INTRODUCTION

A Return to Constitutional Basics: Amendment, Constitution, and Writtenness

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This book invites us all to consider a puzzle: How to amend America's unwritten constitution? To begin this exploration, one can hardly do better than to start by asking what is America's "constitution," and even more specifically what is a constitution?

I WHAT IS AMERICA'S "CONSTITUTION"?

A constitution is the cluster of supreme principles and rules, typically set in a written document, that establish and regulate the state's basic institutional arrangements and express the nation's highest values.[1] A modern constitution is the highest law in a legal system. It establishes and regulates institutions, and provides rules and principles that both empower and limit governmental power. The constitution "defines the authority which the people commits to its government, and in doing so thereby limits it."[2] By defining governmental authority, the constitution constrains "the actions of government officials," every day in myriad decisions they make.[3]

The number of national constitutions is growing, and in the modern era, "to have a formal Constitution well-nigh became a universal fashion, a symbol of modernism."[4] As historian Linda Colley writes, "by 1914, written constitutions

[1] Michael J. Perry, "What Is 'the Constitution'? (and Other Fundamental Questions)" in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press 2001) 99, 103.

[2] Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Clark, NJ: The Lawbook Exchange, Ltd. 2005) 11.

[3] Miriam Seifter, "Unwritten State Constitutions? In Search of Constitutional Communities," this vol.

[4] Benjamin Akzin, "The Place of the Constitution in the Modern State" (1967) 2 Israel Law Review 1. On the development of written constitutions, *see* Charles Borgeaud, "The Origin and Development of Written Constitutions" (1892) 7 Political Science Quarterly 613.

were already becoming the norm across continents."[5] Today, formal written constitutions are the norm for the vast majority of countries,[6] and countries without formal constitutions such as the United Kingdom or New Zealand are the exception.[7]

Of course, not all states with formal constitutions are constitutionalist states.[8] As Karl Loewenstein observed in 1952, not all constitutions are "normative," meaning observed and effective; some are "nominal" and "semantic" insofar as they have no effect, they are aspirational and detached from reality, or they are mere window-dressing that disguise reality,[9] what we now define as "sham constitutions."[10]

A *Defining America's "Constitution"*

But what is "America's Constitution"? At first look, the answer might seem easy, as every person who ever visited the United States Constitution Museum at the National Constitution Center or the Rotunda of the National Archives Building in Washington, DC would reply that it is America's founding document established on behalf of "We the People of the United States."[11] Writing barely thirty-five years after the ratification of the United States Constitution,

5 Linda Colley, *The Gun, the Ship, and the Pen: Warfare, Constitutions, and the Making of the Modern World* (Liveright Publishing Corporation 2021) 4.

6 Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press 2009) 48–50.

7 Judith Pryor, "Unwritten Constitutions? British Exceptionalism and New Zealand Equivocation" (2007) 11 European Journal of English Studies 79.

8 On the distinctions between constitution and constitutionalism, *see*, for example, H. W. O. Okoth-Ogendo, "Constitutions without Constitutionalism: Reflections on an African Political Paradox," in Douglas Greenberg et al. (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press 1993) 65; Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (Albany, NY: SUNNY Press 2001).

9 Karl Loewenstein, "Réflexions sur la valeur des Constitutions dans une époque révolutionnaire" (1952) 2 Revue française de science politique 5–23, 312–334.

10 David S. Law and Mila Versteeg, "Sham Constitutions" (2013) 101 California Law Review 863.

11 Of course, the constitutional history of America goes back before the adoption of the US Constitution, to the Articles of Confederation drafted by the former colonies (now deemed 'states') in 1777 and entered into effect in 1781. This confederation suffered from various difficulties that eventually led to the establishment of a Constitutional Convention in Philadelphia in 1787, originally aimed to propose amendments to the Articles of Confederation, but which resulted in a complete replacement in the form of the Constitution for the United States of America. *See*, in short, Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Oxford: Hart Publishing 2009) 9–17; Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House Publishing Group 2012) 21–39.

William Rawle began his chapter on "The Constitution of the United States" with the following words: "The Government, formed under the appellation of the United States of America, is declared in the solemn instrument which is denominated the Constitution, to be ordained and established by 'the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessing of liberty' to themselves and their posterity."[12] America's Constitution, in short, is the country's fundamental document, which, as Vik Amar states, "was penned in 1787, ratified by a requisite number of states shortly thereafter, and formally amended by the Bill of Rights in 1791 and seventeen times during the two-and- a-quarter centuries since."[13]

But this answer, as we shall see, does not reveal much. For one, we are not even clear which text *is* – or *should* be – considered the fundamental document.

