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Restorative Constitutionalism

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Restorative Constitutionalism

David Landau* & Rosalind Dixon†

Abstract

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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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 U.S. Constitution.¹ 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.”² Preservative constitutionalism aims at maintaining and protecting existing institutions and social order.³ Transformative constitutionalism tries to alter the status quo in pursuit of a constitutional vision saturated with social and political change.⁴ 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.⁵

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 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 aberrant

1. See generally William H. Pryor, *Justice Thomas, Criminal Justice, and Originalism’s Legitimacy*, 127 YALE L.J. F. 173 (2017).

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

3. See *id.* at 217.

4. See *id.* at 216–17; Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998).

5. There are some notable exceptions to the neglect of restoration in the comparative literature. See generally William Partlett, *Restoration Constitution-Making*, 9 VIENNA J. CONST. L. 514 (2015); *Debate: Restoring Constitutionalism*, VERFASSUNGSBLOG, <https://perma.cc/G2T5-MGQE> (last visited Jan. 15, 2024).

presidency wrought in the United States.⁶ 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.⁷

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.⁸ 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.⁹ 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.¹⁰ 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 wider 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.

6. See *infra* Part II.C.

7. See *infra* notes 88–93 and accompanying text.

8. See *infra* Part III.

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

10. See *infra* Part III.C.

Moreover, restorative projects make many different choices about 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.¹¹ Moreover, as both Hungary and Trump show, restorative constitutional appeals can sometimes be used in service of illiberal, anti-democratic ends,¹² 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,¹³ 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.¹⁴ Part II examines the uses of restorative discourse in the United States, focusing on four moments: the Reconstruction period, the modern conservative development of originalism, the Trump presidency, and the Biden presidency. Part III briefly surveys restorative projects outside of the United States 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

11. See *infra* Part IV.B.

12. See *infra* Parts II.C., III.C.

13. See generally Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) [hereinafter Doerfler & Moyn, *Democratizing the Supreme Court*]; Samuel D. Doerfler & Samuel Moyn, *Op-Ed: The Constitution Is Broken and Should Not be Redeemed*, N.Y. TIMES (Aug. 19, 2022) [hereinafter Doerfler & Moyn, *The Constitution Is Broken*], <https://perma.cc/KCR9-EV2N>.

14. See *infra* Part I.

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.

I. SITUATING RESTORATIVE CONSTITUTIONALISM

In this Part, 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.¹⁵

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.”¹⁶ He further argued that it involved “inducing large-scale social change through nonviolent political processes grounded in

15. Klare, *supra* note 4, at 150.

16. *Id.*

law.”¹⁷ 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.¹⁸

Klare’s article sparked an outpouring of work on transformative constitutionalism, but this conversation has acknowledged serious difficulties defining the concept.¹⁹ It seems commonplace to acknowledge that transformative constitutionalism entails a commitment to permanent, large-scale 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,²⁰ although they sometimes also include other goals such as increases in political accountability or deconsolidation of power.²¹ 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.²² The justification for transformative constitutional projects is future-oriented: to

17. *Id.*

18. *See id.* at 188.

19. *See, e.g.,* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527, 531 (2017) (noting that “there is no single comprehensive comparative theory or concept of transformative constitutionalism”); Oscar Vilhena Vieira 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).

20. *See, e.g.,* Hailbronner, *supra* note 19, at 533. *See generally* 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).

21. *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, 708 (2019) (examining structural diffusions of power within the South African Constitution and the role of so-called “integrity institutions” as a means of ensuring political accountability).

22. *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.”).

construct a different and better future than the country has today or that it has had 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.”²³

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.²⁴ She focuses on the example of Germany after World War II, where aspects of the 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.²⁵

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,²⁶ which is used as a paradigm of a preservative rather than transformative constitution.²⁷ This account however seems to ignore the

23. Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 125 (1999).

24. See generally Hailbronner, *supra* note 19.

25. 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.”).

26. The United Kingdom 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, 439 (2020) (arguing that the United Kingdom’s collective national government will be put at risk if it does not adopt a more transformative constitutional model, rather than its traditionally preservative one).

27. The comparison sometimes collapses, unhelpfully, into a broader debate about the relative outlier status of certain features of the United States Constitution, such as its absence of socioeconomic rights, brevity and lack of

elements of United States' constitutional history, both formal amendments and constitutional interpretation, that had transformative aspirations.²⁸

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.”²⁹ So put, he views the United States' constitution as a mix of preservative and transformative features, while viewing South Africa's as the “world's leading example” of a transformative constitution.³⁰ Roux adds that the concepts of transformation and preservation should be viewed as end points on a spectrum.³¹

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 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.”³² Likewise, the past can be relatively concrete or historical, or it may be gauzier, more nostalgic, or even imagined.

detail, and rigidity. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1647 (2014).

28. See Hailbronner, *supra* note 19, at 539 (noting moments of transformative jurisprudence in United States history, for example, during the Warren court).

29. SUNSTEIN, *supra* note 2, at 216.

30. Sunstein, *supra* note 23, at 125.

31. See Theunis Roux, *Understanding Grootboom—A Response to Cass R. Sunstein*, 12 CONST. F. 41, 43 (2002).

32. Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017); see *id.* at 150 (proposing that “[w]hen politicians disregard norms of fair political competition, undermine public trust, and repeatedly overreach by using constitutional hardball to rig the system” constitutionalism itself begins “to decay”).

Figure 1: Logics of Constitutional Change

Transformative	Seeks 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 longstanding 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 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.³³ There may also be a third kind of use of the past, however—what Jack Balkin calls constitutional redemption.³⁴ Redemption uses principles drawn from the past in order to seek “change that fulfills the promise of the past.”³⁵ 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 projects that also include transformative change, but redemption as a way of understanding the past seems to lie most 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.³⁶ 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” changes that used amendment, replacement, judicial interpretation, or other forms of constitutional change to damage constitutional democracy.³⁷ A

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

34. See generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011).

35. *Id.* at 5. Balkin further defines “redemption” 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.” *Id.* at 6.

36. See *infra* Part III.A–B.

37. See Landau, *Abusive Constitutionalism*, *supra* note 9, at 195 (defining abusive constitutionalism “as the use of mechanisms in constitutional change in order to make a state significantly less democratic than it was before”); Rosalind Dixon & David Landau, *1989–2019: From Democratic to Abusive Constitutional Borrowing*, 17 *INT’L J. CONST. L.* 489, 493 (2019) (highlighting autocratic “use of liberal democratic constitutional designs and concepts” deployed “for anti-democratic rather than pro-democratic ends, which we refer to as abusive constitutional borrowing”).

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.³⁸

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.³⁹

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.⁴⁰ The nature of a restorative discourse, particularly of the more nostalgic variant, may also (and ironically) lead to calls for consolidation of power, and a reduction of checks on that power, so that the true constitutional order can be redeemed.⁴¹ We shall see, below, potential examples of these dynamics drawn from the United States and Hungary.

38. See Dixon & Landau, *supra* note 37, at 527 (explaining how constitutional restoration “is often found in constitutional transitions that take place in the aftermath of war, a military coup, or outside occupation” and is a process that “is governed by the partial or full restoration of a pre-existing constitution”).

39. Balkin, *supra* note 32, at 152.

40. On this distinction, see, e.g., WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN 20 (2019), which notes the inherent contradiction in anti-pluralist, populist appeals in Poland to “unity” and “community” while depicting marginalized groups as the “enemy.”

41. See, e.g., *id.* at 7 (observing in the case of Poland reliance on judicial review not to distribute governmental power but to consolidate it).

B. *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*.⁴² 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,⁴³ 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.⁴⁴ 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.⁴⁵ At least some of these seem transformative as well, while others, we will argue below, can be at least partially understood as restorative.⁴⁶

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

42. See Sunstein, *supra* note 23, at 125 (defining preservative constitutions as those that “seek to maintain existing practices, to ensure that things do not get worse” and transformative constitutions as setting “out certain aspirations that are emphatically understood as a challenge to longstanding practices”).

43. See *id.*

44. See Roux, *supra* note 31, at 43 (“The American Constitution is mixed because of the practical difficulty of adding to the amendments, meaning that it is a patchwork of different generations’ constitutional aspirations, with some missing generations in between. In the result, there is no express commitment either to preserving or to transforming the *status quo*.”).

45. See 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 108–11, 119–20 (1991) (exploring constitutional changes outside of formal Article V procedures during the New Deal and Civil Rights eras).

46. See *infra* Part II.

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 inclusion.⁴⁷ These are, to be sure, elements of many (if not most) transformational constitutional projects.⁴⁸ 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.⁴⁹ 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 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.⁵⁰ It is fairly common, as the

47. See Hailbronner, *supra* note 19, 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).

48. See *id.*

49. See *id.* at 533 (“The basic core of the idea of transformative constitutionalism is that it entails a commitment to *social and political change*, and not just change at the margins, but of a more fundamental sort.”); Klare, *supra* note 4, at 150 (defining transformative constitutionalism as “a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country's political and social institutions”).

50. See *supra* notes 43–44 and accompanying text.

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 for below, after we give some examples drawn from the United States and elsewhere around the world.⁵¹ 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 signaling the illegitimacy and inauthenticity of the intervening constitutional order.⁵² And 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.⁵³ Additionally, it may help to overcome bargaining or transaction costs between elites that would otherwise make agreement impossible.⁵⁴ 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.⁵⁵

51. See *infra* Part IV.

52. Cf. Gábor Halmai, *Restoring Constitutionalism in Hungary*, VERFASSUNGSBLOG (Dec. 13, 2021), <https://perma.cc/S786-UGZU> (arguing that Hungary’s Fundamental Law “is an illegitimate, authoritarian constitution which needs to be replaced in order to *restore* constitutionalism in Hungary” (emphasis added)).

53. See *infra* Part II.B.

54. See Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15 INT’L J. CONST. L. 988, 1003 (2017).

55. 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.” Inter-American Democratic Charter, art. 19, Sept. 11, 2001, 40 I.L.M. 1289; see also African Charter on Democracy, Elections, and Governance, art. 23, Jan. 30, 2007, O.A.U. Doc. Assembly/AU/Dec.47 (VIII) (“State Parties agree that the use of . . . the following illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union.”). These were

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 in a more compressed timeframe, through a single, large-scale constitutional amendment or replacement.⁵⁶ 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 constitution or wholesale replacement of the existing constitutional order via a constitution-making process.⁵⁷

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.⁵⁸

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,

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 generally 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).

56. See, e.g., David S. Law & Ryan Whalen, *Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison*, in ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 74, 75 (Xenophon Contiades & Alkmene Fotiadou eds., 2020) (“Countries exhibit patterns of constitutional change that tend to fall along a continuum ranging from incremental and frequent tinkering to periodic bursts of major revision.”).

57. See *id.* at 74–75 (developing a quantitative measure that differentiates amendment from constitution-making); see also Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Logic*, in COMPARATIVE CONSTITUTIONAL CHANGE 96, 96 (Tom Ginsburg & Rosalind Dixon eds., 2013).

58. See Dixon, *supra* note 57, at 96; see also DIXON & LANDAU, *supra* note 9, at 23–36 (describing forms of change).

to replace the text.⁵⁹ 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.⁶⁰ 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 that has been degraded or lost. Contemporary legal discourse associated with modern conservatism has focused at times on these kinds of goals.⁶¹ 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.⁶² Statutory changes by political actors, or even informal changes, can also carry out restorative constitutional goals.⁶³

59. ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS?* 23 (2017); see RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS* 217 (2019).

60. See 1 ACKERMAN, *supra* note 45, at 268 (noting the “modern system” where “a President claim[s] a mandate from the People[,] . . . Congress supports this claim by enacting transformative statutes that challenge the fundamentals of the preexisting regime, [and] these statutes are treated as the functional equivalent of a proposal for constitutional amendment”). 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, 289 (1963).

61. See *infra* Part II.B.

62. See Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1264 (2011).

63. See, e.g., Roberto Gargarella, *Restoring the Validity of Law in Democratic Societies*, VERFASSUNGSBLOG (Jan. 4, 2022), <https://perma.cc/98WL-94SS> (emphasizing non-textual modes of constitutional restoration); Cem Tecimer, *Restoration Without the Constitution*, VERFASSUNGSBLOG (Jan. 11,

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.⁶⁴ 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.⁶⁵ Or consider Argentina, where Juan Peron, after ascending to power in the 1940s, replaced the existing 1853 constitution with a new text in 1949.⁶⁶ The new text was “transformative,” containing new social rights and extensive labor rights, but it also consolidated presidential power, eliminating term limits and thus allowing Peron to remain president indefinitely.⁶⁷ After Peron was pushed out of power, his opponents did not write a new constitution, but instead the reforms of 1957 primarily reinstated the 1853 text.⁶⁸ 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

2022), <https://perma.cc/U8AQ-EJ75> (noting ordinary laws, policies, and unwritten norms as part of the restorative toolkit).

