on the landlord to do so. Frequent fliers may offer their first-class seats to veterans. These are wholesome customs.

Similarly, as noted earlier, there are practical accommodations among, and within, the branches. The Senate may defer to the executive with respect to cabinet appointments, in the sense that Senators generally approve such nominees. The House may regularly bow to the Senate's preferences on appropriations. Presidents may inter the veto pen, rarely wielding it to object to bills. Judges may speedily adjudicate a case to satisfy the political branches. There is nothing unconstitutional in any of these accommodations. The Constitution does not require sharp differences of opinion or continual clashes.

But I do not regard our Constitution as infinitely accommodating. In particular, I don't believe that the Founders crafted a Constitution that politicians and judges could alter via informal means. Certainly, if the Constitution was meant to be ever-changing, its creators did a very poor job of making that manifest. After all, why would they have spelled out the elaborate and arduous process in Article V if an informal, easily-satisfied procedure was also at hand? In my view, the Founding Generation did not regard the entire Constitution as an elaborate set of default rules that can be supplanted by whatever compromises that the branches generate over time.<sup>22</sup> Under the original Constitution, our agents cannot amend their assigned powers and duties, even if all branches wholeheartedly agree. Relatedly, our constitutional rights should not be hostage to interbranch bargaining, with rights shrinking and expanding as our politicians see fit.

For instance, the Constitution establishes a rule for pardons: presidents can only pardon *federal* offenses and only after their commission.<sup>23</sup> They cannot acquire a power to suspend statutes by repeatedly pardoning *ex ante*, before the offense.<sup>24</sup> And the President cannot acquire, through diligent violations, a power

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22. The founders divided the federal government's power over three distinct branches to create rival power centers. These rival branches would seek to check the other branches' encroachment into their own power, which would counter an individual's lust for power. As James Madison put it, "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009). Permitting the branches to trade their powers would run afoul of the framer's desire to check an individual's lust for power.

23. U.S. CONST. art. II, § 2, cl. 1; SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 99–109 (2015).

24. PRAKASH, *supra* note 12, at 99–109.

to pardon state offenses.<sup>25</sup> Likewise, the Constitution establishes a rule for treaty-making. Significant international contracts require the consent of a supermajority of the Senate.<sup>26</sup> The Senate cannot formally surrender its check and allow presidents to make major international agreements unilaterally. Finally, even if the other branches saw the wisdom of judicial legislation, our federal courts cannot enact, amend, or repeal laws. While the Constitution may invite struggle, it is certainly not some invitation to barter constitutional powers, where in return for authority to preside over criminal trials, the President hands the veto pen to the Chief Justice and grants the House Speaker the power to make treaties.

There is an underlying current, an implicit premise, that runs through the account of the Conventionalists and other similar claims. The assumption is that if the branches have supposedly settled on a practice, there must be something socially desirable or beneficial about the convention. This untestable assumption is utterly unwarranted. To be sure, most politicians do consult their sense of the public welfare because most politicians are not full-bore egoists. Nonetheless, every politician considers how some constitutional innovation advances their interests and preferences, both short- and long-term. First is the electoral principle—how does this constitutional reading advance my electoral fortunes?<sup>27</sup> If a group of Senators supposes that some expansion of presidential power will elevate their chances of getting elected because the new power will be used to adopt a policy that furthers their reelection prospects, they will tend to favor the presidential imperialism. Theoretically, if presidents conclude that some narrower conception of *presidential* power will help them get reelected, they are more apt to voice the constrained theory.

Second, we have to consider the politician's policy preferences. If a Representative favors abortion rights and an expansive reading of executive power happens to advance these rights in a particular case, then the politician will tend to favor the expansive reading in the heat of the political moment. Conversely, when a narrow reading of executive power favors abortion rights, we can expect this politician to insist upon the constrained reading.

Given this more realistic sense of the motivations behind the stances politicians take about the separation of powers, it would be a blunder to assume that informal amendments to the separation of powers reflect some objective truth about the social desirability of revised allocations of constitutional power. When Senators choose to be mostly silent about a particular presidential war, they likely do so because they would rather not be on the record, either for or against the war. Their silence is not a function of a complicated constitutional inquiry that turns on the societal value of presidential war-making. To think otherwise is to blink reality.