Consider the formal amendments to the text of the document referred to as the United States Constitution. Even counting *how many* amendments there have been to it, as Sanford Levinson shows, is a more complex task than we might first think.[14] As Levinson notes, constitutional amendments to the United States Constitution do not follow a single-subject rule and often include multiple complex changes.[15] There are also questions concerning the validity of certain amendments whose ratification process remains questionable, none more so than the Twenty-seventh Amendment, proposed by the First Congress in 1789 and ratified over two centuries later in 1992.[16] Moreover, some constitutional amendments might not be "genuine amendments in the sense of truly changing the correct understanding of the Constitution."[17] All of

[12] William Rawle, A *View of the Constitution of the United States of America* (1825) 25.

[13] Vikram David Amar, "The Drive for a National Popular Vote for the Presidency: A Case Study in Amending the Unwritten Constitution," this vol.

[14] Sanford Levinson, "Enumerating Amendments," this vol. *See also:* Sanford Levinson, "Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (a) <26; (b) 26; (c) >26; (d) all of the above)" (1991) 8 Constitutional Commentary 409.

[15] On the idea of a single-subject rule in amendment formulas, *see* Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford: Oxford University Press 2019) 186–88.

[16] *See*, for example, William Van Alstyne, "What Do You Think about the Twenty-Seventh Amendment?" (1993) 10 Constitutional Commentary 9. For an analysis of the reconstruction amendments, *see* John Harrison, "The Lawfulness of the Reconstruction Amendments" (2001) 68 University of Chicago Law Review 375.

[17] Levinson (n 14).

which raises an essential question: How can we identify America's constitution if we do not have a clear understanding of what amounts to an amendment?

B Beyond the Text

Furthermore, the text alone does not reveal much. The constitutional text – like any other legal text and perhaps even more so due its generality – must be interpreted and construed.[18] Simply reading the constitutional text, it has been argued, might leave concealed many essential hypotheses implicit within, written in "invisible" ink.[19] Indeed, as Amar notes, it is very often a court's rulings that determine the meaning of the written document, and are thus necessary for comprehending what the Constitution means.[20]

Moreover, some judicial interpretations might be so transformative that they should be considered "informal amendments" to the Constitution.[21] In her chapter, Carolyn Shapiro shows that certain judicial decisions can be considered "unwritten constitutional amendments" insofar as they create "a move from one constitutional equilibrium to another," usually not on their own but with the involvement of other institutions and actors. This new equilibrium may be inconsistent with the text, purpose, or original meaning of the constitutional text, as Shapiro demonstrates with respect to the Fourteenth and Fifteenth Amendments.[22]

The Constitution, Miriam Seifter argues in her contribution, therefore requires a "community of interpreters" that would develop "shared understandings of what it means." It requires, in order to fulfil its functions, constitutional participants who create a constitutional discourse: politicians and judges surely, but also attorneys, academics, commentators, media outlets, civil society organizations, and more.[23]

[18] On the complex debate over approaches to constitutional interpretation in the United States. *see*, for example, Philip Chase Bobbitt, *Constitutional Interpretation* (Oxford and Cambridge, MA: Blackwell Publishing 1991); Christopher Wolfe, *How to Read the Constitution: Originalism, Constitutional Interpretation, and Judicial Power* (Lanham, MD: Rowman & Littlefield 1996); James E. Fleming and Sotirios A. Barber, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press 2007).

[19] *See*, for example, Laurence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press 2008). For a comparative perspective on this idea, *see* Rosalind Dixon and Adrienne Stone (eds.), *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press 2018).

[20] Amar (n 13).

[21] Levinson (n 14). On this idea at the state level see Jonathan L. Marshfield, "Courts and Informal Constitutional Change in the States" (2017) 51 New England Law Review 453.

[22] Carolyn Shapiro, "Change Is the Only Constant: Unwritten Amendments and the Courts," this vol.

[23] Seifter (n 3).

