

## Constitutional Amendment and Democracy

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### *Abstract*

*What do constitutional amendments do for and against a democracy? This Article theorizes four models of large-scale fundamental amendments and their relation to a democracy. Each model of fundamental amendment is defined by distinctive elements: condition, scale, pace, and function. The intersection of these elements generates four models of fundamental amendment: foundational, constructive, progressive, and retrogressive. Foundational amendments change the constitution paradigmatically all at once to facilitate democratic founding. Constructive amendments change the constitution incrementally to facilitate democratic transformation. Progressive amendments change the constitution incrementally to facilitate democratic service of deprived individuals. Finally, retrogressive amendments change the constitution incrementally to facilitate democratic erosion.*

*The four models are illustrated by American experience: the amendment of the Articles of Confederation and the Bill of Rights as foundational amendments; Reconstruction Amendments as constructive amendments; the 16th, 17th, 18th, 19th amendments as progressive amendments; the risk of retrogressive amendments under Trump administration. These models are further illustrated by comparative experience in seven Asian jurisdictions: Japan and South Korea (fundamental amendments); Taiwan and Indonesia (constructive amendments); Singapore and India (progressive amendments);*

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and Cambodia (retrogressive amendments).

*This Article makes empirical and theoretical contributions to the scholarship. First, this study enriches empirical knowledge about constitutional amendments. Second, this study theorizes four models to understand the actual role of various fundamental amendments. The four amendment models have further theoretical implications for: functionalism as the epistemology of comparative constitutional amendment inquiry; a positivist concept of constitutional amendment; and national identity as the explanation of constitutional design choice between amendment and replacement.*

### Introduction

In January 2020, Russian President Vladimir Putin proposed a sweeping package of constitutional amendments.<sup>1</sup> Specifically, the proposed amendments would change the relationship between Russia's Constitution and international treaties; the presidential election and power; cabinet formation; Parliament's power; the Constitutional Court's power; the dismissal process of judicial actors; citizenship; and minimum wage.<sup>2</sup> Some observers believe that Putin proposed these changes to remain in power after his term ends in 2024.<sup>3</sup> Russia's Parliament unanimously approved the amendment proposal upon its first reading on January 23, 2020.<sup>4</sup> On July 1, 2020, the amendments were approved by the Russians in a national vote, which was initially scheduled to occur in April but later postponed due to the COVID-19 pandemic.<sup>5</sup> Russia's 2020 constitutional amendments are not minor nor technical, but

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1. *What Changes is Putin Planning for Russia's Constitution?*, MOSCOW TIMES (Jan. 16, 2020), <https://www.themoscowtimes.com/2020/01/16/what-changes-is-putin-planning-for-russias-constitution-a68928>.

2. *Id.*

3. Patrick Reeve, *Why Is Vladimir Putin Racing to Amend Russia's Constitution?*, ABC NEWS (Jan. 25, 2020), <https://abcnews.go.com/International/vladimir-putin-racing-amend-russias-constitution/story?id=68510345>.

4. Georgi Kantchev & Thomas Grove, *Russia's Parliament Passes Putin's Constitutional Plans on First Reading*, WALL ST. J. (Jan. 23, 2020), <https://www.wsj.com/articles/russias-parliament-passes-putins-constitutional-plans-on-first-reading-11579775327>.

5. Andrew Higgins, *The Theatrical Method in Putin's Vote Madness*, N.Y. TIMES (Jul. 1, 2020), <https://www.nytimes.com/2020/07/01/world/europe/putin-referendum-vote-russia.html>.

fundamentally change power relations. This Article theorizes different models of such fundamental amendments.

The concept of fundamental amendments<sup>6</sup> seems to be an oxymoron — amendments cannot be fundamental. In the conventional view, “the term ‘amendment’ implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.”<sup>7</sup> Amendments, of course, can introduce technical, small-scale changes to the current constitution.<sup>8</sup> For example, the Twenty-Fifth Amendment to the U.S. Constitution stipulates that if the President becomes unable to fulfill the duties of his office, the Vice President becomes the President.<sup>9</sup> Amendments, however, can introduce fundamental changes, which can ameliorate the original constitution. For example, the U.S. 1787 Constitution was adopted according to the amendment procedures set forth by the Articles of Confederation, but replaced the latter.<sup>10</sup> The Reconstruction Amendments, adopted after the Civil War, radically transformed the 1787 Constitution.<sup>11</sup> In addition, amendments do not merely improve the current constitution, they can make it worse. For example, an empirical account indicates that since 2000, there have been 25 successful uses of formal constitutional amendments to evade presidential term limits in different countries.<sup>12</sup> Such amendments undermine constitutional democracies as they dismantle institutional checks on public power.

This Article conceptualizes fundamental constitutional amendment. Two terms should be clarified: constitutional

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6. Scholars proposed different terms to conceptualize this kind of fundamental constitutional change, such as “dismemberment” or “fundamendment.” Compare Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1 (2018), with Yaniv Roznai, *Constitutional Amendment and “Fundamendment”: A Response to Professor Richard Albert*, 43 YALE J. INT’L L. 1 (2018), <https://www.yjil.yale.edu/constitutional-amendment-and-fundamendment-a-response-to-professor-richard-albert/>. To be more specific and to capture various positive and negative functions of this type of amendment, I use the phrase “fundamental amendment.”

7. *Livermore v. Waite*, 102 Cal. 113, 118–19 (1894).

8. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* 4 (2019).

9. U.S. CONST. amend. XXV, § 1.

10. See *infra* notes 83–87 and accompanying text.

11. See *infra* notes 96–105 and accompanying text.

12. Mila Versteeg et al., *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 200 (2020).

amendment (or “amendment”), and fundamental constitutional amendment (or “fundamental amendment”). I adopt a functional, positivist concept of constitutional amendment. Accordingly, constitutional amendment refers to formal constitutional change consciously initiated by reformers as an amendment project, which may or may not follow the amendment rules established by the original constitution, and can introduce any change to the original constitution. A fundamental amendment alters one or more underlying ideal, principle, or rule of the original constitution. This kind of amendment is complicated and generates more far-reaching effects than technical amendments, and therefore deserves greater academic attention.

I focus on fundamental amendments with reference to a democracy. Democracy is understood widely to include both liberal and illiberal democracies. Democracy and liberalism can come together or separate.<sup>13</sup> Liberal democracies conflate electoral institutions designed to translate popular view into public policy and liberal institutions protecting fundamental rights.<sup>14</sup> Illiberal democracies include electoral institutions designed to translate popular view into public policy, but lack, or substantially limit, liberal institutions protecting fundamental rights.<sup>15</sup>

This Article theorizes models of fundamental amendment in relation to democracy. Each model of fundamental amendment is defined by distinctive elements: condition, scale, pace, and function. The intersection of these elements generates four models of fundamental amendment: foundational, constructive, progressive, and retrogressive. Foundational amendments change the constitution all at once to facilitate democratic founding. Constructive amendments change the constitution incrementally to facilitate democratic transformation. Progressive amendments change the constitution incrementally to facilitate democratic service to deprived individuals. Finally, retrogressive amendments change the constitution incrementally to facilitate democratic erosion.

The four amendment models are illustrated by American experience: the amendment of the Articles of Confederation and the Bill of Rights as foundational amendments; the

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13. YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER & HOW TO SAVE IT* 26 (2018).

14. *Id.* at 27.

15. *Id.*

Reconstruction Amendments as constructive amendments; the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments as progressive amendments; and the risk of retrogressive amendments under the Trump administration. These models are further illustrated by comparative experiences in seven Asian jurisdictions: Japan and South Korea (foundational amendments); Taiwan and Indonesia (constructive amendments); Singapore and India (progressive amendments); and Cambodia (retrogressive amendments). Comparative accounts explore constitutional amendments in different regions of the world<sup>16</sup>, but tend to focus on western jurisdictions.<sup>17</sup> The integration of seven Asian cases fills this jurisdictional gap.

This Article makes empirical and theoretical contributions to the scholarship. First, this study enriches empirical knowledge about constitutional amendments. Second, this study theorizes four models of understanding the actual role of various fundamental amendments. The four amendment models have further theoretical implications for functionalism as the epistemology of comparative constitutional amendment inquiry, a positivist concept of constitutional amendment, and national identity as the explanation for the constitutional design choice

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16. See generally CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA (Richard Albert et al. eds., 2019) (explaining modern constitutional change and its implications across Latin America); Richard Albert, *Constitutional Reform in the Caribbean*, 16 ELECTION L.J. 263 (2017) (examining the potential effects of constitutional reform in the Bahamas, Saint Lucia, and Trinidad and Tobago); Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 181 (2014) (exploring the legality and legitimacy of amendment procedure in the context of the Canadian and American governments); Heinz Klug, *Constitutional Amendments*, 11 ANN. REV. L. & SOC. SCI. 95 (2015) (discussing constitutional amendments in South Africa and Zimbabwe).

17. See, e.g., PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION (Xenophon Contiades & Alkmene Fotiadou eds., 2016) (discussing the use of referendum in constitutional change in France, Switzerland, California, Iceland, Luxemburg, Greece, and the European Union); ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophōn I Kontiadēs ed., 2013); cf. HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro, eds., 2013) (examining constitutional change in Canada, the Czech Republic, Finland, France, Germany, India, Israel, Italy, New Zealand, Republic of South Africa, Spain, Switzerland, the United Kingdom, the United States of America, and the European Union). The three non-western jurisdictions included in the last source have similar institutional settings to the western ones. See Jaclyn Neo & Bui Ngoc Son, *Expanding the Universe of Comparative Constitutional Amendment in Southeast Asia*, 14 J. COMP. L. 46 (2019), for recent efforts to integrate the Southeast Asian experience.

between amendment and replacement.

Part I advances the theory of the four amendment models. Part II applies this theory to the American amendments, while Part III applies it to the Asian amendments. Part IV discusses further implications for amendment theorization. Part V concludes with reflections on the future of comparative constitutional amendment.

## I. THEORY: AMENDMENT MODELS

### A. Model Elements: Condition, Scale, Pace, and Function

The fundamental amendment model includes a distinct set of causal, dimensional, temporal, and functional elements constituting a pattern of major constitutional change. Building upon the theory of policy change,<sup>18</sup> I identify four elements for an amendment model: condition, scale, pace, and function.

#### 1. *Condition*

Condition refers to essential factors that open a “window of opportunity” for major change.<sup>19</sup> Conditions are an essential element of the amendment model, not only because they explain why fundamental amendment occurs in some circumstances but not in others, but because they also determine the scale of amendment. For example, regime change explains why amendment is necessary to create a new framework for the new regime and shapes the large scale of amendment that the new regime needs.

I distinguish between two types of conditions: objective and subjective. The objective conditions for fundamental amendment refer to the political, social, and economic factors that render major changes to the original constitution imperative. The political conditions of fundamental amendment vary, e.g., the

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18. See generally CAROLYN J. TUOHY, REMAKING POLICY: SCALE, PACE, AND POLITICAL STRATEGY IN HEALTH CARE REFORM (2018) (identifying scale and pace as the fundamental dimensions under which to analyze policy change); Michael Howlett & Benjamin Cashore, *The Dependent Variable Problem in the Study of Policy Change: Understanding Policy Change as a Methodological Problem*, 11 J. COMP. POL'Y ANALYSIS: RSCH. & PRAC. 33 (2009) (reconceptualizing the methodology underpinning the modern theory of policy change).

19. TUOHY, *supra* note 18, at 6–7.

end of a war, regime change, leadership change, government corruption. The social and economic conditions concern necessary factors, such as the emergence of new social groups, social inequality, economic development, and urbanization, which creates pressure for major constitutional change.<sup>20</sup> Subjective conditions are tantamount to what is called “political willing” and “political capacity” (in institutional and electoral circumstances) in comparative accounts of policy change. So, subjective conditions refer to politicians’ institutional capacity to carry out major constitutional amendment.

## 2. *Scale*

Scale of change refers to the degree and scope of change.<sup>21</sup> The scale of fundamental amendment is important in understanding the substance and process of amendment. Constitutional amendments can consist of large-scale or small-scale change. Fundamental amendments refer to large-scale constitutional change—they alter underlying ideals, principles, and rules of the original constitution. To adopt a taxonomy of policy components,<sup>22</sup> the degree of fundamental amendment can be classified as philosophical, programmatic, or specific. The corresponding scopes of fundamental amendment are ideals, principles, and rules.<sup>23</sup> Constitutional ideals (e.g. liberalism or socialism) refer to philosophical, aspirational goals that a polity aims to achieve in a long-term future. Constitutional principles (e.g. justice) define programmatic objectives that a polity aims to address. Constitutional rules (e.g. term limit or freedom of speech) authoritatively define specific rights and duties of government institutions and individuals. Constitutional ideals, principles, and rules are interrelated. Philological constitutional ideals are embodied in the more operational level of constitutional principles.<sup>24</sup> For example, liberalism is embodied in the constitutional principles of separation of powers and checks and balances. “[L]egal rules typically describe how people

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20. *Id.* at 6.

21. *Id.* at 9.

22. Howlett & Cashore, *supra* note 18, at 37.

23. See generally William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat*, 143 U. PA. L. REV. 1889, 2129–32 (1995) (drawing on the distinction between ideas, principles, and rules).

24. See *id.* at 2129 (displaying the fundamental interconnectedness of ideals, rules, and principles).

are to conduct themselves, or stipulate the legal consequences of a particular action; principles, in contrast, typically provide the underlying justification for the rule. Crudely: rules say what is to be done, and principles explain why.”<sup>25</sup> Constitutional principles, therefore, justify the actions of structural institutions and individuals commanded by constitutional rules. To illustrate, the constitutional principle of checks and balances justifies a constitutional rule imposing executive term limit.

Taking degree and scope together in consideration, we have three scales of fundamental amendments. First, fundamental amendments can change philological constitutional ideals. Second, fundamental amendments can change programmatic constitutional principles. Third, fundamental amendments can change specific constitutional rules.

### 3. *Pace*

Pace refers to tempo (timing) or speed of change.<sup>26</sup> By definition, “it falls on spectrum from fast to slow.”<sup>27</sup> In comparative policy analysis, “[t]he key question regarding the pace of enactment is whether the policy framework should be enacted all at once or requires a winning legislative coalition to be established and re-established at several points in time.”<sup>28</sup> The pace of fundamental amendment refers to the tempo or speed of major constitutional change. Drawing on policy accounts,<sup>29</sup> the pace of fundamental amendments can be paradigmatic or incremental. Paradigmatic amendments refer to rapid fundamental constitutional change adopted all at once. Differently, incremental amendments occur slowly in serial small steps which eventually culminate in major constitutional change.

Under what conditions do paradigmatic or incremental amendments occur? “[T]he factors that allow and motivate politicians to embark on major change also affect how they assess their positions of current and future influence . . .”<sup>30</sup> Institutional settings and electoral markets would condition the

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25. *Id.* at 2130.

26. *See* Tuohy, *supra* note 18, at 11.

27. *Id.*

28. *Id.*

29. Howlett & Cashore, *supra* note **Error! Bookmark not defined.**, at 30 (distinguishing paradigmatic or incremental model of policy change).

30. Tuohy, *supra* note 18, at 7.



political calculus of their positions of current and future influence, and hence determine their willing as well as the pace of major constitutional change. This rational consideration is, in turn, determined by the elements of uncertainty and stability. When politicians anticipate that they may lose power in the future due to their current vulnerable condition, the adoption of a comprehensive amendment package is more likely to ensure that future winning politicians cannot reverse the constitutional entrenchment for the sake of political stability and constitutional continuity. This must be accompanied by the consensus of different parties at the time of constitutional amendment. In contrast, when consensus has not yet been achieved but current politicians are certain about their future power and seek to compromise with oppositions to prevent chaos and ensure political stability and constitutional continuity, they may amend the constitutions serially.

#### *4. Function*

Function refers to the natural purpose and consequence resulted from the fundamental amendments. In relation to a democracy, fundamental amendments create, transform, improve, or weaken democratic institutions. The intersection of conditions, scale, and pace, generates four functions of fundamental amendments: foundational, constructive, progressive, and retrogressive. As these functions are the culminative consequences of the model elements, they essentially characterize each amendment model.

#### *B. Four Models*

##### *1. Foundational Amendments*

The concept of foundational amendments is intellectually connected to foundational constitutionalism, a theoretical model to understand the function of constitutional change in a radical moment. Drawing mainly on constitution-making after radical revolutions in the eighteenth century, particularly in the United States and France, this theory, pioneered by Yale Law Professor Bruce Ackerman, is defined by these features: formal constitutional change happens in the extraordinary moment, e.g., an end-result of a liberal revolution; formal constitutional change is separate from ordinary politics; and formal

constitutional change creates the foundation for a new democratic order.<sup>31</sup>

A project of constitutional amendments may perform a similar foundational function, like making a new constitution. However, unlike foundational constitution-making, foundational amendments are a part of ordinary politics: they are adopted not by constituent power but by amendment power or even legislative power. By nature, *foundational amendments introduce paradigmatic changes to the original constitution all at once to facilitate the foundation of a democratic system*. Let us elaborate the four elements of this model: condition, scale, pace, and function.

First, the socio-political conditions for foundational constitutional amendment are the moments of radical political change, such as state-founding and regime change, which lead to the founding of a democracy. Consider first the founding moment of a new state. In such condition, a new state is created and engages in erecting foundational institutional framework for its movement forward to democratic directions. In the founding moment, the enactment of a constitution is normally employed to express sovereignty and to lay down the legal foundation for the state's legitimacy.<sup>32</sup> However, the founding moment is normally turbulent and embryonic, and hence national framers may be confronted with great uncertainty and ambiguity regarding the goals of the state and necessary principles and institutions for democratic foundation.<sup>33</sup> Consequently, the original constitution may not be designed as stable at the very beginning of state-founding. This creates the condition for fundamental amendments which continue the original constitutional project but introduce new underlying constitutional ideals, principles, and rules foundational to the creation of a new democratic order. In addition to state-founding, the radical moment of regime change (from an authoritarianism into a democracy) creates the condition for foundational amendments. This regime change can occur after wars or democratizing transformation. Like the moment of state-

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31. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992), for his standard account of foundational constitutionalism.

32. *FOUNDING MOMENTS IN CONSTITUTIONALISM* (Richard Albert et al. eds., 2019); MADHAV KHOSLA, *INDIA'S FOUNDING MOMENT: THE CONSTITUTION OF A MOST SURPRISING DEMOCRACY* 30 (2020).

33. JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 28 (2018) (discussing the uncertainty of written constitutionalism).

founding, the moment of regime changes is often tumultuous, and hence constitutional designers are often confronted with great uncertainty and ambiguity. One possible response to these is to maintain formal constitutional continuity by introducing fundamental amendments to the constitutions of the previous regimes.