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25. *Id.*

26. U.S. CONST. art. II, § 2, cl. 2; Ramsey, *supra* note 12, at 183–206 (describing a treaty as a significant and durable agreement between sovereigns).

27. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6 (2d ed. 2004).

Likewise, when politicians fail to condemn a constitutional rights innovation from the Supreme Court, they likely favor the innovation for personal or political reasons. For instance, if a Representative favors public funding of religious schools, she will not complain when the Court adjusts doctrine under the Religion Clauses to permit such support. Or if presidents favor gay marriage, they will celebrate, rather than denounce, any judicial opinion that advances that cause. In reacting this way, politicians are not weighing the societal advantages of the judicial construction. The judicial pronouncement advances the cherished cause and will be favored for that reason alone.

We can tell this because, most of the time, politicians do not speak as if the Constitution has changed through practice.<sup>28</sup> They do not make such claims because the public would find it extremely jarring for politicians to openly state that they (and federal judges) can easily transform our Constitution. For example, imagine that a President starts a war and that a Senator favors the new conflict. Rather than arguing that repeated presidential violations have changed the Constitution as it relates to war, this legislator is far more apt to declare that the Commander in Chief has constitutional authority to use military force to protect the vital national interests of the United States. The latter claim will seem more palatable for Senators to voice because the American people do not understand, much less embrace, the claim that federal politicians may, via their *transgressions*, amend the Constitution that ordains and establishes them. Further, the textual claim does not leave the door open to further changes the Senator disdains. The Senator may wish to preserve the Senate's role for appointments and once Senators openly speak of practice putting a "gloss" on the Constitution, it becomes crystal clear that every constitutional feature is up for grabs.

Even if our federal officers truly believe that they can, through interbranch bargaining, somehow erect a "more perfect" separation of powers, there is little reason to conclude that their particular evaluations are superior to the opinions of the Founders. No one can deny that politicians are a confident lot, sure of their righteousness and abilities. Yet, I do lack confidence in the empirically-untested claim that modern politicians—Donald Trump, Nancy Pelosi, and Mitch McConnell—are the intellectual successors to Alexander Hamilton, James Wilson, and James Madison. But perhaps they will prove me wrong.

Although I've focused most intently on powers, what I say applies no less to duties. Presidents cannot, through sloth or indifference, wash their hands of the express duty to take care that the laws be faithfully executed.<sup>29</sup> Likewise, the federal courts cannot shed their implied (but undoubted) duty to enforce federal

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28. For example, during President Trump's impeachment trial, both Republican and Democratic Senators cited the Framers' alleged views when arguing whether to convict and remove President Trump from office. Neither side argued that the meaning of "high crimes and misdemeanors" should change over time. *See, e.g.*, 166 Cong. Rec. S289–98 (daily ed. Jan. 21, 2020).

29. U.S. CONST. art. II, § 3.

law in cases properly before them. And Congress cannot absolve itself of the responsibility to ensure its laws are constitutional. Legislators must judge whether bills breach the constraints that arise from the separation of powers, the subject-matter limits on legislative power, and the people's retained rights.

For instance, I would not conclude that a consistent practice of ignoring Section 2 of the Fourteenth Amendment has purged or obliterated that section.<sup>30</sup> The obligation to adjust representation in the House endures, even if members of Congress (and presidents) do not take it seriously. Neglectful politicians cannot amend our Constitution through their serial ignorance or neglect.

### III.

#### THE ACTUAL PRACTICE OF PRACTICE-BASED CONSTITUTIONAL CHANGE

Those who claim practice can amend the Constitution often envision a series of conditions that the political branches must fulfill. Failure to satisfy the steps renders the practice illegitimate. For example, Professor Bruce Ackerman has a theory with several sequential steps: initial constitutional violations, judicial nullification of one or more violations, and ultimately a ratifying election that consecrates the new constitutional order. That apparently is how the New Deal reconception of federal legislative power was made legitimate, at least according to Ackerman. For Justice Felix Frankfurter, acquiring novel power is also complicated:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.<sup>31</sup>