Another reason why pointing to the constitutional text alone is plainly not enough is that constitutional rules and principles are often accompanied by constitutional conventions, which are constitutional norms that "help vindicate the spirit – or the purposes – of the Constitution," in the words of Neil S. Siegel.[24] While such norms "are not *in* the written Constitution," he notes, they are "deeply connected *to* the Constitution" and assist in maintaining the fundamental purposes of the constitutional system by limiting political discretion beyond formal constitutional restraints.[25] As we shall see, our inquiry into what is "America's constitution" is complicated in fascinating ways by the nature and content of these conventions, how we identify them, and how we know when they have changed.[26]

What seems fairly clear is that observing solely the United States constitutional text may only provide a partial picture of the reality of American constitutional politics. As Emily Zackin notes, "the apparent stability of the U.S. Constitutional document, however, obscures enormous changes in the way we have organized and conducted American political life."[27] The New Deal political transformation was "fundamental to the exercise of political power" yet the changes that took place "were never reflected in changes to the text of the federal Constitution."[28]

C *The Complexities of Federalism*

The role of state constitutions in the United States constitutional order is an additional aspect that may be important for understanding the nature of the constitution.[29] After all, state constitutions and their accompanying jurisprudence might be a significant source for the development of constitutional rights and values. Ignoring them may be a mistake, both descriptively and normatively.[30] As Jonathan Marshfield shows in his chapter:

> In addition to the Federal Constitution, all fifty states have their own written constitutions that are essential to the constitutional order. Those

[24] Neil S. Siegel, "The Trump Presidency, the Racial Realignment, and the Future of Constitutional Norms," this vol.
[25] *Ibid*.
[26] *See* Mark Tushnet, "Amending an Unwritten Constitution: Comparative Perspectives," this vol.
[27] Emily Zackin, "The Role of the People in Unwritten Amendments," this vol.
[28] *Ibid*.
[29] For a comparative and theoretical perspective on the character of subnational constitutions in federal-type systems, *see* Cheryl Anne Saunders, "The Constitutional Credentials of State Constitutions" (2011) 42 Rutgers Law Journal 853.
[30] *See*, for example, Jeffrey S. Sutton, "The Enduring Salience of State Constitutional Law" (2018) 70 Rutgers University Law Review 791, and more generally Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford: Oxford University Press 2018).

> constitutions structure and limit a vast public enterprise that includes hundreds of thousands of public officials, effects millions of citizens, and manages billions of public dollars.[31]

It is not possible to analyze the US Constitution and its effect on the domestic constitutional order while ignoring state constitutions and state courts' decisions. These subnational constitutional orders provide, as Zackin writes, "a plethora of positive rights that are absent from the text of their federal counterpart."[32] So, there is a deeper question to what extent one ought to examine subnational constitutional arrangements and their influence on the constitutional order when answering the question before us: What is the Constitution?

D Underlying the Text

There are still more reasons why an exclusively text-based reading of the constitution is insufficient. Mark Graber makes the point directly: "All constitutions require foundations that no single written text can provide."[33] He continues: "the Constitution of the United States contains numerous provisions and features that seem operational only under certain unwritten empirical conditions."[34] Furthermore, the Constitution of the United States, he explains, does not embody the entire fundamental law of the American regime because the text includes statements that do not set fundamental law and also because the text is not exclusive in the sense that "Americans make appeal to other texts as sources of higher or fundamental law."[35] Not only may other texts provide an alternative or complementary source of fundamental law but, as Frederick Schauer writes, even parts of the written text itself may not *effectively* be a part of the "Constitution." For example, the Preamble has no relevance from a positive constitutional law perspective and some provisions may lose their authority and become inoperative through nonenforcement or other nonuse, thereby making "the Constitution" only one part of the entire textual document.[36]

[31] Jonathan L. Marshfield, "State Constitutions and the Interaction between Formal Amendment and Unwritten Commitments," this vol.

[32] Zackin (n 27); and *see*, more broadly, Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton NJ: Princeton University Press 2013).

[33] Mark Graber, "The Unwritten Constitutions of the United States," this vol.

[34] *Ibid.*

[35] *Ibid.*

[36] Frederick Schauer, "The Unwritten Foundations of (All) Written Constitutions," this vol. On the idea that Article V of the US Constitution has been informally amended by constitutional desuetude see Richard Albert, "Constitutional Disuse or Desuetude: The Case of Article V" (2014) 94 Boston University Law Review 1029.

