Constituent Power and Constitutional Change in American Constitutionalism

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Modern constitutionalism involves a tension between the “constituent power” of the sovereign people and the constitutional forms that are intended to express and check this power. The idea of the people as constituent power, as the active creators of the constitutional order, is familiar in American constitutionalism. The importance of this idea to the distinctiveness of the American experiment has been described by historians such as R. R. Palmer and Gordon Wood.¹ The idea was that the constitutional convention was the concrete, operational form of the sovereignty of the people. Through the device of the convention, the people as a whole adopted the Constitution. The convention made the Constitution superior to the laws enacted by legislatures.

Such was the idea. What was the argument that the convention gave the Constitution the status of supreme law? The answer had to do with the uniqueness of the convention as a political device. The convention was a one-off, a special political body that existed solely for the purpose of creating a constitution. It was elected by the people, but it was this single-mindedness that gave it a special status. Wood concludes: “[o]nly ‘a Convention of Delegates chosen by the people for that express purpose and no other,’” as the South Carolina legislature after four years of bitter contention finally admitted in

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1787, could establish or alter a constitution. It was an extraordinary invention, the most
distinctive institutional contribution, it has been said, the American Revolutionaries made
to Western politics. It not only enabled the constitution to rest on an authority different
from the legislature’s, but it actually seemed to have legitimized revolution."2

Having established the Constitution, what became of the people? Their passions
and interests were channeled and contained by the institutions created by it. Of course,
under Article V they could amend the Constitution or even institute another constitutional
convention.3 Thus, the conventional meaning of constituent power within American
constitutionalism is the power of the people to change the Constitution through
amendment or a constitutional convention.

Members of the founding generation did not see frequent recourse to Article V as
desirable. James Madison argued that frequent recourse to amendment would imply that
the Constitution was seriously defective. Madison noted that the Constitution would
benefit from “that veneration, which time bestows on every thing,”4 and that this
veneration would enhance the stability of the government. The most serious danger of
frequent change through amendment was “of disturbing the public tranquility by
interesting too strongly the public passions.”5 Madison thought that the commendable
deliberation that had attended the adoption of state constitutions was due to the unique
characteristics of the revolutionary era. Because it was unlikely that those circumstances
would recur, frequent recourse to amendment would engage the passions of the public,

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2 Wood, 342.
3 Article V requires that amendments be approved by a supermajority of both houses of Congress and by a
supermajority of state legislatures before they can take effect. U.S. Const., Art. V.
5 Ibid.
not its reason. Making amendment of the Constitution relatively easy would have the effect of continually placing the fundamental structure of the government up for grabs. Ordinary political struggles might be transformed into constitutional crises. While Madison saw that provision had to be made for amendment, he believed that it would be appropriate only on “certain great and extraordinary occasions.”

After the Constitution was ratified, it might appear that there was no further opportunity for the exercise of the primordial constituent power. Constituent power could be exercised only through the forms specified in the Constitution and “the people themselves” would rarely be found on the constitutional stage. This states the understanding of most American constitutional lawyers. Because a second constitutional convention is so unlikely, the only practical way for “constituent power” to influence the Constitution is through the Article V amendment process. This understanding informs a conventional view about how constitutional change occurs. Constitutional change can take place only through Article V amendments or judicial interpretation. Lawyers differ over which cases exemplify constitutional change, but all would agree that it has occurred primarily through doctrinal interpretation by the Supreme Court.

Contrary to the conventional view, from the beginning of the American republic constituent power has changed the constitutional order through informal constitutional change. Indeed, the conventional view has been extensively critiqued and revised by scholars interested in the process of constitutional change. These scholars have put

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6 Ibid 340-43.
8 See Madison, Federalist No. 63 (total exclusion of people in their collective capacity).
10 See, e.g., Bruce Ackerman, We The People: Foundations (1991); Bruce Ackerman, We The People: Transformations (1998); Griffin (n 7 above); Kramer (n 9 above); Keith E. Whittington, Constitutional
forward a new approach to constitutional change that involves highlighting the importance of institutions and the constituent power of the people.

In this article, I will argue that three ideas are fundamental to understanding the role of constituent power in constitutional change:

(1) Political constitutions are self-enforcing documents.

(2) How constitutional change occurs is influenced by the degree to which the constitution has been “legalized.”

(3) Change can be constitutional without being legal. That is, a significant amount of constitutional change occurs through the ordinary political process.