I think the Conventionalists have a theory akin to Frankfurter's. But, to their credit, they have jettisoned most of his requirements; the Justice's conditions were absolutely unrealistic when he uttered them. Perhaps more importantly, the innovations the Conventionalists embrace cannot satisfy the Justice's limits. For instance, Frankfurter's systematic requirement seems to require a change that is "methodical in procedure or plan."<sup>32</sup> But most practice-based constitutional amendments do not begin with a method, much less a conscious choice to

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30. This Section provides that a state's representation is to be proportionally reduced when the right to vote is denied or abridged for any male over twenty-one years of age, except for participation in a rebellion or other crime, U.S. CONST. amend. XIV, § 2. But this section has never been enforced despite disenfranchisement of males, blacks and whites alike. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 105–08 (2000) (discussing how southern states suppressed black, Republican, and Populist voters).

31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

32. See *Systematic*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/systematic> [<https://perma.cc/W6C7-KPZ2>].

change the Constitution. Rather, they often arise from acts that reflect rather little to no constitutional consideration. When there is constitutional thought that creeps in, that thought is not likely driven by a desire to amend the Constitution as much as there is a concerted effort to skirt or massage the constitutional questions. For instance, presidents sometimes resolve to take acts without regard to the law and then merely cast about for some veneer of legal argumentation. Moreover, neither the unbroken practice requirement nor the “never before questioned” prong are much honored.<sup>33</sup> A practice can be vigorously doubted for decades, and can be broken or interrupted along the way, and yet many will stoutly defend its constitutionality.

Consider the war power. While presidents have acquired this power through practice, their actions were not calculated to alter the meaning of the Constitution. In the early days of the Korean War, President Harry S. Truman was not attempting to methodically change the Constitution.<sup>34</sup> And the same is true of his successors—they were not acting systematically but instead acting ad hoc. Nor can someone describe our war powers practice as “unbroken,” as Frankfurter required.<sup>35</sup> For instance, was the recourse to Congress for the Gulf of Tonkin resolution, whether or not duplicitous, a break in presidential war practice?<sup>36</sup> If not, perhaps the two gulf wars and the Al-Qaeda/Taliban conflict broke the practice of presidential war-making.<sup>37</sup> After all, Congress authorized all three wars. Finally, presidential war-making has *never been* “questioned.”<sup>38</sup> Detractors do not merely doubt the practice, they utterly denounce it. Despite all this, the Department of Justice’s Office of Legal Counsel (OLC) has shown little compunction in quoting Frankfurter’s theory of constitutional change and concluding that presidents can wage war on their say-so.<sup>39</sup> The OLC favors Frankfurter’s conclusion—that presidential powers can accrete via significant glosses—and cares little about the host of requirements Frankfurter listed.

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33. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring).

34. Truman decided he did not need congressional approval for the Korean War. Instead, he simply informed Congress and classified the use of force as a “[p]olice action.” LARRY BLOMSTEDT, TRUMAN, CONGRESS, AND KOREA: THE POLITICS OF AMERICA’S FIRST UNDECLARED WAR 31–33 (2016).

35. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

36. The Resolution neither “declared war” nor commanded the use of force. Rather, it authorized an attack on North Vietnam and a defense of Southeast Asia. Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964).

37. See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991); Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a) (2002), 116 Stat. 1498, 1501 (codified at 50 U.S.C. § 1541).

38. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

39. See Authority to Use Military Force in Libya, 2011 WL 1459998, at \*6 (Op. O.L.C. Apr. 1, 2011) (arguing that the President had the authority to direct “limited military operations abroad [in Libya], even without prior specific congressional approval”).

As one might surmise, the actual practice of making arguments grounded in practice to defend informal constitutional change has not comported with any abstract theory. Pay no attention to all the caveats and provisos that are often used to cabin informal legal change. For instance, it turns out that even a single innovation can change the Constitution. “As the first of every thing, in our situation will serve to establish a Precedent,” the first President observed, “it is devoutly wished on my part, that these precedents may be fixed on true principles.”<sup>40</sup> George Washington understood that initial practices would be treated as precedents, even when they were *not* “fixed on true principles.”<sup>41</sup> He further recognized that posterity would assume that a practice reflected the *true* sense of the law. Hence the first President felt it essential to ensure that the first practices were fully consistent with the Constitution.