In the end, Graber writes, "written constitutions rarely fully articulate the telos of a regime that explains the underlying structure of constitutional practices and constitutional decision-making,"[37] because "all written constitutions depend on an underlying constitutional politics that determines their authority, meaning and implementation."[38] It is the very structure of unwritten constitutional politics that is crucial for constitutionalism and how the constitutional order functions, no less than the written constitution itself. And if, as Schauer argues in his chapter, the ultimate authority of the written Constitution is based on a nonlegal empirical fact of its acceptance, then "[t]he relevant accepting group might … accept only part of some written instrument as its constitution, and might in addition accept all or part of some other particular written instrument as part of its constitution, while also accepting all or part of something else – written instrument or not – as its constitution."[39] According to Hart's Rule of Recognition, the question which of two asserted constitutional documents is binding and effective depends on its acceptance by public officials and especially by judges. This is not a mere theoretical question in the philosophy of law, as courts have often found themselves having to decide which constitution is the valid and effective law of the land, for example, after *coups d'état*.[40]

Both Graber and Schauer demonstrate that the United States Constitution (or any other constitution for that matter) operates and rests on unwritten and extralegal preconstitutional assumptions and presuppositions. If that is the case – and we believe it is – then we must acknowledge that any understanding of a constitution must account for its "unwritten" dimensions.

II WHAT IS "UNWRITTEN" ABOUT AMERICA'S CONSTITUTION?

As the foregoing discussion demonstrates, a full appreciation of America's "Constitution" cannot stop with identifying a single authoritative written text. There are unwritten components to America's Constitution. Yet, an equally important set of questions arises when trying to define the scope of an "unwritten" constitution in general and to specify in particular those aspects of the American constitutional order we should regard as unwritten.

[37] Graber (n 33).
[38] Graber (n 33).
[39] Schauer (n 36).
[40] For a critical examination of how courts in postcolonial common-law jurisdictions responded to issues of the validity of the constitutional order in the wake of coups d'etat, *see* Tayyab Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) 27 Cornell International Law Journal 49.

One way of thinking about an "unwritten" constitution in the US context is to associate the "unwritten" constitution with a set of norms, understandings, and conventions designed to supplement or flesh out the written Constitution. Amar adopts such a framing in describing the "unwritten constitution" as referring, at least in some measure, to "the norms, conventions, and practices that have developed in America to give meaning to, and fill in the gaps of, the constitutional text that was penned in 1787, ratified by a requisite number of states shortly thereafter, and formally amended by the Bill of Rights in 1791 and seventeen times during the two-and- a-quarter centuries since."[41] Other contributors, including Seifter and Marshfield, frame the concept of an "unwritten" constitution in similar terms – *that is*, as a set of authoritative norms of constitutional status that are not directly discernible from any authoritative written constitutional text.[42]

This definition provides a useful starting point for thinking about the role of unwritten constitutional norms in our legal system and helps us to see how much of our system of governance depends upon shared conventions, understandings, and expectations that cannot be located in any canonical written constitutional text. But perhaps this definition does not go far enough. Perhaps, rather than solely thinking about the "unwritten" constitution as a set of norms that exist outside of and that supplement our written Constitution, we can also see the "unwritten" constitution as something that is inextricably bound up with and that undergirds the written Constitution as well.

A *Constitutional Conventions and the Unwritten Constitution*

Recent years have seen a growing scholarly interest in the role that unwritten conventions play in structuring and regulating our system of constitutional governance.[43] Constitutional conventions – sometimes also referred to as

[41] Amar (n 13).

[42] *See*, for example, Seifter (n 3) (using the term "unwritten constitution" to mean "an authoritative (in the sense that people follow it) rule or principle not found in the constitution's written text."); Marshfield (n 31) (using the term "unwritten constitution" to refer to "binding constitutional rules with no obvious or direct textual referent.").

[43] *See*, for example, Samuel Issacharoff and Trevor W. Morrison, "Constitution by Convention" (2020) 108 California Law Review 1913; Josh Chafetz and David E. Pozen, "How Constitutional Norms Break Down" (2018) 65 UCLA Law Review 1430, 1434; Neil S. Siegel, "Political Norms, Constitutional Conventions, and President Donald Trump" (2018) 93 Indiana Law Journal 177, 182; Curtis A. Bradley and Neil S. Siegel, "Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers" (2017) 105 The Georgetown Law Journal 255; Keith E. Whittington, "The Status of Unwritten Constitutional Conventions in the United States" (2013) University of Illinois Law Review 1847, 1860.