Second, the scale of foundational amendments normally includes fundamental ideals, principles, and rules essential for the creation of a liberal democracy. At the philosophical level, foundational amendments tend to be shaped by ideals associated with classical liberalism which stresses limited government and individual autonomy. The amendments enshrine programmatic principles as the embodiments of the liberal philosophical ideals. These principles normally include popular sovereignty, representative government, the separation of powers, checks and balances, which are constitutive to the creation of a new liberal democratic order. Finally, foundational amendments may add specific individual rights, the essential component of a liberal democracy, to the original constitution.

Third, the pace of foundational amendments is paradigmatic. Foundational amendments are rapidly adopted all at once as a sweeping comprehensive package of fundamental constitutional democratic ideals, principles and institutions or rules. This “Big Bang” constitutional change is shaped by the element of uncertainty in politicians’ current and future influence. This uncertainty may be due to fragmented powers which rend leaders in current positions unsure about their future power. Consequently, they mobilize for a monist comprehensive constitutional sweep entrenched against future changes which may be pursued by the future winners. This paradigmatic constitutional entrenchment is driven by the considerations of political stability and constitutional continuity. Such paradigmatic pace is shaped mainly by domestic political will and capacity. It is also animated by external authority which has the capacity to impose a comprehensive constitutional package to drive a given polity toward a democracy. This imposition is driven by the same element of uncertainty but with a different meaning. The comprehensive, imposed, constitutional entrenchment is to prevent future leaders from reversing the polity to undemocratic directions.

Fourth, the function of foundational amendments is to facilitate the initial founding of a democracy. Amendments are adopted as a part of the larger project of democratic foundation. Together with the original constitution, foundational

amendments lay down the fundamental framework under which a democracy is erected.

Foundational amendments are rare. They are mainly associated with the initial creation of early democracies, such as that of the United States and new democracies in the context of great uncertainty animated fragmented powers (such as South Korea) and post-war occupation with American influence (such as Japan). These experiences will be explored in greater detail later.

## 2. *Constructive Amendments*

The concept of constructive constitutional amendment is built on the theory of constructive constitutionalism developed by Professor Ruti Teitel of New York Law School in her influential article published in *Yale Law Journal*.<sup>34</sup> The core argument of the theory is that formal constitutional changes are constructed of and constructive to gradual shifts from an authoritarian regime to a more liberal constitutional regime, replacing violent revolutions by peaceful political transformation.<sup>35</sup> This theory is drawn on constitutional change in post-communist Central and East European nations in the late twentieth century.<sup>36</sup>

Fundamental amendments play an important role in constructive constitutionalism. This model of amendment can be called constructive constitutional amendment. Constructive amendments introduce incremental changes to the original constitution to facilitate democratic transformation.

The *conditions* for constructive constitutional amendment are regime change or other radical political change. The first is the context of transformation from an authoritarian regime into a democracy. This regime change entails necessary fundamental constitutional change to create a new institutional framework for the new regime. This fundamental constitutional change may take the forms of constitution-making or constructive amendments. Apart from regime change, other radical political change (e.g. the end of a civil war) can also open the opportunity for constructive amendments to facilitate substantive

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34. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2051–52 (1997).

35. *Id.* at 2067.

36. *Id.* at 2069.

transformation of an incomplete democracy.

The *scale* of constructive amendments is large and includes constitutional ideals, principles, and rules associated with both liberalism and neoliberalism. The amendments may entrench constitutional values associated with enlightenment liberalism, such as representative government, the separation of powers, and political freedom. However, constructive amendments which facilitated what Samuel P. Huntington calls the “third wave” of democratization<sup>37</sup> in the late twentieth century also reflected principles associated with neoliberalism, such as economic privatization, free trade, open market, and deregulation.<sup>38</sup> In addition to the first generation of rights (political and civil rights), constructive amendments of the new democracies may include the second generation of rights (economic, social, and cultural rights).

The *pace* of constructive amendments is incremental. Different from foundational amendments, constructive amendments are serially adopted in multiple stages rather than as a big bang change. Each stage of amendments offers partial settings constructive to democratic transformation and instigates next stages of amendments. “[I]nitial constitutional changes would alter subsequent political situations, where new demands for constitutional reforms would rise and facilitate another round of constitutional changes that would again alter political situations where new changes would be brought about.”<sup>39</sup> The incremental pace of constructive amendment is due mainly to the lack of social and political consensus, which prevents the adoption of a comprehensive amendment package. During periods of regime change, as popular consensus disintegrates, constitutional amendments are not the codifications of the existing social and political consensus, but the steerers instrumental to the gradual construction of such consensus.<sup>40</sup> The institutional context and electoral market also explain incremental amendments. Current leaders are able to concentrate power, confident about winning future elections.

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37. See generally SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY passim* (1991) (describing and later exploring the birth of many new democracies around the globe).

38. NATALIE GOLDSTEIN, *GLOBALIZATION AND FREE TRADE* 30 (2007).

39. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4 NAT'L TAIWAN U. L. REV. 145, 161 (2009).

40. *Id.* at 149.

This motivates them to reform the constitutional system step by step through negotiations with the opposition to avoid radical conflicts and maintain political stability and constitutional continuity.

The *function* of constructive amendments is transformative. Constructive amendments are the institutional steerers facilitating the transformation of or into a democracy. These amendments are both constructed of and constructive to this transformative process. The initial stage of transformation opens the window of opportunity for these amendments. The amendments, in their turn, facilitate the democratic construction.

### 3. *Progressive Amendments*

The concept of progressive amendment is intellectually drawn on the theory of progressive constitutionalism. The theory of progressive constitutionalism has three grounds: intellectual, textual, and practical. Intellectually, progressive constitutionalism is informed by the Idea of Progress in history of philosophy. The Idea of Progress holds that “the human condition has improved over the course of history and will continue to improve.”<sup>41</sup> This Idea has a complex history, and there is no a single theory about it.<sup>42</sup> In the ancient time, Greek’s philosophers Plato and Aristotle hold a cyclical view of human progress.<sup>43</sup> In the middle era, Augustine rejected the cyclical view and developed a linear one.<sup>44</sup> The eighteenth century witnesses the emergence of the theory of progress, buttressed by the Scientific Revolution in the sixteenth and seventh centuries, undertaken by such major figures as Copernicus, Galileo, Kepler, and Newton.<sup>45</sup> Scientific discoveries inspire the optimistic view of human capacity and the continuous progress of human condition.<sup>46</sup> The Idea of Progress was theorized by: the French Enlightenment thinkers, such as Anne-Robert-Jacques

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41. Margaret Meek Lange, *Progress*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011).

42. See generally J.B. BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH (1920) (illustrating the long and complex history and conception of progress); ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS (1980).

43. Lange, *supra* note 41.

44. *Id.*

45. *Id.*

46. *Id.*

Turgot and Marquis de Condorcet; Scottish Enlightenment thinkers, such as David Hume and Adam Smith; and German Enlightenment thinker Immanuel Kant.<sup>47</sup> Subsequently, inspired by the Industrial Revolution, the Idea of Progress was continually developed in the nineteenth century by prominent thinkers, such as G.W.F. Hegel, Karl Marx, Auguste Comte, John Stuart Mill, and Herbert Spencer.<sup>48</sup> The twentieth century, however, witnesses fatal catastrophes and upheavals, especially the two world wars, which generate the pessimistic view of human affairs and criticism of the Idea of Progress.<sup>49</sup> The Idea of Progress witnesses some return in the twenty first century.<sup>50</sup>

The philosophical Idea of Progress is embodied in constitutional discourse. Many thinkers of progress refer to the constitutional condition for the continuing improvement of human life. For example, Aristotle contends that a city-state with a good constitution is a condition for the realization of human excellence.<sup>51</sup> Later, Hume argues that a free government under the form of republic or “civilized monarchy” is “the only proper nursery for the arts and sciences”<sup>52</sup> because this government “gives rise to [general] LAW . . . From law arises security: From security curiosity: And from curiosity knowledge.”<sup>53</sup> In the same vein, Kant also contends that human faculties can be fully expressed when security is guaranteed, which in turn requires a republican constitution which “is established firstly (a) by principles of the freedom of the members of a society (as human beings); secondly, (b) by principles of everyone’s dependence on a single common system of law (as subjects); and thirdly (c) by the law of their equality (as citizens).”<sup>54</sup> Differently from Kant, Hegel argues for a constitutional monarchy, which ensures free social institutions and free human beings, as the condition for the development of

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47. *Id.*

48. *Id.*

49. *See, e.g.*, AMY ALLEN, *THE END OF PROGRESS: DECOLONIZING THE NORMATIVE FOUNDATIONS OF CRITICAL THEORY* 166–67, 175 (2016).

50. *See, e.g.*, PETER WAGNER, *PROGRESS: A RECONSTRUCTION* 153 (2016); Omid Payrow Shabani, *The Ineliminability of the Idea of Progress*, 51 *J. VALUE INQUIRY* 663 (2017).

51. Lange, *supra* note 41.

52. DAVID HUME, *ESSAYS, MORAL, POLITICAL, AND LITERARY* 119 (Eugene F. Miller ed., 1987).

53. *Id.* at 118.

54. IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795).

the Spirit or the self-realization of spiritual dimension.<sup>55</sup>

The second foundation for progressive constitutionalism is textual. More specifically, the US Constitution is normally considered a liberal document, but Article 1, Section 8 of the charter is an unusual example of the competing progressive constitutional model. It provides that “The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>56</sup> It explicitly references to “Progress.” It touches on “Science and useful Arts”, important determinants of human progress. It designates “the Congress”, not courts, as the political mechanism to exercise progressive policy. Finally, through the language of “promote”, it does not constrain but defines the positive role of the government in pursuing progressive policy.

The third base of progressive constitutionalism is the social movement called *Progressivism* (or the Progressive Movement). This social movement lasting from the 1890s to the 1920s in the United States, which mobilized for improvement of the living condition of the people by reforms to eliminate social problems engendered by urbanization, industrialization, and government corruption.<sup>57</sup> An expert on this social movement summarizes its multiple dimensions in these words:

In the history of American society and politics, ‘Progressivism’ was a many-sided reform movement that emerged in the final years of the nineteenth century, flourished from about 1900 to 1920, and faded away by the early 1920s. In national politics, its greatest achievements occurred between 1910 and 1917. In state and local politics and in private reform efforts—churches, settlement houses, campaigns to fight diseases, for example—Progressive changes began appearing in the 1890s and continued into the 1920s. In these social-justice efforts, legions of activist women, despite lacking the suffrage, were enormously effective.<sup>58</sup>

With these bases, prominent American constitutional scholars, such as Jack Balkin, Vicki Jackson, Frank Michelman, Reva Siegel, and Mark Tushnet have theorized normatively and positively “progressive constitutionalism” as opposed to liberal,

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55. Lange, *supra* note 41.

56. U.S. CONST. art. I, § 8.

57. For an overview of this movement, *see generally*, WALTER NUGENT, PROGRESSIVISM: A VERY SHORT INTRODUCTION (2010).

58. *Id.* at 1.



judicial constitutionalism.<sup>59</sup> Tushnet argues that progressive constitutionalism aims at “improving the material conditions of those existing under material conditions of existence that place them in positions of reasonably severe deprivation.”<sup>60</sup> More recently, the reelection of Barack Obama to the U.S. presidency in 2012 provides the “benchmarks” for the American constitutional retrospective discourse on Progressivism which was put forward a century before that as the “national agenda” in the 1912 presidential campaign.<sup>61</sup>

Progressive constitutionalism resonates with the philosophical theories of progress in that constitutional condition is necessary for the wellbeing of human life.<sup>62</sup> Progressive constitutionalism articulates distinctive arguments about the political mechanisms which allow the people to have a say in the process of enforcement of progressive constitutional values. However, the American theories of progressive constitutionalism have a narrow focus. These theories are almost reducible to the theories of constitutional interpretation or informal constitutional change, and have not addressed the question of how formal constitutional change, including constitutional amendment, addresses progressive goals.

Formal constitutional amendment is a part of reforms to improve human condition.<sup>63</sup> This type of constitutional amendment can be called progressive amendment, defined as incremental change to the original constitution to facilitate democratic service of material needs of deprived individuals.

The *condition* of progressive amendments is the context of socio-economic problems which play certain groups of individuals in positions of deprivation, such as poverty, unemployment, crimes, migration, gap between the rich and the

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59. See *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009), for a collection of their essays on progressive constitutionalism.

60. Mark Tushnet, *Progressive Constitutionalism: What is “It”?*, 72 *OHIO ST. L.J.* 1073, 1073 (2011).

61. Stephen Skowronek & Stephen M. Engel, *The Progressives’ Century*, in *THE PROGRESSIVES’ CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 2* (Stephen Skowronek et al. eds., 2016).

62. See Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 *OHIO ST. L.J.* 1159, 1162–64 (2011), for an engagement with the Idea of Progress.

63. See, e.g., Arun Thiruvengadam & Gedion Hessebon, *Constitutionalism and Impoverishment: A Complex Dynamic*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 153, 161 (Michel Rosenfeld & András Sajó eds., 2012).

poor, and government corruption. These problems are often caused by urbanization, industrialization, and favoritism. The condition of the American society in the late nineteenth century and early twentieth century that informs and inspires the theories of progressive constitutionalism resonates in many current societies where the people are struggling for the improvement of their living condition by reforms, including constitutional amendments, to address similar problems, such as unemployment, crimes, public education, medicine, the backwardness in science and technology, caused by similar factors, such as urbanization, industrialization, and favoritism.<sup>64</sup> These objective conditions must be accompanied by the political will to carry out constitutional amendments to address these problems.

The *scale* of progressive amendments is large and concerns constitutional ideals, principles, and rules associated with social and economic conditions of deprived community. At the philosophical level, this model of amendment is shaped by a cogitative framework variously associated with progressivism, socialism, or communitarianism. Different from liberalism, these three models of thinking support the active role of a government in pursuing collective social welfare, although they have different assumptions and constitutional proposals.<sup>65</sup> With this intellectual foundation, the amendments may introduce new principles and rules empowering both the government and the underprivileged individuals. Especially, the second generation of rights (social, economic, cultural rights) are the main scope of progressive amendments mainly because these rights naturally entail the government's positive duties to improve the living standard of local residents by issuing corresponding progressive policy. In addition, these amendments may include the third generation of rights, particularly the rights of vulnerable and marginalized groups.

The *pace* of progressive amendments is incremental. This pace stems from the aspirational nature of progressive

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64. See generally U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2016: HUMAN DEVELOPMENT FOR EVERYONE, at 5–7, U.N. Sales No. E.16.III.B.1 (2016).

65. See BEAU BRESLIN, THE COMMUNITARIAN CONSTITUTION 32–33 (2004). See generally RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION 35–35 (2014), for more on the difference between progressive and liberal thinking on the constitution in the context of the United States; David Miller, *In What Sense Must Socialism be Communitarian?*, 6 SOC. PHIL. & POL'Y 51, 51–53, 60 (1989), for a further discussion on socialism and communitarianism.

amendments. These amendments may include substances that the government cannot achieve immediately, but these substances are normative constitutional values, principles, and hopes that a people is committed to and attempt to realize in a long-term future throughout different generations. The initial, progressive amendment may include aspirational provisions which would be gradually realized by generations over time, and new generations would come up with new aspirations that would be supplemented in the constitution, and this generates incremental progressive amendments.<sup>66</sup>

The *function* of the progressive amendments is to facilitate democratic service<sup>67</sup> or the active duties of the government in improving living condition of the deprived people. Different from foundational and constructive amendments, progressive amendments tend enable rather than disable government actions. They channel the government to certain positive duties to address social and economic problems to serve the material needs of local residents.

#### 4. *Retrogressive Amendments*

From UK Brexit and U.S. 2016 election to Hungary's Viktor Orbán, Venezuela's Nicolas Maduro, the Philippines's Rodrigo Duterte and Cambodia's Hun Sen, democracy has been under stress around the world.<sup>68</sup> Political scientists have explored the global regression of democracy.<sup>69</sup> Constitutional change is a part of this regression, leading to the emergence of scholarship on the democracy's decline and authoritarianism's rise in comparative constitutional law.<sup>70</sup>

David Landau theorizes "abusive constitutionalism."<sup>71</sup>

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66. I thank Tushnet for suggesting this idea. E-mail from Mark Tushnet to Bui Ngoc Son (Nov. 3, 2017) (on file with author).

67. See Joseph Raz, *The Problem of Authority: Revising the Service Conception*, 90 MINN. L. REV. 1003, 1012 (2006), for more on the service conception of authority.

68. See also BRIAN KLAAS, *THE DESPOT'S ACCOMPLICE: HOW THE WEST IS AIDING AND ABETTING THE DECLINE OF DEMOCRACY* (2016).

69. See FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* 5 (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 7–10 (2018); MOUNK, *supra* note 13, at 25.

70. See, e.g., CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber et al. eds., 2018); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Symposium, *The Limit of Constitutionalism: Global Perspective*, 85 U. CHI. L. REV. 239 (2018).

71. David Landau, *Abusive Constitutionalism*, 47 U.C.D. L. REV. 189, 260

Abusive constitutionalism is defined as “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.”<sup>72</sup> Constitutional amendment and constitutional replacement are mechanisms of abusive constitutionalism.<sup>73</sup> For example, Colombia’s Constitution was amended to allow President Álvaro Uribe Vélez a second term in office.<sup>74</sup> In Venezuela, a new constitution enacted by President Hugo Chavez in 1999 “abolished the single four-year presidential term-limit found in the existing constitution and replaced it with an allowance of two terms of six years each, effectively allowing Chavez to stay in power for twelve more years.”<sup>75</sup> In Hungary, abusive constitutionalism was effectuated by both amendment and replacement: a series of constitutional amendments and the enactment of a new constitution weakened the institutions (e.g. the Constitutional Court) that check parliamentary majorities.<sup>76</sup>

In a recent important contribution, Aziz Z. Huq and Tom Ginsburg identified two forms of constitutional regress, namely *authoritarian reversion* and *constitutional retrogression*.<sup>77</sup> The reversive form (e.g. Thailand, Mali, and Mauritania) refers to “a wholesale, rapid collapse into authoritarianism”, while the retrogressive form (e.g. Hungary and Poland) is a subtler idea “to capture a more incremental (but ultimately substantial) decay in three basic predicates of democracy—competitive elections, liberal rights to speech and association, and the adjudicative and administrative rule of law necessary for democratic choice to thrive.”<sup>78</sup>

The concept of retrogressive amendments is theoretically built on the above accounts of abusive constitutionalism and constitutional regress. Amendment is used in a retrogressive form of constitutional regress. *Retrogressive amendment refers to incremental constitutional change to facilitate democratic erosion.*

The *condition* of retrogressive amendments is “substantive

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(2013).

72. *Id.* at 195.

73. *Id.*

74. *Id.* at 200–03.

75. *Id.* at 203–07.

76. *Id.* at 208–09.

77. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 83–84 (2018).