Much later, Henry Clay said as much, distinguishing men and governments when it comes to habits:

Man has been described, by some one of those who have treated of his nature, as a bundle of habits. The definition is much truer when applied to governments. Precedents are their habits. There is one important difference between the formation of habits by an individual and by governments. He contracts it only after frequent repetition. A single instance fixes the habits and determines the direction of governments.<sup>42</sup>

Clay concluded that because governments were more apt to shape prior practices, it was imperative to oppose constitutional innovations as soon as they surfaced.<sup>43</sup>

In the place of Ackerman’s exacting multi-stage process and Frankfurter’s rigid framework, the Conventionalists would substitute a nebulous “facts and circumstances” approach. This approach is clearly a better reflection of our actual practices. But it too is too abstract and academic. Our branches do not apply any such test and, indeed, are not even aware of it. Members of Congress were typically not thinking deeply as they violated earlier constitutional rules. Nor were presidents engaged in intense constitutional thought as they take the nation to war on their own authority, either the first time it happened or the second and third. Even many Justices—those most likely to theorize—are apt to consider “the imperatives of events and contemporary imponderables rather than [] abstract theories” of constitutional change.<sup>44</sup>

To truly capture actual practices, all one can say is that there are no rules. There are no rules about sincerity and obligations—oaths do not matter. There are no rules requiring consistent practices—inconsistency and reversion to old

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40. Letter from George Washington to James Madison (May 5, 1789), in 12 THE PAPERS OF JAMES MADISON 131, 132 (Charles F. Hobson & Robert A. Rutland eds., 1979).

41. *Id.*

42. Henry Clay, *On the Seminole War*, in 1 THE SPEECHES OF HENRY CLAY 179, 203 (Calvin Colton ed. 1857).

43. *Id.*

44. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

ways matter not at all. There are no rules requiring textual ambiguity—even the clearest of constitutional rules is not immune from informal change. And there are no rules requiring a systematic convention—one deviant practice is enough. Just as a formal amendment need only be passed once, a President need only act once to usher in considerable constitutional change. Sometimes, one novel custom is enough to alter the lived Constitution.

It is easy to see why once might be enough. Once a branch has innovated, others will tend to cite this single innovation as if it establishes a rule, without regard to its original novelty. After all, the second act is not novel because the first act paved the way. Of course, some may denounce the second transgressive act. But the same may be true of the thirteenth or thirtieth act. If a denouncement of the thirtieth act of “usurpation,” however sincere, will fall on deaf ears because the complaint is at war with the perception of actual practices, criticism of the second act can be similarly rebutted: the sincere critics simply do not understand how the Constitution changes and what the Constitution has become via practice.

As an example, consider Ulysses S. Grant’s assertion of authority over cross-border cables. In his second term, he publicly opposed the laying of a transatlantic telegraph cable until a company satisfied certain conditions.<sup>45</sup> When his stipulations were met, Grant acquiesced.<sup>46</sup> Soon thereafter the executive branch laid claim to the power, doing little more than citing Grant’s address to Congress as the source of the legal claim.<sup>47</sup> Later presidents extended the cross-border power to cover electric lines, aerial railways, trams, and pipelines.<sup>48</sup> That is why President Barack Obama imagined that he could halt the Keystone Pipeline traversal of the border with Canada.<sup>49</sup> No congressional law and no constitutional clause ceded this power. But President Barack Obama had the authority, courtesy of President Grant and Grant’s successors.

Ironically, history and practice have written a gloss upon Frankfurter’s theory, making his theory a victim of its own success. Whether his complicated theory could account for all the informal constitutional amendments of his era is itself rather doubtful. But in any case, his exacting theory certainly cannot justify today’s prevailing practices, the constitutionality of which many people quickly assume. If we are to understand our Constitution by reference to practices, then the practice of making constitutional arguments grounded in practice and recognizing informal amendments grounded in practice no longer conforms to his antiquated theory. Apparently, the normative power of the factual is so

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45. Ulysses S. Grant, Seventh Annual Message (Dec. 7, 1875), in 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS: 1790-1966, 1294, 1316 (Fred L. Israel ed., 1967).