I first describe each idea briefly and then provide a more detailed discussion by situating the relationship between constituent power and constitutional change in the context of the early republic. I then discuss some of the methodological issues raised by the study of non-legal or informal constitutional change. Finally, I use the example of presidential power to illustrate how informal constitutional change can serve as a lens for understanding contemporary American constitutionalism.

Constitutions as Self-Enforcing

When an ordinary law is violated, some external agency stands ready to enforce the law and remedy the violation. By contrast, constitutions must be self-enforcing. In the constitutional sphere, there is no external agency available (if there were, it would not be subject to the constitution). Lacking an external agency, constitutions must ultimately be enforced by the operation of the entire political system, or, one might say, by the people as a whole.

There is some evidence that the founding generation understood this point. This was “popular constitutionalism,” the idea that “the Founders expected constitutional limits to be enforced through politics and by the people rather than in courts...Their history, their political theory, and their actual experience all taught that popular pressure was the only sure way to bring an unruly authority to heel.”

The enforcement of the U.S. Constitution by the judiciary does not alter this fundamental reality. The judiciary enforces the Constitution from within the constitutional system, not by acting as an external enforcement agency. The judiciary derives its authority from the Constitution, not the other way around. But this purely legal point does not get to the heart of the matter. As part of the constitutional system, the judiciary is subject to the reality of self-enforcement. The structure and composition of the judiciary can be altered in the course of ordinary politics and in response to judicial decisions. The judiciary thus has to swim in the same political sea as other constitutional institutions.

The Legalized Constitution

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11 For discussion, see Russell Hardin, Liberalism, Constitutionalism, and Democracy (1999) 89, 98.
12 Kramer (n 9 above) 91.
A constitution is legalized to the extent it is made cognizable by lawyers and courts. The U.S. Constitution was legalized in the first decades of the new republic in the course of a struggle fought over the boundary between law and politics. The process of legalization involved assimilating the Constitution and its interpretation into the structure of ordinary law. Lawyers of the founding generation argued, for example, that the Constitution should be interpreted according to the principles used to construe other legal documents.

Within the sphere of the legalized Constitution, decisions by the judiciary are regarded as authoritative. But the institutional limits of the judiciary affect the scope of the legalized Constitution. The federal courts cannot create cases and depend on the other branches to enforce judgments. The judiciary thus cannot supervise everything in the political system that might affect the meaning and operation of the Constitution. Legalizing the Constitution made it enforceable, but it also made large areas of the constitutional order subject to ordinary political change.

**Constitutional Change and the Political Process**

Constitutional change can occur through either a legal (formal) or non-legal (informal) process. Legal change, change within the legalized Constitution, can occur through amendment or judicial interpretation. Non-legal constitutional change occurs through the political process. The crucial conceptual move is to recognize that the way

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13 See Griffin (n 7 above) 16-19.
the Constitution interacts with political institutions and actors creates a category of change that is constitutional without being legal. Legal actors cannot control fully the flow of constitutional change because political actors and institutions have a strong interest in constitutional meaning.

Constituent power has thus reshaped the Constitution and the various government institutions and political orders that it created. Roughly speaking, the ratification of the Constitution created internal and external contexts for non-legal constitutional change. The internal context involved the different institutions created by the Constitution and their mutual effort to work out various sorts of understandings and accommodations. The external context was the rapidly evolving sphere of democratic politics and the realization by political actors that constitutional meaning could be determined through political argument and contestation.

**Constitutional Change in the Early Republic**

A self-enforcing constitution with a limited sphere of legalization creates both the necessity and opportunity for change outside the legal process. The Constitution of 1787 created institutional uncertainties and gaps that were addressed through a process of informal constitutional change. Did “advise and consent” mean that the President was supposed to go to the Senate and literally ask for it? President Washington thought so (but the Senate disagreed). Did the requirement of Senate approval for presidential appointments mean that approval was required for removals? The president’s power to
remove executive officials was the subject of a famous debate in the House of Representatives in 1789.\textsuperscript{14}

These instances of informal change can be described using the categories of ordinary legal change. Thus, the practices followed in President Washington’s first administration are sometimes referred to as “precedents” arising from constitutional “interpretation.” The use of terms drawn from ordinary law to describe constitutional change shows the influence of the legalized Constitution. It would be a mistake, however, to think that we can understand constitutional change solely in this way. Of course, these practices do not literally have the status of judicial precedents, but the problems with this approach go beyond this point. These changes occurred in a political and institutional context that cannot be captured through concepts drawn from ordinary law. They involved reasons and argument that go beyond standard methods of constitutional interpretation. In addition, change arising from the political process may be inadvertent and justified in legal terms only after the fact.

