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THE CONSTITUTIONAL RIGHT TO “CONSERVATIVE” REVOLUTION

David C. Williams*

Introduction

The American political tradition has generally recognized that the people have a moral right to revolution: when a government becomes tyrannical, the citizenry may, by force of arms, overthrow it and institute a new, more acceptable one. The constitutional status of this right is, however, the subject of considerable doubt. It is commonly argued that the *moral* right to revolution cannot be a *constitutional* right because the concepts of revolution and constitution are, at a deep level, in conflict.¹ A revolution, by definition, attempts to change the fundamental politico-legal order. A constitution, by definition, attempts to entrench that order. In other words, the *purposes* of a constitution and a revolution are deeply different: a constitution seeks to create order, a revolution to undo order. It would be absurd, in this view, to assume that a constitution contains the seeds of its own undoing by creating a right to revolution. Furthermore, as soon as a revolution commences, it must cease to be a constitutional activity because the people leave the constituted order and return to the state of nature. Thus, the *methods* and *political forms* of constitution and revolution are deeply different: constitutional activity is governed by the founding rules of a given constitutional regime, but revolution is governed by, at best, natural equity, and at worst, main force. In this view, therefore, revolution and constitution are inherently in tension, and a constitutional right to revolution is an oxymoron. For that reason, I will call this argument the inconsistency claim.²

This Article will argue that the inconsistency claim is overbroad, because it fails to distinguish between two critically different types of revolution.³ With regard to the goals of revolution, while all revolutions

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¹ See *infra* Part II.

² I elaborate and give examples of the inconsistency argument in Part II of this Article.

³ The focus of the inconsistency argument and my response to it is significantly eurocentric, in terms of the intellectual tradition and examples upon which both rely. The reason is that the consistency of revolution and constitution has especially agitated those of European legal heritage. It has not so agitated those of other traditions, in part because formal constitutions have played a less prominent part in non-European traditions. Any complete theory of the Second Amendment and the American revolutionary tradition would have to compare this country's experience with those of Africa, Asia, and Central and South America, but such a theory is beyond the scope of this Article.

aim to overthrow government, the inconsistency claim is wrong in maintaining that all revolutions aim to destroy the existing constitutional order. On the contrary, some revolutions are made to preserve the traditional order against the efforts of innovative government officials to change it; indeed, the American revolutionaries began their war as professed defenders of the British Constitution.⁴ Armed revolt against such a government is therefore not an attack on the constitution but an attempt to protect it. Thus, the chief error made by the inconsistency claim is to assume that government and constitution are the same thing, so that a revolt against one is necessarily a revolt against the other. In fact, the two are conceptually quite distinct. In some circumstances the government might even be opposed to the constitution. Therefore, a constitution could conceptually protect a right to conservative revolution—a right to protect the preexisting constitutional order against government officials who would subvert it.⁵

Similarly, with regard to the methods of revolution, the inconsistency claim fails to distinguish between different types of revolution. Some uprisings break the constitutional frame and plunge us back into the state of nature—as the inconsistency claim commonly puts it, some revolutions reduce us to anarchy.⁶ Revolutions are not, however, inherently anarchical. Theoretically, they could follow implicit or explicit constitutional norms for the conduct of revolutionary movements, staying well within the settled legal landscape and well away from the legal wilderness of the state of nature. When a government has set itself against the constitution, such a revolutionary movement may be more law-abiding than the government itself. In this vein, the chief error made by the inconsistency claim is to assume that there can be nothing between conventional, standing government on the one hand, and anarchy and mob violence on the other. In fact, there are many things in between—more or less orderly, more or less popular political forms that are neither governmental nor anarchical. Indeed, such forms may be necessary for any healthy democracy, and a democratic constitution might protect them for precisely that reason.⁷

In short, then, there is nothing conceptually incoherent in the idea of a constitutional right to revolution. There are, however, important inherent limits in the idea that it must be conservative. First, the goal of any such

⁴ See *infra* text accompanying notes 53–64.