64. See *infra* Part III.A.

65. See Partlett, *supra* note 5, at 528 (“[M]any former communist countries saw restoration as a way to return to their normal European path of development by breaking with the legacies of abusive socialist revolution.” (internal quotations omitted)).

66. See ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810–2010: THE ENGINE ROOM OF THE CONSTITUTION* 119–20 (2013).

67. See *id.* at 120–21 (noting that while the 1949 Constitution contained features to further “social justice” and protect the “economically disadvantaged,” it also had “a special section for justifying the importance of concentrating power in the Executive” (internal quotations omitted)).

68. See Partlett, *supra* note 5, at 527 (“In Latin America, a military junta in Argentina restored the 1853 Constitution after expelling the Peronists from power.”).

appropriate way to restore democratic governance after an authoritarian regime.⁶⁹

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.⁷⁰ 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 preempt domestic constitutional change.⁷¹

69. See Mark Tushnet, *Restoring Self-Governance*, VERFASSUNGSBLOG (Dec. 14, 2021), <https://perma.cc/D486-UT7G>.

70. On this doctrine, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 6 (2017) (describing the doctrine as one where “amendments that were enacted according to the amendment procedure . . . [though] declared unconstitutional on the grounds that their content is at variance with the existing constitution” (internal quotation omitted)). See also RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING AND CHANGING CONSTITUTIONS 219–22 (2019); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606, 607–08 (2015) (“[T]he [unconstitutional constitutional amendment] doctrine holds that some constitutional amendments are substantively unconstitutional because they undermine core principles in the existing constitutional order.”).

71. See, e.g., Armin von Bogdandy & Luke Dimitrios Spieker, *How to Set Aside Hungarian Cardinal Laws*, VERFASSUNGSBLOG (Mar. 18, 2022), <https://perma.cc/6VFU-R857> (noting, in the case of Hungary, the possibilities of both “changing the [domestic] electoral rules” and the “operationaliz[ation of] EU law”); Kim Lane Scheppele, *Escaping Orbán’s Constitutional Prison*, VERFASSUNGSBLOG (Dec. 21, 2021) [hereinafter Scheppele, *Constitutional Prison*], <https://perma.cc/VK2H-ZSSC> (positing that, in the event “the [Hungarian] opposition wins a mere majority in the Parliament . . . [and] its political will can be blocked by Orbán’s legacy laws and hand-picked guardians,” Hungary may “simply embrac[e] European law to provide a legal path back to the rule of law”).

The optimal choices are likely to depend heavily on context. Countering formal changes with formal change may provide a rule of law benefit, which may affect the degree of support for that change both domestically and internationally.⁷² 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 they have often been eroded by prior informal modes of change.⁷³

At the same time, in some cases there may be little practical chance of formal restoration of a prior constitutional order.⁷⁴ 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.⁷⁵ In these cases, informal or sub-constitutional changes, acting as a kind of “constitutional workaround[,]”⁷⁶ may be the only way to restore previously desirable constitutional norms and institutions.⁷⁷

72. See Tushnet, *supra* note 69 (“[I]t is frequently politically prudent to come as close to complying with the existing amendment rule as possible even if perfect compliance isn’t possible because such compliance would prevent constitutional revision.”).

73. See Dmitry Kurnosov, *Beware of the Bulldozer*, VERFASSUNGSBLOG (Jan. 7, 2022), <https://perma.cc/Q2J3-GE59> (illustrating through President Yeltsin’s 1993 extra-constitutional constitution-making how “mere political inconvenience cannot be a reason” for such actions); Beata Bakó, *Why Throw a Constitution out of the Window Instead of Making it Work?*, VERFASSUNGSBLOG (Dec. 23, 2021), <https://perma.cc/CA8D-4KC4> (positing, in the case of Hungary, that the opposition “could show real respect for constitutionalism by keeping the constitution”).

74. For a pragmatic account of how best to maximize effective constitutional restoration and change, see, e.g., Ece Göztepe et al., *A Matter of Pragmatism Rather than Principle*, VERFASSUNGSBLOG (Dec. 30, 2021), <https://perma.cc/53LE-F65K>.

75. See, e.g., Scheppele, *Constitutional Prison*, *supra* note 71 (“Orbán has entrenched his own party loyalists in crucial chokepoints in the constitutional order.”).

76. Mark Tushnet, *Constitutional Change: Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009).

77. See, e.g., Sanford Levinson, *The Iron Cage of Veneration*, VERFASSUNGSBLOG (Dec. 27, 2021), <https://perma.cc/GU23-8TMY> (examining “workarounds” in the context of the American formal system); see also Andrew Arato & András Sajó, *Restoring Constitutionalism*, VERFASSUNGSBLOG (Nov. 11, 2021), <https://perma.cc/HZ7Z-UBG3> (noting the difficulty of constitutional restoration in the face of entrenched authoritarianism).

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 counter constitutional erosion.⁷⁸ And this may also feed into “abusive” uses of rule of law discourses in aid of authoritarian preservation.⁷⁹

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.⁸⁰ 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 the making of the Reconstruction amendments, and modern conservative constitutionalism. Then we turn to the present, tracing the

78. See Kurnosov, *supra* note 73 (“No substantive institutional changes should be made outside of the constitutional bounds. Otherwise, there will always be the danger that breaking the rule of law will continue even after constitutional change has taken place.”); Bakó, *supra* note 73 (“Once we accept ‘extra-constitutional’ constitution-making after normal elections and a regular change of government, nothing would guarantee that the rules of constitution making will not be simply overridden right after the next election.”). For arguments that this may lead to destabilization of translation rule of law regimes, see Csaba Győry, *Governance or Revolution?*, VERFASSUNGSBLOG (Dec. 16, 2021), <https://perma.cc/2Q4H-7M52>.

79. See, e.g., András L. Pap, *Four Recommendations for Constitutional Restoration in Hungary*, VERFASSUNGSBLOG (Dec. 19, 2021), <https://perma.cc/Q8MT-S79Y>. On the abusive uses of rule of law rhetoric, see generally Rosalind Dixon, *Rule of Law Teleology: Against the Misuse and Abuse of Rule of Law Rhetoric*, 11 HAGUE J. RULE 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* (Jan. 26, 2019) (J.S.D. Dissertation, New York University School of Law), <https://perma.cc/VNG2-9RYQ>.

80. See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1366–69 (2006) (explaining how a forward-looking women’s equality movement led to changes in constitutional interpretation of the equal protection clause).

“dueling” 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.⁸¹ More interestingly, some of those *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.⁸²

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.⁸³ 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.⁸⁴ Garrison famously called the U.S. Constitution a “covenant with Death” and an “agreement with Hell.”⁸⁵ This tendency pushed many abolitionists of the Garrison wing out of U.S. electoral politics completely as a form of total opposition to

81. The language of redemption was used to defend attacks on the project of Reconstruction, though modern conservatives claim an anti-racist rather than racist conception of redemption. See KENNETH KERSCH, *CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM* 368–69 (2019).

82. See *supra* note 34 and accompanying text.

83. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 150–54 (1975) (summarizing the arguments made by Garrisonians when presenting evidence that the Constitution was best understood as a “compromise over slavery”).

84. 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”).

85. Paul Finkelman, *Garrison’s Constitution: The Covenant with Death and How It Was Made*, PROLOGUE, <https://perma.cc/8UYT-6RGW> (last updated Oct. 21, 2022).

the current political order.⁸⁶ A second wing of the abolitionist movement worked within the legal system, making “mainstream” constitutional and legal arguments that furthered the cause, and dealing with issues like circumscribing slavery in the territories and placing procedural safeguards around the Fugitive Slave Act.⁸⁷

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”⁸⁸ and Wiecek calls them “radicals”⁸⁹ in contradiction to 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 toward the position that the U.S. Constitution was an anti-slavery document and that contemporary politics had lost touch with the United States’ founding ideals.⁹⁰ 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.⁹¹ 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, which they expected to end shortly, and that the founders wrote the text to “avoid any inference that the Constitution secured slavery.”⁹² Further, the

86. *See id.* (“The Garrisonians believed that if they worked within the political system they were merely spinning their wheels, spending their money and time on a cause that was doomed.”).

87. Pub. L. No. 31–60, 9 Stat. 462 (repealed 1864); *see* WILLIAM M. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848*, at 202 (1977) (referring to this group as “moderate constitutionalists”).

88. COVER, *supra* note 83, at 155.

89. WIECEK, *supra* note 87, at 249.

90. *See id.* at 251.

91. *See id.* at 265–70.

92. *Id.* at 264.

radicals read the Constitution against a backdrop of natural law, based on documents like the Declaration of Independence.⁹³

Later, these perspectives influenced the making of the Reconstruction amendments. In framing the Thirteenth 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.”⁹⁴ Senator Charles Sumner argued that the Thirteenth Amendment recognized the anti-slavery character that was already in the Constitution, while abolitionist Gerrit Smith stated that the Thirteenth 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 Civil War.⁹⁵ In different ways, both of these arguments, and some others made by abolitionists and Republicans in Congress, viewed the Thirteenth Amendment as “declaratory” of congressional powers already implicit in the Constitution.⁹⁶

Smith’s argument above is indicative of the nuance and complexity of arguments surrounding the Thirteenth 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

93. 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”).

94. See MICHAEL VORENBURG, *FINAL FREEDOM: THE CIVIL WARS, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 95 (2001).

95. *Id.* at 192–93. During consideration of the Thirteenth 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. *Id.* at 159.

96. See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 152–53 (1951).

transformative use of constitutional change.⁹⁷ But the debate over the Reconstruction amendments—and the Thirteenth 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 Thirteenth 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.⁹⁸ 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.⁹⁹

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. As Barnett and Bernick have recently shown, the drafters of the Fourteenth Amendment drew on these ideas in drafting it.¹⁰⁰ And during debates, some members of Congress again presented the Fourteenth Amendment in “declaratory” terms, as recognizing rights that were implicit in the Constitution already but had been lost or

97. See VORENBURG, *supra* note 94, at 196–97 (showing that proponents, and some detractors, of the Thirteenth Amendment argued for an “unlimited nature of the amendment power”).

98. 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”).

99. See *id.* (“Antislavery congressmen hauled out the writings of Patrick Henry, John Adams, and James Madison to prove that the natural sentiments of the founding generation were against slavery.”).

100. See RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT* 90–102 (2021); see also James Oakes, *Foreward*, in *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT*, 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 . . .”).

undermined.¹⁰¹ 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.”¹⁰² 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.¹⁰³ Debates surrounding the Fourteenth Amendment in fact seem to mix all of the discourses of constitutional change identified above—they were obviously heavily transformative in nature but also contained aspects of restoration and even preservation.¹⁰⁴

B. *Modern Constitutional Conservatism*

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.¹⁰⁵ Some conservatives have suggested jurisprudence that would restore, in part or in full, aspects of the pre-1937 constitutional order, including a smaller federal government, greater responsibility on the part of Congress compared to federal agencies, and stronger protections for property and contract rights.¹⁰⁶ The underpinnings of this approach are, in part, based on libertarian economic and political philosophies.¹⁰⁷ But these are intertwined with a

101. See TENBROEK, *supra* note 96, at 193.

102. See *id.* (quoting Rep. William Higby of California).

103. See *id.* (quoting Rep. William D. Kelley of Pennsylvania).

104. On the preservative nature of the Privileges and Immunities Clause, see BARNETT & BERNICK, *supra* note 100, at 240.

105. See generally William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); William W. Van Alstyne, *Foreword: The Constitution in Exile: Is It Time to Bring It in from the Cold?*, 51 DUKE L.J. 1 (2001).

106. See Forbath, *supra* note 105, at 196–97.

107. See *id.*

project that is, in Ken Kersch's words, often "restorationist and redemptivist".¹⁰⁸

As scholars have suggested, much modern constitutional conservatism 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.¹⁰⁹ The three concepts have developed a tight relationship in the United States 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.¹¹⁰ 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.¹¹¹ Common good constitutionalism seems identifiably "restorative," based on ideas like a revival of traditional morality associated with Catholicism, but it is certainly not originalist.¹¹²

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

108. KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 382 (2019); see also Forbath, *supra* note 105, at 165–66.

109. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 212 (2008) [hereinafter Siegel, *Dead or Alive*] (linking "originalism" and "restoration" in the project to give justiciable meaning to the second amendment, leading up to the landmark *Heller* decision).

110. See ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 36 (2022).

111. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), <https://perma.cc/K4F9-F9QK>.