78. *Id.* at 83, 92–94.

negative [political] change.”<sup>79</sup> These objective conditions include, for example, *coup d'état*, the election of would-be authoritarians, or dissolution of an opposition party, which open the window of opportunity for would-be authoritarians to employ the tool of constitutional amendments to underline democratic institutions. These objective conditions must be accompanied by the subjective willing of political leaders of authoritarian inclination to use the amendment tool to consolidate their powers.

The *scale* of retrogressive amendments is large and includes ideals, principles, and rules against a democracy. These amendments are often underpinned by the ideal/ideology associated with populism. Landau points out that “If populism is defined as an ideology that divides the world into two antagonistic groups, a ‘pure people’ represented by the populist leaders and a ‘corrupt elite’ against whom they struggle, then there is a relationship between populist ideology and large-scale constitutional change that will refound the political and social order.”<sup>80</sup> Populism justifies large-scale amendments that undermine core principles and institutions, such as free elections, political freedom, and the rule of law essential to the health of a democracy.

The *pace* of retrogressive amendments is incremental. Would-be authoritarian leaders introduce series of amendments rather than adopting a comprehensive amendment package.<sup>81</sup> This gradual, slow, but ultimately consequential move of retrogressive amendment is due mainly to the lack of social and political consensus on constitutional change. Opposition parties and society may oppose a deconstructive overhaul of the constitutional democratic system all at once. To avoid political and social antagonism, would-be authoritarians adopt a subtle strategy: amending the constitution serially. This strategy is only possible when would-be authoritarian leaders are able to control political power thanks to electoral markets or institutional functions: they are able to dominate the decision-making platform (e.g. the legislature) and control mass media to limit popular opposition.

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79. *See id.* at 97.

80. David Landau, *Populist Constitutions*, 85 U. CHI. L. REV. 521, 522 (2018).

81. Retrogressive amendments can be paradigmatic, as was the case in Turkey in 2017, but this is another type of amendment. *See id.* at 522–533, for more on this type of amendment.

The *function* of retrogressive amendments is to erode democratic institutions and consolidate elite power over time. “Populist projects of constitutional change tend to consolidate the power of incumbents, erode the separation of powers, and weaken protections for minority or opposition groups.”<sup>82</sup> The retrogressive amendments remove or weaken principles and institutions designed to limit arbitrary power. At the same time, they limit political freedom of individuals to enhance political leaders’ power.

**Figure 1: Four Amendment Models**

Elements	Foundational	Constructive	Progressive	Retrogressive
<i>Condition</i>	War ended, revolution ended, state-founding, regime change.	Regime change and other radical political changes	Socio-economic problems: e.g. poverty, inequality, government corruption	Negative political events: e.g. election of would-be authoritarians, <i>coup d'état</i> , opposition party dissolution
<i>Scale</i>	Liberalism Democratic principles (representative, separation of powers) First generation of rights	Liberalism, neo-liberalism Democratic principles (representative, separation of powers, constitutional review) First and second generation of rights	Progressivism, socialism, communitarianism Regulatory Government Second and third generation of rights	Populism, nationalism Unlimited government Limited rights
<i>Pace</i>	Paradigmatic (rapid)	Incremental (slow)	Incremental (slow)	Incremental (slow)
<i>Function</i>	Democratic founding	Democratic transformation	Democratic service	Democratic erosion

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82. *Id.* at 532.

## II. AMERICAN EXPERIENCE

This section exemplifies the above four amendment models through the American experience: the Articles of Confederation and the Bill of Rights as foundational amendments, the Reconstruction Amendments as constructive amendments, the 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> Amendments as progressive amendments, and the potential risk of retrogressive constitutional amendments after the 2016 election.

### A. Foundational Amendment: Amending the Articles of Confederation and the Bill of Rights

The 1777 Articles of Confederation is considered “the first national constitution of the United States.”<sup>83</sup> Pursuant to the instructions of the Continental Congress, the state delegates would gather in the Philadelphia Convention to revise the Articles, not to make a new constitution.<sup>84</sup> According to the Report of Proceedings in Congress,

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.<sup>85</sup>

Formally, the process of constitutional change went far away from the original plan, and the 1787 Constitution was adopted beyond the procedures created by the Articles. Richard Albert points out that: “The Continental Congress neither approved nor disapproved the draft constitution that the Convention later sent to it . . . Nor did the states ultimately

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83. Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 *PUBLIUS* 55, 57 (1990).

84. Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 *CORNELL INT’L L.J.* 169, 174 (2017).

85. REPORT OF PROCEEDINGS IN CONGRESS: FEBRUARY 21, 1787, 32 *JOURNALS OF THE CONTINENTAL CONG.* 71, as published on YALE LAW SCH.: LILLIAN GOLDMAN LAW LIBRARY, [https://avalon.law.yale.edu/18th\\_century/const04.asp#1](https://avalon.law.yale.edu/18th_century/const04.asp#1).

approve the new constitution by unanimous agreement; the new constitution became effective when, as indicated in the text of the proposed constitution, nine out of the thirteen states approved it.”<sup>86</sup> But, functionally, as Donald S. Lutz indicates, “a textual analysis reveal extent to which the 1787 Constitution was a logical extension of the Articles of Confederation. Most of the Articles were incorporated in the U.S. Constitution, and several key changes in the later document were present in embryo in the Articles of Confederation.”<sup>87</sup> The U.S. 1787 Constitution is, therefore, the continuity of a constitutional project to found a democratic constitutional order. It can be considered a foundational amendment to the Articles of Confederation.

Together with the Declaration of Independence of 1776 and the Philadelphia Constitution of 1787, the Bill of Rights of 1791 is considered a “founding” document of the United States.<sup>88</sup> The Bill of Rights are the first ten amendments to the Philadelphia Constitution, adopted according to the amendment process created by the original Constitution. The Bill of Rights is a response to the demands of Anti-Federalists in the controversial debates over constitutional ratification. Alexander Hamilton, one of the founding fathers of the United States, in response to the call for a bill of rights, stressed that the original Constitution is itself a bill of rights as the structural arrangement is designed to protect rights.<sup>89</sup> Akhil Reed Amar argues the other way around, namely that the Bill of Rights is itself a Constitution as it is “a document attentive to structure, focused on the ‘agency’ problem of government, and rooted in the sovereignty of We the People of the United States.”<sup>90</sup> Amar argues that “[a] close look at the Bill reveals structural ideas tightly interconnected with language of rights; states’ rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous electorate. The main thrust of the Bill was not to downplay organizational structure, but to

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86. Albert, *supra* note 84, at 175.

87. Lutz, *supra* note 83, at 66–67.

88. *America’s Founding Documents*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/constitution> (last visited Sept. 17, 2020).

89. THE FEDERALIST NO. 84, at 581 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

90. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1205 (1991).



deploy it; not to impede popular majorities, but to empower them.”<sup>91</sup> So, the Bill of Rights is not only about rights as its name suggests. Adopted at the founding moment, the Bill of Rights necessarily addresses crucial structural and rights issues foundational to the creation of a new democratic constitutional polity. The first ten amendments bear a foundational significance similar the Philadelphia charter: they all address fundamental structural and rights issues that define the nature of a constitutional democracy. The Bill of Rights continues the constitutional project to found a liberal democracy. It can be considered a foundational amendment to the 1787 Constitution.

Altogether, the 1787 Constitution and the Bill of Rights can be conceptualized as foundational amendments: they introduced big bang change which altered underlying ideals, principles, and rules of the original constitutions to facilitate democratic founding.

The *condition* of state-founding opened the window of opportunity for the foundational amendments. Uncertainty in the early stage of state-founding after independence from the British colonist rule rendered the adoption of the first constitution (the Articles of Confederation) transient, which created the condition for subsequent foundational constitutional change. At the founding moment, the foundational amendments, albeit fundamental change, did not completely disconnect with but continued the initial constitutional project to create a democracy for the United States. This explains the textual continuity between the 1787 Constitution and the Articles of Federation, and the structural continuity between the Bill of Rights and the 1787 Constitution.

The *large scale* of the foundational amendments includes extensive ideals, principles, and rules associated with Enlightenment liberalism.<sup>92</sup> The ideal of “Liberty” is expressed in the constitutional preamble,<sup>93</sup> embodied in the unwritten constitutional principles of rule of law, separation of powers and checks and balances,<sup>94</sup> and inform specific rules on institutional

91. *Id.* at 1132.

92. H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 1–2 (1993) (“[T]he United States is almost purely the product of Enlightenment thought and liberal political action.”).

93. U.S. CONST. pmb1.

94. See AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012) (exploring these principles as unwritten constitutional principles). *But see* David A. Strauss, *Not Unwritten, After All?*, 126 HARV. L. REV. 1532 (2013) (discussing the unwritten

authorities and individuals' rights. The *pace* of foundational amendments is paradigmatic. Fundamental constitutional changes are adopted all at once. This "Big Bang" change is possible mainly because the Federalists (led by Alexander Hamilton, James Madison, John Jay, John Marshall, James Wilson, John Dickinson, and Roger Sherman) and the Anti-Federalists (led by Patrick Henry, George Mason, Richard Henry Lee, James Monroe, John Hancock, Samuel Adams, Elbridge Gerry, George Clinton, Willie Jones, and Melancton Smith) eventually reached into a consensus (the Massachusetts Compromise) after long debate.<sup>95</sup> The function of the foundational amendments is to facilitate democratic founding. The 1787 Constitution and the Bill of Rights provides a fundamental institutional framework for the creation of a liberal democracy for the United States.

#### B. Constructive Amendment: The Reconstruction Amendments

The U.S. Reconstruction Amendments (or Civil War Amendments) are a series of the Thirteenth, Fourteenth, and Fifteenth Amendments adopted between 1865 and 1870, the five years after the Civil War.<sup>96</sup> The Thirteenth Amendment abolishes slavery;<sup>97</sup> the Fourteenth Amendment protects citizenship rights and equal protection of the laws;<sup>98</sup> and the Fifteenth Amendment ensures that the right to vote could not be denied on the basis of "race, color, or previous condition of servitude."<sup>99</sup> Teitel argues that

[T]he Reconstruction Amendments appear highly backward-looking, as they normatively structure the constitutional status of the confederate secession. The Amendments respond to the evil of slavery by imposing new obligations on the Southern States; only by affirming the principle of equality under law, could states reenter the Union

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constitutional principles in a critical light).

95. Richard B. Bernstein, *Ratification of the Constitution*, in THE READER'S COMPANION TO AMERICAN HISTORY (2004).

96. See generally 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1991), for further information on these amendments.

97. U.S. CONST. amend. XIII, § 1.

98. *Id.* amend. XIV, § 1.

99. *Id.* amend. XV, § 1.

and be equally represented in Congress.<sup>100</sup>

The Reconstruction Amendments can be conceptualized as constructive amendments. They were shaped by the *condition* of post-civil war which struggled for transforming the Union by ending secession, slavery, and consolidating civil rights. These *large-scale* amendments realized the ideals of Liberty committed at founding moment by incorporating fundamental rules to extend political freedom to entire citizens. The *pace* of these constructive amendments is incremental. The amendments were adopted serially in different events. This incremental pace of amendments is due mainly to “an unavoidable political compromise.”<sup>101</sup> In the turmoil of Reconstruction, the lack of a centralized power and social and political consensus prevented the enactment of a comprehensive package of constitutional change. Therefore, constitutional dealing with the remnants of the Civil War in an incremental mode is understandable.

The *function* of the Reconstruction Amendments is to facilitate democratic transformation in the United States. David A. Strauss argues that the Reconstruction Amendments “made relatively little difference when they were adopted; the changes they prescribed came about only when society itself changed.”<sup>102</sup> Other scholars “conceptualize these three amendments as constituting a new regime, a new order, or a new constitution.”<sup>103</sup> I contend that the function of these amendments can be conceptualized in constructive terms. These amendments may not change the society immediately. They were constructed of the changing society, but once entrenched overtime they were constructive to the continuing transformation of society toward democratic direction. They provided the firm constitutional commitments upon which the society struggled for democratic transformation and consolidation. To illustrate, as Jack M. Balkin and Sanford Levinson point out, many social movements after the Civil War mobilized for realizing the Reconstruction Amendments’ commitments to equal citizenship and equal rights.<sup>104</sup>

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100. Teitel, *supra* note **Error! Bookmark not defined.**, at 2074.

101. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 410 (2001).

102. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1479 (2001).

103. Albert, *supra* note 6, at 5.

104. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1100 (2001).

One may doubt that the Civil War Amendments are constructive rather than progressive. These amendments protect the civil and political rights of the deprived individuals but are different from progressive amendments in that they aim to realize ideals associated with classical liberalism and do not promote social rights which entail government's service. As Mark Tushnet states, "[f]or Reconstruction legal thought, government had nothing to do with guaranteeing social rights except to enforce those rights guaranteed by the common law."<sup>105</sup> This differentiates the Reconstruction Amendments (the constructive amendments) from the progressive amendments discussed below.

C. Progressive Amendment: The 16th, 17th, 18th, 19th Amendments

The movement of *Progressivism* has led to the Sixteenth Amendment (February 3, 1913) on income tax, the Seventeenth Amendment on direct election of U.S. Senators (April 8, 1913), the Eighteenth Amendment (August 18, 1920) on prohibition (repealed by the later Twenty-First Amendment), and the Nineteenth amendment (August 18, 1920) on women's suffrage.<sup>106</sup> The amendments of the Progressive Era can be considered progressive amendments: they introduced incremental constitutional change to facilitate democratic service of material needs of the deprived individuals.

The Progressive Movement was the *condition* opening the window of opportunity for the progressive amendments. These amendments try to address the socio-economic problems raised by the Progressive Movement. This was accompanied by the willing and capacity of politicians to fix progressive policy into the Constitution. This political willing and capacity is due to the fact that the Progressive Movement was supported by national leaders, including the "big four": William Jennings Bryan, Theodore Roosevelt, Robert M. La Follette, and Woodrow Wilson.<sup>107</sup>

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105. Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1208 (1992).

106. See Richard Albert, *The Progressive Era of Constitutional Amendment*, 2 REVISTA INVESTIGAÇÕES CONSTITUCIONAIS 35 (2015) (Braz.), for more on constitutional amendments during this era. I thank Yaniv Roznai for suggesting this literature.

107. NUGENT, *supra* note 57, at 1.

The large-scale of the progressive amendments concerns the progressive ideals which stresses the positive role of the government in addressing social issues. American historian William E. Leuchtenburg demonstrates that

The Progressives believed in the Hamiltonian concept of positive government, of a national government directing the destinies of the nation at home and abroad. They had little but contempt for the strict construction of the Constitution by conservative judges, who would restrict the power of the national government to act against social evils and to extend the blessings of democracy to less favored lands. The real enemy was particularism, state rights, limited government . . .<sup>108</sup>

The progressive amendments include rules expressing the Hamiltonian concept of positive government. For example, the Sixteenth Amendment empowers (not limits) the Congress to lay and collect taxes on incomes,<sup>109</sup> by which it promotes the active role of the government in dealing with material issues to improve the living condition: the role “to tax income and fund wealth redistributions directly.”<sup>110</sup> In the same vein, the Seventeenth Amendment removed the state’s control over election of U.S. Senators to promote the expanded role of the federal government in the context of “the increasing nationalization of the economy and the growth of the federal regulatory role.”<sup>111</sup> The Eighteenth Amendment prohibited the sale of alcoholic beverages to alleviate poverty and other social problems.<sup>112</sup> The Nineteenth amendment empowers women to ensure equality.<sup>113</sup>

The pace of the progressive amendments is incremental. The amendments were adopted serially in several events. Akhil Reed Amar states that “The obvious incompleteness and openedness of the Constitution as a perpetual work in progress is thus dramatized by a series of amendments pointing outward toward the horizon, facing the future.”<sup>114</sup> This

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108. William E. Leuchtenburg, *Progressivism and Imperialism: The Progressive Movement and American Foreign Policy, 1898-1916*, 39 *MISS. VALLEY HIST. REV.* 483, 500–01 (1952).

109. U.S. CONST. amend. XVI.

110. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 *FORDHAM L. REV.* 111, 146 (1993).

111. *Id.*

112. U.S. CONST. amend XVIII, § 1.

113. U.S. CONST. amend XIX, § 1.

114. Akhil Reed Amar, *Architecture*, 77 *IND. L.J.* 671, 686 (2002).

observation of incremental constitutional amendments stems from the imperfect nature of the U.S. Constitution. Apart from this, the incremental pace of the amendments is shaped by the imperfect nature of the Progressive Movement: “the lack of a suitable political vehicle, the severity of the tensions that kept progressives apart, the failures of progressives to agree upon a common program, and the absence of a national leadership . . . .”<sup>115</sup> The internal tension, the lack of a common program and a national leader of this social movement prevents the enactment of progressive policy in a comprehensive package of amendments. The partial constitutionalization of the progressives’ demands in several events became more possible in such circumstance.

The *function* of the progressive amendments was to facilitate the positive role of the government in dealing with social issues to improve the material wellbeing of living conditions of the underprivileged individuals, particularly the poor, workers, and women. These amendments reflected the demands of the Progressive Movement and entrenched progressive values at a constitutional level. This partial constitutional entrenchment of progressive values suggests that the U.S. Constitution is not entirely a classical liberal constitution. It embodies both the Madisonian concept of limited government and the Hamiltonian concept of positive government. Thus, from foundational to constructive to progressive amendments, constitutional cacophony emerged in the trajectory of American democracy.

#### D. The Risk of Retrogressive Amendment?

For many political scientists and constitutionalists, the election of Donald Trump to the presidency in 2016 is the manifestation of the regress of constitutional democracy in the United States.<sup>116</sup> The potential risk is whether formal amendment may be used to facilitate the constitutional retrogression. Examples include whether the Twenty-Second Amendment, which imposed term limits on presidency, may be removed by another formal amendment, or whether the proposed constitutional amendments restricting liberal rights

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115. Arthur S. Link, *What Happened to the Progressive Movement in the 1920's?*, 64 AM. HIST. REV. 833, 842 (1959).

116. See, e.g., CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).

(e.g. a proposed amendment to prohibit flag burning) may be passed.<sup>117</sup> Huq and Ginsburg aptly explain that constitutional amendment will not play a significant role in promoting the retrogression of constitutional liberal democracy in the United States.<sup>118</sup> This is in part because such amendment would confront with “constitutional resistance by regime opponents,” in part because Article V of the Constitution establishes extremely difficult procedures for the ratification of amendments.<sup>119</sup>

The recent controversy over birthright citizenship’s protection under the 14th Amendment illustrates the unlikely role of a constitutional amendment undermining constitutional democracy in the United States.<sup>120</sup> President Donald Trump wanted to end birthright citizenship.<sup>121</sup> But, because the amendment process provides a platform for constitutional resistance and because the constitutional amendment ratification process is exceedingly onerous, the President aimed instead to pursue an executive order. Commentators indicate however that this alternative solution is impossible because an executive order cannot change a core value protected by a formal constitutional amendment.<sup>122</sup>

### III. ASIAN EXPERIENCE

This section turns to the four models of constitutional amendment in seven Asian democracies: Japan and South Korea (fundamental amendments); Taiwan and Indonesia (constructive amendments); Singapore and India (progressive amendments); and Cambodia (retrogressive amendments). This exploration is historically specific rather than country-based. Like in the United States, different historical periods give rise

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117. Huq & Ginsburg, *supra* note 77, at 143.