⁵ Because the idea of “conservative revolution” is in the air, let me quickly distinguish my usage of this phrase from other, more common ones. By a conservative revolution, I mean specifically armed insurrection against government officials who seek to overthrow the constitutional order, for the purpose of restoring that constitutional order. I do not mean sudden change brought about through the legislature or the judiciary to move the country in a right-wing direction. The word “conservative” thus refers only to conserving the constitution, not to a place on the political spectrum.

⁶ See *infra* text accompanying notes 33 and 37.

⁷ See *infra* text accompanying notes 84–90.

revolution must always and only be to preserve the constitutional order, not to change it. Such a truly conservative revolution may have never occurred. Some revolutions may start as attempts at restoration, but inevitably they end up dreaming larger, newer dreams. Even the American Revolution, notoriously the most conservative of revolutions, eventually turned to more democratic ideas.⁸ As a result, most revolutions may, sooner or later, become unconstitutional as they seek to institute a new and better order of things.

Second, the form and method of a conservative revolution must be governed by constitutional norms. Revolution is a political activity, and there are a variety of ways to order such activity: revolutionary movements can be more or less democratic, more or less respectful of individual rights, more or less decentralized, et cetera. For a revolution to be constitutional, the constitutional order must contain some norms about how to carry out a revolution, and the revolution must conform to those norms. Again, such a truly conservative revolution may never have occurred: the early stages of revolutionary movements are often filled with discussion about preexisting constitutional limits, but as time goes on, the revolutionaries begin to develop their own forms.

Thus, the people do not create a constitutional revolution in the militant, unbounded exercise of self-rule; rather, they act within the dictates of a constitutional tradition imposed on them by the past. As soon as revolutionary movements become completely self-determining, they have ceased to be constitutional. A new constitution may result from such an exercise of self-determination, but the exercise itself cannot be said to be governed by a constitution. In short, most, perhaps all, revolutions leave their constitutional moorings and become the sort of revolution with which we are most familiar: the people wreaking their will on the world, creating their political landscape anew in a great exertion of self-definition.

Theoretically, then, although a constitution could guarantee a right of revolution, in practice it may be very difficult to determine whether a given revolution is in fact constitutional. That difficulty arises for two reasons: constitutional change and constitutional interpretation. Most constitutions have internal rules for change, and during revolution such internal change may come thick and fast. A constitutional revolution must protect the constitution in its present form, however new or shifting that form may be. In practice, however, it may be difficult to distinguish between a revolution made to preserve a changing constitution and a revolution made to repudiate the old constitutional order and replace it with a new one. That difficulty is compounded by the problems inherent

⁸ See *infra* text accompanying notes 65–66.

in constitutional interpretation. Even during peaceful times, with the help of settled institutions like the Supreme Court, Americans vituperatively disagree about the meaning of the Constitution. One would have to speculate that during armed conflict guided only by a brand new revolutionary movement, that disagreement would be significantly more severe.

This Article will proceed in five Parts. Part I will formally state the question that I wish to address whether: (1) a constitution could coherently protect a right to revolt, and (2) what difference it makes whether the right to revolution arises from a constitution or from natural law. Part II will present the inconsistency claim and offer examples of that claim made by prominent American thinkers. Part III delineates the heart of the argument: that a constitution can coherently protect a right to revolt against government in defense of the constitutional order. Part IV elaborates on the severe, inherent limits on a constitutional revolution, and explains how constitutional interpretation and constitutional change make those limits obscure in practice. The conclusion then suggests that, for all of its theoretical limits and practical difficulties, a constitutional right to revolution might be an important and useful concept in the American political tradition.