These changes are best understood as alterations to structuring rules and practices that are the functional equivalent of those written in the Constitution. Their legal status is uncertain and they are not best understood as “extra-constitutional,” as if there were a clear dividing line between the constitutional rules inside and outside the Constitution.\textsuperscript{15} Certainly they are easier to modify than the rules contained in the text, but once they are established, changing them is not the stuff of ordinary politics.

\textsuperscript{15} Despite occasional uses of this term, U.S. constitutional law does not have an established understanding of what counts as an extraconstitutional rule or practice.
Another kind of constitutional change in the early republic consisted of struggles over constitutive rules, those that were believed to be fundamental to the purpose of the Constitution. An excellent example was the decades-long conflict over the establishment of a national bank. During President Washington’s administration, Secretary of the Treasury Alexander Hamilton argued that such a bank was necessary to constitutional powers. But the bank was opposed in Congress by James Madison and in Washington’s administration by Secretary of State Thomas Jefferson and Attorney General Edmund Randolph. Washington followed Hamilton’s advice and signed the bank bill, but Madison and Jefferson became convinced that Hamilton’s designs threatened the constitutional order. The conflict intensified after Chief Justice John Marshall upheld the constitutionality of the bank, following Hamilton’s arguments, in *McCulloch v. Maryland*.16 Despite Marshall’s magisterial opinion, President Andrew Jackson finally killed the Second Bank of the United States by means of a controversial veto in 1832.

On one level, the conflict over the national bank was an exercise in interpreting a specific provision of the Constitution, the “necessary and proper” clause.17 Contemporary lawyers who find Hamilton’s interpretation sound might argue that there was no constitutional change involved. This might be a persuasive doctrinal argument, but it is poor constitutional history. In every decade after President Washington’s signing of the original bank bill, the issue of the bank was highly controversial. This was because the bank implicated the constitutive issue of the scope of the powers of the national government and its relationship with the states. This issue, much like the constitutional conflicts over internal improvements and the power of Congress to prohibit slavery in

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16 17 U.S. 316 (1819).
17 See U.S. Const, Art I, sec 8.
new territories acquired by the United States, could not be settled by judicial precedent, nor, indeed, by any single act of interpretation.

Students of U.S. constitutional history are often struck by how much constitutional debate occurred in the antebellum Congress. Important constitutive issues revolving around the power of the national government and federalism were fought out in the political arena. An approach that focuses solely on the legalized Constitution tends to ignore this sort of constitutional change.

The constitutional order was changed also by external events, circumstances that went beyond institutional accommodation or debates inside the government. A primary example in the early republic was the development of political parties. The founding generation did not foresee the impact that developments abroad such as the French Revolution would have on American politics. When war broke out between France and Great Britain, Americans were affected as the combatants tried to affect the ability of Americans to trade. As the government tried to find its way, it reached a low point when Federalists passed the Alien and Sedition Acts of 1798 which put severe restrictions on the freedoms of speech and the press. These Acts were certainly unconstitutional but appeared expedient at the time and in opposition Madison and Jefferson authored respectively the Virginia and Kentucky Resolutions, which advocated strict construction of the Constitution and the theory that came to be known as states’ rights. Two embryo parties, Federalists and Republicans, developed and the election of 1800 seemed to many a revolution in that it introduced party politics into presidential elections and signaled a

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new order of things in the federal government.\(^\text{19}\) Federalists were opposed to parties, indeed opposed to the very idea of opposition in government, but they lost the initiative and eventually their party disappeared.

The advent of political parties had such far-reaching implications for U.S. constitutional government that it is very hard to believe the Constitution would have been written in the same way had the founders known of them in advance. This is the best way to understand the idea that the Constitution was antidemocratic or, at least, was adopted in a predemocratic era. Parties meant a role in government for ordinary people, not just leisured gentlemen, and created the possibility of presidential government and the control of Congress by means of party influence. Constituent power now had an everyday role in government. Parties changed the way the Constitution worked and was expected to work.

Consider the relationship between constituent power and the legalized Constitution in these early examples of constitutional change. True believers in the legalized Constitution would wish each significant change to be marked by an amendment.\(^\text{20}\) Proposing an amendment would ensure that the implications of each change would be debated openly and made legitimate in the same way as the 1787 Constitution. But constitutional change in the United States has not typically happened in this way and there are important reasons why it could not, aside from the considerable obstacles to amendment contained in Article V.