118. *Id.*

119. *Id.*

120. Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>.

121. *Id.*

122. Chris Riotta, *Trump Wants to Use an Executive Order to Override the 14th Amendment: Here’s Why That Won’t Work*, INDEPENDENT (Oct. 20, 2018, 15:54), <https://www.independent.co.uk/news/world/americas/us-politics/birthright-citizenship-14th-amendment-trump-executive-order-immigrants-constitution-a8608836.html>.

to different models of constitutional amendments within each Asian jurisdiction under consideration here. Additionally, in some countries (e.g. India and Singapore), constitutional amendments are extensive, and selective discussions are necessary.

#### A. Foundational Amendment

##### 1. *Japan.*

The 1946 Constitution (effective in 1947), the current constitution of Japan, is considered the foundational document creating democracy in the country.<sup>123</sup> It is normally addressed as “the new constitution.”<sup>124</sup> However, the 1946 Constitution can be conceptualized as foundational amendments to the Meiji Constitution of 1889.

The Meiji Constitution<sup>125</sup> is the first modern constitution in Asia and is modeled after the Prussian Constitution of Germany.<sup>126</sup> It was enacted as a part of the modernization project to deal with the threat of colonialization posted by Western powers.<sup>127</sup> It established a constitutional monarchy: the sovereignty resting on a strong Emperor; the creation of a legislature called Imperial Diet to assist the Emperor in legislation; some mechanisms of separation of powers among the Diet, the ministers, and the Judicature;<sup>128</sup> and the protection of some rights of individuals as subjects (such as the right to property; liberty of speech, writing, publication, public meetings and associations).<sup>129</sup>

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123. See CHAIHARK HAHM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA (2015).

124. KOSEKI SHŌCHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 5 (Ray A. Moore trans., 1998).

125. See generally GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE OLIGARCHS AND THE CONSTITUTIONAL DEVELOPMENT OF JAPAN: 1868-1891 (1957); TAKII KAZUHIRO, THE MEIJI CONSTITUTION: THE JAPANESE EXPERIENCE OF THE WEST AND THE SHAPING OF THE MODERN STATE (2007); G. AKITA, FOUNDATIONS OF CONSTITUTIONAL GOVERNMENT IN MODERN JAPAN: 1868-1900 (1967).

126. SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 9 (2011).

127. *Id.*

128. *Id.* at 9–10.

129. THE CONSTITUTION OF THE EMPIRE OF JAPAN (1889), art. 27, 29.



On August 14, 1945, Japan surrendered and was occupied by the Allied Powers.<sup>130</sup> General Douglas MacArthur arrived in Atsugi on August 30, 1945 to preside over the occupation as the Supreme Commander for the Allied Powers (“SCAP”).<sup>131</sup> “The purpose of the occupation was democratise Japan and to ensure that Japan would never become a threat to the world as a military power.”<sup>132</sup> Therefore, the Proclamation Defining Terms for Japanese Surrender issued, at Potsdam, July 26, 1945, stated that: “The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.”<sup>133</sup> Such democratization entails constitutional change. The occupying forces considered a constitutional amendment to be necessary for Japan’s creation of a constitutional democracy. The agreements made by the State-War-Navy Coordinating Committee included: “1) that Constitutional revision was necessary and desirable in Japan, 2) that the terms of surrender did not preclude the Allies from requiring such revision, and 3) that, while it was preferable that constitutional reforms be initiated by the Japanese, if they refused to do so, the Supreme Commander might ‘as a last resort’ order the effectuation of a specific list of constitutional changes.”<sup>134</sup>

The Japanese government was reluctant to a formal constitutional amendment, believing that informal constitutional change (change to the interpretation of the Meiji Constitution) would be sufficient.<sup>135</sup> But, in response to the pressures put forward by the SCAP, the Japanese government created the Research Committee on Constitutional Issues to study the necessity of formal constitutional amendment.<sup>136</sup> The committee concluded that minor amendments (e.g. expanding the Diet’s power, ministers’ powers, and individual rights) to the

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130. MATSUI, *supra* note 126, at 12–13.

131. *Id.* at 13.

132. *Id.*

133. POTSDAM DECLARATION: PROCLAMATION DEFINING TERMS FOR JAPANESE SURRENDER (July 26, 1945) § 10, *as reprinted in Text of the Constitution and Other Important Documents*, NAT’L DIET LIBRARY, <https://www.ndl.go.jp/constitution/e/etc/c06.html>.

134. Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV., 980, 991 (1956).

135. MATSUI, *supra* note 126, at 14.

136. *Id.* at 14–15.

Meiji Constitution would be adequate.<sup>137</sup> The committee prepared an amendment draft which slightly modified the wording of the Meiji Constitution while retaining the substances of the imperial structure.<sup>138</sup>

The SCAP was not informed of that development, and was dismayed when the amendment draft was published in a newspaper.<sup>139</sup> The SCAP believed that such amendment would fail to meet the purpose of occupation, and hence decided to draft of a new constitution (on the bases of popular sovereignty, war renunciation, and dismantling of feudal structure) and present it to the Japanese government for consideration.<sup>140</sup> The draft was completed in eight days by SCAP's members, and then was sent to the Japanese officials.<sup>141</sup> The latter was appalled by the fact that their amendment draft was rejected and they were now given a new constitution.<sup>142</sup> They tried to convince the SCAP to accept their draft but failed.<sup>143</sup> Fearing that constitution-making might be the topic for the next election which they might lost to the socialists, the leaders of the Japanese government accepted the granted draft as their own draft.<sup>144</sup> The subsequent process of constitutional drafting and approval was conducted according to the amendment rules established by Article 73 of the Meiji Constitution.<sup>145</sup> The amendment bill was submitted to the Privy Council, the Diet, and finally approved by the Emperor on 3 November 1946.<sup>146</sup> Given that the influential role of General MacArthur in the process of constitutional change, the adopted Constitution of 1946 is also called *MacArthur's Japanese Constitution*.<sup>147</sup>

The 1946 Constitution is the *amendments* to the Meiji Constitution. Constitutional change was initiated as a project of constitutional amendments. The 1946 Constitution was adopted according to the constitutional amendment procedure established by the Meiji Constitution. Especially, it was adopted

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137. *Id.* at 14.

138. *Id.*

139. *Id.*

140. *Id.* at 14–15.

141. *Id.* at 15.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See generally KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* (1991).

as an amendment bill rather a new constitution. There was no new constitution made by the constituent power by “we the people”. Rather, constitutional change was effectuated by external power and institutionalized by internal imperial power according to the existing amendment rules. The Constitution, is therefore, started with the Emperor’s imperial edict, which considers it as amendments to the Meiji Constitution:

“I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said Constitution.”<sup>148</sup>

The 1946 Constitution is the *foundational* amendments to the Meiji Constitution. It introduced paradigmatic changes to the Meiji Constitution all at once to facilitate the immediate creation of a democratic system in post-war Japan. The condition of the end of World War II and the Allied Powers’ occupation of Japan opened the window of opportunity for the foundational amendments to the Meiji Constitution. As mentioned above, the Allied Powers considered the creation of democracy essential for Japan not to become a threat to the world as a military power. This project of democratic founding requires fundamental changes to the Meiji Constitution which was considered the institutional cause of Japan’s aggressive military power during the World War II: the Meiji Constitution concentrated political powers to a small group of political leaders responsible the emperor rather than the people, and such group was dominated by military since 1930 to the end of the War.<sup>149</sup> To democratize Japan, therefore, entailed fundamental changes to this Constitution to create a limited government accountable to the people.

Consequently, the *large-scale* of foundational amendments concerns liberal ideals of limited government and political freedom of individuals. Due to MacArthur’s influence, the 1946 Constitution of Japan adopted a comprehensive package of liberal constitutional principles and institutions similar to American liberal constitutionalism: popular sovereignty, separation of powers, individualism and protection of

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148. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], (Japan).

149. *Bringing Democracy to Japan*, CONSTITUTIONAL RIGHTS FOUND., <https://www.crf-usa.org/election-central/bringing-democracy-to-japan.html>.

fundamental human rights, and the Marshallian model of judicial review.<sup>150</sup> In addition, it incorporated the unique pacific clause in Article 9 renouncing war. The liberal constitutional framework and the constitutional entrenchment of pacifism is consistent with Allied Powers' concern: to democratize Japan and to ensure that Japan will not become a threat to the world as a military power.

The *pace* of the foundational amendments is paradigmatic. The 1946 Constitution was quickly adopted and introduced foundational changes all at once to the Meiji Constitution. This was possible since the occupying forces could centralize political power and control the amendment process. As stated in a memo published by MacArthur's staff on February 1, 1946, "The Supreme Commander in Japan has unrestricted authority to take any action you deem proper in effecting change in the Japanese constitutional structure."<sup>151</sup> Particularly, the adoption of a sweeping comprehensive package of constitutional amendments was possible "given MacArthur's control over the constitutional deliberation process in both chambers of the Japanese parliament."<sup>152</sup> Uncertainty is the key factor explaining this big-bang constitutional amendments. Informed by Japanese experience in the War, the occupation force was unsure about its power in future, and hence prescribed a comprehensive constitutional framework to lock the country in democratic directions.<sup>153</sup> Domestically, as mentioned above, the existing political leaders of the Japanese government were uncertain about the power and future influence: they may lose power to the socialists in the future election. Therefore, they were willing to support a comprehensive constitutional locking of the country in a democracy to ensure that the democratic constitutional framework would not be reversed by the socialists

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150. See Yasuhiro Okudaria, *Forty Years of the Constitution and Its Various Influences: Japanese, American and European*, 53 L. & CONTEMP. PROBS. 17, 22 (1990) (discussing "three aspects of significant American influence on the 1947 Constitution: the ideas of democracy, individual rights, and judicial review"); Ward, *supra* note 134, at 1008 (discussing "the essentially American origins of the present Japanese constitution").

151. Axel Berkofsky, *Japan's US-Imposed' Post War Constitution: How, Why, and What For?*, in ITALY AND JAPAN: HOW SIMILAR ARE THEY? 67, 79–80 (Silvio Beretta et al. eds., 2014) (quoting Memorandum from Gen. Douglas MacArthur (Feb. 1, 1946)).

152. *Id.* at 81.

153. See generally Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707 (2006), for more on the theory of locking in democracy through constitutional design.

if they won the future election.

The *function* of the 1946 Constitution, the foundational amendments, is to facilitate the immediate creation of a democracy in Japan. The charter, however, was not a completely new constitutional beginning. It facilitated quick democratic creation while dealing with constitutional past. Chaihark Hahm and Sung Ho Kim observe that “Even for the occupation, the past was not merely an object of repudiation and renunciation. In order to establish a new democratic polity, the Constitution had to be seen as somehow connected to, and drawing from, certain principles, if not precedents, in the nation’s history.”<sup>154</sup> To illustrate, the Far Eastern Commission’s “Criteria for the Adoption of a New Japanese Constitution” ensured that “complete legal continuity from the Constitution of 1889 to the new Constitution be assured.”<sup>155</sup> One example of this constitutional continuity is the retaining of the emperorship, conceived as Japan’s ‘national character’ (*kokutai*).<sup>156</sup> But, the Meiji Constitution already included some values of a constitutional democracy (representative institutions and fundamental rights) which were then continued by the 1946 Constitution. The Constitution, therefore, continued the constitutional project to create a democratic polity in Japan.

Altogether in consideration, Japan’s foundational amendments aim to maintain both procedural and substantive constitutional continuity. Procedurally, the foundational amendments – the 1946 Constitution - were adopted according to the procedure prescribed by the original Meiji Constitution. Substantively, the amendments continued several institutions of the Meiji constitution. What accounts for this constitutional continuity? This constitutional continuity legitimatizes the foundational amendments. In an influential article, Harvard law professor Richard H. Jr. Fallon distinguishes the legal and sociological concepts of constitutional legitimacy: “When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal

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154. Chaihark Hahm & Sung Ho Kim, *To Make We the People: Constitutional Founding in Postwar Japan and South Korea*, 8 INT’L J. CONST. L. 800, 826 (2010).

155. *Far Eastern Commission Request for Consultation on Japanese Constitution*, NAT’L DIET LIBR., <https://www.ndl.go.jp/constitution/e/shiryo/03/098shoshi.html> (last updated May 3, 2004).

156. Berkofsky, *supra* note 151, at 85.

authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience.”<sup>157</sup> Measured by legal standards, the legal foundation of the 1946 Constitution’s legitimacy was considerably weak since it was imposed by external power rather than enacted by “we, the Japanese people” as its preamble claims.<sup>158</sup> The Constitution, therefore, must depend on the alternative source of legitimacy: the social acceptance and respect. Constitutional continuity is crucial to the sociological foundation of the Constitution. Procedural and substantive continuity of the legacies of the country’s first constitution which was associated with the glorified Meiji Restoration and the national character (the emperor) could render the foundational constitutional amendments accepted and respected by the Japanese people.

The foundational amendments have important implications for understanding constitutional dynamics in contemporary Japan. The 1946 Constitution remains in effect in today’s Japan without any amendments, despite the occasional calls for amendments.<sup>159</sup> Particularly, Article 9 constitutionalizing pacifism has recently been the subject for controversial debate on constitutional amendments.<sup>160</sup> Faced with security threats from North Korea, Japanese Prime Minister Shinzo Abe pursued the goal to amend this Article in 2020 to allow Japan to send troops overseas<sup>161</sup> but has abandoned this goal due to scandals and oppositions.<sup>162</sup> The Abe government, however, sought to amend the Article informally by reinterpreting it to allow Japan to engage in “collective self-defense,” leading to the “constitutional moment” à la Ackerman’s model which “has in

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157. Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005).

158. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], pmbl (Japan).

159. LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN: 1970 THROUGH 1990* (1996).

160. See Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the “Reinterpretation” of Japan’s War Powers*, 40 FORDHAM INT’L L.J. 427 (2017).

161. Motoko Rich, *Shinzo Abe Announces Plan to Revise Japan’s Pacifist Constitution*, N.Y. TIMES (May 3, 2017), <https://www.nytimes.com/2017/05/03/world/asia/japan-constitution-shinzo-abe-military.html>.

162. Shuhei Endo, *PM Abe Abandons Bid to Revise Constitution in 2020 due to Deadlock Over Scandals*, MAINICHI NEWSPAPERS (Dec. 7, 2019), <https://mainichi.jp/english/articles/20191207/p2a/00m/0na/004000c>. Shuhei Endo, *PM Abe Abandons Bid to Revise Constitution in 2020 due to Deadlock Over Scandals*, MAINICHI NEWSPAPERS (Dec. 7, 2019), <https://mainichi.jp/english/articles/20191207/p2a/00m/0na/004000c>.

fact involved quite broad-ranging debate and engagement on the part of civil society.”<sup>163</sup> This dynamics indicates that the continued commitment to pacifism at the foundational moment has a lasting impact on the development of constitutional order in contemporary Japan. In addition, the constitutional moment could occur in Japan mainly due to democratic institutions created by the foundational amendments. Particularly, the amendments’ entrenchment of political freedom enables the civil society to engage in protection of democratic and peaceful values.

## 2. *South Korea*

South Korea can be considered to have two foundational constitutional experiences: the foundational constitution of 1948; and the foundational constitutional amendment of 1987. This part demonstrates that the 1987 constitutional change is, in fact, foundational amendments to the original 1948 Constitution.

Background introduction to the original text is useful. The Korean peninsula was annexed to Japan in 1910, but Japan’s surrender in August 1945 created the condition for constitution-making in Korea.<sup>164</sup> By 1948, the Korean peninsula was divided into the North and the South, and governments in both sided engaged in constitution-making.<sup>165</sup> The North Korea’s Constitution modelled after Stalin Constitution of the Union of Soviet Socialist Republics of 1936, while the South Korea’s Constitution was influenced by the German Weimar Constitution.<sup>166</sup> The 1948 Constitution of South Korea embodied “liberal democratic values, in particular the Western democratic form of government, and fundamental human rights. It consisted of provisions for the protection of human rights and freedoms, balance of powers, a unicameral legislative system, a presidential pattern of government, and a controlled economy.”<sup>167</sup>

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163. Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments: A Reflection on the Japanese Article 9 Debate*, 67 AM. J. COMP. L. 145, 146 (2019).

164. Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 NAT’L TAIWAN U. L. REV. 111, 119 (2009).

165. Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 818 (2011).

166. Tscholsu Kim, *Comparison of the Constitution of South and North Korea: Prospects for a Constitution for a Unified Korea*, 10 KOREAN J. COMP. L. 1, 2–3 (1982).

167. Han-Key Lee, *Constitutional Developments in South Korea*, 4 H.K. L.J.

The 1948 Constitution experienced eight amendments before the foundational amendment occurred in 1987.<sup>168</sup> The first amendment in 1952 provided for direct presidential election to facilitate President Syngman Rhee's remaining in power. The original Constitution stipulated indirect election of president by the National Assembly. In 1952, the National Assembly was controlled by political parties which opposed President Rhee. The President, therefore, managed to amend the constitution to allow for popular election. National Assembly adopted the amendment under the middle of martial law declared by the President. Rhee was reelected to the presidency. The second amendment was passed in 1954 to allow President Rhee to enjoy unlimited term. The fall of the Rhee government led to the third amendment in 1960, which changed the government type from presidential to parliamentary system. The fourth amendment was introduced in the same year to deal with retroactive punishment. After a coup, the fifth amendment was ratified in a referendum, which reinstated the presidential system. The sixth amendment was clandestinely adopted at midnight in 1969 to allow President Park Chung-hee to enjoy the third term. President Park was successful in pursuing another (seventh) amendment in 1972, which provided for unlimited presidential term, authorized the president to override other political branches, and imposed restrictions on individual rights. Park was assassinated in 1979, and the new military government introduced the eighth constitutional amendment in 1980, which removed some shortcomings created by the previous amendments but still vastly consolidated the presidential power: e.g., presidential seven-year term can be extended by constitutional amendment given the change is conducted when the president is incumbent.<sup>169</sup>

Several observations can be drawn from these eight amendments. First, constitutional amendment was relatively easy. The constitutional flexibility may be due to the easy process of constitutional amendment provided by the 1948 Constitution (two-third legislative vote)<sup>170</sup>, but this is mainly

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41, 42 (1974).