I. The Question

A. *Distinguishing the Question*

The question whether there is an inherent tension between constitution and revolution, such that it is conceptually impossible that the United States Constitution could protect a right to revolution, must be carefully distinguished from several different but related questions. First, whether the U.S. Constitution *could* conceptually protect a right to revolution is independent of whether it *does* protect such a right. In particular, it is independent of whether the drafters of the Constitution intended to guarantee a right to revolution. Second, some have argued that the Second Amendment to the U.S. Constitution protects the people's right to keep arms in readiness for revolution.⁹ Whether the people have a constitutional

⁹ See, e.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987). I have argued elsewhere that the Second Amendment once protected the people's right to own arms for revolution but no longer does so because of changes in the nature of the citizenry. If the citizenry should change again, it might reacquire a Second Amendment right to arms. See David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) [hereinafter Williams, *Civic Republicanism*]. Under the latter circumstance, the Constitution would guarantee a right to arms for revolution, but would not necessarily guarantee the right of revolution itself. As explained

right to own arms for revolution is, however, not the same question as whether the people have a constitutional right to revolt. The difference between those two questions, though subtle, is nonetheless important. Conceivably, the Constitution might guarantee a right to own arms in preparation for revolution, but once the revolution actually commences, we might, by definition, return to the state of nature, rendering the Constitution irrelevant. Third, whether the people have a natural right to revolution is independent of whether they have a constitutional right to revolution. The people might have a moral right to overthrow a tyrannical government and institute a new one, but the Constitution might in no sense create, limit, govern, or protect such a right. In short, it is possible to imagine the following legal regime: in recognizing a natural right to revolution, the Constitution protects a popular right to arms, but once the people begin a revolution, the constitutional frame cracks, and we must look to some other body of norms to consider the legitimacy of such activity.¹⁰

B. Defining Key Terms

To distinguish more clearly between natural and constitutional rights to revolution, and to consider why such a distinction should even matter, it is necessary first to define the concept of "revolution" with greater precision.¹¹ Perhaps because revolution is such a freighted concept, some

in the text, it would be coherent for the Constitution to protect the means of revolution but leave it to natural law to protect and govern the underlying right of revolution itself.

¹⁰The question whether revolution can be a constitutional activity is also not the same as whether revolution can *result* in a new constitutional order. Successful revolutions can, of course, create new constitutions. Indeed, some have argued that to be successful, revolutions must give rise to stable constitutions that protect freedom, however defined. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46–68 (1992); HANNAH ARENDT, *ON REVOLUTION* 125–26, 139–40 (1963). Similarly, whether revolution can be constitutional is also not the same question as whether a new constitution can be revolutionary in the sense of making a clean break with the established legal order. A lively debate is presently ongoing concerning whether the American Constitution was revolutionary in this sense. Compare Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995) (revolutionary), and Charles Fried, *The Supreme Court, 1994 Term, Foreword: Revolutions?*, 109 HARV. L. REV. 13 (1995) (revolutionary), with Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (not revolutionary). By contrast with both of those questions, the question at hand is whether an ongoing revolution can itself be constitutional, in the sense of being governed by a preexisting fundamental body of legal norms not created by the revolution itself or any associated new constitution.

¹¹When I refer to constitutional rights, I mean rights protected by a constitution, whether or not they are also natural rights. When I refer to natural rights, I mean rights protected only by natural law and not by a constitution. The reason for this distinction stems from the inconsistency claim's assertion that the right of revolution can be a natural right but cannot be a constitutional right. The critical question therefore is whether the right to revolution is (1) a natural right that is not also a constitutional right (as the

have proposed highly specific substantive definitions.¹² Many have focused on the degree of change, arguing that a revolt is not a true revolution unless it radically changes the preexisting politico-legal order.¹³ Some have defined revolution in terms of its substantive goals; Hannah Arendt, for example, argued that the aim of a true revolution is public freedom, rather than economic happiness.¹⁴ I offer a definition that is simpler but more useful for present purposes. The functional question that I wish to examine is whether the people might, without logical contradiction, have a constitutional right to take up arms against an oppressive government. Accordingly, I will define a revolution as a popular attempt by armed violence to change the present form or personnel of government. Such a revolution will necessarily produce change, but the change need not be total or sweeping; indeed, it may involve no more than substituting one (hopefully more faithful) set of officeholders for another within the same governmental structure. Such a revolution also must be popular in some broad sense—an act of the people, rather than a putsch or coup d'état. Within that parameter, however, it need not create any particular type of democratic or liberal system. The core of this definition is therefore armed resistance to government, because that is the activity of which the constitutional status is at issue.¹⁵

inconsistency claim asserts) or (2) a constitutional right, whether or not it is a natural right (as the inconsistency claim denies).