112. For a very critical reply by two prominent originalists of Vermeule's project, see generally William Baude & Stephen E. Sachs, *The "Common Good" Manifesto*, 138 HARV. L. REV. 861 (2023) (reviewing ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022)).

redemption, is a striking example.¹¹³ Balkin argues that interpreters should look at original public meaning of clauses, like the Equal Protection Clause and the Due Process Clause, to understand what the drafting generation of those clauses thought that they meant.¹¹⁴ 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 a useful guide for constitutional interpretation, but is not binding on later interpreters.¹¹⁵ The result of this is a variant of originalism that is often more transformative in nature than it is restorative.¹¹⁶ 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 construction[ism]" and "law and order" to express opposition to liberal legal ideas and Supreme Court decisions disliked by the right.¹¹⁷ Later conservatives, during and after the Reagan administration, decried the crudeness of the earlier efforts and made calls for more sophisticated concepts, which were developed and

113. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

114. See *id.* at 102.

115. See *id.* at 101 (arguing that originalists have "tended to conflate original meaning with constructions derived from original expected applications").

116. See *id.* at 104 ("The logical consequence of moving from original intention and original understanding to original meaning is that original meaning originalism . . . becomes a form of living constitutionalism.").

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

promoted by an increasingly robust conservative legal infrastructure.¹¹⁸

Some key conservative actors initially held a decidedly ambivalent relationship with the United States' founding. Many Catholic conservatives, for example, were extremely wary of the religious views of the founders. Some drew back much further in history, to feudal Europe, "where things had been properly ordered."¹¹⁹ 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.¹²⁰

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 conservatism 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).¹²¹ 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.¹²² Siegel and Post have demonstrated how originalism has also allowed for mediation between elite and popular views, in a way that both responds to and creates popular mobilization.¹²³ For example,

118. See *id.* at 134–37 (noting that originalists in the 1980s argued against a liberal assessment of judicial power). On the infrastructure, see generally STEPHEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR THE CONTROL OF THE LAW* (2008).

119. KERSCH, *supra* note 108, at 321.

120. *Id.* at 357.

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

122. See *id.* at 213 (explaining how the Constitution became part of the "viable" heritage for the right); see also KERSCH, *supra* note 108, at 382 (arguing that originalism has allowed for an "overlapping consensus" among conservative groups).

123. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORD. L. REV.* 545, 565 (2006) (arguing that

early originalists like Raoul Berger were highly critical of *Brown v. Board of Education*,¹²⁴ whereas later originalists have developed sophisticated defenses of *Brown* as an originalist decision.¹²⁵ Original meaning has also seemed to play 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.¹²⁶

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.¹²⁷ These ideas, of course, have borne concrete fruit in *District of Columbia v. Heller*¹²⁸ and its progeny and have also shaped political understandings around the country.¹²⁹ Changed understandings of the meaning of the

Scalia and Thomas, though nominally originalists, exemplify “living constitutionalism” when they reinterpret the past to serve conservative political ends).

124. 347 U.S. 483 (1954).

125. See O’NEILL, *supra* note 117, at 201 (noting that originalists have defended *Brown* as being “within the legitimate range of interpretations of the amendment held by its authors”); see also Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) (“Such is the moral authority of *Brown* that if any particular [constitutional] theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”). Similarly, as Siegel and Post note, “[n]o one paid any attention” to Lino Graglia’s “not implausibl[e]” argument that the Fifth Amendment’s Due Process Clause could not be read in its original understanding to require school desegregation in Washington, D.C., and therefore that *Bolling v. Sharpe*, 347 U.S. 497 (1954), was decided incorrectly. Post & Siegel, *supra* note 123, at 558.

126. See Post & Siegel, *supra* note 123, at 564 (suggesting that the Framers did not intend for the Constitution to prohibit affirmative action generally); see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 753 (1985) (noting that affirmative action precedence is totally “devoid of any reference to the original intent of the framers of the [F]ourteenth Amendment”).

127. See Siegel, *Dead or Alive*, *supra* note 109, at 222–26 (providing an overview of the changing understanding of the Second Amendment resulting from the Reagan administration’s “project of constitutional restoration” and its tension with legislative gun control proposals).

128. 554 U.S. 570 (2008).

129. See *id.* at 628–35 (holding that the Second Amendment protects an individual right to keep and bear arms, and striking down a handgun ban and

Second Amendment in turn reflected mobilization by right-wing actors like the National Rifle Association (“NRA”).¹³⁰ 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.¹³¹

Heston portrayed gun owners as losers in the “culture wars” who were being victimized by progressive groups deviating from the original understanding of the U.S. Constitution.¹³²

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.”¹³³ 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 Thirteenth Amendment, a restorative

certain other restrictions in the District of Columbia); *see also* McDonald v. Chicago, 561 U.S. 742, 780 (2010) (holding that the right to bear arms was incorporated into the Fourteenth Amendment and thus could be enforced against the state as well as federal governments); N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 69 (2022) (striking down a New York law requiring that citizens show “proper cause” to get a concealed carry license).

130. *See* Siegel, *Dead or Alive*, *supra* note 109, at 207–12.

131. *Id.* at 234 (quoting Charlton Heston, Address at the Free Congress Foundation’s 20th Anniversary Gala (Dec. 7, 1997)).

132. *See id.* at 233.

133. Daniel Levin, *Federalists in the Attic: Original Intent, the Heritage Movement, and Democratic Theory*, 29 L. & SOC. INQ. 105, 107, 108 (2004).

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.”¹³⁴ Talking about the restoration of the U.S. 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.¹³⁵ More concretely, discourses around originalism and restoration developed in a period in which right-wing political actors had lost faith in Article V as an instrument for carrying out political change, after repeated failures to change the constitution in accord with their goals in the 1950s, 1960s, and 1970s.¹³⁶ The director of the Center for Judicial Studies, James McClellan, argued 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.¹³⁷

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.¹³⁸ 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

134. See *supra* note 98 and accompanying text.

135. See *supra* note 123 and accompanying text.

136. See Siegel, *Dead or Alive*, *supra* note 109, at 219.

137. See *id.* (quoting James McClellan, *Kicking the Amendment Habit*, BENCHMARK, Jan.–Feb. 1984, at 1, 1–2).

138. See David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1337–38 (2020) (explaining judicial (re-)interpretation as one of several tools of constitutional change that can be used for antidemocratic ends and explaining how regimes might decide to rely on some tools more heavily than others).

the 1980s.¹³⁹ 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—Dueling 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.”¹⁴⁰ 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.¹⁴¹ Moreover, Trump offered his supporters a list of foes who had contributed to that decline—undocumented immigrants, the media and allied cultural and educational elites, and the deep state, for instance.¹⁴² 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

139. Cf. Siegel, *Dead or Alive*, *supra* note 109, at 212 (discussing the “New Right” movement of the 1970s and 80s and its emphasis on social issues as part of a larger project of “constitutional restoration”).

140. See Karen Tumulty, *How Donald Trump Came Up with ‘Make America Great Again’*, WASH. POST (Jan. 18, 2017), <https://perma.cc/SE2P-8KJW> (elaborating on the familiar slogan and its creation).

141. See Robert J. Shiller, *Making America Great Again Isn’t Just About Money and Power*, N.Y. TIMES (Jan. 12, 2017), <https://perma.cc/R3CF-WM57>.

142. See Stephen Collinson & Jeremy Diamond, *Trump on Immigration: No Amnesty, No Pivot*, CNN (Sept. 1, 2016), <https://perma.cc/27NS-4TBR>; Jeremy Diamond, *Trump Launches All-Out Attack on the Press*, CNN (June 1, 2016), <https://perma.cc/G556-9VGL>; Catherine Lucey & Darlene Superville, *Trump Accuses DOJ of Being Part of “Deep State”*, ASSOCIATED PRESS (Jan. 2, 2018), <https://perma.cc/FW6D-NGNB>.

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.’”¹⁴³ The effort achieved a significant goal of the movement in 2022, when the Court reversed *Roe v Wade*¹⁴⁴ and held that the Constitution contained no right to abortion.¹⁴⁵ The decision was presented by its proponents as a triumph of originalism and as “constitutional restoration.”¹⁴⁶

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 Federal Bureau of Investigation (“FBI”), Central Intelligence Agency, and the military, where prior administrations had been less willing to tread.¹⁴⁷ 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 through the end of his presidency.¹⁴⁸

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

143. Emily Bazelon, *How Will Trump’s Supreme Court Remake America?*, N.Y. TIMES MAG. (Feb. 27, 2020), <https://perma.cc/3HTZ-EEME>.

144. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

145. *See Dobbs*, 597 U.S. at 292.

146. *See* Reva Siegel, *The Trump Court Limited Women’s Rights Using 19th-Century Standards*, WASH. POST (June 25, 2022), <https://perma.cc/NFR6-26NH>.

147. *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).

148. *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 . . .”).

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.¹⁴⁹ And President Trump did—through, for example, a ban on the entry of 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 from so-called sanctuary jurisdictions.¹⁵⁰ Some but not all of these measures were blocked by the judiciary, and the Biden administration rapidly moved to reverse others.¹⁵¹ But, when seen in full, they seem like an attempt to fundamentally restructure the way the system works, through fifteen major executive orders and over 1,000 bureaucratic actions.¹⁵²

The Trump administration also took a series of steps aimed at changing the nature of the administrative state. Former White House Chief Strategist Steve Bannon famously called for

149. See Adam B. Cox & Cristina B. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009) (“Scholars and courts generally understand the plenary power doctrine in immigration law to sharply limit judicial scrutiny of the immigration rules adopted by Congress and the President.”).

150. See Ngai, *supra* note 148, at 151 (discussing the “nearly unlimited executive power over immigration” and President Donald Trump’s use of it).

151. See, e.g., *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1245 (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, 677 (9th Cir. 2019) (upholding district court injunction against the administration’s repurposing of money for a wall on the southern border). *But see Trump v. Hawaii*, 585 U.S. 667, 711 (2018) (upholding the administration’s restrictions on travel for people from a number of countries).

152. See Ngai, *supra* note 148, at 151.

the “deconstruction of the administrative state,”¹⁵³ while Trump called for draining “the swamp.”¹⁵⁴ In part, this proceeded through a series of actions that seemed partially intended to demoralize existing agency personnel. For instance, the Trump administration planned to reorganize the Department of the Interior by relocating many employees from D.C. to the West Coast.¹⁵⁵ At the Department of State, career personnel quit because of concerns about the administration and the Department.¹⁵⁶ Coupled with a hiring freeze and other moves, this, according to observers, “broke” the Department.¹⁵⁷ Some agency leaders, such as Scott Pruitt at the Environmental Protection Agency and Mick Mulvaney at the Consumer Financial Protection Bureau, seemed to have goals that ran counter to the underlying purposes of their respective agencies.¹⁵⁸

In October 2020, just before the 2020 election, the administration issued a rule that would have allowed agencies to move many employees to positions classified as Schedule F, without civil service protection.¹⁵⁹ While Biden quickly reversed this move upon taking office,¹⁶⁰ Trump allies are exploring ways to reinstate and expand it should he win the presidency in 2024.¹⁶¹ Here, as elsewhere, many of the most consequential

153. Gage, *supra* note 147, at 299.

154. Keeanga-Yamahtta Taylor, *From Color-Blind to Black Lives Matter: Race, Class, and Politics under Trump*, in *THE PRESIDENCY OF DONALD J. TRUMP: A FIRST HISTORICAL ASSESSMENT* 198, 201 (Julian E. Zelizer ed., 2022).

155. See 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), <https://perma.cc/ZH3F-542V>.

156. See Reid Wilson, *Diplomats Describe All-Time Low in Morale at State Under Trump*, HILL (Oct. 21, 2019), <https://perma.cc/562A-59WN>.

157. Robbie Gramer et al., *How the Trump Administration Broke the State Department*, FOREIGN POL’Y (July 31, 2017), <https://perma.cc/7ACD-E78P>.

158. See Michael Goldhaber, *Scott Pruitt Versus the Environmental Protection Agency*, IBA GLOB. INSIGHT, <https://perma.cc/KX42-XY4T> (last visited Jan. 15, 2024).