The self-enforcing character of the Constitution means that it is up to each citizen, if they are so inclined, to decide what it means. If there is a desirable policy in

\(^{19}\) For a recent involving account, see Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (2005).

view that might be argued to conflict with the Constitution, it is of course in the interest of the party in favor to argue that it does not. If amendment is perceived as difficult, they might choose to represent what should count as amendment as an ordinary interpretation. However, the logic driving informal change goes deeper. The constitutive and ideological power of the Constitution, its ability to embody the identity of the polity, means that citizens will tend to regard even significant changes as realizations of its ultimate purposes. Hamilton certainly believed that the national bank was constitutional, despite strong objections. The sincere belief that potentially radical changes accord perfectly with the Constitution’s ultimate purposes has played a much larger role in U.S. constitutional history than duplicitous efforts to change the document through interpretation rather than amendment.21

The politics of the early republic showed that it was difficult to draw a sharp line between what counted as an interpretation and what counted as an amendment. Advocates of constitutionally controversial policies (like the bank) and institutions (like political parties) argued with perfect sincerity that they were consistent with the Constitution. Their opponents could not show them to be clearly wrong. Because no obvious legal line had been crossed, the debates occurred in the realm of ordinary politics, and no amendments were proposed. At the same time, the intense and lasting character of these debates left few doubts that the institutional ordering established in 1787 had changed. Constitutional change had occurred through a process that was primarily political, not legal.

This conception of constitutional change has important implications for how we understand American constitutionalism. The relative lack of formal amendments and the limited scope of judicial power means there is no legally certain way to track constitutional change. However, the history of the early republic suggests another approach. We might attempt to track constitutional change through a better understanding of changes in governing institutions and political orders.

**Understanding Constitutional Change**

Identifying structural political changes as constitutional in the absence of formal amendments can make people uneasy. How are we to tell the difference between changes that are merely political and changes that are truly constitutional? We require some way of tracking constitutional change outside of formal amendments and judicial precedents.

Any sustained inquiry into constitutional change thus raises questions of method. It is important to realize, however, that there is no escaping the reality of constitutional change outside the legalized Constitution. It is a key element of American constitutionalism. Keith Whittington lists 87 examples of constitutional changes made outside of amendments and legal precedents, including the president’s cabinet, independent regulatory commissions, congressional subpoena and contempt power, the military draft, the Louisiana Purchase, establishment of the Federal Reserve System,
development of the welfare state, and entrance into the United Nations. Whittington’s list is by no means comprehensive. Various factors, including the difficulty of enacting formal amendments, have created a practical situation in which changes are often made through non-legal processes. While questions of method are important, we should recognize that this phenomenon exists regardless of how we seek to understand it.

Consider also that American constitutional law has no standard doctrine of what is “extra-constitutional.” Such a doctrine would provide an avenue to understand structural changes outside of amendment and judicial precedent in a legal fashion. While this term is used occasionally by scholars, it has no set meaning within the American legal community. This suggests that in American constitutionalism there is a strong boundary between the sphere of the legalized Constitution (understood roughly as text plus judicial precedent) and what is sometimes called the “political” constitution. The methodological issue is how to understand the concept of the political or non-legal Constitution.

Two cautionary notes before I proceed further. The inquiry into constitutional change can be easily misunderstood. From a conventional legal perspective, it can appear as if scholars interested in constitutional change wish to add one or two more items to a canonical list of methods of altering the Constitution (amendment, interpretation and so on). In reality, what these scholars are aiming at is a different understanding of the Constitution and American constitutionalism generally. This is one reason they emphasize understanding the Constitution in terms of regimes, orders, and institutions.

In addition, an emphasis on constitutional change can produce an understandable reaction that mischaracterizes the approach as “all change, all the time.” The American

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22 See Whittington (n 10 above) 12.
constitutional order of course exhibits continuities as well as discontinuities over time. The initial point is simply that the absence of formal amendment does not tell us whether the meaning of the Constitution and its practical operation have changed.

A first step toward tracking informal constitutional change is to stress the importance of structuring rules and practices that are functionally equivalent to the rules in the Constitution. Here a comparison with the movement in American political science known as “American political development” (APD) is helpful.  Karen Orren and Stephen Skowronek have written of a “deep skepticism about master ideas or processes alleged to arrange political affairs for extended periods of time.” This skepticism extends to “the idea that the Supreme Court is the final arbiter of changes in the constitutional rules of the game. Correcting the distortions introduced by a Court-centered view of who is in charge of these rules and pointing to the full variety of sources of constitutional innovation affords a new multisided picture of constitutional politics, one in which states, representatives, executives, and judges are all ‘in charge,’ vying with one another to determine the Constitution’s meaning.”