¹² Because I am here examining the right to revolution against government, I consider definitions of political revolution, not economic, scientific, cultural, or social revolutions, even though the line separating all these types of revolution is sometimes very fine.

¹³ Hannah Arendt, for example, maintains that a revolution must constitute a truly new beginning in the affairs of people. *See* ARENDT, *supra* note 10, at 28–35. Bruce Ackerman cautions that “a *total* change in governing principles” would be impossible, but he still defines a revolution in terms of fundamental (if less than total) change: “A revolution is a successful effort to transform the governing principles and practices of a basic aspect of life through an act of collective and self-conscious mobilization.” ACKERMAN, *supra* note 10, at 5–6. Similarly, Charles Fried asserts that a revolution involves “a clear break with previous sources of legal authority.” Fried, *supra* note 10, at 17. Under such a definition, a revolution is tautologically anticonstitutional, because the goal of a revolution must be to change the fundamental politico-legal order. As I explain in the text, I believe that such a definition is inappropriate if the question is whether a constitution might sanction resistance to government.

¹⁴ *See* ARENDT, *supra* note 10, at 31–35. For Arendt, the complete definition of a revolution involves three elements: violence, a new beginning, and public freedom. *See id.* at 35.

¹⁵ This definition thus includes violence as one of its elements, as do the definitions formulated by Amar and Arendt, *see* AMAR, *supra* note 10, at 462–63, and ARENDT, *supra* note 10, at 18–20, 35. By contrast, Ackerman’s definition would recognize both violent and persuasive revolutions, and he urges would-be revolutionaries not to use violence. *See* ACKERMAN, *supra* note 10, at 13. Ackerman’s definition of revolution proceeds from a different concern from my own. His interest in revolution is not whether the people have a right to armed resistance; instead, he is principally interested in how self-conscious political movements can generate liberal constitutions. *See id.* at 14.

By a constitution, I mean a set of written or unwritten legal norms that are considered to be more fundamental than and superior to all other legal norms within a given polity. These norms may or may not always be enforceable in a court of law, but they must be generally accepted by the members of a polity as binding on them.¹⁶ The question at issue is whether the people might have a constitutional *right* to revolution. Weak forms of constitutionalism, in which constitutional norms are only conventions or aspirational ideals, create no rights at all in the sense that the term “rights” is commonly used—rights as trumps.¹⁷ Such weak constitutions therefore could not create a right to revolution because they do not create rights of any kind, not because there is a logical contradiction between revolution and constitution.

Though perhaps no less important, natural law is distinct from constitutional law. In contrast to constitutional rights, within the Enlightenment tradition in general and social contract theory in particular, natural rights are those rights that belong to all individuals at all times and places by virtue of being human. So defined, constitutional rights are different from natural rights in at least three important ways.

First, the content of constitutional and natural rights may overlap, or they may differ. Constitutional rights may (perhaps should) include some or all natural rights, but they need not. Further, a constitution may make concrete by codification the scope of natural rights—it may adapt the content of a natural right to a given place and time, and it may define the content of an ambiguous natural right with greater precision. Finally, a constitution may include rights other than natural rights.

Second, the origins of natural rights and constitutional rights are significantly different. Natural law is that law appropriate to human individuals by virtue of their moral status as human individuals; as a result, it is operative in all places and times. Constitutional law, by contrast, is the constitution of a particular legal community; it is binding on its citizens by virtue of their membership in a particular ongoing, historically situated, political association. A constitution, even when it does incorporate natural law, adds an additional element of obligation by making it part of the organic law for a particular community, rather than just the universal law for abstract individuals.¹⁸

¹⁶ Charles Fried’s formulation of the concept is similar: a constitution “identifies what the law of the society is and how laws are made, and sometimes defines the proper subjects, types, and contents of law.” Fried, *supra* note 10, at 24. It is, in short, “a developing but continuous constituted structure judging and generating law.” *Id.* at 33.