159. See Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 26, 2020).

160. See Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021).

161. See Paige Hopkins, *D.C.’s Federal Workforce Fears Schedule F*, AXIOS (Aug. 17, 2022), <https://perma.cc/75ZD-FEJ3> (explaining that Schedule F “would make it easier to fire as many as 50,000 federal workers deemed to have some influence over policy”); Loren DeJonge Schulman, *Schedule F: An Unwelcome Resurgence*, LAWFARE (Aug. 12, 2022), <https://perma.cc/6J4D->

changes or attempted changes—for example, Trump’s bombshell firing of FBI Director James Comey (and comportment towards the director before that firing)—did not seem to violate the law, since the director appears to be removable at will, but they did cut against strong norms protecting FBI independence.¹⁶²

One could give other examples that also worked as 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.¹⁶³ 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 [C]onstitution.”¹⁶⁴ He argued that “[o]ur 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.”¹⁶⁵ In a particularly odd passage, he compared the 2020 election to alleged attempts to rename or remove the Washington, Jefferson, and Lincoln memorials.¹⁶⁶ In comparative terms, the January 6 insurrection and its surrounding events resemble “abusive” forms of constitutional change, where incumbents seek to use forms of legal and constitutional change to undermine rather than bolster the democratic order.¹⁶⁷ The

LUT7 (“Thousands of such ‘risk managers’ who work in policy-adjacent roles would be implicated by a Schedule F policy that removes the civil service protections set out for them . . .”).

162. See Gage, *supra* note 147, at 308.

163. See, e.g., Jonathan Rauch, *The Five Trump Amendments to the Constitution*, ATLANTIC (Feb. 22, 2021), <https://perma.cc/9Q25-XTJE>.

164. Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://perma.cc/7PRG-UWQU>.

165. *Id.*

166. See *id.* (“We will not cancel culture.”).

167. See Landau, *Abusive Constitutionalism*, *supra* note 9, at 191.

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.¹⁶⁸ But President Biden and his advisors framed their program 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.”¹⁶⁹ On immigration, his campaign stated that Trump had “waged an unrelenting assault on our values and our history as a nation of immigrants,”¹⁷⁰ and that a Biden administration would “take urgent action to undo Trump’s damage and reclaim America’s values.”¹⁷¹ On foreign policy, Biden emphatically stated in his first major speech that “America is back” and that the administration would “repair our alliances and engage with the world once again.”¹⁷² And on the first anniversary of January 6, Biden proclaimed that Trump had held “a dagger at the throat of America—at American democracy.”¹⁷³ He argued that the “Founding Fathers . . . set in motion an experiment that changed the world,” that Trump and his allies “could not be

168. See Press Release, The White House, President Biden Announces the Build Back Better Framework (Oct. 28, 2021), <https://perma.cc/7MNC-XHH7>.

169. Eric Katz, *The Rival: Rebuilding the Bureaucracy*, GOV’T EXEC. (Sept. 21, 2020), <https://perma.cc/JEV9-WE7Z>.

170. Jacob Pramuk, *Joe Biden Acknowledges ‘Pain’ Caused by Obama Deportation as He Unveils Immigration Plan*, CNBC (Dec. 11, 2019, 2:09 PM), <https://perma.cc/D83J-DL6S> (last updated Dec. 11, 2019, 3:28 PM).

171. Matthew Green, *President Biden’s First Actions Reversing Trump’s Anti-Immigrant Policies*, GREEN EVANS-SCHROEDER (Feb. 1, 2021), <https://perma.cc/57VC-87AA>.

172. See Joe Biden, President of the United States, Remarks by President Biden on America’s Place in the World (Feb. 4, 2021), <https://perma.cc/E8TU-NBE6>.

173. Joe Biden, President of the United States, Remarks by President Biden to Mark One Year Since the January 6th Deadly Assault on the U.S. Capitol (Jan. 6, 2022), <https://perma.cc/X6Q4-HGSD>.

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 Omaha Beach; Seneca Falls; Selma, Alabama.”¹⁷⁴ 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,¹⁷⁵ its “Muslim ban” on entry of nationals from certain countries,¹⁷⁶ its crackdown on sanctuary jurisdictions,¹⁷⁷ its declaration of emergency to build a wall on the southern border,¹⁷⁸ and its suspension of the U.S. refugee admissions program.¹⁷⁹ Biden also quickly re-joined the Paris Climate Agreement, which Trump had withdrawn from.¹⁸⁰ These rapid reversals of Trump-era policies suggested the brittleness of large chunks of his program, which depended heavily on executive action.¹⁸¹

As noted above, much of the perceived damage done during the Trump presidency was more informal or norm-based.¹⁸² 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

174. *Id.*

175. *See* Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021).

176. *See* Proclamation No. 10,141, 86 Fed. Reg. 7,005 (Jan. 20, 2021).

177. *See* Exec. Order No. 13,993, 86 Fed. Reg. 7,051 (Jan. 20, 2021).

178. *See* Proclamation No. 10,142, 86 Fed. Reg. 7,225 (Jan. 20, 2021).

179. *See* Exec. Order No. 14,013, 86 Fed. Reg. 8,839 (Feb. 4, 2021).

180. *See* Joe Biden, President of the United States, Paris Climate Agreement: Acceptance on Behalf of the United States of America (Jan. 20, 2021), <https://perma.cc/MKS3-9WWG>.

181. Some aspects of Trump’s program, especially those dealing with immigration, have proven harder to reverse because of judicial intervention. For example, the Biden administration’s plan to end the Trump-era “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 generally* Biden v. Texas, 597 U.S. 785 (2022).

182. *See supra* note 162 and accompanying text.

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."¹⁸³ 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.¹⁸⁴

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."¹⁸⁵ 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 2021.¹⁸⁶ The former would reauthorize and update the Voting Rights Act¹⁸⁷ after the Supreme Court struck down key parts of the law in *Shelby County v. Holder*;¹⁸⁸ 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 reforms.¹⁸⁹ This second bill was later repackaged, in a somewhat narrower form, as the Freedom to Vote Act.¹⁹⁰

183. *Nomination of Hon. Anthony J. Blinken to be U.S. Secretary of State: Hearings Before the Comm. on Foreign Rels.*, 117th Cong. 1 (2021) (statement of Anthony J. Blinken, of N.Y., nominated to be Sec'y of State), <https://perma.cc/36CU-STS3>.

184. *See, e.g.*, Amy Mackinnon & Robbie Gramer, *Study Finds Nearly 1 in 3 U.S. Diplomats Eyeing the Door*, FOREIGN POLY (July 2, 2021), <https://perma.cc/R2UB-QDC6>.

185. Joe Biden, President of the United States, Address Before a Joint Session of the Congress (Apr. 28, 2021), <https://perma.cc/X688-G5P3>.

186. *Id.*

187. 52 U.S.C. §§ 10101–10702.

188. 570 U.S. 529 (2013).

189. *See* H.R. 1, 117th Cong. (2021).

190. *See* S. 2747, 117th Cong. (2021).

In a subsequent statement containing a more detailed description of the administration's plan for voting rights and democracy, released in conjunction with the administration's 2021 Summit for Democracy, Biden elaborated on the need to pass measures that would "restore and strengthen American democracy."¹⁹¹ He linked the domestic agenda, which focused on the two major pieces of voting rights legislation and interlinked executive action, to the foreign policy agenda, which focused on "[s]ustaining democracy" "[a]gainst the backdrop of a rise in authoritarianism and increasing threats to democracy around the world."¹⁹²

In an early 2022 speech from Atlanta, Biden stated that "Jim Crow 2.0 is about two insidious things: voter suppression and election subversion."¹⁹³ He hearkened back to the struggles of the civil rights era, where a bipartisan majority passed the Civil Rights Act¹⁹⁴ and the Voting Rights Act and "each successive generation continued that ongoing work."¹⁹⁵ "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."¹⁹⁶ 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."¹⁹⁷ He also called upon Republicans to "[r]estore the bipartisan tradition of voting rights," which he argued had been "restored" and "abided by" by a list of Republican presidents running from Nixon to George W. Bush.¹⁹⁸ And he called upon Republicans to "[r]estore the

191. Press Release, White House, Fact Sheet: The Biden-Harris Administration is Taking Action to Restore and Strengthen American Democracy (Dec. 8, 2021), <https://perma.cc/DF4C-AET6>.

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

193. Joe Biden, President of the United States, Remarks by President Biden on Protecting the Right to Vote (Jan. 11, 2022), <https://perma.cc/48JQ-4DL6> [hereinafter Biden, Remarks on the Right to Vote].

194. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5 and 42 U.S.C.).

195. Biden, Remarks on the Right to Vote, *supra* note 193.

196. *Id.*

197. *Id.*

198. *Id.*

institution of the Senate the way it was designed to be” because it had been rendered “a shell of its former self.”¹⁹⁹ He argued that changing the Senate filibuster to allow a majority to vote for pro-democracy legislation would, in effect, be a restorative change.²⁰⁰ 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.²⁰¹

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,”²⁰² 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.²⁰³ He has continued to lodge similar critiques at the Court, with increasing vehemence, since *Dobbs v. Jackson Women’s Health Organization*²⁰⁴ overturned *Roe v. Wade*.²⁰⁵ 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 “[t]he Court has done what it has never done before: expressly take away a constitutional right.”²⁰⁶ 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

199. *Id.*

200. *See id.* (“To protect our democracy, I support changing the Senate rules, whichever way they need to be changed to prevent a minority of senators from blocking action on voting rights.”).

201. *See* Exec. Order No. 14,019, 86 Fed. Reg. 13,623 (Mar. 7, 2021) (directing agencies to consider ways to expand voter registration opportunities and participate in the electoral process).

202. Costas Pitas, *Biden Proposes Panel to Study Reforming ‘Out of Whack’ U.S. Judiciary*, REUTERS (Oct. 22, 2020), <https://perma.cc/FF6Y-LQ7P>.

203. Jennifer Epstein, *Biden Rules Out Term Limits for Supreme Court Justices*, BLOOMBERG L. (Oct. 26, 2020), <https://perma.cc/4RT2-TAYV>.

204. 597 U.S. 215 (2022).

205. *See id.* at 292.

206. Joe Biden, President of the United States, Remarks by President Biden on the Supreme Court Decision to Overturn *Roe v. Wade* (June 24, 2022), <https://perma.cc/A8ZC-P4LN> [hereinafter Biden, Remarks on Overturning *Roe v. Wade*].

executive action.²⁰⁷ Two weeks later, while concluding a speech on executive action he had taken in response to the decision, Biden 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.”²⁰⁸

As a candidate, the main action President Biden promised to take on the Supreme Court was to appoint a commission to study reforms.²⁰⁹ In April 2021, he appointed a thirty-six-member commission composed of law professors, former judges, and others with a range of views and partisan affiliations.²¹⁰ The executive order creating the Presidential Commission on the Supreme Court of the United States (“the Commission”) charged it with producing a report that would give an account of the 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.”²¹¹ 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.²¹²

The final report gives a thorough grounding of the history of controversies surrounding the Supreme Court and

207. *Id.*

208. Joe Biden, President of the United States, Remarks by President Biden on Protecting Access to Reproductive Health Care Services (July 8, 2022), <https://perma.cc/6MYK-EUGK>.

209. *See* Pitas, *supra* note 202.

210. *See* Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021) (establishing the Presidential Commission on the Supreme Court of the United States).

211. *Id.*

212. *See* Madeleine Carlisle, *Behind the Scenes of President Biden’s Supreme Court Reform Commission*, TIME (Dec. 10, 2021), <https://perma.cc/45CH-YXZ2> (describing frustration among panel members regarding the report as an “exercise in bipartisan analysis, rather than an engine of transformative change”).

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 issues, such as an advisory code of conduct for justices.²¹³ 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.²¹⁴ In media interviews, the commissioners described the exercise as valuable, but one also expressed that they were “surprised 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.”²¹⁵ Two also expressed frustration with the charge, wishing that the mandate had been different and focused on coming up with solutions rather than merely analyzing the debate.²¹⁶ 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. After the decision was issued, his press secretary said that expanding the size of the Court is something that Biden “does not agree with.”²¹⁷

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

213. PRESIDENTIAL COMM’N ON SUP. CT. U.S., FINAL REPORT 221 (2021), <https://perma.cc/7H7M-YH39> (PDF).

214. *Id.* at 111; *see also id.* at 122 (“Of the forty-seven states that impose term limits for their highest court judges, only one state has a term longer than twelve years. Similarly, of the twenty-seven countries that impose a term limit, those limits range between five and fifteen years.”).

215. Carlisle, *supra* note 212.

216. *See id.*

217. Diana Glebova, *Biden Remains Opposed to Court-Packing Despite Roe Reversal, White House Confirms*, NAT’L REV. (June 27, 2022), <https://perma.cc/AZT2-N9QJ>.

the Trump presidency and an 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 polarization and decreased frequency of cross-party compromise.²¹⁸ 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 fueled by nostalgia but also by the exclusion of groups like immigrants and minorities.²¹⁹ 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.²²⁰

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 took actions—such as January 6—that many consider 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 characteristic of the modern U.S. left. His administration's December 2021 statement on voting rights, for example, includes a paean to “restoring people's faith in democracy,” but also emphasizes that “[d]emocracy is always a work-in-progress, a constant striving

218. See Hanna Trudo & Sam Stein, *Joe Biden Bet It All on Nostalgia*, DAILY BEAST (Nov. 1, 2020), <https://perma.cc/48WB-9YRM> (“The idea, as one campaign official put it, was not to be ‘a Democratic version of Trump’ but, rather, his ‘polar opposite.’”).