168. See generally JUSTINE GUICHARD, REGIME TRANSITION AND THE JUDICIAL POLITICS OF ENMITY: DEMOCRATIC INCLUSION AND EXCLUSION IN SOUTH KOREAN CONSTITUTIONAL JUSTICE 24 (2016).

169. See generally Dae-kyu Yoon, *New Developments in Korean Constitutionalism: Changes and Prospects*, 4 PAC. RIM L. & POL'Y J. 395, 400–42 (1995) (briefing the first eight constitutional amendments).

170. 1948 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (July 17,



because of the instability of the political regimes. Coups, assassination, and regime change indisputably entailed often formal constitutional change. Second, the eight amendments were animated not by popular demands but by authoritarian impulses.<sup>171</sup> The amendments respond to the top-down demands of political elites in consolidating their authoritarian powers through constitutional means. This explained why most of the amendments focused on removing or weakening limiting institutions. Third, radical constitutional amendment was seemingly South Korea's amendment culture and history: several amendments changed the government type. Finally, despite radical amendments, textual continuity was maintained: the amendments were introduced in the original Constitution of 1948 rather than replaced it.

The constitutional amendments in 1987 were very different from the previous amendments. These amendments were introduced after the June Democracy Movement in 1987, in which the mass demonstrated against the military government and called for elections, democratic reforms, and constitutional amendment.<sup>172</sup> The 1987 amendments are unusual in South Korean constitutional history in the sense that they were a response to the popular demand and the "result of a relatively unrestricted collaboration between the government and the opposition."<sup>173</sup> The amendments were the consequence of the negotiation between governing Democratic Justice Party (DJP) presenting the government and the opposition Reunification of Democratic Party (RDP) presenting the pro-democracy movement.<sup>174</sup> Procedurally, the amendments were undertaken "according to the procedures provided by the existing constitution."<sup>175</sup> The amended constitution was ratified in a national referendum with 78.2% turnout and 93.1% approval.<sup>176</sup> The proposals of the two sides and the compromises are summarized in the following table:

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1948), art. 48, 128–130 (S. Kor.).

171. Yoon, *supra* note 169, at 403.

172. See Chulhee Chung, *Mesomobilization and the June Uprising: Strategic and Cultural Integration in Pro-Democracy Movements in South Korea*, in *EAST ASIAN SOCIAL MOVEMENT: POWERS, PROTEST, AND CHANGE IN A DYNAMIC REGION* 157 (Jeffrey Broadbent & Vicky Brockman eds., 2011).

173. Yoon, *supra* note 169, at 402.

174. Jung-Kwan Cho, *The Politics of Constitution-Making During the 1987 Democratic Transition in South Korea*, 35 *KOREA OBSERVER* 171, 183 (2004).

175. Yoon, *supra* note 169, at 402.

176. GUICHARD, *supra* note 168, at 28.

**Figure 2: Constitutional Proposals on Political Institutions**<sup>177</sup>

Item	Fifth Republic Constitution	Governing DJP Proposal	Opposition RDP Proposal	New Constitution After Compromise
<b>President</b>				
Tenure	7 years, single	6 years, single	4 years, allowed	5 years, single
Candidate Qualification	5 year residence before election	5 year residence before election	one re-election	Remove the provision
Vice-President	No	No	Remove the provision	No change
Dissolution of Assembly	Yes	Yes	Yes	No
<b>Assembly</b>				
Right to Audit Governmental Affairs	No (instead Assembly has limited rights to investigation)	Yes, but limited by law	Yes, unlimited	Yes, unlimited
<b>Judiciary</b>				
Appointment of Chief Justice of Supreme Court	Presidential Appointment by Assembly Consent	No Change	Presidential appointment with Assembly consent upon judges' council recommendation	No change
Appointment of Supreme Court Justices	Presidential appointment under Chief Justice recommendation	No Change	Presidential appointment upon Chief Justice recommendation with judges' council consent	Presidential appointment upon Chief Justice recommendation
Judicial Review of Constitutionality	Constitutional committee separate from judiciary	Constitutional Court separate from judiciary	Presidential appointment upon Chief Justice recommendation with judges' council consent	Constitutional Court separate from judiciary
<b>Others</b>				
Voting age	20	No change	18	20

The 1987 amendments abolished authoritarian institutions established by the previous amendments, and introduced many radical changes. These amendments were so radical that it is

177. Cho, *supra* note 174, at 191.

often referred to as “a new constitution.”<sup>178</sup> Some scholars conceptualized this constitutional change in South Korea from the perspective of transitional (constructive) constitutionalism.<sup>179</sup> Timing may be the element informing this conceptualization: the South Korea’s story happened during the same third wave of democratization. However, I contend that the 1987 constitutional change in South Korea is better conceptualized as foundational amendments. Different from stories of transitional constitutionalism elsewhere, the 1987 amendments introduced fundamental changes all at once to the 1948 Constitution to facilitate the immediate creation of a liberal democracy in South Korea.

The *condition* surrounding the June Democracy Movement opened the window of opportunity for the foundational amendments. Unlike the US Progressive Movement, the 1987 Democracy Movement in South Korea was well organized and cooperatively worked under the leadership of the National Headquarters for Democratic Constitution.<sup>180</sup> Thanks to the organization and the leadership, the June Democracy Movement put pressures on authoritarian leaders to democratize the country.<sup>181</sup> According to a political scientist, the Democracy Movement was so organizational and powerful due to the expansion of the political opportunity structure determined by four variables: state repression; conflict in the ruling elite; existence of supporting forces outside of social movement organizations; and the power configuration in the political parties.<sup>182</sup> These political conditions animated the consequential organized mobilization of Democracy Movement which in turn forced authoritarian leaders to carry out fundamental amendments as a part of the broader democratic project.

The *large-scale* of the foundational amendments includes a wide range of constitutional institutions: direct election of president, one five-year presidential term limit, separation of the executive and legislative powers, further protection of individual rights, and creation of a constitutional court.

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178. Tscholsu Kim & Sang Don Lee, *Republic of Korea (South Korea): The Influence of U.S. Constitutional Law Doctrines in Korea*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 303, 322 (Lawrence W. Beer ed., 1992).

179. See Yeh & Chang, *supra* note 165, at 834–35.

180. Seongyi Yun, *Democratization in South Korea: Social Movements and Their Political Opportunity Structures*, 21 ASIAN PERSP. 146, 146 (1997).

181. *Id.* at 146.

182. *Id.* at 147.

Informed by the past authoritarian experience, these new institutions aim to limit the government power to protect individual rights. These institutions embodied liberal and neoliberal ideals and principles of democracy. Particularly, the institutions of fundamental rights and limited government stem from classical political liberalism, while the institution of the constitutional court echoes neo-liberal ideals.

The *pace* of the foundational amendments is paradigmatic. Different from the incremental and constructive stories elsewhere, the 1987 amendments introduced many fundamental changes all at once to the existing constitution. This speed and comprehensive pace of foundational amendment was largely the function of the social movements and political party's constitutional negotiation. The June Democracy Movement, despite comprised by various social movements, shared the common goal of democratization, the demand of constitutional amendments, and the agreement on a moderate strategy of struggle and under a unified leadership.<sup>183</sup> Their common concerns were reflected in June 29 Declaration the social movements actors forced presidential candidate of the ruling Democratic Justice Party Roh Tae-woo to address, which referred to a comprehensive package of democratization, including speedy constitutional amendment for direct presidential elections and the protection of human rights and freedom of press.<sup>184</sup> As the organizational and consequential social movements shared common demands, the speedy adoption of a comprehensive package of constitutional amendments as the culmination of their effects is understandable. In addition, the successful negotiation of the ruling party presenting the state the opposition party presenting the social movements<sup>185</sup> resulted in their consensus on major constitutional items, and contributed the speedy adoption of a comprehensive package of constitutional amendments.

The *function* of the foundational amendments in 1987 is to facilitate the immediate creation of a democracy in South Korea.

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183. *Id.* at 164.

184. *Id.* at 164–65; see also *Introduction: Bureaucracy and Korean Development*, in *THE EXPERIENCE OF DEMOCRACY AND BUREAUCRACY IN SOUTH KOREA* xvii, xxix (Tobin Im ed., 2017) (listing other points in the June 29 Declaration: revising the presidential election law to ensure free candidature and genuinely competitive elections, granting amnesty to political prisoners, strengthening local and educational autonomy, moving the political climate towards dialogue and compromise, and achieving substantial social reform).

185. Cho, *supra* note 174, at 182–83.

Immediate democratic changes followed the amendments, notably, the direct presidential elections in 1987 and the creation of the Constitutional Court in 1988. Foundational amendments facilitated democratic creation but maintained the original constitutional text to continue “the project of constructing national identity in which the South Korean state has engaged since it was formed.”<sup>186</sup> This concern of continuing construction of the identity of We, the people of Korea” who “proud of a resplendent history and traditions dating from time immemorial” and “the March First Independence Movement of 1919”<sup>187</sup> explains why despite radical change, constitutional amendments rather replacement is the choice. In addition, as the first constitution of the country already expressed liberal democratic ideals, foundational amendments may be sufficient for the project of democratic construction.

The accounts of foundational amendments have important implications for understanding the constitutional democracy in contemporary South Korea. After the 1987 amendments, the South Korea’s constitution has no further amendments despite recent controversial debate on constitutional amendments after the 2017 impeachment of former President Park Geun-hye.<sup>188</sup> As the foundational amendments have established a comprehensive framework for a stable democracy, further amendments are less demanding in South Korea. If there are further amendments, their scale is more technical and rather than fundamental, and their pace is more incremental rather than paradigmatic.

## B. Constructive Amendment

### 1. *Taiwan*

Taiwan was under Japanese colonial rule from 1895 to 1945 as the consequence of Japan’s victory in the Sino-Japanese War.<sup>189</sup> After Japan surrendered in August 1945, the island was

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186. GUICHARD, *supra* note 168, at 24.

187. 1948 DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] (July 17, 1948), pmb1 (S. Kor.).

188. Yaechan Lee, *The Deeper Meaning of South Korea’s Constitutional Debate*, DIPLOMAT (Mar. 21, 2018), <https://thediplomat.com/2018/03/the-deeper-meaning-of-south-koreas-constitutional-debate/>.

189. Tay-Sheng Wang, *The Legal Development of Taiwan in the 20th Century: Toward a Liberal and Democratic Country*, 11 PAC. RIM L. & POL’Y. J.

retroceded to China,<sup>190</sup> now under the Republic of China, the government led by the Kuomintang (KMT) or the Nationalist Party of China which retreated to the island after being defeated by the Communist government in mainland China. The KMT regime is based on the Constitution of the Republic of China promulgated in December 1946. This Constitution already embodied fundamental values of a constitutional democracy, such as, popular sovereignty, referendum, and fundamental rights.<sup>191</sup> Notably, the Constitution designed a five-branch government modelling after Dr Sun Yat-sen's doctrine of five powers.<sup>192</sup> The five branches (Yuan) include three western-style powers (the Legislative, Executive, and Judicial Yuan) and two powers (Examination Yuan and Supervision Yuan) originated from Chinese institutional history. Unfortunately, due to the Chinese Civil War, the Temporary Provisions against the Communist Rebellion ratified on May 10, 1948, suspended the 1946 Constitution, created Martial Law, and legitimized the authoritarian government in Taiwan.<sup>193</sup>

In reaction to the creation of the opposition Democratic Progressive Party in the fall of 1986, The KMT regime lifted the Martial Law in July 1987.<sup>194</sup> But, the Temporary Provisions and the tenured representatives still presented the impediments for the democratization process.<sup>195</sup> In response to the activism of social movements,<sup>196</sup> the KMT regime undertook a series of constitutional amendments. Jiunn-Rong Yeh aptly points out that during the last two decades "incremental constitutional reform" in Taiwan focused on one theme: the representative

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531, 533 (2002).

190. Yun-han Chu & Jih-wen Lin, *Political Development in the 20th Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity*, 165 CHINA Q. 102, 111 (2001).

191. WILLIAM L. TUNG, THE POLITICAL INSTITUTIONS OF MODERN CHINA 127 (1964).

192. See generally Bui Ngoc Son, *Sun Yat-Sen's Constitutionalism*, 32 J. CONST. HIST. 157 (2016).

193. Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan*, 2 SERIES CONTEMP. ASIAN STUD. 1, 14-17 (1993).

194. Joseph Wong, *Dynamic Democratization in Taiwan*, 10 J. CONTEMP. CHINA 339, 348 (2001).

195. JIUN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 37 (2016).

196. Hsin-Hsing Chen, *My Wild Lily: A Self-Criticism From a Participant in the March 1999 Student Movement*, 6 INTER-ASIA CULTURAL STUD. 591, 601 (2005).

institutions.<sup>197</sup> The first round of constitutional amendments in 1991, among other things, terminated the tenured representatives and provided for representative elections, and these amendments were ironically enacted by the tenured representatives.<sup>198</sup> In the following year, 1992, the newly elected legislature called National Assembly passed the second set of amendments, which provided for, among other things, presidential elections, but the amendments are silent about the method of elections due in part to the irresolvable competing views in the two intra-KMT fractions.<sup>199</sup> The problem was solved two years later by the third round of constitutional amendments in 1994, which established direct election of president.<sup>200</sup> Following the constitutional amendments, the presidential elections were held in March 1996. Subsequent constitutional amendments in 1997, 1999, 2000, 2005 further consolidated the representative institutions and established in the last time referendum as the mandatory process of formal constitutional change.<sup>201</sup>

**Figure 3: Constitutional Amendment in Transitional Period**<sup>202</sup>

Year	Major content of amendment
1991	Regular elections for the Legislative Yuan and the National Assembly Presidential power to issue emergency orders Rights and obligations between people on the two sides of the Taiwan Strait may be regulated by law.
1992	National Assembly's hearing a presidential report on the state of the nation The President and the Vice President elected by the people Provincial governor and municipal mayors elected by

197. Yeh, *supra* note 195, at 38.

198. *Id.* at 41.

199. *Id.*

200. *Id.*

201. *See id.* at 42–48.

202. *History of Constitutional Revisions in the Republic of China*, TAIWAN DOCUMENT PROJECT, <http://taiwandocuments.org/constitution07.htm> (last visited Sept. 3, 2020).

	popular vote Grand Justices of the Judicial Yuan forming a constitutional tribunal to adjudicate on the dissolution of political parties for constitutional violations.
1994	Direct popular presidential elections Presidential orders to appoint or remove from office personnel appointed with the confirmation of the National Assembly without premier's counter-signature

Nowadays, like South Korea, Taiwan is a vibrant constitutional democracy in Asia. As the two stories joined the third wave of democratization in the late twentieth century, they are together conceptualized under the framework of transitional (constructive) constitutionalism.<sup>203</sup> But, the two cases are, in fact, very different, especially in term of the model of constitutional amendment applied the democratization process. My take is that constitutional amendments in Taiwan exemplify the constructive model, different from the foundational model presented in the case of South Korea.

To be sure, like the case of South Korea, the *condition* for the constitutional amendments in Taiwan is the context of radical transition from an authoritarian regime into a democracy. In both cases, social movements played an important role in the democratization process, and generated the window of opportunity for constitutional amendments. However, unlike the massive and influential June Democracy Movement in South Korea, social movements in the early 1990s in Taiwan had “a much smaller scale of citizen protests in the streets” and “were limited to dissident intellectuals and college students in Taipei.”<sup>204</sup> Consequently, while the democratization process in South Korea presented the bottom-up pattern, the Taiwan’s “was initiated from the top down when the ruling Kuomintang (Nationalist Party, KMT) carefully orchestrated a gradual process of political liberalization.”<sup>205</sup> This different political context generated different conditions for constitutional amendments. While South Korea’s constitutional amendments

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203. Yeh & Chang, *supra* note 40, at 145.

204. Yoonkyung Lee, *Diverging Patterns of Democratic Representation in Korea and Taiwan: Political Parties and Social Movement*, 54 ASIAN SURV. 419, 424 (2014).

205. *Id.* at 424.



were more conditioned by social movements, Taiwan's were more shaped by political elites, particularly their political willing to enable constitutional change.

The different condition result in the different *scale* of constitutional amendments in Taiwan and South Korea. The scale of constructive amendments in Taiwan is large but not as large as the foundational amendments in South Korea. The Taiwan's amendments focused mainly on two institutions associated with the elite power, although the amendments also extended the power of Taiwan's Council of Grand Justices (constitutional court) in the dissolution of political parties for constitutional violations.<sup>206</sup> The three rounds of constitutional amendments in the early 1990s facilitate the creation of the two major democratic institutions, which is crucial to democratic transformation in Taiwan.

The *pace* of constructive amendments in Taiwan is incremental. Unlike the big bang constitutional amendments in South Korea, constitutional amendments in Taiwan were adopted serially. This distinction was due to the different roles of political parties in the two jurisdictions. While paradigmatic constitutional change in South Korea was driven by social movements, incremental constitutional change in Taiwan was orchestrated by the dominant, ruling Kuomintang during the transitional period. Unlike weak political parties in South Korea, the Kuomintang in Taiwan was well institutionalized and stable: "Through elections, the KMT was able to gauge the voice of the local Taiwanese, to adapt to social demands, to learn to tolerate political opposition, and eventually to become a highly institutionalized organization."<sup>207</sup> The KMT's dominant role shaped the incremental pace of constitutional amendments. Given this role, the party must be confident about its future power and influence, and hence sought to negotiate with the oppositions through gradual amendments to reduce political conflicts and legitimize the constitutional change.

The *function* of constructive amendments in Taiwan is to facilitate the gradual transformation of the authoritarian regime into a democracy. These amendments did not immediately lead to the creation of a constitutional democracy. Rather, they responded to the constitutional pasts and gradually dismantled the legacies of the authoritarian regime (e.g. the tenured

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206. Jerry McBeath, *Democratization and Taiwan's Constitutional Court*, 11 AM. J. CHINESE STUD. 51, 54 (2004).

207. Lee, *supra* note 204, at 438.

legislative members) by which they facilitated the incremental construction of a constitutional democracy in Taiwan. The late 1990s and 2000s amendments further consolidated the constitutional democracy.

## 2. Indonesia

Like Taiwan, Indonesia transitioned into a constitutional democracy<sup>208</sup> from an authoritarian regime in a constructive way. To facilitate this democratic transition, a series of amendments was introduced to the 1945 Constitution.<sup>209</sup> This original Constitution provided for a type of presidential authoritarianism, the base for the authoritarian rule by Soeharno and Soeharto.<sup>210</sup> Following the Soeharto's resignation as the consequence of grave economic and political crises, including popular demonstration, four constitutional amendments in 1999, 2000, 2001, and 2002 enacted by the People Consultative Assembly (the *Majelis Permusyawaratan Rakyat*, MPR, functioning as a legislature) gradually dismantled the presidential authoritarian elements, by which they are facilitative to Indonesia's construction of a constitutional democracy. A quantitative survey indicated that the original text was significantly changed after the amendments.