¹⁷ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 188–92 (1978) (arguing that constitutional rights are rights in the “strong sense,” giving American citizens the right to disobey any law that wrongly invades these rights).

¹⁸ In particular cases, when a constitution seeks to protect natural rights, it tends to blur the origin of the rights involved. That blurring, however, should not obscure the basic difference. If citizens regard a constitution as only an expression of natural rights and

Third, the materials and techniques for interpreting natural rights may be different from those for interpreting constitutional rights. To determine the content of natural rights, one consults natural law. More specifically, within certain religious traditions, one would consult the Bible, along with the teachings of religious authorities and/or visionaries. Within the social contract tradition, one would consult the implications of the concept of the free, rational, and equal human agent. By contrast, to determine the content of constitutional rights, one consults the text (if any) of the constitution itself, associated documents, and customary understandings and authoritative pronouncements of its meaning. For the U.S. Constitution in particular, one might consult the text of the Constitution and its amendments, Supreme Court cases, the documentary history of the congresses and conventions that drafted and ratified its language, and widely shared popular and legal assumptions about the meaning of the Constitution.

C. The Significance of the Difference between Constitutional and Natural Rights to Revolution

These three differences offer an explanation of why it matters whether Americans have a constitutional or only a moral right to revolution. First, the type of right affects its enforceability. Citizens regard a constitutional right as a matter settled and legally binding among themselves, by themselves, and for themselves at a given time and place. Such a right is sanctioned by the very act of their constitution as a single legal community, and so it is inseparable from their existence as a legal community. A constitutional right to revolution is thus the product of fundamental positive law, and it should be enforceable in the way that other such rights are enforceable within any given legal system—perhaps even by legal action in court. By contrast, a natural right to revolution is the property of all peoples at all times and places. For that very reason, it is largely theoretical, sanctioned only by the appeal to Heaven.¹⁹ Such natural rights

binding only insofar as it expresses natural rights, then the fact of constitution adds nothing to natural law. One school of constitutional interpretation takes this point of view. See, e.g., MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 15 (1982) (describing the Constitution as an expression of natural law). By the same token, although a constitution might seek generally to enshrine natural law, the rights are essentially constitutional if citizens follow the constitution even when they suspect that it diverges from natural law. Finally, in rare cases, a constitution may provide simply that it protects natural law, without any more detail. In such a case, the practical difference between constitutional law and natural law may disappear, as it would be neither necessary nor possible to decide whether the right receives protection because of the constitution or because of natural law. Still, one might recognize a theoretical difference even here—a right might be protected because it is in the constitution (which happens to protect natural law) or because it is in natural law (which the constitution happens to protect).

¹⁹Locke explains that when a prince refuses to submit to the will of the people

might theoretically place moral limits on all positive law, but those limits arise only from the rather abstract dictates of "nature and of nature's God."²⁰

Second, because of the different materials and techniques used in the interpretation of a constitutional and a natural right to revolution respectively, the nature of the inquiries would be distinct. Interpretation of a constitutional right to revolution would be heavily documentary, designed to determine the meaning of a preexisting feature of our constitutional order. By contrast, inquiry into a natural right to revolution would involve abstract consideration of God's will or the nature of human rationality, individuality, and freedom. Inevitably, perhaps notoriously, such a direct inquiry into natural rights is more abstract and amorphous than an inquiry into constitutional meaning. It also deems irrelevant most of the material of constitutional law, because natural law transcends and controls all such culturally and historically specific acts as the constitution. If the materials of constitutional law fail to safeguard a natural right, then the constitution is simply wrong.²¹

Third, for both of the foregoing reasons, the relationship among citizens during a constitutional revolution is different from their relationship during a revolution sanctioned only by natural law. Constitutional revolutionaries must appeal to other Americans as Americans, citizens sharing a particular legal tradition and owing one another particular, historically contingent obligations. Constitutional revolutionaries may also demand acquiescence in a revolution because of this set of shared norms, obligations, and histories. And these revolutionaries make their revolution as coparticipants in an ongoing, constituted cultural enterprise. By contrast, natural law revolutionaries must appeal to others as human beings who possess rights simply by virtue of being human.²² Their revolution is potentially worldwide, because political boundaries are simply arbitrary marks on a map. Theoretically, every person in the world would have the same right or obligation to participate in every war of liberation. Natural law revolution would be governed not by shared, historically entrenched understandings, but by direct appeal to natural justice.