46. *Id.*

47. *See* Foreign Cables, 22 Op. Att’y Gen. 13, 15, 25 (1898). *But see id.* at 25 (listing two officials denying any such power).

48. *See, e.g.*, Executive Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004).

49. *Sisseton–Wahpeton Oyate v. U.S. Dep’t of State*, 659 F. Supp. 2d 1071, 1081 (D. S.D. 2009).

compelling it cannot be cabined by the meditations of law professors, much less the guideposts of Supreme Court Justices.

#### IV.

##### THE CONSTITUTION THAT PRESIDENTS MAKE AND REMAKE

Exalting practice as a means of constitutional change exalts the institution best situated to amend existing practice: the presidency. The Conventionalists are aware of this repercussion. But their discussion lacks a systematic treatment, let alone defense, of this troubling consequence of applauding practice.

The unitary executive is like an agile, supersonic fighter jet that can act with speed, secrecy, and decisiveness as it generates novel practices. In contrast, the first branch, Congress, is not only a “they;”<sup>50</sup> Congress actually encompasses two separate “theys”—meaning two chambers. No one has ever supposed Congress is anything but an elephant:<sup>51</sup> a complex and powerful giant, but one that sometimes labors and lumbers to respond. The third branch—the courts—must act by consensus and are hemmed in by several institutional constraints that limit their ability to opine on matters, constitutional and otherwise.<sup>52</sup> And the need to count to five makes it imperative that Justices work with each other and moderate their actual preferences to secure a majority opinion. All in all, no other federal institution compares to the presidency in its capacity to make constitutional claims and act on them and hence no other entity has the same influence on the scope of federal power, the powers reserved to the states, and individual rights.

Presidents influence informal constitutional change in a host of ways. First, they create constitutional practices as they consider bills. Unlike the courts, which rule on the constitutionality of a few provisions in a fraction of all laws, presidents may opine on the constitutionality of *every* bill before it becomes law. For instance, some regard Andrew Jackson’s constitutional objections to the 1832 Bank Bill as an attempt to reorient constitutional law away from John Marshall’s expansive reading of federal power.<sup>53</sup> Jackson was hardly the last to use veto messages to convey and promote particular constitutional theories. When presidents object to a bill on constitutional grounds, they create a documentary record of objections. These objections then become data points for

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50. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992).

51. See Saikrishna Bangalore Prakash, *Congress as Elephant*, 104 VA. L. REV. 797 (2018).

52. For example, federal courts are courts of limited jurisdiction and may only hear cases within the jurisdiction granted by statute and the Constitution. U.S. CONST. art. III, § 2. They may not issue advisory opinions. See RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 52 (7th ed. 2015). Lastly, certain constitutional questions are nonjusticiable due to the political question doctrine. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (holding that partisan gerrymandering presents a nonjusticiable political question).

53. Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1144–54 (James D. Richardson ed., 1897).

the content of our practices. Consider the string of vetoes of public works projects, vetoes that shaped the early contours of the federal spending power.<sup>54</sup>

Relatedly, modern presidents use signing statements to create and announce practices, as Bill Clinton did to promote his conception of equal protection.<sup>55</sup> In 1996, Clinton signed a bill requiring the discharge of all military personnel with HIV. But he simultaneously objected that the new law was unconstitutional.<sup>56</sup> The next year, Congress left out the provision, apparently to accommodate his objections.<sup>57</sup> By using the signing statement to express his view that Congress had violated individual rights, Clinton generated something of a soft practice that nudged constitutional law in his preferred direction.

Presidential practice can also bolster the perceived constitutionality of laws. If several presidents have claimed a law is constitutional, this practice may move judges. In sustaining the Bank of the United States, John Marshall noted that the arguments for the Bank's legality had "convinced minds as pure and as intelligent as this country can boast."<sup>58</sup> Among these uncorrupted intellects was George Washington, who signed the Bank of the United States bill after carefully weighing the constitutional misgivings of some.<sup>59</sup> Chief Justice Marshall also observed that a former opponent had belatedly endorsed the Bank's constitutionality, referring to President James Madison.