219. See *supra* note 148 and accompanying text.

220. 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 & COMPAR. SOC. POL'Y 128, 129 (2021) (analyzing the use of collective memory by European populist political groups to cultivate a romantic image of the past to mobilize their electorate); Manuel Menke & Tim Wulf, *The Dark Side of Inspirational Pasts: An Investigation of Nostalgia in Right-Wing Populist Communication*, 9 MEDIA & COMM. 237, 237–38 (2021) (studying the use of populist nostalgic rhetoric in German political campaigns).

to build a more perfect union.”²²¹ It foregrounded inclusion and “the advancement of fundamental rights.”²²² And the president has returned repeatedly in his public speeches to a phrasing that began as his campaign slogan in 2019, which captures Biden’s melding of restoration and transformation: “Our best days lie ahead.”²²³

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 United States. 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*

Worldwide, a relatively common scenario 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.²²⁴ In others, the damage may be deeper, but new leadership is nonetheless attempting to re-establish a liberal democratic regime.²²⁵ In

221. Fact Sheet: The Biden-Harris Administration is Taking Action to Restore and Strengthen American Democracy, *supra* note 191.

222. *Id.*

223. Eric Lach, *Joe Biden Bets on Being the Anti-Trump Candidate*, NEW YORKER (June 12, 2019), <https://perma.cc/3GQX-7EHW>; Anders Hagstrom, *Biden Says America’s “Best Days Still Lie Ahead” in July 4th Message*, FOX NEWS (July 4, 2022), <https://perma.cc/YY6M-ZJVU>.

224. Tom Ginsburg & Aziz Huq, *Democracy’s “Near Misses”*, 29 J. DEMOCRACY 16, 17 (2018).

225. *See id.* at 19–20 (considering examples where institutional elites acted to prevent democratic backsliding).

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 been fairly well-studied in the literature and do not need an extensive recounting here.²²⁶ 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 Revolutionary Armed Forces of Colombia (“FARC”) and other guerrilla movements.²²⁷ The perceived success of this strategy made Uribe a very popular president.²²⁸ Reports of significant human rights abuses (such as the “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.²²⁹

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.²³⁰ In the lead-up to the

226. See, e.g., SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* 146–58 (2015) (analyzing Colombia under Uribe); Landau, *Abusive Constitutionalism*, at 200–03, 207 (examining Colombia and Ecuador).

227. See Ann Mason, *Colombia's Democratic Security Agenda: Public Order in the Security Tripod*, 34 *SEC. DIALOGUE* 391, 392 (2003).

228. See *id.* at 398 (attributing Uribe's high approval rating after nine months in office to “improvements in various security-related indicators”).

229. See, e.g., Michael Evans & Juan Franco, *US-Opposed Probe of Colombia's Uribe Is Essential Step in Road to Peace*, *JUST SEC.* (Nov. 18, 2020), <https://perma.cc/892W-4SXN> (“Uribe's popularity rating never dropped below 80 percent during his tenure as president . . .”).

230. See Mila Versteeg et al., *Essay, The Law and Politics of Presidential Term Limit Evasion*, 120 *COLUM. L. REV.* 173, 217 (2020).

2010 election, after having won re-election in 2006, Uribe again sought to change the constitution to allow a *third* consecutive term in office.²³¹ 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 amended, basic principles in the existing constitutional text).²³² Uribe obeyed the decision and did not stand for office in 2010.²³³ 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.²³⁴

The story in Ecuador is fairly similar. Correa won office in 2006, promising to replace the existing constitution and re-found the country²³⁵ 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.²³⁶ The 2008 constitution²³⁷ is a fascinating document, one which combined significant innovations in constitutional rights—such as the recognition of nature as a legal personality enjoying rights—with a sharp consolidation of power in the hands of the president.²³⁸ It lengthened the time presidents could serve by

231. See *id.* at 218.

232. See Corte Constitucional [C.C.] [Constitutional Court], febrero 26, 2010, M.S.: Humberto Antonio Sierra Porto, Sentencia C-141/10, *translated in* MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW 352 (2017).

233. See *id.* at 360.

234. See *id.*

235. See Catherine M. Conaghan, *Ecuador: Correa's Plebiscitary Presidency*, 19 J. DEMOCRACY 46, 46 (2008).

236. See *id.* at 50–52 (describing Correa's use of popular support and controversial measures to replace the Ecuadorian Constitution).

237. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008.

238. 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 that those provisions constituted “shams” that Correa had no real intention of implementing. See DIXON & LANDAU, *supra* note 9, at 74–79; see

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.²³⁹ 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 suppress opposition groups and maintain power.²⁴⁰

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.²⁴¹ 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.²⁴² 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 they would add a transitional provision that would make the change take effect only after the 2017 election so that Correa would need to leave office at least temporarily.²⁴³ The 2017 election was instead won by his handpicked successor and vice president, Lenin Moreno.²⁴⁴ But Moreno, like Santos in Colombia, turned against his predecessor and pursued a different political path, with Correa in turn labelling Moreno a “traitor.”²⁴⁵

also Rosalind Dixon, *Constitutional Rights as Bribes*, 50 CONN. L. REV. 767, 794 (2018).

239. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR Oct. 20, 2008, § VI, art. 114.

240. See William Neuman, *In ‘Battle’ With Media, a New Tactic in Ecuador*, N.Y. TIMES (Mar. 12, 2012), <https://perma.cc/NZJ9-WNXV> (detailing Correa's defamation lawsuits against news journalists and government control over various television, radio, and newspaper media properties).

241. See *Ecuador: Aprueban Enmiendas a la Constitución que Incluyen la Autorización de la Reelección Indefinida*, BBC MUNDO (Dec. 4, 2015), <https://perma.cc/6VK4-BH5M>.

242. See *id.*

243. See *id.*

244. See *Ecuador Election: Socialist Lenin Moreno Declared Winner*, BBC NEWS (Apr. 4, 2017), <https://perma.cc/LX65-JFRQ>.

245. Stefania Gozzer, *Arresto de Julian Assange, Fundador de WikiLeaks: Por qué Supone la “Ruptura Definitiva” de Lenin Moreno con la Herencia de Rafael Correa*, BBC NEWS (Apr. 11, 2019), <https://perma.cc/8QKP-837T>.

The broad outlines of the “abusive” constitutional programs of Uribe and Correa, as stated above, are well known; less 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.²⁴⁶ 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.²⁴⁷ 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 life²⁴⁸—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.²⁴⁹ 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.²⁵⁰ The newly constituted transitional body would have broad powers to remove personnel from “control” institutions such as the National Electoral Council and the national ombudsperson, as well as certain courts and judicial bodies, which had previously been dominated by Correa supporters.²⁵¹

246. *Ecuador’s President Lenín Moreno Tries to Bury the Legacy of His Predecessor*, *ECONOMIST* (Feb. 2, 2018), <https://perma.cc/SA8J-QKC6>.

247. *Id.*

248. *Id.*

249. For a perspective that is deeply critical of the use of criminal law against Correa allies by the Moreno administration, see Javier Calderón Castillo et al., *Lawfare Recargado en Ecuador*, *CELAG* (Apr. 5, 2021), <https://perma.cc/6256-P9RG>.

250. See José María León Cabrera, *Consulta en Ecuador: Moreno consolida su poder y Correa no volverá a ser presidente*, *N.Y. TIMES* (Feb. 4, 2018), <https://perma.cc/N49S-ZHSE>.

251. See *id.* 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 *The Power of the Purge: Julio César Trujillo Is Ecuador’s Second-Most Powerful Man*, *ECONOMIST* (Aug. 30, 2018), <https://perma.cc/53DS-8MWT>. 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

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.”²⁵² Moreno promoted the reform by arguing that it would correct a “political aberration.”²⁵³ 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.”²⁵⁴ 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; he therefore sent the question to the National Electoral Council without a Constitutional Court ruling after he claimed (problematically) that the twenty-day period for the Court to rule had elapsed.²⁵⁵ All seven questions, including the reimposition of a term limit, were approved by a wide margin in early 2018.²⁵⁶

In Colombia, Uribe’s successor, Santos, also had the 1991 constitution amended to remove Uribe’s lengthening of the presidential term limit.²⁵⁷ Santos, another deeply consequential president who served in office from 2010 until 2018, sent a package of proposed amendments dealing with the separation of

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), <https://perma.cc/P5G-Z2XE>.

252. Consejo Nacional Electoral, Memorando No. CNE-SG-2017-2674-M, at 5 (question 2) (translated by authors).

253. *Lenín Moreno: La alternabilidad es necesaria en el ejercicio del poder*, EL COMERCIO (Sept. 25, 2017), <https://perma.cc/3CXJ-K3VE> (translated by authors).

254. *Id.*

255. See Mauricio Guim & Augusto Verduga, *Ecuador’s “Unstoppable” Constitutional Referendum*, INT’L J. CONST. L. BLOG (Dec. 16, 2017), <https://perma.cc/CY5K-WBLX> (“The President’s official announcement said: ‘Because it is The People’s right, I have submitted to the National Electoral Council the decrees calling for a constitutional referendum.’”).

256. See Cabrera, *supra* note 250.

257. Tom Ginsburg et al., *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1811 (2011).

powers to Congress shortly after winning a second term in office.²⁵⁸ One of his key proposals reinstated the four-year, one-term lifetime limit on presidents.²⁵⁹ 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 re-election “is the entry door to the reestablishment of the equilibrium of powers in our country.”²⁶⁰

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.²⁶¹ During passage, members of Congress added a provision to protect the reinstated term limit against attempts like Uribe’s, requiring a Constituent Assembly or referendum to make any future constitutional change to the limit.²⁶² 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.²⁶³ 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 vengeance.”²⁶⁴

President Santos’s program on political change was more mixed than that of Moreno, combining restorative discourse

258. See Elizabeth Reyes L., *Colombian Lawmakers Approve a One-Term Limit for Presidents*, EL PAIS (June 4, 2015), <https://perma.cc/E4Q5-SZCA>; see also *Se confirma que el periodo presidencial se queda en cuatro años*, EL TIEMPO (Sept. 3, 2014), <https://perma.cc/SG4J-W8K7> (describing Santos’ initiative of constitutional reform to help balance public powers).

259. Rosalind Dixon & David Landau, *Constitutional End Games: Making Presidential Term Limits Stick*, 71 HASTINGS L.J. 359, 374 (2020).

260. *Se confirma que el periodo presidencial se queda en cuatro años*, *supra* note 258 (translated by authors).

261. See Laura Ardila Arrieta, *Santos nunca cerró con llave la puerta de la reelección, pero el Congreso se impuso*, LA SILLA VACÍA (Dec. 11, 2014), <https://perma.cc/HWP7-FK8Q>.

262. *Id.*

263. Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 510 (2018).

264. *Eliminaron la reelección por una venganza política: Uribe*, EL ESPECTADOR (June 18, 2015), <https://perma.cc/C9NK-H8M5> (translated by authors).

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.”²⁶⁵ 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 2016.²⁶⁶ 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.”²⁶⁷ 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.²⁶⁸ 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.²⁶⁹ 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. Re-election almost

265. *Santos quiere ser recordado como el presidente que eliminó la reelección en Colombia*, EL ESPECTADOR (July 20, 2015), <https://perma.cc/Z4FM-C7PX> (translated by authors).

266. See RENATA SEGURA & DELPHINE MECHOULAN, INT’L PEACE INST., MADE IN HAVANA: HOW COLOMBIA AND THE FARC DECIDED TO END THE WAR 1 (2017), <https://perma.cc/ZT22-SHDS> (PDF) (“On November 24, 2016, the government of Colombia and the biggest guerrilla group in the country, the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP), signed a final peace agreement.”).

267. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] July 4, 1991, art. 22 (translated by authors).