regarding the meaning of the social contract, then "the Appeal lies only to Heaven," rather than to some constituted, earthly forum. See JOHN LOCKE, *The Second Treatise of Government, in TWO TREATISES OF GOVERNMENT* 283, para. 242 (Peter Laslett ed., 1960) [hereinafter LOCKE, *Second Treatise*].

²⁰ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

²¹ The materials of constitutional law might aid the inquiry into natural rights indirectly: some of the drafters of constitutional law were trying to codify natural law, so natural lawyers might look to the constitution for suggestions about the content of natural law. Those suggestions, however, have no more authority than any others.

²² Perhaps the most famous example of such an approach is the French Revolution. See ARENDT, *supra* note 10, at 148-49.

A concrete illustration of these differences is as follows: If revolution is a constitutional right, Timothy McVeigh and Terry Nichols could conceivably offer it as a defense in their trials, and the judge could conceivably recognize it. The court could find that, protected by the Constitution, the right of revolution is currently part of America's fundamental legal structure, enforceable in a court of law, and all other Americans are required to respect it. To be sure, the court might (and should) decide that even if the Constitution does protect a right of revolution, it does not extend to the actions of McVeigh and Nichols. But if the right to revolution is only natural and not constitutional, then the defendants could not even appropriately raise it in a court of law; such a plea belongs only in the court of Heaven, because it does not derive from any legal norm cognizable in an American jurisdiction.²³

In summary, the distinction could be formulated in the following way, perhaps somewhat overdrawn for clarity. A constitutional revolution is conceptually nothing more than the normal interpretation and enforcement of constitutional rules in an extreme and perhaps dizzying set of circumstances. It does not alter the basic legal relationships among citizens, nor does it disrupt the preexisting fundamental order. By contrast, a revolution based only on natural law does disrupt that order, and, in an important sense, it casts citizens into a legal wilderness with few clear landmarks. Such revolutionaries must work out their civil and political relationships anew, and they must try to bring some new legal order out of the wilds. Depending on one's perspective, then, a constitutional revolution may seem hopelessly conservative, crabbed by the dead hand of the past. Alternatively, it may seem reassuringly to offer some measure of safety in a time of turmoil. By contrast, a natural law revolution may seem chaotic and threatening, or it may seem wonderfully hopeful and full of possibility. Whichever perspective one adopts, it matters whether the right to revolution is constitutional or only natural.

II. The Inconsistency Claim

For some time, one school of historians has described the U.S. Constitution as a conservative reaction against the perceived excesses of the revolutionary period. Rich and powerful elites sought to centralize power into the hands of a stable, distant central government and to limit the populist state legislatures that had proved insufficiently respectful of property and hierarchy.²⁴ Some early rural rebels echoed this view. In protest-

²³ For another illustration of the distinction between natural and constitutional law, see the discussion of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *infra* note 48.

²⁴ See generally E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776-1790* (1961); MERRILL JENSEN, *THE ARTICLES OF*

ing taxes or property inequality, they claimed the legacy of the American Revolution.²⁵ By contrast, those who resisted the rebels' demands cast themselves as defenders of the new constitution and the rebels as malcontents unwilling to reconcile themselves to the constitutional order.²⁶ The revolutionary mood was thus expansive, ebullient, unstable, and erratic; the constitutional mood was narrow, fearful, orderly, and careful.

This historical change in mood illustrates in a particular instance the essence of the inconsistency claim. Not just the American Revolution, but revolution generally is about disorder and change; not just the American Constitution, but constitutionalism generally is about order and stability. Therefore, a constitution cannot contain a right of revolution, because such a right would be inconsistent with the nature of a constitution itself.