Second, presidents create practices when they disregard or nullify existing laws because they believe that the laws are unconstitutional. Thomas Jefferson refused to enforce the Sedition Act because he believed it unconstitutional.<sup>60</sup> Jefferson's practice no doubt has contributed to the modern sense that the Sedition Act violated the First Amendment, something hardly obvious at the time. This practice of refusing to enforce statutes has accelerated in modern times, with presidents especially willing to ignore laws that constrain presidential authority. For instance, both George W. Bush and Barack Obama ignored a law that touched on Israel's claim to Jerusalem because each supposed the law infringed on their constitutional authority over foreign affairs.<sup>61</sup>

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54. For a discussion of these vetoes, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 409–25 (2015).

55. See William J. Clinton, *Statement on Signing the National Defense Authorization Act for Fiscal Year 1996*, 32 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 260 (1996).

56. See *id.*

57. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996).

58. *McCulloch v. Maryland*, 17 U.S. 316, 402 (1819).

59. EDWARD S. KAPLAN, *THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY* 24–25 (1999).

60. Letter from Thomas Jefferson to Mrs. John Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 42, 43–44 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

61. The Supreme Court held that the executive had an exclusive power to recognize foreign nations and that Congress's law impermissibly interfered with that power. *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

Presidents also shape constitutional law through their law enforcement practices vis-à-vis the states. Andrew Jackson's stand against South Carolina's tariff nullification established a now undoubted principle, namely that states have no right to obstruct the execution of federal law within their borders.<sup>62</sup> Likewise, many today suppose secession is illegal, in large part because the North defeated the South. The man most responsible for this constitutional judgment was Abraham Lincoln. Another President—James Buchanan—would have let the South slip away. But Lincoln scorned secession as illegal and had no qualms about deploying Union forces to vindicate that constitutional conviction.

Presidents, via assertions and actions, help steer the course of constitutional law regarding individual rights, federalism, and the separation of powers. To influence Congress, they craft constitutional opinions meant to attract partisan allies within the legislature. To influence the courts, they rely upon appointments, court briefs, and public persuasion and pressure. To sway the public, they make constitutional claims in many contexts, assertions that have the power to shape popular conceptions of the Constitution.

All things considered, a President can wield more influence over the trajectory of informal constitutional change than any other contemporary, even a Supreme Court Justice. Indeed, it seems fair to say that the influence of certain dominant presidents on the shape of constitutional practice in their respective eras—think Washington, Lincoln, and Franklin Roosevelt—far eclipsed the influence of their contemporaries on the Supreme Court.

## V.

### THE PRESIDENCY THAT PRESIDENTS MAKE

The executive's ability to reshape constitutional practice (and therefore constitutional law) is at its zenith with respect to the presidency. Again, I sense that the Conventionalists are fully aware of this reality. But they have done little to assuage the fears of many who recognize that a Constitution by Convention enables presidents to radically transform their office. No presidential duty is sacrosanct. No constitutional power is off limits.

The changes to the presidency are all around us. Presidents now declare war. The incumbent executive regularly cites the examples of previous incarnations, saying that dozens of presidents have used military force without congressional authority. Whether these characterizations are accurate or not is beside the point. The point is that under our lived Constitution, the presidency has acquired a parallel power to declare war.

In other areas of foreign affairs, presidents have made additional amendments to the scope of presidential power, some major and some minor.

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62. *President Jackson's Proclamation Regarding Nullification, December 10, 1832*, AVALON PROJECT, YALE LAW SCHOOL LILLIAN GOLDMAN LAW LIBRARY, [http://avalon.law.yale.edu/19th\\_century/jack01.asp#1](http://avalon.law.yale.edu/19th_century/jack01.asp#1) [<https://perma.cc/G4ZU-W6JM>].

Modern presidents make international treaties without satisfying the Treaty Clause, a major departure from the Constitution's text. And, as noted earlier, with Ulysses S. Grant leading the way, modern presidents have made the minor change of acquiring authority to regulate transborder pipelines, a power that more comfortably fits within the confines of the Commerce Clause.