This vision of multiple actors contesting the Constitution’s meaning (sometimes called “the Constitution outside the courts”) moves us part of the way toward a fully developed understanding of constitutional change. However, understanding change as a contest over meaning tends to implicitly import a legalized model, complete with an emphasis on executive and legislative “precedents” and individual interpretive struggles, into an inquiry that is intended to achieve a comprehensive view of the non-legalized Constitution.

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24 Ibid 16.
25 Ibid.
The Constitution itself suggests another path. It created institutions and structural relationships intended to last through history. To understand constitutional change we should focus on the development of constitutional institutions within a historicist framework. Focusing on institutions forces us to pay attention to how structures influence political action and interpretive contexts. Adopting a historicist framework forces us to confront the myriad ways in which constitutional institutions interact with the world outside constitutional doctrine and especially with politics.

APD scholarship has recently emphasized the multiplicity of ordering relationships that affect constitutional institutions. According to this view, there is “an ‘interinstitutional’ environment characterized by patterns of intercurrence, where ‘different institutional rules and norms will abut and grate as a normal state of affairs.’”26 The task of understanding the Constitution at any particular point in time thus becomes a matter of establishing the ways in which multiple structuring institutions, orders, and rules intersect to establish a pattern for political action. Understanding the Constitution across time involves recognizing patterns of interaction and proposing theories to explain constitutional development.

Consider presidential impeachment as an example. If we study impeachment in the same way we study doctrine, we focus on the clauses of the Constitution at issue and how they were interpreted by Presidents Andrew Johnson, Richard Nixon, Bill Clinton and their adversaries. Given that the impeachment process occurs outside the courts, this is also the approach of scholars interested in the Constitution as “interpreted” by the political branches. By contrast, using constitutional change as a lens for understanding American constitutionalism enables a much richer approach to the context of

26 See Kersch (n 10 above) 8.
impeachment, the issues at stake, and the implications for future constitutional and political action.

First, in understanding any particular impeachment, we should consider institutional relationships in time – with respect to Johnson’s impeachment, for example, how Congress and the presidency had been affected by the experience of the Civil War. Second, the influence of party, electoral results and conflicts over policy preceding the impeachment must be layered over institutional structures. Third, we should examine how institutional and political realities, such as the need to achieve consensus by focusing on indictable crimes, constrain otherwise valid legal interpretations of the Constitution (that the constitutional standard of “high crimes and misdemeanors” does not refer solely to crimes, but a larger class of political offenses). Fourth, we should consider how the results of the impeachment shaped future understandings of the proper role of the executive and legislative branches.

These multiple dimensions of understanding highlight aspects of the Clinton impeachment missed by purely interpretive approaches. In general, scholars tried to evaluate the impeachment through methods of interpretation such as textualism and originalism, consulting primarily the eighteenth century background of the adoption of the Constitution. They could have achieved greater insights and relevance to the public debate had they used a comparative historical or developmental approach. That approach would have employed the Johnson and Nixon impeachments to shed light on the situation.

28 This is suggested by the account in Whittington (n 10 above) 113-57.
that developed after Republicans won control of Congress in 1994.\textsuperscript{30} The parallels were striking: Congress controlled by the opposition, a political context of bitter partisanship and policy disagreements, presidents challenged by their own unusual personalities and errors of judgment, and an impeachment process driven ultimately by questions of criminality rather than constitutional abuse of power and suitability for high office.

Bruce Ackerman’s well-known works on American constitutional transformation have been exemplary in advancing the developmental approach.\textsuperscript{31} Ackerman’s most striking claim is that the Constitution has been marked by a series of unconventional changes outside the text, but having the same legal status as formal constitutional amendments. While insuperable barriers of legal conventionalism perhaps stand in the way of acceptance of this proposition, Ackerman’s consistent emphasis on patterns of unconventional change during his three key periods of the founding, Reconstruction, and the New Deal have proven remarkably suggestive for many scholars. For example, Ackerman has called attention to how the interpretive labors of the Supreme Court followed rather than led changes initiated by the political branches.\textsuperscript{32} And Ackerman has properly emphasized the importance of the New Deal in marking a key unconventional turning point, not just for constitutional doctrine, but for the structure of American constitutionalism as a whole.\textsuperscript{33}

My developmental theory of constitutional change differs from Ackerman’s in not placing so much stress on a few periods of change. While change is not necessarily occurring all the time, Ackerman has gone too far in emphasizing just three key

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\item \textsuperscript{30} See Skowronek (n 10 above) 442-46.
\item \textsuperscript{31} See works of Ackerman (n 10 above).
\item \textsuperscript{32} See Ackerman, Foundations (n 10 above).
\item \textsuperscript{33} See Ackerman, Transformations (n 10 above). See also Griffin, Constitutional Theory Transformed (n 21 above).
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constitutional moments, to the exclusion of other important periods in American constitutional history. Historian Gordon Wood sums up this view when he says that “many scholars, especially historians, would not agree with Ackerman that the major constitutional changes occurred only at his three extraordinary moments of transformation. Instead, they say, the changes have been ongoing, incremental, and often indeliberate. Indeed, ultimately they have made our Constitution as unwritten as that of Great Britain.”