268. See *Santos v Uribe*, ECONOMIST (Apr. 7, 2012), <https://perma.cc/8P9E-6TF8>.

269. See THE COLOMBIAN PEACE AGREEMENT: A MULTIDISCIPLINARY ASSESSMENT (Jorge Luis Fabra-Zamora et al. eds., 2022); see also TED PICCONE, BROOKINGS INST., PEACE WITH JUSTICE: THE COLOMBIAN EXPERIENCE WITH TRANSITIONAL JUSTICE 10 (2019), <https://perma.cc/UE7W-C6M7> (PDF); David Landau, *The Causes and Consequences of a Judicialized Peace Process in Colombia*, 18 INT’L J. CONST. L. 1303, 1321 (2020).

certainly helped to stabilize the peace agreement, which took over five years from the beginning of talks until the 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 it given that it had gained solid ground by 2018.²⁷⁰

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.²⁷¹ 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 twenty-one-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.²⁷² Judicial review and civil liberties were sharply curtailed, with widespread preventative detention and limits on press freedom and opposition rights.²⁷³

270. See Shauna N. Gillooly, *Colombia's Elections in May Could Determine the Fate of the Peace Deal*, WASH. POST (Apr. 28, 2022), <https://perma.cc/M4QK-54ES> (noting that Duque has done his best to “slow” implementation of the peace agreement).

271. See Javier Calderón Castillo, *Lenín y la restauración neoliberal en Ecuador*, CELAG (Aug. 17, 2019), <https://perma.cc/3LYD-BDJM>.

272. See generally SHAH COMM'N INQUIRY, THIRD AND FINAL REPORT (1978).

273. See *id.* at 12 (observing “the subversion of an entire legal system including the judicial process”).

A number of these practices were entrenched by the Forty-Second Amendment passed in 1976, during the Emergency.²⁷⁴ The Forty-Second Amendment consisted of fifty-nine clauses and amended numerous articles of the constitution.²⁷⁵ The amendment increased the emergency powers of the prime minister by increasing power to suspend rights and doubling the time during which an emergency could remain in effect without parliamentary approval from six months to one year.²⁷⁶ It also increased federal power to disqualify state legislators.²⁷⁷ 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.²⁷⁸ 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*),²⁷⁹ and requiring a two-thirds majority of the bench to strike down a law.²⁸⁰

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 Forty-Second Amendment, to "restore" fundamental freedoms and the "authority of the judiciary," and to "re-establish the rule of law."²⁸¹ 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

274. India Const., amended by The Constitution (Forty-Second Amendment) Act, 1976.

275. *See generally id.*

276. *Id.* cl. 50.

277. *Id.* cl. 32(a).

278. *Id.* Statement of Objects and Reasons.

279. *Kesavananda Bharati v. State of Kerala*, 4 SCC 225 (1973) (India).

280. India Const., amended by The Constitution (Forty-Second Amendment) Act, 1976, Statement of Objects and Reasons.

281. SANJAY RUPARELIA, *DIVIDED WE GOVERN: COALITION POLITICS IN MODERN INDIA* 67 (2015).

dictatorship.”²⁸² The manifesto also promised to create a “new society” by reducing poverty, tackling illiteracy and other social problems.²⁸³ Thus, the manifesto, as we have seen in other cases, combined restorative and transformative rhetoric.

The 1977 elections constituted a “critical juncture,” with the opposition parties dominating and Indira Gandhi’s Congress Party swept out of power.²⁸⁴ The Janata Party won 270 of 542 seats, while the Congress Party won only 153, and Prime Minister Indira Gandhi herself lost her seat.²⁸⁵ Morarji Desai of the Janata Party became the first non-Congress Party Prime Minister of India, taking over from Gandhi.²⁸⁶ 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 he said that “the clouds of fear and uneasiness have lifted . . . by a revolution of the people to restore democracy.”²⁸⁷

Most commentary sees the Janata Party as successful at carrying out its goal of restoring the constitutional system. The Forty-Third and Forty-Fourth Amendments repealed major portions (although not the entirety) of the Forty-Second Amendment.²⁸⁸ The Forty-Third Amendment, passed in 1977, repealed provisions of the Forty-Second Amendment authorizing Parliament to enact laws against anti-national activities and restricting the power of the Supreme Court and

282. *Id.*

283. *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”).

284. *Id.* at 69.

285. *See* GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION* 395 (1999).

286. *See* Sanjoy Hazarika, *Morarji Desai Dies at 99; Defeated Indira Gandhi to Become Premier of India*, N.Y. TIMES, Apr. 11, 1995, at B6 (“Morarji Desai . . . sprang from obscurity and imprisonment to become the Prime Minister of India’s first non-Congress Party Government in 1977.”).

287. AUSTIN, *supra* note 285, at 403.

288. *See* Michael Henderson, *Setting India’s Democratic House in Order: Constitutional Amendments*, 19 ASIAN SURV. 946, 952–53 (1979) (noting that “[s]ome of the most objectionable features of the 42nd Amendment were removed by the 43rd Amendment” and other changes accepted by the Forty-Fourth Amendment Act).

High Court to review state and federal laws (such as the requirement of a two-thirds supermajority to hold laws unconstitutional).²⁸⁹

The Forty-Fourth Amendment of 1978, in response to Gandhi's Emergency, limited emergency powers by providing increased procedural safeguards, eliminating the ability to suspend the right to life, and curbing preventative detention.²⁹⁰ 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.²⁹¹ 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 by the Congress Party.²⁹² 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.²⁹³

The judiciary also played a significant role in India's constitutional restoration. The key case was *Minerva Mills v.*

289. India Const. arts. 145, 228, 335 amended by The Constitution (Forty-Third Amendment) Act, 1977. Articles 31D, 32A, 144A, 226A, and 228A were omitted in the Amendment.

290. India Const. arts. 19, 22, 30, 31A, 31C, 38, 74, 77, 83, 105, 123, 132–34, 139A, 150, 166, 172, 194, 213, 217, 225–27, 239B, 329, 352, 356, 358–60, 368, 371F amended by The Constitution (Forty-Fourth Amendment) Act, 1978.

291. *Id.* cl. 30(a)

292. See RUPARELIA, *supra* note 281, at 80. The parliamentary debates on both amendments also demonstrate the dominance of a restorative framing. See 8 LOK SABHA DEBATES 289 (1977) (“[T]he process of dismantl[ing] the pillars of tyranny, authoritarianism, and dictatorship . . . is a solid commitment of the Janata Party to the nation.”); 7 LOK SABHA DEBATES 302–03 (1977) (calling for “restor[ing] back the position of article 226” under the view that the amendments made during the Emergency were invalid).

293. See AUSTIN, *supra* note 285, at 403–04.

Union of India,²⁹⁴ where the Supreme Court used the basic structure (or unconstitutional constitutional amendment) doctrine²⁹⁵ to strike down two key clauses of the Forty-Second 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 (i.e. to wield the basic structure doctrine itself).²⁹⁶

However, the Janata Party's restorative project was complicated by two factors. The first was disagreement over the scope of restoration itself. The Forty-Third and Forty-Fourth Amendments overturned parts of the Forty-Second Amendment piecemeal but also left some key elements of the Forty-Second 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 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.²⁹⁷ 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.²⁹⁸

In the end, the Janata coalition fell after only sixteen months, beset by internal tensions, and united primarily by a desire to overcome Gandhi's Emergency and by dislike of

294. AIR 1980 SC 1789 (1980) (India).

295. On the unconstitutional constitutional amendment, see generally Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CON. L. 606 (2015); YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2016); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CON. L. 460 (2006).

296. See *Minerva Mills*, AIR 1980 SC at 1794, 1803–04.

297. See AUSTIN, *supra* note 285, at 423–27 (describing the back-and-forth process between members on passing the amendment).

298. *Id.* at 404.

Gandhi herself.²⁹⁹ Indira Gandhi in fact returned to power as Prime Minister after the 1980 election.³⁰⁰ 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.³⁰¹

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 the 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.³⁰²

In Latvia, for example, there was wide-ranging debate among pro-independence groups in 1980s as to whether to pursue constitutional restoration or incremental reform to the Communist constitutions.³⁰³ 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.³⁰⁴ After independence

299. 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.”).

300. See *id.* at 408.

301. See *id.* at 485.

302. See Partlett, *supra* note 5, at 528 (“[M]any former communist countries saw restoration as a way to return to their normal European path of development by breaking with the legacies of ‘abusive socialist revolution.’”).

303. See Andrejs Gusachenko & Vineta Kleinberga, *The Emergence and Restoration of the State: Latvia in 1918 and 1990*, 11 TALTECH J. EUR. STUDS. 55, 67 (2021).

304. *Id.* at 68; see also Jānis Lazdiņš et al., *Legal and Historical Elements of Latvia’s Restoration of Independence*, 19 BALTIC YEARBOOK INT. L. 27 (2021) (describing Latvia’s attempt to ensure the continuity as a State after fifty years of unlawful occupation by the Soviet Union).

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.³⁰⁵ 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.³⁰⁶

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, restoring five of the first six articles of the 1938 constitution, although the movement later adopted a different approach.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹

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 communist constitutions in place. For many post-communist leaders, as András Sajó notes, the aim was to repudiate revolutionary discourse and modes of politics.³¹⁰ 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

305. Partlett, *supra* note 5, at 530–31.

306. *See id.* at 531.

307. *Id.* at 531–32.

308. *Id.* at 532–33.

309. *See id.* at 533 (“[E]lements of restoration helped to lend important legitimacy to the existing legislative institutions at the center of these processes.”).

310. *See* András Sajó, *Preferred Generations: A Paradox of Restoration Constitutions*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 335, 335 (Michel Rosenfeld ed., 1994) (discussing the aims of post-communist leaders).

change—or promoting the idea of a “return to the golden glorious past and the ‘correct and normal European tradition.’”³¹¹

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.³¹² 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.³¹³ The aim was for this amended constitution to be interim only.³¹⁴ In Poland, this process worked and was completed by the writing of a permanent, new democratic constitution in 1997.³¹⁵

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.³¹⁶ 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 construction of an “invisible constitution” informed by broader principles.³¹⁷

311. *Id.*

312. See generally Istvan Szikinger, *Hungary’s Pliable Constitution*, in 1 DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: INSTITUTIONAL ENGINEERING 406 (Jan Zielonka ed., 2021); JOHN W. SCHIEMANN, *THE POLITICS OF PACT-MAKING* ch. 2 (2005).

313. See Tomasz Tadeusz Koncewicz, *Understanding Polish Pacted (R)evolution(s) of 1989 and the Politics of Resentment of 2015–2018 and Beyond*, 17 INT. J. CONST. L. 695, 696–700 (2019) (comparing the differing outcomes in Poland and Hungary after the Roundtable Talks); see also Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, 26 S. AFR. J. ON HUM. RTS. 19, 27 (2010) (discussing implementation of new constitutional amendments in Hungary following 1990 election).

314. See Arato, *supra* note 313, at 24.

315. For a defense of the 1997 Constitution and the earlier 1989 amendments on pragmatic grounds, see generally Koncewicz, *supra* note 313.

316. See Arato, *supra* note 313, at 24.

317. See Gabor Halmai, *Silence of Transitional Constitutions: The “Invisible Constitution” Concept of the Hungarian Constitutional Court*, 16

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.³¹⁸ 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.³¹⁹

Consider the preamble of the 2011 Hungarian Constitution, called the “National Avowal.”³²⁰ It references the “historical constitution” of Hungary, its “constitutional continuity,” which it traces back to Saint Stephen, and foregrounds as a symbol the Holy Crown.³²¹ 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, “We do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule, therefore we proclaim it to be invalid.”³²² It dates “the restoration of our country’s self-determination,” lost in 1944, to May 2, 1990, the end of the Communist regime.³²³ 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.”³²⁴

INT’L J. CONST. L. 969, 977–84 (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).

318. See András Bozóki, *The Politics of Worst Practices: Hungary in the 2010s*, SCIENCESPO (Feb. 2015), <https://perma.cc/8AAG-ZF7J> (discussing the twelve times that the Fidesz Party amended the constitution to remove the institutional checks preventing the party from installing a new constitution).

319. See *id.* (providing examples of the rhetoric used by the Fidesz Party).

320. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY pmbl.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

The Avowal's vision of Hungarian history is carefully crafted to serve Fidesz's ideology and interests. Sajó 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,” and an earlier period relied heavily on unwritten constitutions.³²⁵ This creates a temptation to rely on an “imaginary past.”³²⁶ Scheppele refers to the Fidesz constitutional project as one of “constitutional nostalgia.”³²⁷

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.”³²⁸ The kind of past restored by Fidesz, both in the 2011 constitution and elsewhere, is a “glorious past.”³²⁹ The vision is a relatively thick and historical one. In recent years, the Hungarian regime has used the concept of “constitutional identity” to resist European Union measures, particularly those involving refugees.³³⁰ 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.³³¹ The amendment also contained new provisions limiting immigration, including one that stated “no alien population shall be settled in Hungary” and limited rights of asylum

325. Sajó, *supra* note 310, at 346.

326. *Id.*

327. Kim Lane Scheppele, *Constitutional Nostalgia*, HUNGARIAN SPECTRUM (Feb. 8, 2012) [hereinafter Scheppele, *Constitutional Nostalgia*], <https://perma.cc/GH2T-WTP9>.