In the realm of voicing constitutional objections, presidents now have far greater authority than their predecessors did, something that arose wholly from practice. Modern presidents raise constitutional objections to bills *before* Congress presents them. In his Bank veto message, Andrew Jackson suggested that Congress ought to have consulted him.<sup>63</sup> To his critics, the proposition was not only meddlesome, it was unconstitutional. The President could participate in the legislative process after presentment and not before, they said.<sup>64</sup> At the time Jackson's critics had a point. No more. Presidents today evince no hesitation in voicing constitutional objections throughout the life-cycle of a bill.<sup>65</sup>

Moreover, presidents since James Buchanan have acquired the power to raise constitutional objections to the bills they sign into law. No early President did this. Early chief magistrates believed that they had a duty to veto laws that contained unconstitutional provisions.<sup>66</sup> This innovation—the power to sign a bill and simultaneously denounce it—is a powerful tool, for it enables presidents to carve up bills, giving chief executives something akin to a line-item veto. Presidents can benefit from the parts of bills they favor and denounce other portions as unconstitutional and therefore unenforceable. In acquiring this power, presidents shed a solemn duty, the obligation to veto bills they believed were unconstitutional.<sup>67</sup>

These two novel constitutional practices—the practice of voicing constitutional objections both prior to presentment and concurrently with bill signing—have made it easier for presidents to generate still more novel constitutional practices. The more one opines on constitutional matters, the more one generates data points for a constitutional law that is grounded in practice.

Finally, chief executives are becoming less executive and more legislative. Besides their ability to reshape the most supreme form of supreme law (the Constitution), executives have acquired a vast array of interpretive authority over the making, unmaking, and meaning of federal law. Congress has delegated legislative authority, presidents have sometimes seized it in discrete areas and ways, and presidents deploy creative interpretive techniques to expand, contract, and evade the requirements of Congress's laws. One might say that our practices

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63. See 8 REG. DEB. 1220, 1225 (1833).

64. 2 THE LIFE AND SPEECHES OF THE HON. HENRY CLAY 102 (Daniel Mallory ed., 1844).

65. PRAKASH, THE LIVING PRESIDENCY, *supra* note 12, at 221–23.

66. Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 84–86 (2007).

67. See *generally id.* (explaining that the President has the ability to block unconstitutional legislation by veto, and to refrain from doing so is an unacceptable abdication of power).

are rapidly heading towards a revolutionary reconceptualization of the presidency. While Justice Hugo Black insisted the duty to faithfully execute the law, he effectively refuted the idea that presidents may make law.<sup>68</sup> Today's practices signal that the power to execute the law now comes freighted with sizable authority to make it.

The means by which presidents amend Article II should be familiar. Presidents, through declarations and deeds, create facts on the ground. That is, they make pronouncements and take actions that touch upon the content of presidential powers and duties. Later, sometimes much later, when an opponent claims that the incumbent has done something constitutionally amiss, that sitting executive stands ready with a shield of precedents to cite. Incumbents (and their lawyers) habitually trot out, massage, reinterpret, and even distort previous presidential acts to bolster their actions. An incumbent's allies, all of whom favor the contested act, also insist that there is nothing legally amiss, because we have seen all this before. In a version of executive "whataboutism," the incumbent's opponents may well be asked, "Do you really imagine that Presidents Madison, Truman, Reagan, and Clinton violated our Constitution? Because they did the exact same thing."

"Whataboutist" arguments are even made within an administration, as lawyers argue among themselves. Consider an episode from the Obama presidency. Internally, lawyers clashed over whether Congress could bar trying terrorists in Article III courts.<sup>69</sup> Congress wanted trials before military tribunals, far from our shores. Some lawyers argued Congress could impose such a constraint while others said such a law unconstitutionally invaded executive authority. In response to the argument that if Barack Obama declared his unwillingness to honor any such statutory limit, he would be "acting too much like Bush," Harold Koh, then the State Department Legal Adviser, "repeatedly argued in meetings: Democrats get to be president, too."<sup>70</sup>

This was a potent argument. Someone in Professor Koh's situation should be excused for arguing that if President George W. Bush took an act, the incumbent, President Obama, must be able to do the same, or else he is a second-class President. Evidently, presidents (and their aides) will seldom fail to observe that, if one or more presidents have taken some action, the incumbent is free to do the same. Every President must be able to do what predecessors did, lest we have a one-sided contest, where some presidents advance their agendas while honoring timeless constitutional rules and others promote their programs by flouting those rules. Hence almost every backer of the incumbent will ardently insist that the current President must "get to be president, too."<sup>71</sup>

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68. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

69. CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST 9-11 PRESIDENCY* 299 (2015).

70. *Id.*

71. *Id.*

Yet this rational short-term approach has alarming long-term consequences. It creates a one-way ratchet, where no President is willing to pause and consider what their office has become, and will become, if every incumbent gets to be all that his predecessors have been and more. The refrain that my co-partisan gets to be President too—an insistence that, by itself, does not grapple with legal claims but instead insists upon equal treatment—is too alluring. Yes, anyone who is the President gets to be President. But it hardly follows that presidents must have legal authority to do whatever their predecessors were able to get away with.