Wood’s comment raises a problem for a developmental theory of constitutional change. If change occurs through the ordinary political process and is ongoing, how are we to distinguish change that is truly constitutional from the ordinary ebb and flow of policy and politics? We may appreciate the practical point that there are rules and practices outside the Constitution that are functionally equivalent to those in the text. But do these rules and practices have the same normative force as those in the text?

A developmental approach rests on the idea that informal constitutional change can occur through the political process. Such change can constitute a norm that guides action. So, for example, Supreme Court opinions have taken notice of executive and legislative practice in making constitutional decisions. However, norms derived from informal constitutional change are not legal norms in the first instance. Again, norms can be constitutional without being legal. Tracking non-legal constitutional change requires a conceptual shift from a normative perspective grounded in doctrinal analysis to a historicist perspective focused on institutional change that is the functional equivalent of formal constitutional rules and practices. Further, a historicist perspective involves

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examining change as a self-conscious process. We should take into consideration whether the participants thought constitutional change was going on but then check to see whether later developments confirmed that the changes had staying power.

Constitutional change outside the legalized Constitution is thus about constitutional institutions in development through history. Return to the example of political parties. Their creation might be said to express the constitutional principle that there should be a loyal opposition in a democracy. We would be badly misled, however, if we were to treat this principle as the causal reason why political parties formed in the first few decades of the early republic. Political parties formed for all sorts of reasons, but the point from a developmental perspective is that they made a substantial difference to how the constitutional order operated. It is appropriate to conclude that they changed the Constitution itself.

Finally, we might ask whether a developmental perspective is relevant to the conventional understanding lawyers and judges have of constitutional change. If a developmental perspective does not generate legal-constitutional norms (at least in the first instance), what is its status relative to the standard project of interpreting the Constitution to make judicial decisions? In response, it is important to appreciate initially that the primary goal of a developmental perspective is not to resolve cases but to understand how the constitutional system works. This is the same point of view the founding generation had as the Constitution was being written, ratified, and put into operation. They were concerned with the constitutional order as a whole, not specific judicial decisions. While a second Federal Convention is not likely, Americans always
face the challenge of understanding how the constitutional order works and adapting it to new historical circumstances.

This should not be taken to imply that a developmental perspective has little relevance to the legal interpretation of the Constitution. Every constitutional law case involves a determination, however implicit, that relevant historical circumstances and background institutions have changed or not since the adoption of the Constitution. This determination of course influences the interpretation of the Constitution and its application to specific fact situations. In the famous school segregation case *Brown v. Board of Education*, Chief Justice Earl Warren wrote: “we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation.” In deciding *Brown*, the Supreme Court recognized that the nature of public education had changed since the nineteenth century and that this made a difference to how the case should be resolved.

After the September 11, 2001 terrorist attacks on the United States, the issue of constitutional change was raised anew. President George W. Bush’s administration asserted that the world had changed and the old rules no longer applied. The president’s attorneys argued that this was a “new kind of war” and a “new paradigm” that “renders obsolete” some provisions of the Geneva Conventions. Prior to the terrorist attacks, President Bush and Vice President Cheney had already signaled their intent to restore the balance among the branches of government by increasing executive power.

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37 347 U.S. at 492-93.
39 These are quotations from a memorandum by Alberto R. Gonzales, Counsel to the President to President Bush, Jan. 25, 2002. See http://www.msnbc.msn.com/id/4999148/site/newsweek/.
But the events of 9/11 triggered institutional changes with potentially momentous constitutional implications. These implications are best grasped through the lens afforded by the study of constitutional change.