More formally stated, the inconsistency claim has two primary elements. First, some have argued that the purpose of a revolution is to change the established politico-legal order, but the purpose of a constitution is to preserve that order. Therefore, a constitutional guarantee to a right of revolution would contradict that constitution's very *raison d'être*. A constitutional right of revolution would be a suicide note, written by the framers on behalf of the constitutional order even as they brought that order into being.²⁷ I will call this view the *purpose-inconsistency argument*.

Second, the form and method of a revolution are different from the form and method of a constitution. Constitutional government proceeds according to known, fixed, consensual rules and within established institutions. By contrast, revolutions tend to swirl out of control as the people take power into their own hands and make the political world anew. In a revolution, the constitutional frame cracks as citizens are plunged into the state of nature and must devise new forms and methods to advance the revolution. I will call this view the *method-inconsistency argument*.

CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781 (1940); MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789 (1950). For a brief summary of Ferguson's and Jensen's views, see JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS xiv-xv (1979). Others have denied this discontinuity between the revolution and the Constitution, portraying the Constitution as resting on the revolution's fundamental principles. See ACKERMAN, *supra* note 10, at 48-54; ARENDT, *supra* note 10, at 141-44.

²⁵ See RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 63-65 (1975); THOMAS P. SLAUGHTER, THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION 127-33 (1986).

²⁶ See SLAUGHTER, *supra* note 25, at 133-42.

²⁷ Justice Goldberg pithily made this argument in another context: "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (explaining that Congress has broad powers to require military service).

In short, then, the point of a revolution is to upset the constituted order, and the way it does so is to create a revolutionary movement that does not follow constituted modes. Across the history of this republic, a number of significant figures have espoused the inconsistency claim. For example, Abraham Lincoln made the inconsistency claim the central theoretical theme of his First Inaugural Address. Lincoln considered the secession of the Southern states to be a revolution against the United States, and he denied that the Constitution contained any such right. He admitted that the people might have a natural right to revolution: "If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution."²⁸ But Lincoln carefully distinguished between constitutional modes of change and the natural right to revolution: "Whenever [the people] shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to dismember, or overthrow it."²⁹ Revolution could not be a constitutional right because the Constitution must presuppose its own perpetual legitimacy:

Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever—it being impossible to destroy it, except by some action not provided for in the instrument itself.³⁰

In other words, the purpose of revolution, to overthrow government, contradicts the purpose of constitution, to institute perpetual government. Any right of revolution must logically come from "outside the instrument itself"—as, for example, from natural law. Because Lincoln had taken an "oath registered in Heaven" to "preserve, protect, and defend" the Constitution, he was honor-bound to resist all attempts at revolution.³¹

In Lincoln's view, not only were the purposes of constitution and revolution contradictory; so too were their forms and methods. The constitutional method of change involved orderly elections governed by stable, fundamental rules: "By the frame of government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that

²⁸ Abraham Lincoln, *First Inaugural Address*, in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 215, 219 (Don E. Fehrenbacher ed., 1989).

²⁹ *Id.* at 222.

³⁰ *Id.* at 217.

³¹ *Id.* at 224.

little to their own hands at very short intervals.”³² By contrast, revolution was an essentially lawless and therefore unconstitutional activity:

Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form is all that is left.³³

After the Civil War, the Supreme Court embraced Lincoln’s theory of revolution.³⁴ More recently, the Court reiterated its view by rejecting the free speech challenge of American Communists to the Smith Act.³⁵ The Court held perfunctorily that Congress plainly had the power to stop revolution; the only serious question was whether it had violated the First and Fifth Amendments by the particular antirevolutionary means that it had chosen in the Smith Act.³⁶ The Court drew a sharp distinction between constitution, which it identified with order, and revolution, which it identified with disorder: “The obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.”³⁷ The Court was prepared to admit that there might be a right to revolution against authoritarian governments. Even that right, however, was only “theoretical”—meaning, apparently, that it is only a moral, not a positive legal right. Also, the Court felt bound to put the word “right” in quotation marks: “Whatever theoretical merit there may be to the argument that there is a ‘right’ to rebellion against dictatorial governments is without force where the existing structure of the government provides for peaceful and orderly change.”³⁸ Indeed, the Court found it virtually self-evident that Congress must have the power to protect itself from rebellion, appar-

³² *Id.* at 223.