"constitutional norms" – comprise the set of "maxims, beliefs, and principles that guide officials in how they exercise political discretion."[44] Such conventions are "[s]ituated at the normative borderland between legal constraints on the exercise of political power and no restraints on the exercise of political will,"[45] and exert at least some degree of normative pull on official decision-making.[46]

Conventions of this sort have long been a familiar focus of constitutional study in other legal systems.[47] But the attention lavished on the written Constitution and its interpretation has muted the salience of unwritten conventions in the United States context until relatively recently. Nonetheless, it seems difficult to deny the purely descriptive claim that many unwritten conventions – such as the long-standing convention limiting the size of the Supreme Court to nine Justices and norms surrounding the use and preservation of the Senate filibuster – do, in fact, exert a meaningful degree of influence on official behavior.[48]

As Mark Tushnet observes, conventions perform many of the same functions as written constitutions, prohibiting some things, requiring others, and allocating decision-making authority over the remainder to various actors and institutions.[49] Observance of such norms, according to Siegel, helps to "vindicate basic purposes of" our constitutional system "that law alone cannot accomplish – including democratic self-government, a reasonably well-functioning federal government, limits on executive power to avoid a descent into authoritarianism, and judicial independence."[50]

44 Whittington (n 43) 1860; *see also* Siegel (n 24) (discussing constitutional conventions); Graber (n 33) (describing "constitutional conventions" as "the practices and settlements for implementing the Constitution that, although not mandated by the written Constitution, are understood to have constitutional dimension during particular constitutional regimes").

45 Siegel (n 24).

46 *See*, for example, Whittington (n 44) 1863 ("Given the continuing compliance of others, the simple existence of the convention provides a *prima facie* reason for following it. The presence of the convention itself provides a content independent reason for political action.") (footnote omitted); Tushnet (n 26) ("Conventions are usually said to be something like regularities to which people conform out of a sense of obligation …").

47 For a classic and influential study of the role that conventions play in the English constitutional system, *see* A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, MacMillan & Co. 3rd ed. 1889) 346. For more recent work examining the role of constitutional conventions in the English system, *see*, for example, Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Oxford University Press 1984); Joseph Jaconelli, "The Nature of Constitutional Convention" (1999) 19 Legal Studies 24.

48 *See*, for example, Graber (n 33) (noting the "present inhibition against court packing" as an example of an unwritten convention); Siegel (n 24) (citing examples of multiple conventions, including the norm against court packing and "the norm against using majority power in the Senate to repeal the filibuster as to legislation").

49 Tushnet (n 26).

50 Siegel (n 24).

At the same time, both Tushnet and Siegel acknowledge that the normative pull of conventions may be contingent, persisting only so long as conditions conducive to the cooperative behavior necessary to sustain and reinforce them continue to prevail. Tushnet takes a comparative perspective, viewing the role of conventions in the United States legal system alongside their role in the constitutional system of the United Kingdom, where conventions play a much more prominent and publicly acknowledged role.[51] Tushnet observes that conventions in both legal systems typically evolve through official defiance, when officials simply refuse to acknowledge their binding force and act in a manner inconsistent with the taken-for-granted regularities of behavior.[52] Tushnet cautions that the normative pull of conventions may depend on the willingness of particular officials to work within the boundaries of the presently dominant "regime" that organizes our constitutional politics at any given time.[53] As such, conventions may be "relative to the regimes within which they are embedded and that they sustain," such that those who reject or seek to transform the currently predominating regime may feel much less constrained by the currently predominating conventions.[54]

Tushnet's observations about the contingency of constitutional conventions dovetail with those of Siegel, who takes as his focus the erosion of many significant constitutional norms over the past few years. Siegel attributes a substantial portion of this erosion to the norm-defying behavior of former President Donald Trump and his administration[55] but cautions that the Trump Presidency can also be seen as a symptom of broader political forces that have contributed to the erosion of constitutional norms in recent decades.[56]

B Interpretation, Expectations, and the Unwritten Constitution

While constitutional conventions mark an important component of what we might think of as the "unwritten" Constitution of the United States, they hardly exhaust the category of what an unwritten constitution might entail.

51 Tushnet (n 26).
52 *Ibid.*
53 Tushnet (n 26) (discussing role of regimes in American constitutional politics and the potential contingency of conventions on the regime in which they are embedded); see also Graber (n 33) 34 (describing constitutional conventions as "the practices and settlements for implementing the Constitution that, although not mandated by the written Constitution, are understood to have constitutional dimension *during particular constitutional regimes*") (emphasis added).
54 *Ibid.*
55 *Ibid.*
56 *Ibid.*