**The Lens of Constitutional Change**

The Supreme Court occasionally highlights the degree to which constitutional institutions have changed over time. The circumstances of the famous *Steel Seizure*\(^\text{40}\) case, decided during the Korean War, led Justice Jackson to focus on changes to the presidency in his justly praised concurring opinion: “[I]t is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blueprint of the Government that is. Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.”\(^\text{41}\)

Here Justice Jackson used the lens of constitutional change to better understand the presidency and thus, the Constitution itself. He focused on the presidency as an institution and the difference that existed between the institution described in the text (“paper powers”) and the real constitutional power the presidency had acquired over

\(^{40}\)Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

\(^{41}\)343 U.S. at 653.
time. Jackson might have had in mind the changes that occurred during the New Deal administration of President Roosevelt (in which he served as Solicitor General and Attorney General) and those that followed entry of the U.S. into World War II and the development of the Cold War.

In the years following 9/11 U.S. lawyers and legal scholars have had a similar vertiginous sense that their constitutional universe has changed in unexpected ways. A war of indefinite duration (the “global war on terror”) fought against a non-state opponent. The use of torture and other cruel interrogation techniques, military commissions and indefinite detention without judicial review. The development of a domestic dimension to the Commander in Chief power. Domestic surveillance by intelligence agencies in violation of law without judicial scrutiny. And all this marked by an absence of congressional oversight or legislation and the most aggressive advocacy of unilateral presidential power yet seen in U.S. history.

As Jackson suggested, it is impossible to track constitutional changes such as those that have affected the presidency by examining the text of the Constitution (there are no relevant amendments) or even through judicial precedent. After all, not all actions of the president are subject to judicial review. A theory that understands constitutional change in institutional terms offers a more promising approach. Of all the institutions established by the Constitution, the presidency is the most protean. The accumulation of power in the presidency during the twentieth century, to which Jackson referred, would not have been possible had it not been supported by the constituent power of the people. The changes that have occurred in the presidency are part of a larger story in which a

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more democratized American polity informally changed the constitutional system in many respects.

President Roosevelt’s New Deal is a paradigmatic example of constitutional change through constituent power. An older constitutional order based on ideas about the proper role and function of the national government collapsed under repeated legislative hammer blows, backed by FDR’s enormous electoral majorities. FDR had the advantage of a personal relationship with the American public and the people came to view the presidency as a sort of national tribune.

In national crises such as the Great Depression and World War II, the American people expected presidential action, sometimes without regard to what the Constitution said. This is significant because the increased power of the presidency is often portrayed as something that presidents have done alone. In part, this reflects a mode of thinking inherited from the eighteenth century – presidents seek to increase their power because that is what ambitious men in office tend to do. But it is at least equally the case that increased power has been something forced on the presidency by an aroused constituency of the people.

Increased presidential power was also a consequence of the institutional weaknesses of Congress in new circumstances. In the years prior to World War II, Congress discredited itself by adhering strictly to a policy of isolationism and stridently refusing to follow presidential leadership in foreign affairs. After the outbreak of war, it seemed to many that Congress’s feckless attitude had placed the U.S. in greater peril.

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43 See the discussion in Griffin (n 21 above).
If Congress was the danger, increased presidential power and authority appeared to be the solution.

Increased presidential power led to a new series of constitutional dangers. Presidents assumed they had the unilateral power to lead the U.S. into war, a problem many thought exemplified by the Vietnam War. The indefinite nature of the Cold War led presidents to apply tactics suited to foreign affairs to the domestic sphere, a phenomenon which contributed to the great scandal and constitutional crisis of Watergate. Informal constitutional change appeared to offer flexibility at the price of unanticipated and unwelcome side effects.

The party system played an important role in shaping how the constitutional lessons of Vietnam and Watergate were perceived by political actors. The lessons, such as they were, were absorbed principally by elites associated with the Democratic party. They believed that the presidency had become “imperial” and had to be reined in by an assertive Congress cognizant of its role as the true repository of constituent power. By contrast, the Republican party remained relatively unaffected by these supposed insights. For Republican elites, the lesson of the 1970s was that Watergate led to an overreaction against presidential power. They continued to see the president as the natural leader of government, especially in foreign affairs, and set forth the theory of the “unitary executive” during President Reagan’s administration in the 1980s. Many of these Republicans would later play key roles in the 9/11 administration of President Bush.

At one level, the unitary executive was a way to counterbalance the legacy of Watergate and reintroduce the need for energy and unitary action in the executive branch. But in the circumstances of the 1980s it provided a theme for Republicans in their efforts

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45 See the discussion in Griffin (n 7 above) 196-99.
to keep congressional Democrats in check, to strike back at the frequent appointment of independent counsels to investigate the executive branch, and provide breathing room for the president in foreign affairs. There was a natural link between emphasizing a unitary executive and the president’s power as commander in chief of the armed forces. During this period, Republicans also had closer relations than Democrats with the military and intelligence agencies.