**Figure 4: The 1945 Constitution: Before and After the Amendments<sup>211</sup>**

	Before Amendment	After Amendment					
		Unchanged	Deleted	Amended	Added	Total	% Unchanged
Chapters	16	1	1	14	5	20	1/20=5%

208. See generally DONALD L. HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA (2013).

209. See generally Denny Indrayana, Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition (2005) (unpublished Ph.D. Thesis, Melbourne University).

210. Tim Lindsey, *Indonesian Constitutional Reform: Muddling Towards Democracy*, 6 SING. J. INT'L & COMP. L. 244, 245 (2002).

211. Denny Indrayana, *In Search for a Democratic Constitution: Indonesian Constitutional Reform 1999-2002*, 17 JURNAL MEDIA HUKUM 115, 118 tbl. 1 (2010).

Articles	37	8	1	28	37	73	8/73=11%
Paragraphs	65	29	2	34	131	194	29/194=15%

Let us examine the important substantive change constructive to the transition to a constitutional democracy in Indonesia. The first amendment in 1999 curtailed the president's power to make statutes, vested this power to the legislature, and established the presidential five-year two-term limit, a response to Soeharno's 23 years and then Soeharto's 30 years in power.<sup>212</sup> The second amendment in 2000, provided for, among other things, a comprehensive list of human rights.<sup>213</sup> The 1945 constitution significantly lacks the protection of fundamental rights due to the philosophy called *integralisticstaatsidee* (integralist state idea) which stated that the state and citizens are integrated and hence there is no need for legal protection of individual freedom independent from the state.<sup>214</sup> The introduction of the bill of rights (Chapter XA including ten articles) "therefore delivered perhaps the most radical change to the original philosophy of the Constitution. Soepomo's paternalist and authoritarian presidential model was tempered with clauses lifted directly from the Universal Declaration of Human Rights (UDHR)."<sup>215</sup> The third amendment in 2001 dealt with a set of crucial institutional issues. The amendment provided for direct elections of the president replacing the legislature-appointed presidency, the detailed procedures of presidential impeachment, the formation of the cabinet determined by the legislature, and significantly the creation of a constitutional court to check the legislative and presidential powers through its judicial review power.<sup>216</sup> The fourth amendment in 2002 further clarifies mechanisms of presidential elections and terminates the appointed members of the MPR.<sup>217</sup>

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212. Lindsey, *supra* note 210, at 249.

213. *Id.* at 254.

214. *Id.* at 253.

215. *Id.* at 254.

216. *Id.* at 259-216.

217. *Id.* at 267.

Like Taiwan, Indonesia introduced constructive constitutional amendments to the existing constitution to facilitate the incremental transformation of the authoritarian regime into a constitutional democracy. The fall of Soeharto generated the *condition* for constructive constitutional amendments. As in Taiwan, constitutional amendments in Indonesia focused on limiting the presidential power, the root of the authoritarian regime. But, the *scale* of constructive constitutional amendments in Indonesia is more extensive. Indonesia's constructive amendments incorporated the comprehensive list of human rights (e.g., the right to have a family, the right to self-development, the right to collective action, the right to education, a right against violence and discrimination, a right to equal opportunity, a right to access to information).<sup>218</sup> Thus, the amendments included both the first and second generations of rights and reflected the move from a communitarian to universalist ideal of rights.<sup>219</sup> In addition, the amendments stipulated a constitutional court which was then created in 2003, and played an important role in the democratic reform.<sup>220</sup> The different scale of constitutional amendments in Indonesia and Taiwan is mainly because the existing constitutions in the two jurisdictions are substantively different. The 1946 Constitution of the Republic of China already included fundamental rights and anticipated a constitutional court (Council of Grand Justices, a part of the Judicial Yuan),<sup>221</sup> while these institutions are absent in Indonesia's original constitution.

Like Taiwan, the *pace* of Indonesia's amendments was incremental: amendments were adopted in several parts. This pace was due to the elite-dominated pattern of constitutional change. Like Taiwan, although social movements did put pressure on the elites, constitutional change and democratization in Indonesia was largely dominated by top-down elite negotiation. As a political scientist writes, "In

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218. *Id.* at 254.

219. See generally Pranoto Iskandar, *Constitutionalizing Human Rights Universality in Nonconstitutional Legal System: Decoding Indonesian Human Rights Brouhaha*, 3 *INDON. J. INT'L & COMP. L.* 1 (2016); Ahmad Tholabi Karlie, *Human Rights in Indonesian Constitutional Amendments* 1 *JURNAL CITA HUKUM* 152 (2013); Leli Tibaka & Rosdian, *The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of The Republic of Indonesia*, 11 *FIAT JUSTISIA* 266 (2017).

220. PAUL J. CARNEGIE, *THE CONSTITUTIONAL COURT AND DEMOCRACY IN INDONESIA* 106 (2010).

221. *Id.* at 110; see *MINGUO XIANFA [CONSTITUTION]* (1947) (Taiwan).

Indonesia, elite cohesion, although punctured, did not simply disintegrate in the face of external pressure. In fact, notwithstanding the catalyst of mass protests, negotiations between incumbent elites and moderate opposition figures effectively excluded protest activists.”<sup>222</sup> Social movement actors (e.g., the Legal Aid Institute, the Democracy Forum, and the Institute for the Defence of Human Rights) could not force elites to democratize the country quickly and paradigmatically, mainly because they were less organizational and “lacked common platforms or sufficient coordination to mount a credible electoral challenge.”<sup>223</sup> Consequently, incumbent elites (e.g. B. J. Habibie and General Wiranto) “were willing to make concessions in the hope of securing a top-down guided democratization.”<sup>224</sup> In addition, the compromises during the transitional period “can often end up serving the interests of established elites.”<sup>225</sup> The top-down guided democratization generated the incremental pace of constitutional change. Social movements were not consequential and well organized enough to compel the elites to adopt a comprehensive package of constitutional amendments all at once. This provided the pace for the elites to undertake incremental constitutional reforms, which appeased the oppositions and the protests while benefited themselves by remaining in power within the new constitutional order.

The *function* of constructive amendments in Indonesia is to facilitate the incremental transformation of the authoritarian regime into a democracy. Constitutional amendments did not immediately create a new constitutional democracy. Rather, they incrementally dismantled the institutional roots of authoritarianism and introduced new institutional structures and human rights essential to democratic transition in Indonesia.

### C. Progressive Amendment

#### 1. Singapore

Singapore provides a good example of progressive constitutional amendment. Progressive amendments were

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222. CARNEGIE, *supra* note 220, at 106.

223. *Id.* at 109.

224. *Id.* at 106.

225. *Id.* at 109.

introduced to the unique, accidental constitution of Singapore enacted by the Parliament on December 22, 1965 after its secession from Malaysia, which incorporated the 1963 Constitution of the State of Singapore, the Republic of Singapore Independence Act 1965, and provisions of the Federal Constitution of Malaysia (including fundamental rights provisions) made it applicable to Singapore by the Independence Act.<sup>226</sup> The Singapore Constitution was not created by deliberative constitutional design, but the accidental consequence of territorial secession.<sup>227</sup> In addition, it was not made by the constituent power of ‘we the people’ but by an ordinary legislative power of the Parliament.<sup>228</sup> This has two implications. First, constitution-making and constitutional amendment are blur in Singapore: both are conducted by the ordinary legislature. Second, due to the legislative process, constitutional amendments are easy and highly frequent, nearly one amendment bill every year since 1965.<sup>229</sup>

Since 1965, Singapore adopted series of constitutional amendments. Many of these amendments could be properly conceptualized as progressive amendments in the sense that they were adopted serially and facilitated the active role of the government in incremental improvement of the material wellbeing of the underprivileged individuals. These progressive amendments include: the 1970 amendment creating the Presidential Council to safeguard the rights of racial and religious minorities; the 1984 amendment introducing the Non-constituency Member of Parliament to enable a loser from the opposition party to have a seat in the Parliament; the 1988

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226. Together with Malacca, Dinding, and Penang, Singapore constituted the British colonists’ Straits Settlements (1826–1942) with a constitution granted by the colony in 1967, which remained unchanged when Singapore was under Japanese occupation (1942-1945). After the Japan’s surrender, the Straits Settlements was abolished, and the separate British Crown Colony of Singapore (1946-1958) was created. When Singapore was independent from the UK and merged with the Federation of Malaysia in 1963, the Constitution of the State of Singapore was granted to Singapore. Two years later, Singapore seceded from Malaysia and became an independent and sovereign state on 9 August 1965. See KEVIN TAN, CONSTITUTION OF SINGAPORE: A CONTEXTUAL ANALYSIS 11–41 (2015) (discussing constitutional history in Singapore).

227. LI-ANN THIO, A TREATY ON SINGAPORE CONSTITUTIONAL LAW 141 (2012) (noting that after Singapore seceded from Malaysia, Lee Kuan Yew stated that: “Accidentally I created this entity called Singapore and it has resulted in the Singaporean . . .”).

228. *Id.*

229. *Id.* at 142.

amendment establishing the group representation constituency to ensure the minority representation in Parliament; the 1992 amendment providing for popularly elected president; and recently the 2016 amendment stipulating reserved presidential election.<sup>230</sup>

These progressive amendments to the constitution in this city-country are generally shaped by their economic, social, and political *condition*. Economically, after decades of modernization and industrialization, Singapore has become one of the richest countries in the world, and the government has played an active role in promoting economic development in the manner of a developmental state.<sup>231</sup> This governmental role necessarily requires some support from constitutional arrangement. The second factor is that the Singaporean society is marked by religious and ethnic diversities, which elicit constitutional response to protect these minority groups from discrimination.<sup>232</sup> In terms of politics, Singapore is an example of an illiberal democracy: the polity is dominated by the People's Action Party (PAP), which Lee Kuan Yew, who was considered the founding father of the state, founded with others in the 1950's, although more than twenty political parties are registered.<sup>233</sup> The illiberal form of democracy has implications for the illiberal form of constitutionalism, which does not accentuate the protection of liberal rights, but rather the improvement of the living conditions of the local people. Progressive constitutional amendments arise within this model of constitutionalism. The *scale* of the amendments is extensive, ranging from legislative components, presidential structure, to minority rights. As discussed below, these institutions are the embodiment of Singapore's distinctive communitarian constitutional ideals. The *pace* of the amendments is incremental, mainly due to the dominance of the People's Action

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230. See generally CONSTITUTIONAL CHANGE IN SINGAPORE: REFORMING THE ELECTED PRESIDENCY (Jaclyn Neo & Swati Jhaver eds., 2019) (addressing the last amendment in particular); Jaclyn Neo & Andrea Hui Xian Ong, *Making the Singapore Constitution: Amendments as Constitution-Making*, 14 J. COMP. L. 72 (2019) (providing a general account of constitutional amendments in Singapore).

231. Linda Low, *The Singapore Developmental State in the New Economy and Polity*, 14 PAC. REV. 411 (2001).

232. See Li-ann Thio, *Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales in South-East Asia*, 22 PACE INT'L L. REV. 43, 70 (2010).

233. Hussin Mutalib, *Illiberal Democracy and the Future of Opposition in Singapore*, 21 THIRD WORLD Q. 313 *passim* (2000).

Party in Singapore's constitutional politics. These amendments are not driven by bottom-up popular mobilization but by the elite's incremental constitutional accommodation of opposition and *the rights of ethnic and religious minorities*.<sup>234</sup> The function of these amendments is to facilitate the active role of the government in incrementally improving the material wellbeing of underprivileged individuals.

As the amendments are extensive, they cannot be comprehensively covered in this section. Rather, this Article will illustrate progressive amendments in Singapore through discussion of two amendments: the 1991 amendment creating an elected presidency, and the recent 2016 amendment providing for reserved presidential election.

The first is the amendment in 1991, which created an elected presidency.<sup>235</sup> The original Constitution of 1965 stipulates a Westminster parliamentary system with a symbolic presidency created by the parliament. A constitutional amendment in 1991 provided for a presidency elected popularly by the people. Its catalyst was the general election of December 1984 in which the dominant party, the PAP, won 64.8 per cent of and lost 12.6 per cent of the popular vote.<sup>236</sup> This induced the real fear that a "freak election" result may bring power to a non-PAP government.<sup>237</sup> In the National Day Rally speech in 1984, Prime Minister Lee Kuan Yew stated:

From politics of poverty in the 1950s and 60s, we have moved to the politics of progress; from the politics of desperation, to the politics of hope; from the politics of squatters, to the politics of owners. You have more at stake than ever before.

If you vote to rogues or opportunists, or incompetent or impractical men, the value of your flats and of your savings will shrink. It has become your business to ensure that the people elected to Parliament are capable and honest so that your flats will increase in value and your CPF [Central Provident Fund, a compulsory comprehensive savings plan] will grow.

. . . The danger is that there is nothing to prevent a future government from running through these reserves . . . in one five-year spending spree, Singapore can be rendered prostrate and

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234. See Thio, *supra* note 233, at 68, for Singapore's constitutional accommodation of the rights of ethnic and religious minorities.

235. Constitution of the Republic of Singapore (Amendment) Act, 1991 (Act No. 5/1991).

236. TAN, *supra* note 226, at 38.

237. *Id.* at 37.



bankrupt.<sup>238</sup>

Under Singapore's parliamentary system, the elected government had nearly "unlimited power over taxation and spending."<sup>239</sup> And here is the risk: over \$30 billion in national reserves accumulated by the PAP-led government may be quickly ruined by an irresponsible government in the future.<sup>240</sup> To protect the nation's reserves, Lee proposed "working out a blocking mechanism whereby the President can block the spending of any reserve which the government in office has not itself accumulated."<sup>241</sup> This requires the transformation of the symbolic presidency into an elected presidency with legal legitimacy originating from the people. After several proposals in 1988 and 1990, a constitutional amendment adopted in 1991 provided for an elected presidency.<sup>242</sup> The president, who must be "a person of integrity, good character and reputation[.]"<sup>243</sup> was the "second key" to the nation's reserves,<sup>244</sup> with the power to withhold or veto budgets and transactions related to past reserves created by the previous governments.<sup>245</sup> In addition to other traditional powers, the president also has the power to veto the appointments of public servants.<sup>246</sup> This arrangement is meant to ensure that that government is served by responsible people. This elected presidency is considered "Singapore's most innovative constitutional experiment."<sup>247</sup>

Another constitutional amendment recently introduced in 2016 stipulates a reserved presidential election, providing that: "[a]n election for the office of President is reserved for a community if no person belonging to that community has held the office of President for any of the 5 most recent terms of office

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238. *Id.* at 38 (quoting *Protection Plan: To Help You Keep What You Have*, STRAITS TIMES (Sing.), Aug. 20, 1984, at 1).

239. *Id.*

240. *Id.* at 131.

241. *Id.* at 38 (quoting Ee Boon Lee, *Big Changes Likely After Polls*, SING. MONITOR, Aug. 20, 1984 at 1).

242. *Id.*

243. CONSTITUTION OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 19.

244. TAN, *supra* note 226, at 39.

245. CONSTITUTION OF THE REPUBLIC OF SINGAPORE July 1, 1999, art. 21.

246. *Id.* art. 22.

247. See Yvonne C. L. Lee, *Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian*, 2007 SING. J. LEGAL STUD. 290, 290 (2007). See also MANAGING POLITICAL CHANGE IN SINGAPORE: THE ELECTED PRESIDENT (Lam Peng Er & Kevin Tan eds., 1997); Li-Ann Thio, *Working Out the Presidency: The Rites of Passage*, 1995 SING. J. LEGAL STUD. 509 (1995), for further analyses of this institution.

of the President.”<sup>248</sup> The official justification of the amendment is to “strengthen racial harmony and national pride.”<sup>249</sup> Prime Minister Lee Hsien Loong stated in the National Day Rally of 2017 that the multiracial presidency “will enable [Singapore] to work even closer together to face whatever challenges that may come our way, so we can thrive and progress as one people, one Singapore.”<sup>250</sup> The constitutional amendment was, however, criticized for undermining the legitimacy of the elected presidency<sup>251</sup> and the principle of meritocracy.<sup>252</sup> As the current and the previous four holders of the presidency belong or belonged to the Chinese and Indian communities, the Presidential Election in 2017 was reserved for Malay candidates.<sup>253</sup> Madam Halimah Yacob was then elected to the presidency in 2017 as the only eligible candidate.<sup>254</sup> The practice of the 2017 presidential election was also confronted with a failed judicial constitutional challenge and a silent sit-in protest.<sup>255</sup>

The above two constitutional amendments must be situated within the broader context of the Singaporean constitutional polity. Singapore is variously considered an authoritarian

248. Constitution of the Republic of Singapore (Amendment) Act, 2016, (Act No. 28/2016), art. 19B.

249. Nur Asyiquin Mohamad Salleh, *National Day Rally 2017: Multiracial Presidency Will Strengthen Racial Harmony*, STRAITS TIMES (Sing.) (Aug. 17, 2017, 5:00 AM), <https://www.straitstimes.com/politics/multiracial-presidency-will-strengthen-racial-harmony>.

250. *Id.* (emphasis added).

251. Kesavan Thanagopal, *Why the Constitutional Amendment to the Elected Presidency is Fundamentally Bad for Singapore*, INDEP. NEWS & MEDIA (Sing.) (Sept. 17, 2017), <http://theindependent.sg/why-the-constitutional-amendment-to-the-elected-presidency-is-fundamentally-bad-for-singapore/>.

252. Eugene K.B. Tan, *Reserved Election: Boost for Multiracialism?*, TODAY (Sing.) (Sept. 8, 2016), <https://www.todayonline.com/singapore/reserved-election-boost-multiracialism>.

253. Chuang Peck Ming, *Next Presidential Election to be Reserved for Malay Candidates: PM Lee*, BUS. TIMES (Sing.) (Nov. 9, 2016), <https://www.businesstimes.com.sg/government-economy/presidential-election-2017/next-presidential-election-reserved-for-malay>.

254. Lydia Lam, *Halimah Yacob Set to be Singapore's First Female President: A Timeline of Her Career*, STRAIT TIMES (Sing.) (Sept. 11, 2017, 9:30 PM), <https://www.straitstimes.com/singapore/halimah-yacob-set-to-be-singapores-first-female-president-a-timeline-of-her-career>.

255. Nicholas Yong, *Tan Cheng Bock's Constitutional Challenge on Elected Presidency Fails*, YAHOO NEWS (Sing.) (July 7, 2017), <https://sg.news.yahoo.com/tan-cheng-bock-constitutional-challenge-elected-presidency-fails-070236394.html>.

state,<sup>256</sup> under an authoritarian rule of law,<sup>257</sup> or under authoritarian constitutionalism.<sup>258</sup> This Article's contention is that the Singapore constitutional polity can be conceptualized as progressive constitutionalism.<sup>259</sup> Singapore is less interested in negative constitutional limitations to protect liberal rights. Rather, the country is more interested in the active role of the government in pursuing the common values as indicated in the Shared Values White Paper (nation before community and society above self; family as the basic unit of society; community support and respect for the individual; consensus not conflict; and racial and religious harmony) formally adopted by the government in 1991.<sup>260</sup> These shared values are the constitutional principles, hopes, and aspirations<sup>261</sup> that direct the active role of the government toward doing positive things to improve the material wellbeing of the living conditions.