328. 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 (Tusnadjurdo) of 26 July 2014*, BUDAPEST BEACON (July 29, 2014), <https://perma.cc/W9H7-7T3K>.

329. *See* Sajó, *supra* note 310, at 342.

330. *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, 25 (2018); DIXON & LANDAU, *supra* note 9, at 146–47.

331. MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY, amend. VII.

seekers.³³² The explanatory note accompanying the amendment stated that its goal was to prevent Hungary from becoming an “immigrant country.”³³³ 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 EU oversight.

Fidesz’s 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.³³⁴ 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.³³⁵ 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.³³⁶ The Fourth Amendment to the constitution also nullified all of the Constitutional Court’s caselaw from before the Fidesz constitution went into effect,³³⁷ 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 powers to

332. *Id.*

333. *Id.*

334. See, e.g., Miklós Bánkuti Gábor Halmai & Kim Lane Scheppele, *Hungary’s Illiberal Turn: Disabling the Constitution*, 23 J. DEMOC. 138, 138–46 (2012) (outlining the ways in which the Fidesz administration has entrenched its constitutional power).

335. 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).

336. See MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY amend. IV, art. 3 (creating new civil and criminal measures dealing with the Communist past).

337. 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.”).

review constitutional amendments.³³⁸ 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.³³⁹

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.³⁴⁰ 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, a large number in a country of about ten million, and the Fidesz Party has thus gained a large tranche of loyal voters.³⁴¹ 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).³⁴² The regime has bolstered this strategy, as we have explained elsewhere,³⁴³ 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

338. 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).

339. See *id.* at 117.

340. See Valentina Jovanovski, *Hungary Seeks New Voters Abroad to Shape Elections at Home*, CHRISTIAN SCI. MONITOR (Sept. 3, 2013), <https://perma.cc/UCY4-BZ9X>.

341. See Balazs Majtenyi et al., "Only Fidesz": *Minority Electoral Law in Hungary*, VERFASSUNGSBLOG (Mar. 31, 2018), <https://perma.cc/V2AU-67H4>.

342. *Id.*

343. See DIXON & LANDAU, *supra* note 9, at 66–68.

government) must vote in person at an Embassy, which makes turnout far more difficult.³⁴⁴

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.³⁴⁵

IV. THE PROMISE AND PERIL OF RESTORATIVE CONSTITUTIONALISM

As we demonstrated in the last two Parts, restorative projects appear to be powerful within the United States and 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.

344. See Majtenyi et al., *supra* note 341.

345. See, e.g., Scheppele, *Constitutional Prison*, *supra* note 71 (evaluating the possibility of restoring civil rights in Hungary by way of modifying the constitution).

In terms of the public at large, restorative projects seem to depend on a positive evaluation of some constitutional past, to which the project promises to return. Constitutional restoration is, in some sense, a form of constitutional “nostalgia.”³⁴⁶ 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.³⁴⁷ In 1995, Krystine Batcho developed a “nostalgia inventory” to test individuals’ susceptibility to nostalgic appeals.³⁴⁸ 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.³⁴⁹

But probably more important are specific perceptions 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.³⁵⁰

In other systems, previous constitutional experiences (whether past or present) may be seen in 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

346. Scheppele, *Constitutional Nostalgia*, *supra* note 327.

347. See generally Krystine Batcho, *Nostalgia: Retreat or Support in Difficult Times?*, 126 AM. J. PSYCHOLOGY 355, 355–67 (2013) (analyzing the relationship between nostalgia and coping during difficult times).

348. See Krystine Batcho, *Nostalgia: A Psychological Perspective*, 80 PERCEPTUAL & MOTOR SKILLS 131, 131–43 (1995) (surveying the factors that comprise nostalgia).

349. See generally Erica G. Hepper et al., *Pancultural Nostalgia: Prototypical Conceptions Across Cultures*, 14 EMOTION 733 (2014).

350. See, e.g., Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CON. L. 296, 302–07 (2003) (describing constitutional aversion as just as powerful as constitutional borrowing). See generally 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).

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 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.³⁵¹

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.³⁵² Americans often conceive of all constitution-making as following the template of constitutional debate at Philadelphia.³⁵³ 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.³⁵⁴ 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 the constitution.³⁵⁵ These dimensions to the

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

352. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 364–70 (1995) (describing the methods of constitution foundation and modification).

353. See, e.g., Karol Edward So Tan, *Constitution Making at the Edges of Constitutional Order*, 49 WM. & MARY L. REV. 1409, 1412 (2008) (“[The United States] conception of constitution making is dominated by images of the hot summer in Philadelphia at the Constitutional Convention of 1787, combined in some cases with those from another summer during the French Revolution only two years later in Paris.”).

354. See Jennifer Widner, *Constitution Writing in Post-Conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513, 1533–36 (2008); Hanna Lerner, *Constitution-Writing in Deeply Divided Societies: The Incrementalist Approach*, 16 NATIONS & NATIONALISM 68, 74 (2010) (distinguishing “one definite model” of constitution-making from examples of an “incrementalist” approach in light of varying geo-political circumstances).

355. See Gabriel L. Negretto, *New Constitutions in Democratic Regimes*, in REDRAFTING CONSTITUTIONS IN DEMOCRATIC REGIMES: THEORETICAL AND COMPARATIVE PERSPECTIVES 1, 13–19 (Gabriel L. Negretto ed., 2020).

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. constitutionalism.³⁵⁶ 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.³⁵⁷ Exactly why is unclear, but it 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.³⁵⁸ 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 United States 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.

356. See *supra* Part II.

357. See *supra* Part II.

358. See Lee Rainee & Andrew Perrin, *Key Findings About Americans’ Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), <https://perma.cc/K4LY-QAGW> (reporting a long-term trend of declining trust in government in the United States).

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.³⁵⁹ 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 frequently.³⁶⁰ 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.³⁶¹ In Ecuador, the 2008 constitution, although drafted by allies of a president with authoritarian leanings, has been taken as a point of pride by many because of its innovative nature with respect to environmental and other rights.³⁶² 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.³⁶³ 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

359. See MADHAV KHOSLA, *INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY* 14 (2020).

360. See generally 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).

361. See *supra* notes 265–269 and accompanying text.

362. See *supra* notes 237–238 and accompanying text.

363. See Sajó, *supra* note 310, at 346 (discussing the unconstitutional arrangements in Hungary).

a source of transformation.³⁶⁴ Fidesz nonetheless has claimed to restore the “authentic” constitutional tradition in Hungary, one which was interrupted by the Communist regime.³⁶⁵ 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.³⁶⁶ Comparative work shows that originalism can thrive in surprising contexts outside the United States, and with very different constitutional cultures and traditions.³⁶⁷ 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 United States seems to be one national context where these arguments have power, particularly at our present moment.³⁶⁸

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

364. See CATHERINE DUPRE, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY 65–86 (2003) (exploring the ways in which the 1990s Hungarian Constitutional Court relied on and altered a concept of human dignity taken from German jurisprudence).

365. See *supra* Part III.C.

366. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 4 (2009).

367. See Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L L. 1239, 1246 (2012) (“[O]riginalism thrives in revolutionary constitutions, which create a nation, but not in reorganizational constitutions, which merely reorganize an already existing political and legal structure.”); Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780, 838 (2014) (“The form of originalism that thrives in both [Australia and Malaysia] is strikingly similar: their national courts employ textualist originalist methods in a legalistic manner consistent with a formalistic view of the Constitution.”).

368. See *supra* Part II.

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 polarization³⁶⁹ or where political actors are working under significant time constraints.³⁷⁰

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.³⁷¹ 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 limits (as well as some other changes) carried out by their predecessors.³⁷² 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.³⁷³

369. On the difficulties of constitution-making under polarization, see Johanna Fröhlich, *Do We Want a Constitution?*, VERFASSUNGSBLOG (Dec. 20 2021), <https://perma.cc/8MVX-D8TR>.

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

371. See *supra* Part III.B.

372. See *supra* Part III.A.

373. See Hugh Bronstein, *Colombian House Says No to Uribe 2010 Re-elect*, REUTERS (Dec. 17, 2008), <https://perma.cc/ZA8P-S22M>; see also *Ecuador Votes to Limit Presidents' Terms in Blow to Rafael Correa*, GUARDIAN (Feb. 5, 2018), <https://perma.cc/TC2X-W92F>.

This suggests again that there was broad agreement about restoration, even among elements of the former presidents' own coalitions and erstwhile allies.

The United States, 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.³⁷⁴ Republicans have also displayed, 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.³⁷⁵ At the least, the Biden administration has seemed to bank, in large part, on a restorative framing to ground major initiatives.³⁷⁶ Whether this has been a successful strategy is a question we take up in more detail in the next subpart.

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

374. See Lauren Lantry, *Former President Donald Trump Acquitted in 2nd Impeachment Trial*, ABC NEWS (Feb. 13, 2021), <https://perma.cc/T33A-S9G3>.

375. See Susan Sullivan Lagon, *Will Congress Restore the Voting Rights Act?*, GOV'T AFFS. INST., <https://perma.cc/7KRX-SVKA> (last visited Jan. 15, 2024).

376. See *supra* Part II.C.

president to call a referendum on whether to replace the constitution.³⁷⁷ Following that referendum, in which about 80 percent of Chileans voted for a new constitution, the country held elections to elect a Constitutional Convention.³⁷⁸ 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.³⁷⁹

The Convention's rhetoric was dominated by discussions 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.³⁸⁰ 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.³⁸¹

The Convention emphasized a break with Chile's constitutional past—even if, in some cases, 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.³⁸² 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

377. See Sandra Cuffe, *Chile Agrees to Hold Referendum on Constitution: 5 Things to Know*, ALJAZEERA (Nov. 15, 2019), <https://perma.cc/Q2XG-A2KQ>.

378. John Otis, *Chileans Have Rejected a New, Progressive Constitution*, NPR (Sept. 5, 2022), <https://perma.cc/9PNY-CS5E>.

379. See, e.g., David Landau, *The New Chilean Constitutional Project in Comparative Perspective*, BLOG INT'L J. CONST. L. (July 16, 2022) [hereinafter Landau, *The New Chilean Constitutional Project*], <https://perma.cc/4H3M-6PPE>.

380. See *id.*; see also Catherine Osborn, *Chile Unveils Its Proposed New Constitution*, FOREIGN POL'Y (July 5, 2022), <https://perma.cc/ADL7-NW8Y>.

381. See Osborn, *supra* note 380.

382. See Cuffe, *supra* note 377.

power as the lower house.³⁸³ 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.³⁸⁴ However, the change also allowed opponents of the project to argue that the Convention was destroying the “bicameral tradition” of the country.³⁸⁵

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.³⁸⁶ In making this argument, they focused on continuity with the 1925 constitution and its predecessors, rather than emphasizing the largely discredited 1980 constitution.³⁸⁷ 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 the name of the country.³⁸⁸ These arguments landed with a broad segment of the public, and ultimately the draft was

383. See Nick Burns, *Chile’s Proposed Constitution: 7 Key Points*, AMS. Q. (July 7, 2022), <https://perma.cc/Q3GX-P7VA> (describing the perception of the drafters that the old Senate was elitist and a barrier to reform).

384. See *id.*

385. See 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), <https://perma.cc/UG5X-PULH>.

386. See Eugenio Rivera Urrutia, *Los “Amarillos” y la Convención Constitucional. ¿Voces del Pasado?*, EL MOSTRADOR (Feb. 23, 2022), <https://perma.cc/TPW8-TNZ4> (noting arguments of opponents that the Convention wanted to “start from zero” (translated by author)); Editorial, *El Rechazo Es la Mejor Opción Para el País*, LA TERCERA (Aug. 20, 2022), <https://perma.cc/RN4N-3DBA>.

387. See generally JAIME ARANCIBIA MATTAR, *CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE CHILE: EDICIÓN 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).

388. 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), <https://perma.cc/JA5S-DSZ5>.

rejected by a large margin in an exit referendum held on September 4, 2022.³⁸⁹

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.³⁹⁰

Yet there is also a countervailing concern: a purely restorative framing may unduly limit or inhibit the political or constitutional imagination. That is, 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 to reform the Supreme Court 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 which have continued to resonate well into his term.³⁹¹ The debates here are multifaceted. Biden has echoed a dominant, restorative narrative, referring to the Court as “out of whack”³⁹² and calling on Congress to “restore” rights taken away by the Court.³⁹³ 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

389. See *A Una Semana del Plebiscito en Chile, Encuestas Apuntan a Rechazo de Nueva Constitución*, FRANCE24 (Aug. 27, 2022), <https://perma.cc/XQD5-G6BD>.