When terrorists struck on 9/11, there were two basic paths open for an American response. One would treat the attacks as a colossal crime against the United States and emphasize bringing those guilty to justice and preventing future attacks through limited military action and a renewed emphasis on domestic and foreign intelligence. The second would treat the attacks as if they were akin to Pearl Harbor and the start of a major world war. President Bush and the Republican party sent the U.S. careening down the second path so quickly that some Americans were left behind gasping in disbelief.

Using the lens afforded by constitutional change, we can see that the constitutional perspective the Republicans had developed on the presidency left them well prepared to respond to the 9/11 attacks. President Bush immediately categorized the attacks as a military operation, akin to an invasion by a foreign state. The President told his advisers “‘we’re at war’”46 just hours after the attacks occurred and made a global war on terror the official policy of the executive branch.47 And at one and the same time, it was unconventional warfare beyond the standard laws of war. In addition, it could be construed as warfare going on inside the country. As the Commander in Chief responding to a surprise attack, he was at the zenith of his constitutional power. In the

47 See ibid 330-38.
next few months, the executive branch set into motion all of the questionable doctrines that would later come to light: indefinite detentions, military tribunals, and extreme interrogation techniques.\textsuperscript{48}

Understanding the constitutional changes wrought by the Bush presidency is thus a matter of describing the state of constitutional institutions and practices prior to 9/11 and noticing the range of institutional opportunities that were available as a result of the attacks. The lens afforded by the study of informal constitutional change helps us to do this. But an institutional analysis can take us only so far. The crucial role of constituent power should not be overlooked. President Bush enjoyed the immediate support of the American people and easily obtained congressional authorization to wage war against al Qaeda and their Taliban supporters in Afghanistan. The legitimacy provided by constituent power allowed President Bush to expand the power of the presidency far beyond its normal limits.

The legal battles that followed over the Bush administration’s 9/11 measures illustrate the tensions between formal and informal constitutional change. To those inside the sphere of the legalized Constitution, constituent power and, indeed, the presidency itself can appear to be dangerous wild cards within the constitutional order. How to bring these wild cards safely under legal control is not obvious. Consider that the Bush administration has consistently opposed judicial review of its wartime measures. When cases are brought, the administration has argued that the judiciary has no role supervising its conduct of the war on terror. Subjecting presidential initiatives to judicial review means legalizing wartime measures that the executive branch sees as exercises of

\textsuperscript{48} See Margulies (n 42 above).
discretion. But lawyers outside the government have been struggling consistently to
legalize the war and thus bring it within the sphere of formal constitutional change.49

Asking whether the Bush administration’s wartime measures are consistent with
the Constitution is thus a more complex question than first appears. As Justice Jackson
noted, the powers of the presidency have developed informally without necessarily
receiving judicial or legal approval. They are matters of practice, of informal
constitutional change. American lawyers are often surprised when constitutional
institutions that can change informally seem to have the capacity to create their own
reality, so to speak. Using judicial or ordinary legal criteria as the sole means of
evaluation misses the role informal constitutional change plays within American
constitutionalism. Bush’s wartime measures can be evaluated, but not by criteria drawn
from ordinary legal practice. This may seem problematic from a conventional legal
perspective, but that is precisely the dilemma created by the development of informal
constitutional change within American constitutionalism. The reality of constitutional
change means that the use of ordinary legal baselines to judge presidential actions will
always fall short of an effective critique.

**Concluding Remarks**

Consider some common opposed observations about American constitutionalism:
It is based on a designed order expressed solely in the Constitution or it has changed
informally in such significant ways that it now resembles the “unwritten” tradition

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49 See ibid.
characteristic of British constitutionalism. The constituent power of the people plays no
direct role in American constitutionalism, other than through the amendment process or
the interpretation of the Constitution is influenced by public opinion and the constituent
power of the people can change the Constitution through informal means.

Perhaps it would be too much to expect that the lens of constitutional change
could help us solve these paradoxes. But we can make some headway if we use the study
of constitutional change to help us understand how all of these statements shed some light
on the nature of American constitutionalism. Portions of the original constitutional
design survive today, but no part has been immune from the effects of history and
informal constitutional change. Institutions such as the presidency that have undergone
the greatest change still bear marks of their original design and the hopes of the founding
generation. While the constituent power of the people is still seen by many as dangerous
to the integrity of constitutional forms, there are very few who would deny that it has had
a role in shaping American constitutionalism. Progress would be for constitutional
scholars to achieve a greater historical understanding of these phenomena before moving
on to their perennial normative projects.