The aforementioned constitutional amendments are the specific manifestation of progressive constitutionalism in Singapore. The constitutional amendment creating the elected presidency in Singapore can be conceptualized in progressive terms. As can be seen, Lee Kuan Yew explicitly refers to the idea of "politics of progress" and repeatedly underlines the need to improve people's flats and savings in his precaution of the risk of a future extravagant government. The main function of the creation of the elected presidency in Singapore is not to facilitate the construction of a liberal democracy like the cases of Taiwan and Indonesia. In addition, the amendment does not aim to transform the nature of the constitutional polity: Singapore remains a Westminster parliamentary system despite the direct presidential elections. Rather, the main function of the constitutional amendment is to create a presidency with legal legitimacy deriving from the people to facilitate the active role of

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256. Phyllis Lee, *Silent Sit-In Protest Against Reserved Presidential Elections to be Held on Saturday*, INDEP. NEWS & MEDIA (Sing.) (Sept. 14, 2017), <http://theindependent.sg/silent-sit-in-protest-against-reserved-presidential-elections-to-be-held-on-saturday/>.

257. See generally LYNETTE J. CHUA, *MOBILIZING GAY SINGAPORE: RIGHTS AND RESISTANCE IN AN AUTHORITARIAN STATE* (2014).

258. See generally JOTHIE RAJAH, *AUTHORITARIAN RULE OF LAW* (2012).

259. See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

260. Parliament of Singapore, White Paper, *Shared Values* (Paper Cmd. No. 1 of 1991).

261. Li-ann Thio, *Soft Constitutional Law in Nonliberal Asian Constitutional Democracies*, 8 INT'L J. CONST. L. 766, 779 (2010) (referring to these values as soft constitutional law).

the government in improving the material wellbeing of living condition; more specifically, the government's role in using the nation's reserves responsibly to make people's lives better. In the same vein, the amendment creating a reserved presidential election is progressive not only because the language of "progress" is used in the official justification of the amendment but also because it is actually connected to an aspirational constitutional principle (racial harmony) to which the polity is committed. The constitutional amendment and the aspiration facilitate the active role of the government in improving the material wellbeing (multi-racial presentation in the presidency) of the living condition. One possible response is that the constitutional amendments present the PAP regime's pragmatic politics rather than its principled commitments. The answer may be both, as presented in the idea of 'principled pragmatism.'<sup>262</sup> The Singapore government may be concerned with both practical calculation and aspirational commitments.

## 2. India

The Indian Constitution enacted in 1950 is the longest written constitution in the world<sup>263</sup> and had 103 amendments as of January 2019.<sup>264</sup> This is consistent with Donald S. Lutz's theory that "the longer a constitution is (the more words it has), the higher its amendment rate."<sup>265</sup> These amendments provide rich data for economic analysis.<sup>266</sup> This Article will selectively focus on some serial amendments that exemplify the model of progressive amendments.

To understand progressive amendments in India, it is important to note that the Indian Constitution is not a purely

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262. Li-ann Thio, *Principled Pragmatism and the 'Third Wave' of Communitarian Judicial Review in Singapore*, in CONSTITUTIONAL INTERPRETATION IN SINGAPORE THEORY AND PRACTICE 75 (Jaclyn L. Neo ed., 2016).

263. Comparative Constitutions Project, Constitution Rankings, <https://comparativeconstitutionproject.org/ccp-rankings/> (last updated Apr. 8, 2016).

264. INDIA CONST., *amended by The Constitution (One-Hundred-Third Amendment) Act*, 2019.

265. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 357 (1994).

266. See Shruti Rajagopalan, *Economic Analysis of Amendments to the Indian Constitution* (2013) (unpublished Ph.D. dissertation, George Mason University) (on file with author).

liberal document. Rather, it exemplifies what Gary J. Jacobsohn calls the “disharmonic constitution,” or the constitutional document that incorporates competing political aspirations and commitments.<sup>267</sup> The 1950 Constitution embodies fundamental values of liberal constitutionalism (parliamentary democracy, an accountable executive, separation of powers, independent judicial review, and fundamental rights), but at the same time it is committed to socialism.<sup>268</sup> This constitutional disharmony is due to the political leaders’ commitments to competing ideas and values. At time of independence, Indian political leaders, including Jawaharlal Nehru, were inspired by the idea that “a socialist welfare state would uplift the masses deprived and exploited through 200 years of colonial rule,” and believed that “capitalism would weaken both political and economic equality.”<sup>269</sup> At the same time, the political leaders believed that India should be a republic, and “republic meant a constitutional democracy accompanied by a framework of individual rights and checks and balances through separation of powers and federalism.”<sup>270</sup> The political leaders believed that liberal constitutionalism and socialism could be reconciled.<sup>271</sup>

It is the commitment to socialism that shaped progressive constitutional amendments in India. The 42<sup>nd</sup> Amendment in 1976 explicitly inserted socialism (together with secularism) into the constitutional preamble.<sup>272</sup> The commitment to socialism induced incremental, progressive constitutional amendments in India. For example, the 44<sup>th</sup> Amendment in 1978 removes the right to private property to facilitate land redistribution and land acquisition for developmental projects;<sup>273</sup> the 86<sup>th</sup> Amendment provides for free and compulsory education to children between 6 to 14 years;<sup>274</sup> and the 103<sup>rd</sup> Amendment permits a 10% reservation for economically weaker sections of society for admission to educational institutions, including

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267. GARY J. JACOBSON, *CONSTITUTIONAL IDENTITY* 87 (2010).

268. Shruti Rajagopalan, *Incompatible Institutions: Socialism Versus Constitutionalism in India*, 26 *CONST. POL. ECON.* 328, 334–35 (2015).

269. *Id.* at 331.

270. *Id.* at 333.

271. *Id.*

272. INDIA CONST. pmb., *amended by* The Constitution (Forty-Second Amendment) Act, 1976.

273. INDIA CONST. arts. 19(f), 31, *amended by* The Constitution (Forty-Fourth Amendment) Act, 1978.

274. INDIA CONST. arts. 45, 51(a), *amended by* The Constitution (Eighty-Sixth Amendment) Act, 2002.

private educational institutions, whether aided or unaided by the State (except for minority educational institutions).<sup>275</sup>

Shruti Rajagopalan identifies “positive entitlements” as the common pattern of both formal constitutional amendment and informal constitutional change through judicial interpretation in India.<sup>276</sup> In another study, she argues that the Indian constitutional amendments in the socialist lines, especially the ones curtailing fundamental rights (e.g. the right to private property), weaken the rule of law, individual rights, and democracy in India.<sup>277</sup> Rajagopalan contends that this is because socialism and constitutionalism, the two institutions that the framers tried to reconcile, are in fact incompatible.<sup>278</sup> Precisely speaking, the incompatibility is between socialist planning and liberal (not generic) constitutionalism. Consequently, the amendments weakened institutions of liberal constitutionalism as they were used to promote alternative progressive institutions. Despite the weakening, the Indian constitutional polity retains major institutions of liberal constitutionalism: vibrant and diverse political parties, free media, institutions for constitutional constraints (e.g. “the Election Commission, the judiciary, and the office of the President”), and a vibrant and diverse civil society.<sup>279</sup> But the constitutional disharmony provides the dynamics for the development of alternative constitutional values and institutions, e.g. the progressive ones.

The above Indian constitutional amendments can be conceptualized as progressive amendments. Poverty generates the condition for these progressive constitutional amendments. The government was struggling to reconcile liberal constitutional democracy and the improvement of the living condition of the local people. Institutionalists argue that democracy has a positive impact on economic development,<sup>280</sup>

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275. INDIA CONST. arts. 15, 16, *amended by* The Constitution (One-Hundred-Third Amendment) Act, 2019.

276. Shruti Rajagopalan, *Constitutional Change: A Public Choice Analysis*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 127 (Sujit Choudhry et al. eds., 2016).

277. Rajagopalan, *supra* note **Error! Bookmark not defined.**7, at 328–30.

278. *Id.* at 329.

279. Arun Thiruvengadam & Gedion Hessebon, *Constitutionalism and Impoverishment: A Complex Dynamic*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 153, 165 (Michel Rosenfeld & Andrés Sajó eds., 2012).

280. Daron Acemoglu et al., *Democracy Does Cause Growth*, 127 J. POL. ECON. 47 (2014).

but India provides “an example of a nation that has had reasonable success with establishing a constitutional democracy but has not been able to eradicate poverty substantially.”<sup>281</sup> Constitutional amendments were introduced as a part of the broader project of socio-economic development to eradicate poverty. The *scale* of the amendments is extensive, and in particular deals with the social and economic rights of underprivileged individuals: the poor, children, and economically weaker sections of society. These rights are the embodiment of the socialist and progressive aspirational ideals. The *pace* of the amendments is incremental. The amendments were adopted in different periods of time rather than as a comprehensive package. The *function* of the amendments is to empower the government to act positively to eradicate poverty, and more generally to gradually improve the wellbeing of the living condition of the underprivileged individuals.

#### D. Retrogressive Amendment

Retrogressive amendments are not popular in East Asia and Southeast Asia. This is mainly because there are a few well established constitutional democracies in the region. In addition, as opposed to the arguably global crisis of constitutional democracy, some established democracies (e.g., Japan, South Korea, and Taiwan) in Asia are relatively stable.<sup>282</sup> That said, the fragile democracy in Cambodia offers an example of retrogressive constitutional amendments.

The Paris agreements signed on October 23, 1991 were aimed at ending the twenty-year-old conflict in Cambodia and established the role of the UN in resolving such conflicts.<sup>283</sup> Like the experiences elsewhere,<sup>284</sup> constitution-making was employed in Cambodia as part of the projects of post-conflict transition, state-building, and peace-building. The current

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281. Thiruvengadam & Hessebon, *supra* note 279, at 166.

282. David S. Law & Chien-Chih Lin, *Constitutional Inertia in Asia*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 423 (Mark A. Graber et al. eds., 2018).

283. Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AM. J. INT'L L. 1, 1 (1993).

284. See generally Darin Johnson, *Conflict Constitution-Making in Libya and Yemen*, 39 U. PA. J. INT'L L. 293 (2018); Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663 (2006); Jamal Benomar, *Constitution-Making and Peace Building: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries*, United Nations Development Programme (Aug. 2003).

Constitution of Cambodia, enacted by the Constituent Assembly on September 21, 1993, under the guidance and auspices of the United Nations Transitional Authority in Cambodia, is considered “one of the most extraordinary chapters in the efforts of the international community to promote democratic transitions in the post-Cold War era.”<sup>285</sup> The first article of the constitution states that Cambodia is committed to “the principles of liberal multi-party democracy.”<sup>286</sup>

Since its adoption, the Constitution has been amended: the 1994 amendment allows the King to delegate his duty to sign laws to the acting head of the state in case of illness or hospitalization overseas; the 1999 amendment creates the Senate; the 2004 amendment changes the amendment ratification rule from two-thirds to absolute parliamentary votes; the 2005 amendment lowers the quorums of parliament sessions; the 2006 amendment changes parliamentary vote of confidence on the government from two-thirds to absolute votes; and the 2008 amendment slightly modifies the administration levels.<sup>287</sup> Commentators indicate that the amendments “were more or less a spontaneous reaction to political crisis or situations.”<sup>288</sup> These amendments are rather positive and are instrumental to the consolidation of democratic institutions in Cambodia.

Yet, Cambodia is in fact a fragile democracy,<sup>289</sup> and hence is vulnerable to retrogression, and constitutional amendment may be used to facilitate the retrogressive process. Recent constitutional amendments adopted in February 2018 illustrate this.

Different from the several positive amendments introduced as a response to the demands of the opposition,<sup>290</sup> the retrogressive amendments were introduced to consolidate the

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285. Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 45–46 (1994).

286. CONSTITUTION OF THE KINGDOM OF CAMBODIA Sept. 21, 1993, art.1.

287. Jörg Menzel, *Cambodia from Civil War to a Constitution to Constitutionalism?*, in CAMBODIA CONSTITUTIONAL LAW 1, 18 (HOR Peng et al. eds., 2016).

288. *Id.* at 19.

289. For more on the idea of fragile democracies, see Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007). For more on the idea of fragile democracy in Cambodia, see Marks, *supra* note 284.

290. See Marks, *supra* note 286, for more on the idea of fragile democracy in Cambodia; see generally Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007), for more on the idea of fragile democracies in general.



ruling party's power following the dissolution of the opposition party and in preparation for the election in July 2018. In December 2017, in the course of a government lawsuit, Cambodia's Supreme Court ordered the dissolution of the main opposition party, the Cambodia National Rescue Party (CNRP), for its "plotting to topple the government[,]"<sup>291</sup> "effectively paving way for longtime Prime Minister Hun Sen's governing Cambodian People's Party (CPP) to run unopposed in next year's national elections."<sup>292</sup>

To deal with the succeeding election in February 2018, the national legislature (the National Assembly) adopted amendments to five articles in the constitution.

The scale of the amendments is extensive. These amendments allow the restriction of the right to participate in elections (Article 34); require political parties to "put the interests of the nation first" (Article 42); prohibit the citizens from "any activity" that directly or indirectly "affect[s] the interests" of the nation or its citizens (Article 49); oppose foreign interference in Cambodia's internal affairs (Article 53), and abolish the position of secretaries of states in the Council of Ministers (Article 118).<sup>293</sup> These provisions embody populism: political elites claim to present the interests of the nation and the people to oppose the antagonist groups. This ideology is also expressed in the government rhetoric justifying the amendments. For example, a National Assembly spokesman said: "[t]hese amendments [are] aimed to enhance the multi-party democracy regime, strengthening the national interest, the interest of the people, defending neutrality, independence, territory, and opposing internal interference in Cambodia's affairs."<sup>294</sup>

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291. *Cambodia Top Court Dissolves Main Opposition CNRP Party*, BBC (Nov. 16, 2017), <https://www.bbc.com/news/world-asia-42006828>.

292. Joshua Berlinger, *Cambodia Court Orders Main Opposition Party to Dissolve*, CNN (Nov. 17, 2017), <https://edition.cnn.com/2017/11/17/asia/cambodia-opposition-party-dissolved/index.html>.

293. *Cambodia: Reject Draft Amendments to the Constitution and Criminal Code: Joint CSO Statement on Legislative Assault on Rights*, HUM. RTS. WATCH (Feb. 21, 2018), <https://www.hrw.org/news/2018/02/21/cambodia-reject-draft-amendments-constitution-and-criminal-code> [hereinafter *Joint CSO Statement*].

294. Hul Reaksmey, *Cambodian Parliament Passes Controversial Amendments to Constitution*, VOA KHMER (Feb. 16, 2018), <https://www.voacambodia.com/a/cambodian-parliament-passes-controversial-admendments-to-constitution/4257709.html>.

Local activists and international human rights experts criticized that the amendments would undermine democracy and human rights and that they failed to meet with the international standards on the basis that the amendments used vague language to allow the government to restrict fundamental freedom, the right to participate in elections, and the activities of the opposition parties.<sup>295</sup> After the constitutional amendments, the general election was held in July 2018 with the Cambodian People's Party (CPP) winning all 125 seats in parliament with 77.5-percent of the vote.<sup>296</sup> It is reported that "[d]uring the campaign, opposition activists calling for a voter boycott had been accused of incitement."<sup>297</sup>

Comparative constitutional law scholars have pointed out the global trend that constitutional democracies have been undermined legally, constitutionally, and incrementally.<sup>298</sup> In the same vein, legal and constitutional means were used to facilitate the incremental pace of retrogression of the formal constitutional democracy in Cambodia. In the first stage, the opposing party was dissolved legally through the judicial process initiated by the government's lawsuit. This generated a window of opportunity for the next stage: a formal constitutional amendment. The incremental pace of retrogression is also embodied in the ambiguous space the amendments created. Uniquely, retrogressive constitutional amendments in Cambodia do not explicitly attach democratic limitations (e.g., removing term limits)<sup>299</sup> but employ a subtitle technique that utilizes ambiguous constitutional language. The ambiguous constitutional language aims at creating a popular impression about the democratic impulses of constitutional amendments ('put the interests of the nation first') while the amendments in fact widen the space for government power. The government has wide discretion to interpret the meaning of the vague terms and

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295. *Joint CSO Statement*, *supra* note 294; *U.N. Urges Cambodia to Reconsider Constitutional Changes Amid Fears for Human Rights*, REUTERS (Feb. 20, 2018, 4:56 AM), <https://www.reuters.com/article/us-cambodia-un/u-n-urges-cambodia-to-reconsider-constitutional-changes-amid-fears-for-human-rights-idUSKCN1G417M>.

296. *Cambodia Election: Ruling Party Claims Landslide in Vote with No Main Opposition*, BBC (July 30, 2018), <https://www.bbc.com/news/world-asia-44999358>.

297. *Id.*

298. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 545 (2018).

299. *See, e.g.*, NISBET, *supra* note 42, at 200–03 (discussing the case of Colombia at Landau).

phrases (e.g. “any activity” that directly or indirectly “affect[s] the interests” of the nation or its citizens) to control the activities of the opposition party and citizens.

The ambiguous constitutional language benefits the government in two ways. First, the language does not directly attack any democratic institutions, and hence legitimizes the amendments and reduces room for oppositions and conflicts. Of course, critics and activists may condemn the amendments as undermining democracy, but the ambiguous language also allows the government to justify the amendments the other way around: they would undergird democracy. Second, the ambiguous constitutional language is instrumental to implementing the amendments in a way that benefits the government. Having complete control of parliament, the ruling party is confident about its future power and hence can direct the parliament to pass the laws which would detail the ambiguous language created by the constitutional amendments in the way that is useful for the ruling party’s control of oppositional political activities.

The *function* of the amendments is to undergird the government’s power and concomitantly undermine democratic institutions. The formal amendments legitimized the government’s consolidated power because they were adopted according to the procedures provided in the existing constitution. Pragmatically, constitutional amendments are easy to pursue because the constitution allows the parliament to adopt constitutional amendments, while the CPP overwhelmingly dominated the parliament while the opposing party was dissolved.

The formal entrenchment of unamendability failed to prevent the amendments from undermining democratic institutions. Cambodia’s case is connected to the recent debates on unconstitutional constitutional amendments.<sup>300</sup> Judicial review bodies (constitutional courts or supreme courts) around the world held certain constitutional amendments as unconstitutional on the ground that the amendments change the fundamental structure of the existing constitution.<sup>301</sup> The doctrine is rested on a fundamental assumption that there are

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300. See generally Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013).