390. See David Landau, *Personalism and the Trajectories of Populist Constitutions*, 16 ANN. REV. L. & SOC. SCI. 293, 299–300 (2020) (discussing the manner in which constitutional change can “reset[] the political landscape”).

391. See Mark Sherman, *Some Dems, Not Yet Biden, Talk of Expanding Supreme Court*, ASSOCIATED PRESS (Sept. 23, 2020), <https://perma.cc/WJ4G-MB4N>; see also Ian Millhiser, *Nine Ways to Reform the Supreme Court Besides Court-Packing*, VOX (Oct. 21, 2020), <https://perma.cc/G8HV-NN3E>.

392. *Biden Proposes Panel to Study Reforming “Out of Whack” U.S. Judiciary*, REUTERS (Oct. 22, 2020), <https://perma.cc/FF6Y-LQ7P>.

393. Biden, Remarks on Overturning *Roe v. Wade*, *supra* note 206.

political events and “hardball” decisions, such as the Senate Majority Leader’s refusal 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.³⁹⁴

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.³⁹⁵ They also include transformative arguments drawn from comparative inspiration, like claims by Jamal Greene and Vicki Jackson that the United States should adopt proportionality review as used in many countries around the world.³⁹⁶ Or similar claims that the United States should adopt either designs or jurisprudential tools to adopt variants of dialogical or “weak-form” judicial review.³⁹⁷ 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.³⁹⁸

The Presidential Commission on the Supreme Court did a thorough job of hearing a wide range of arguments based on oral

394. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 526 (2004); see also David M. Herszenhorn, *G.O.P. Senators Say Obama Supreme Court Pick Will Be Rejected*, N.Y. TIMES (Feb. 23, 2016), <https://perma.cc/UKF6-MNLF>; Martin Pengelly, *Trump Races to Fill Supreme Court Seat as Republicans Fall into Line*, GUARDIAN (Sept. 22, 2020), <https://perma.cc/4WU6-2JBB>.

395. See AZIZ HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* 87–97 (2021).

396. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* xxi–xxiii, 110–11 (2021); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3122–24 (2015) (contrasting the United States with Canada and Germany).

397. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* xi (2008) (describing weak-form judicial review as “an attractive way to reconcile democratic self-governance with constitutionalism”).

398. Doerfler & Moyn, *Democratizing the Supreme Court*, *supra* note 13, at 1706.

and written testimony from U.S. and comparative scholars.³⁹⁹ 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 (i.e. court-packing) and adopting term limits.⁴⁰⁰ 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.⁴⁰¹

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.⁴⁰² On the more exotic proposals, the Commission's tone is relatively skeptical.⁴⁰³ 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.⁴⁰⁴ And it encourages a constitutional amendment if such a route were pursued, noting that a statutory attempt would be contestable and could prove "unstable."⁴⁰⁵

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 twelve times).⁴⁰⁶ The word "restore" (or restoration) appears six times, compared to three references to the word "transform" (or transformation).⁴⁰⁷

399. See PRESIDENTIAL COMM'N ON SUP. CT. U.S., *supra* note 213, at 1.

400. See *id.* at 67–151.

401. See *id.* at 169–201.

402. 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.").

403. For example, the Commission emphasizes the "many complications" that would arise from a supermajority voting rule to hold laws unconstitutional. *Id.* at 174.

404. *Id.* at 111.

405. *Id.* at 144.

406. We are grateful to John Lidbetter for assistance in collating this data and the word cloud drawn from it.

407. PRESIDENTIAL COMM'N ON SUP. CT. U.S., *supra* note 213, at 144.

Figure 2. Language of the Presidential Commission on the Supreme Court of the United States

Transform
 Restore
Enhance
 Protect Improve
 Maintain

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,”⁴⁰⁸ “[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,”⁴⁰⁹ and the “judicial power of the United States was . . . profoundly *transformed*” during the Reconstruction era.⁴¹⁰

The language of restoration, in contrast, is used as justification for reform. For instance, the Commission notes that “[p]roponents 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 protecting the legitimacy of the Court,”⁴¹¹ or “*restore* the Court’s role as ensuring the representativeness of government and the operation of democracy.”⁴¹²

408. *Id.* at 18 (emphasis added).

409. *Id.* at 46 (emphasis added).

410. *Id.* at 48 (emphasis added).

411. *Id.* at 76 (emphasis added).

412. *Id.* at 78 (emphasis added).

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.⁴¹³ After the report had been delivered, several commissioners expressed frustration with this limited charge.⁴¹⁴ At least one also noted a broader environment favoring maintenance of the status quo and against radical change, expressing “surprise[] by the amount of deference to the status quo” and stating that liberals had warned against change because it might “destabilize the system.”⁴¹⁵ 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.”⁴¹⁶ 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. Proponents 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, it would “restore the Court’s role as ensuring the

413. See Exec. Order No. 14,023, 86 Fed. Reg. 19,569 (Apr. 9, 2021) (charging the Commission with producing “an account of the contemporary commentary and debate about the role and operation of the Supreme Court” and its “historical background”).

414. See Madeleine Carlisle, *Behind the Scenes of President Biden’s Supreme Court Reform Commission*, TIME (Dec. 10, 2021), <https://perma.cc/9ZGD-2A2P> (quoting multiple Commissioner’s frustrations with the exercise and identifying “the fault of the President and the Administration in terms of what they tasked this report to do”).

415. *Id.*

416. Doerfler & Moyn, *Democratizing the Supreme Court*, *supra* note 13, at 1732.

representativeness of government and the operation of democracy.”⁴¹⁷ However, it also noted that critics alleged those 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.”⁴¹⁸

Although we will not belabor 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.⁴¹⁹ 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.⁴²⁰ Ideas like mandatory voting or changes in the electoral system less readily make it to the top of the political conversation.⁴²¹

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 element of transformation. The comparative evidence is consistent with this basic point. We have noted, for example, the

417. PRESIDENTIAL COMM’N ON SUP. CT. U.S., *supra* note 213, at 76, 78.

418. *Id.* at 80; accord Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2807–08 (2020) (arguing that the risks of court-packing outweigh any benefits, and political actors should find other ways to reform the Supreme Court).

419. Biden, Remarks on the Right to Vote, *supra* note 193.

420. See S. 2747, 117th Cong. (2021); see also Marc Tracy, *By Choice and Circumstance, Democrats Put Voting Rights on the Ballot*, N.Y. TIMES (July 13, 2021), <https://perma.cc/H9AZ-73LE> (discussing how the Act would “ban[] partisan gerrymandering, mak[e] voting easier and enforc[e] greater transparency on many political donations”).

421. See, e.g., EUGENE J. DIONNE JR. & MILES RAPOPORT, 100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING 85–97 (2022) (discussing the necessity of universal voting and potential policy avenues for the reform); Didi Kuo, *The Case for Mandatory Universal Voting*, WASH. POST (Mar. 25, 2022), <https://perma.cc/4SQD-RKKF> (reviewing Dionne Jr. and Rapoport’s book and stating, “Ultimately, ‘100% Democracy’ is more manifesto than playbook”); Rosalind Dixon & Anika Gauja, *Australia’s Non-populist Democracy? The Role of Structure and Policy*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 395, 417–21 (Mark Graber et al. eds., 2018).

dominance of restorative ideas in the Janata Party's agenda after Indira Gandhi's Emergency.⁴²² The restorative project bore important fruit under difficult circumstances, particularly in rolling back some of the most constitutionally noxious constitutional amendments pursued by Gandhi. But the emphasis on restoration may have crowded out more ambitious constitutional ideas, including some—like sharper curbs on emergency powers and ending 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.⁴²³ But robust emergency powers and the 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.⁴²⁴ There, Moreno, who sought to protect and restore Correa's constitutional project, was put in a difficult position when those associated with Correa and his program argued that Moreno was actually hostile to it.⁴²⁵ Moreno deepened this impression by failing to take more than token steps to advance the major goals found in the "transformative" 2008 constitution.⁴²⁶ Moreno's referendum contained two minor measures to advance environmental rights but there was little substance or meat to the proposals.⁴²⁷ 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

422. See *supra* Part III.B.

423. See AUSTIN, *supra* note 285, at 423.

424. See *supra* Part III.A.

425. See Castillo, *supra* note 249 (arguing that Moreno sought to destroy the entire institutional structure related to former President Correa).

426. See *id.*

427. See Consejo Nacional Electoral, *supra* note 252, at 9–10 (listing 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).

characterized Ecuador's difficult and unstable constitutional past.⁴²⁸

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 successfully pursuing a peace process with the FARC.⁴²⁹ 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 Article, the past is malleable, and it can be envisioned and presented in many different ways. Some pasts are more concrete, while others are gauzier and more romanticized.⁴³⁰ There is also choice, especially in older constitutional orders like the United States, 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 gives too little attention to the Reconstruction period.⁴³¹ 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.⁴³² Second, Joseph Fishkin and William Forbath's recent book seeks to uncover an anti-oligarchical, "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

428. See, e.g., Castillo, *supra* note 249.

429. See *supra* Part III.A.

430. See *supra* Part II.B.

431. See generally KERMIT ROOSEVELT III, *THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY* (2022).

432. See *id.* at 12 (calling for replacement of the "standard story" of U.S. constitutional history with a "better story").

twentieth century and should be “reclaim[ed].”⁴³³ 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.

C. *Legitimizing 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.⁴³⁴ But the Hungarian case, and the United States under Trump, also demonstrate ways in which illiberal or antidemocratic 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 United States, and Western civilization generally, as facing “imminent collapse,” and called for the “restoration and redemption of American constitutional government” and Western values in response.⁴³⁵ Fidesz used the 2011 constitution and accompanying discourse to present a restoration of a largely mythical Hungarian constitutional tradition.⁴³⁶ 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. 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,

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

434. *See supra* Part III.

435. KERSCH, *supra* note 108, at 376–79.

436. *See supra* Part III.C.

authoritarianism, or threat, and finally a promise of national renewal.

In both the United States under Trump and Hungary, such a discourse fueled 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.⁴³⁷ 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.”⁴³⁸ The Fidesz regime in Hungary also utilized a backward-looking, restorative discourse to consolidate power, attack perceived regime opponents (such as universities and NGOs) that were labelled not authentically Hungarian, and selectively expand voting rights to people of Hungarian descent outside of Hungary to bolster the regime’s power.⁴³⁹

One could conclude from these examples—and others, both inside and outside U.S. 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, that opposed the regime needed to be sidelined, and they ultimately argued that term limits needed to be eliminated so that leaders could remain in power to complete their vital projects.⁴⁴⁰

437. See *supra* note 148 and accompanying text.

438. Naylor, *supra* note 164.

439. See *supra* Part III.C.

440. See David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 539–40 (2018) (describing the Venezuelan efforts in increasing term limits and emergency powers, among others).

A more careful and 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 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, 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.⁴⁴¹ 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 constitutionalism. In contrast, the gauzier or more nostalgic visions of the past seem, in at least some cases, to have an affinity with right-wing variants of populism that themselves pose a threat to liberal democracy.⁴⁴² 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 attack, a democratic status quo. 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-envisioned the past as something more like a set of

441. See *supra* Parts II.C–III.B.

442. On the affinity between romanticized, nostalgic visions of the past and right-wing populist parties with antidemocratic ambitions, see sources cited *supra* note 220.

principles than a lived experience.⁴⁴³ 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.⁴⁴⁴ 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.

CONCLUSION: CONSERVATIVES, PROGRESSIVES, AND
RESTORATIVE CONSTITUTIONALISM

In this Article we have examined an under-noticed mode of constitutional change, both within the United States 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 United States 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 for different kinds of ends, both pro- and antidemocratic. Contrary 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,

443. See *supra* Part I.A.

444. See *supra* Part II.A.

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 conservatism. 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.⁴⁴⁵ Likewise, in a recent *New York 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.⁴⁴⁶ 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. In this Article, 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' 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*

445. See generally Doerfler & Moyn, *Democratizing the Supreme Court*, *supra* note 13.

446. Doerfler & Moyn, *The Constitution Is Broken*, *supra* note 13.

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.⁴⁴⁷ 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.⁴⁴⁸ Finally, also alluded to above, Joseph Fishkin and William Forbath have called upon a "democracy of opportunity" tradition in U.S. constitutionalism that should be reclaimed.⁴⁴⁹ Once again, 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.

447. Biden, Remarks on Overturning *Roe v. Wade*, *supra* note 206.

448. ROOSEVELT, *supra* note 431, at 12.

449. FISHKIN & FORBATH, *supra* note 433, at 3.