If the Conventionalists are conventionalists to their core, they should openly declare that there are no permanent constraints, or limits, on the presidency. If they are fainthearted Conventionalists, however, then they must explain when conventions, even longstanding ones, should be ignored despite the normative power of the factual and notwithstanding their belief that conventions typically reflect modern improvements and enhancements to the Constitution's separation of powers. Either path is perilous, the former for our country and the latter for the intellectual rigor of the Conventionalist enterprise.

#### CONCLUSION

The presidency was robust from its conception. It was, as some predicted, the “fœtus of monarchy.”<sup>72</sup> The office was far more potent than any analog that existed in the states and was, in many respects, more formidable than the Continental Congress, the proto-federal executive. That is why so many early foes and friends of the Constitution described the presidency as differing little from a monarchy.<sup>73</sup>

However powerful the office, the original presidency was in the end a *limited, republican* monarchy. Though no other federal institution has been the subject of so many formal amendments, none of these amendments purported to grant new powers to the executive, much less strip away existing duties.<sup>74</sup> Not even the Civil War or the Great Depression generated formal amendments that ceded greater power to the office.

Nonetheless, with the rise of living constitutionalism and the affiliated concept that practice makes the presidency, the office has become still more monarchical and rather less limited and republican. Presidents declare war, make treaties without the two-thirds consent of the Senate, create new laws, and amend existing ones. Practice has transmogrified the presidency, in the same way that a spell might change a frog into a prince.

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72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 66 (Max Farrand ed., 1911) (statement of Edmund Randolph).

73. See, e.g., Patrick Henry's statement that the presidency “squints towards monarchy.” 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 58 (Jonathan Elliot ed., 1836).

74. See U.S. CONST. amends. XII, XX, XXII, XXIII, XXV.

Dean Morrison and Professor Issacharoff welcome the idea of informal constitutional change. But they also dread it. It is a curious juxtaposition. They wish to defend many (if not all) of the informal constitutional changes wrought in the past. But they seem terrified of what the current President might inaugurate in the way of constitutional novelty. Indeed, they encourage the courts to both defend existing settlements and stave off new ones. If institutional practices at variance with constitutional text (or earlier understandings of it) can be a force for good, why must constitutional progress and accommodation stop now? Why should we fear President Donald J. Trump's innovations any more than President Barack Obama's?

One has to suppose that if we transported the Conventionalists back to the Great Depression, they might have opposed the dangerous innovations of Franklin Roosevelt. They might have argued that the courts ought to preserve the extant conventions in the face of Roosevelt's transparent assaults on the separation of powers and federalism. And one has to suppose that if we could transport the Conventionalists to the future, they might strive to preserve whatever President Trump might have done to the Constitution of the early twenty-first century. Further, they might stoutly resist attempts to revert to the status quo ante, the conventions of our backwards era. Apparently, we ought to denounce constitutional innovations until they become conventions, at which point in time, we must reverse course and defend them.

I cannot but help wonder about the lessons that constitutional actors take away. When our politicians comprehend that conventions—mere statements and acts—have the power to amend, even revolutionize, our Constitution, they will quickly grasp that there is little constraint on their power to amend it. Our presidents will recognize that there are no enduring constraints on their office. Any duty can be shed, and any power acquired through practice and a dogged insistence on preserving, protecting, and defending the novel practice. A Constitution, including a presidency, meant to “endure for ages”<sup>75</sup> will endure in a peculiar way, one where our agents pledge fealty to a lasting Constitution even as they demolish and refashion its basic features with impunity. Several more decades of such endurance may leave no trace of that which was to endure.

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75. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).