301. See Albert, *supra* note 6, at 15–20, for a discussion of three examples in Columbia, Taiwan, and India.

“limitations upon the amendment power.”<sup>302</sup> The unamendability scholarship seems to focus on the constitutional entrenchment of fundamental values and their protection by constitutional review institutions. Yet, a contextual, functional consideration may suggest that the protection against unconstitutional constitutional amendments is the function of different factors, not merely constitutional design. Cambodia’s case illustrates this aspect. Article 134 of the Constitution prohibits “[r]evision or amendment affecting the system of liberal and pluralistic democracy and the regime of Constitutional Monarchy.”<sup>303</sup> The French judicial review institution, the Constitutional Council, is designed “to safeguard respect for the Constitution, to interpret the Constitution, and the laws passed by the Assembly”<sup>304</sup> in addition to the power to “to examine and decide on contested cases involving the election of assembly members.”<sup>305</sup> But, functionally, the Council mainly practiced the latter power to hear disputes over elections,<sup>306</sup> which is the “ancillary power.”<sup>307</sup> The ruling party in Cambodia was able to introduce retrogressive amendments despite the constitutional entrenchment and formal design of constitutional review. The first lesson from this experience is that constitutional entrenchment and formal constitutional review design may not sufficiently explain the protection against unconstitutional constitutional amendments. The second lesson is regarding the politics of unconstitutional constitutional amendments. The protection against unconstitutional constitutional amendments seems difficult under a formal constitutional democracy dominated by a single political party in reality.

#### IV. FURTHER THEORETICAL IMPLICATIONS

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302. See William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919).

303. CONSTITUTION OF THE KINGDOM OF CAMBODIA Sept. 21, 1993, art. 134.

304. *Id.* art. 117.

305. *Id.*

306. Teilee Kuong, *Constitutional Council of Cambodia at the Age of Majority: A History of Weathering the Rule of Law Storms in Peacetime*, in CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE PERSPECTIVE 240, 249 (Albert H. Y. Chen & Andrew Harding eds., 2018).

307. See Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431 (2008) (discussing the ancillary powers of judicial review institutions).

This section further discusses the implications of this theorization of the four amendment models for contemporary theoretical debates in comparative constitutional amendment. The four amendment models have implications for: (1) functionalism as the epistemology of comparative constitutional amendment inquiry; (2) the positivist concept of constitutional amendment; (3) and national identity as the explanation of constitutional design choice between amendment and replacement.

#### A. Functionalism

The four amendment models have general implications for functionalism as the epistemology of comparative constitutional amendment inquiry. Functionalism is the approach that focuses on the actual practice, role, and consequences of constitutional amendments and their historical, social, economic, intellectual, institutional, political conditions.

From this functionalist perspective, the four types of constitutional amendment exist to *facilitate* the foundation, transformation, service, and degeneration of a democracy. Foundational amendments do not create but facilitate the creation of a democracy. Constructive amendments do not transform but facilitate the incremental transformation of a democracy. Progressive amendments do not serve the public but facilitate the government's role in serving the public. Retrogressive amendments do not deteriorate but facilitate the deterioration of a democracy. The foundation, transformation, service, and degeneration of a democracy are the functions of different confrontational, cooperative, dialogical actions of different social and political actors (polite elite, citizens, parties, and social movements). What constitutional amendments can do is provide textual rules, principles, hopes, aspirations, values, and commitments that can facilitate the actions of social and political actors. For example, Taiwan's 1994 amendment providing direct election of the presidency did not create a democratic presidency.<sup>308</sup> It is the actual practice of direct presidential election in 1996 that created the democratic presidency.<sup>309</sup> This action of election is the function of the citizens and other political actors. The constitutional

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308. Yeh, *supra* note 195, at 38.

309. *Id.* at 42–48.

amendment provides the rule that facilitates this action of elections and the creation of the democratic presidency. In the same vein, Indonesia's 2001 amendment providing for a constitutional court does not create this court. The court was actually created in 2003, which involved the actions of different political actors, and the constructive amendment facilitated these actions.<sup>310</sup>

*Functionalism* has three additional important implications for comparative studies of constitutional amendments. The understanding of the actual function of constitutional amendments requires consideration of actual regional context, regime context, and historical context. First, the regional context may shape the way a constitutional amendment performs its functions in a democracy. A region may share relatively common cultural features, social conditions, and political environments, which are consequential to constitutional amendments. The Asian region, which is underrepresented in comparative constitutional amendment scholarship, includes many countries and vast differences among those countries. But, some groups of countries share relatively similar features (e.g., the Confucian culture, colonial history, religious and ethnic pluralities) which may shape the amendment culture and practice. For example, Confucianism (as embodied in the shared values) and religious and ethnic pluralities are important factors of progressive amendments and progressive constitutionalism in Singapore.

Regime context is the second important factor. Constitutional amendments have different functions in a democracy as opposed to in an authoritarian regime. The functions of amendments are also markedly varied in liberal democracies and illiberal democracies. For example, illiberal democracies are more interested in promoting the government's role in pursuing the common good than the negative limitations of the government to protect individual freedom, and hence this tendency provides more rooms for progressive amendments.

Finally, the historical context shapes the amendment's functions. Amendments happen in specific historical moments. Within one country, amendments have different functions in different historical periods. The institutional, political, social, and economic contexts vary in different historical moments, and this determines the functions of amendments in a country's trajectory. The case of the United States illustrates this well. In

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310. CARNEIGE, *supra* note 220.

this regard, the above accounts of the functions of amendments in Asian countries are historically specific, not country-specific. Amendments may have different functions in different historical periods within each Asian democracy discussed above. For example, Cambodia introduced quite positive amendments as the response to the demands of the opposing party, but the dissolution of the opposing party created a new condition for regressive amendments. The comprehensive discussion of different functions of constitutional amendment within each Asian democracy should be a subject for future studies.

### B. Amendment's Nature

Comparative constitutional amendment inquiry features debates on this ontological question: what is constitutional amendment? The conventional understanding views constitutional amendment as the alternative to the current constitution contained within the current constitutional polity. This understanding is rooted in the distinction between constituent and constituted powers, which is tracked back to Sieyès' distinction of "constituent power" (*pouvoir constituant*) and "constituted powers" (*pouvoir constitué*). German constitutional theorist Carl Schmitt contends that constitutional amendment is only used to make additions and deletions and other changes that preserve "the identity and continuity of the constitution as an entirety."<sup>311</sup> In the same vein, leading American constitutional law scholar, Walter Murphy, writes that "valid amendments can operate only within the existing political system: they cannot deconstitute, reconstitute, or replace the polity."<sup>312</sup>

The conventional concept of constitutional amendment is normative rather than descriptive. The concept tries to account for what an amendment should be rather than what it really is. Therefore, it fails to describe the actual empirical practice of constitutional amendments. As the cases in this study indicate, constitutional amendments do deconstitute, reconstitute, or replace the polity. The South Korean amendments replaced the

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311. CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer trans., 2008).

312. Albert, *supra* note 6, at 10 (quoting Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 177 (Sanford Levinson ed., 1995)).

authoritarian polity with a constitutional democratic one. The Indonesian constitutional amendments substantively deconstituted the authoritarian polity. The Taiwan constitutional amendments reconstituted the existing authoritarian polity while incrementally constituted the alternative polity.<sup>313</sup>

These actual functions of amendment require expanding the understanding of the nature of amendment. One of the innovative concepts which has recently been introduced to better understand the reality of formal constitutional change is Richard Albert's concept of "constitutional dismemberment."<sup>314</sup>

[S]ome constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. These constitutional changes entail substantial consequences for the whole of law and society.<sup>315</sup>

Albert contends that such amendments should be called dismemberments rather than amendments. He further clarifies the differences between the two practices, explaining that "an amendment continues the constitution-making project in line with the current design of the constitution, while a dismemberment is incompatible with the existing framework of the constitution and instead seeks to unmake one of its constituent parts—its rights, structure, or identity."<sup>316</sup>

Albert provides a provocative theory to understand the complexity of formal constitutional change. The concept of dismemberment moves beyond the theoretical distinction of constituent and constituted powers to understand the actual practice of formal constitutional change. However, the concept of constitutional dismemberment disqualifies fundamental constitutional amendments as amendments. This concept attaches itself to a normative understanding of constitutional amendment.

This Article contends that constitutional amendment can be descriptively conceptualized as a constitutional phenomenon: constitutional amendment refers to formal constitutional change

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313. Yeh, *supra* note 195, at 38

314. *Id.* at 2.

315. *Id.* at 2–3.

316. *Id.* at 5.



consciously initiated by reformers as an amendment project, which may or may not follow the amendment rules established by the original constitution, and can introduce any changes to the original constitution. This positivist concept is important to understand and appreciate what is really going on in the area of constitutional amendments.

### C. Amendment Choice

Constitutional framers, as indicated in the case of Indonesia, have been faced with this practical question: whether to amend the existing constitution or making a new one. This creates a theoretical teleological question: what motivates the constitutional design choice between constitutional amendment and replacement?<sup>317</sup> Functionally, the distinction between constitution-making or replacement and constitutional amendment is blurry. The stories of foundational and constructive constitutional amendments indicate that constitutional amendments have similar functions to constitution-making or replacement—to facilitate creation and transformation of a democracy.

Then, what explains the constitutional design choice between amendment and replacement? Focusing on new Latin American democracies, Gabriel L. Negretto argues:

[C]onstitutions are replaced when they fail to work as governance structures or when their design prevents competing political interests from accommodating to environment. According to this perspective, constitutions are likely to be replaced when constitutional crises are frequent, when political actors lack the capacity to implement changes by means of amendments or judicial interpretation, or when the constitutional regime has a power-concentrating design.<sup>318</sup>

This thesis somewhat resonates with the acts of frequent constitutional replacements in Thailand. However, this thesis may not explain the case of Indonesia, where constitutional crises (popular protests and Soeharto's fall) arose and the constitution failed to operate as a governance structure, but it was not replaced, only amended. There must be some other

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317. ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 55 (2009).

318. Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 *L. & SOC'Y REV.* 749, 749–50 (2012).

determinants of constitutional design choice.

This Article contends that the differences in the functions of constitution-making and constitutional amendment have implications for understanding constitutional design choice. Compared to constitutional amendment, constitution-making has a *deeply constitutive function*. The making of a constitution by the people's power is not only directed toward creating a new governance structure, but contributes to the formation of national identity or of the collective identity of the people as a political community. Constitution-making translates national identity into what Michel Rosenfeld calls the "identity of constitutional subject."<sup>319</sup> Constitutional preambles are the ideal places to articulate and formulate the national identity.<sup>320</sup> But, the national spirit is also expressed<sup>321</sup> and constituted by the entire constitution. The constitutional provisions about institutional structures are not merely to create institutional structures; they express and constitute deep commitments, values, and identities shared among a community. To illustrate, behind the separation of powers and checks and balances lies the liberal spirit that constitutes a liberal constitutional community. Similarly, constitutional provisions on human rights express and form liberal or communitarian identities, which are varied in different communities.

Constitutional amendment does not have a deeply constitutive function like constitution-making because amendment is not exercised through the legally unlimited, original power of the people.<sup>322</sup> Of course, constitutional amendment may partially express and contribute to the formation of national identity, but a comprehensive expression and formation of the identity of a constitutional subject requires the action of constitution-making. Therefore, in addition to other political factors, this Article submits that a strong aspiration to

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319. See generally MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* (2009).

320. David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 154, 188 (2016).

321. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1269--85 (1999), for a discussion on expressivism in comparative constitutional law.

322. There is a new trend of involving the people in constitutional amendment process (including referendum), but this amendment power is still the constituted power. See generally PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION, *supra* note 17.

express and form national identity through constitutional means is an important determinant of constitutional design choice between constitution-making and constitutional amendment. If substantive political transformation is accompanied with a strong desire for constitutional expression and formation of national identity, constitution-making is likely. The absence or the weakness of the desire for constitutional expression and formation of national identity at the moment of substantive transformation may render amendment a choice.

The Indonesia case illustrates this aspect. While the amendments were radical, the political elite decided to retain the 1945 Constitution rather than make a new constitution. One of the principles agreed upon by the members of the MPR was “to process the amendments through the form of ‘addenda’, without deleting the original text of the 1945 Constitution.”<sup>323</sup> This was mainly because the original constitution, as the first constitution created after national independence, was already expressive of and constitutive to collective identity or shared values and commitments. The political elite wished to keep the two core founding commitments presented in the preamble of the constitution, namely the rejection of an Islamic state and the imposition of the national values called Pancasila.<sup>324</sup> The Pancasila includes these values: Belief in One God, a Just and Civilized Humanity, the Unity of Indonesia, Democracy Guided by Inner Wisdom in Unanimity Arising out of Deliberation among Representatives and Social Justice for All the People of Indonesia.<sup>325</sup> The commitments to these values explain why the constitutional preamble remains unchanged despite substantive changes in the constitutional body. As the original constitution is already expressive of and constitutive to the identity of the constitutional subject, the attachment to this original text is a necessity, and substantive amendments to deal with institutional and rights issues are sufficient.

The battle between constitutional amendments and making a new constitution in Taiwan<sup>326</sup> further illustrates the logic behind constitutional design choice. The battle is traced back to the transitional period in which the ruling party, the KMT, supported incremental constitutional amendments while the

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323. Indrayana, *supra* note 211, at 117.

324. *Id.* at 129.

325. *Id.* at 118.

326. Jiunn-Rong Yeh, *Hope or Nope: The Second Call for a New Constitution in Taiwan*, 125 ASIA PROGRAM SPECIAL REP. 4, 4 (2004).

opposing party, the Democratic Progressive Party (DPP), called for a new constitution.<sup>327</sup> A modus operandi of gradual constitutional reform was established, and the debate lost the momentum.<sup>328</sup> In 2000, the DPP, won the presidential election, and in 2003, then-President Chen Shui-bian and the DPP called for a new constitution.<sup>329</sup> As Taiwan has already created a successful constitutional democracy, why did it need a new constitution? President Chen Shui-bian justified the call for constitution-making in these words:

What is most important is that we can undergo a real process of constitutional and governmental restructuring as a means of improving government efficiency, raising competitiveness and creating a Taiwan identity as a foundation of long term peace and security for our nation and our society.<sup>330</sup>

Constitutional “restructuring” means making a new constitution.<sup>331</sup> There are several other factors (e.g., government efficiency and competitiveness), but the aspiration to create “a Taiwan identity” is an important determination of this constitution-making project. Why is there this aspiration? The ROC 1946 Constitution was brought by KMT from mainland China to Taiwan, and hence “[t]he Taiwanese people have never enjoyed the chance to make a new constitution, by which their national identity, constitutional identity and civic identity could be formed.”<sup>332</sup> This explains the desire to make a new constitution to constitute the identity of the constitutional subject.

### Conclusion

David A. Strauss famously argues that formal constitutional amendment is “irrelevant” in the sense that the US constitutional system “would look the same today if Article V of the Constitution had never been adopted and the Constitution contained no provision for formal amendment.”<sup>333</sup> This is mainly because constitutional change could be undertaken though

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327. *Id.*

328. *Id.*

329. *Id.*

330. President Chen Shui-bian, *Opening Address, in A NEW CONSTITUTION FOR TAIWAN* 17, 19 (Taiwan Advocates ed., 2004) (emphasis added).

331. *Id.* at 20.

332. Yeh, *supra* note 326, at 8.

333. Strauss, *supra* note 102, at 1459.

informal mechanisms, such as judicial interpretation of the “living constitution.”<sup>334</sup> But, Brannon P. Denning and John R. Vile point out five functions of formal constitutional amendments in the United States, namely correcting deficiencies in the Constitution; permitting a popular check on branches of government; providing the legal means to revolutionarily alter fundamental law; legitimizing changes to the fundamental law; and publicizing constitutional norms.<sup>335</sup> A copious amount of American scholarship has explored formal constitutional amendments.<sup>336</sup> Both informal and formal constitutional amendments are relevant to a complete understanding of constitutional change.<sup>337</sup>

In addition to national accounts, globalization has animated the comparative inquiry into constitutional law.<sup>338</sup> Particularly, a comparative inquiry into constitutional amendments is emerging as a new area.<sup>339</sup> The comparative constitutional amendment inquiry features three prominent approaches or epistemologies: conceptual, doctrinal, and normative. The conceptual approach explores questions such as the nature of the amendment power.<sup>340</sup> The doctrinal inquiry focuses on a

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334. See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

335. Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 274 (2002).

336. See generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES: 1789-2015*, (4th ed. 2015); Lutz, *supra* note 260; Symposium, *An Even More Perfect Union: Amending the Constitution*, 13 DUKE J. CONST. L. & PUB. POL'Y 1 (2018).

337. See JOHN R. VILE, *CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND EXECUTIVE ACTIONS* (1994), for a systematic analysis of both formal and informal constitutional amendments; see generally Richard S. Kay, *Formal and Informal Amendment of the United States Constitution*, 66 AM. J. COMP. L. 243 (2018) (general overview).

338. See AN INQUIRY INTO THE EXISTENCE OF GLOBAL VALUES THROUGH THE LENS OF COMPARATIVE CONSTITUTIONAL LAW (Dennis Davis et al. eds., 2017); NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* (3d ed. 2016); GÜNTER FRANKENBERG, *COMPARATIVE CONSTITUTIONAL STUDIES: BETWEEN MAGIC AND DECEIT* (2018); RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2014).

339. See generally THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT (Richard Albert et al. eds., 2017).

340. See Mark Tushnet, *Amendment Theory and Constituent Power*, in *COMPARATIVE CONSTITUTIONAL THEORY* 317 (Gary Jacobssohn & Miguel Schor eds., 2018); Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT'L J. CONST. L. 639

descriptive exploration of constitutional amendment rules.<sup>341</sup> The normative approach considers how constitutional amendment rules should be structured.<sup>342</sup> Some inquiries into constitutional dismemberment<sup>343</sup> and unconstitutional constitutional amendments<sup>344</sup> integrate all three of these approaches.

In addition to conceptual, doctrinal, and normal approaches, functional accounts are necessary to better understand the complicated use of amendments in reality. From this perspective, this study theorizes four amendment models. This, of course, does not exhaust the practices and functions of amendments. An amendment, for example, may consolidate an established democratic institution. Further exploration of the functions of amendments in a democracy is necessary. In addition, this study focuses on constitutional amendments in the context of democracies. Amendments may have varying functions under authoritarianism, which is a promising subject for future comparative inquiry into the functions of amendments. Finally, this study only considers the functions of an amendment's substance, and further studies are needed to explore the functions of the amendment process.

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(2015).

341. See, e.g., Lael K. Weis, *Constitutional Amendment Rules and Interpretive Fidelity to Democracy*, 38 MELB. U.L. REV. 240 (2014).

342. See, e.g., Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655 (2015).

343. Albert, *supra* note 6, at 84.

344. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).