³³ *Id.* at 220.

³⁴ See *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869) (explaining that the Constitution was intended to create a perpetual union); BERNARD SCHWARTZ, *FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION, 1835–1877* at 133–34 (1973) (discussing the doctrine of perpetual union in *Texas v. White* and other cases).

³⁵ *Dennis v. United States*, 341 U.S. 494, 497–98 (1951) (finding that the claim that challenged the federal law prohibiting knowing and willful advocacy of the overthrow of the government was based on the virtue of leadership of the Communist party, rather than the protected advocacy of it).

³⁶ *Id.* at 501.

³⁷ *Id.*

³⁸ *Id.*

ently because the point of a constitution is to sustain a government, not to provide for its dissolution: "That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion No one could conceive that it is not within the power of Congress to prohibit acts intended to overthrow the Government by force and violence."³⁹ Furthermore, according to the Court, the methods of (orderly) constitutionalism and (anarchical) revolution are entirely at odds: "We reject any principle of governmental helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy."⁴⁰

In the last year, the militia movement⁴¹ has moved the right of revolution back into the national spotlight,⁴² and Garry Wills has strongly advanced the inconsistency argument in his analysis of the Second Amendment. According to Wills, some scholars of that amendment find in it "not only a private right to own guns for any purpose but a public right to oppose with arms the government of the United States."⁴³ Wills acknowledges that Americans have a moral "right of insurrection, which clearly does exist whenever tyranny exists."⁴⁴ Yet he denies that that right can come from the Constitution's Second Amendment, because the purpose of revolution is to destroy the constitution itself:

[T]he right to *overthrow* government is not given by government Modern militias say the government instructs them to overthrow government—and wacky scholars endorse this view. They think the Constitution is so deranged a document that it brands as the greatest crime a war against itself (in Article III: Treason against the United States shall consist only in levying war against them) and then instructs its citizens to take this up.⁴⁵

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ For a description of the militia movement and its constitutional thinking, see David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879 (1996) [hereinafter Williams, *The Militia Movement*].

⁴² *See id.* at 880.

⁴³ Garry Wills, *To Keep and Bear Arms*, N.Y. REV. BOOKS, Sept. 21, 1995, 62, 62. Although Wills's interest in the Second Amendment is relatively new, he has written extensively on the revolutionary and constitutional periods. *See, e.g.*, GARRY WILLS, *INVENTING AMERICA* (1978).

⁴⁴ Wills, *To Keep and Bear Arms*, *supra* note 43, at 69.

⁴⁵ *Id.* In the interest of full disclosure, I should admit that Wills names me as one of the "wacky scholars" who embrace constitutional absurdity. *See id.* Actually, I have never argued that the Constitution protects a right to revolution. I *have* argued that once upon a time and under certain circumstances—not now pertaining—the Constitution protected a right to own arms so as to be ready to make a revolution. *See* Williams, *Civic Republi-*

Like Lincoln and the Supreme Court, Wills believes that the point of a constitution can only be to entrench order, and the point of a revolution can only be to overthrow that order. Moreover, the form and method of revolution cannot be governed by constitutional norms because revolution breaks the constitutional frame and plunges us into a world without settled authority: “[The right to overthrow government] arises when government no longer has authority. One cannot say one rebels by right of that nonexistent authority.”⁴⁶ One can, presumably, rebel only by the authority of natural justice, unconstrained by the regularity of constitutional process.

An impressive lineup—one of the greatest Presidents of the United States, the Supreme Court, and one of the most distinguished public commentators of our time—thus unanimously agree: it is simple common sense that a constitution cannot guarantee a right to revolution. A constitution must presuppose its own legitimacy, and so it must presuppose that no one has a right to revolt against it. Citizens may still have a right to revolt, but that right must come from outside the document. The only constitutional way of “responding to imperfection”⁴⁷ in the government is by the normal processes of constitutional governance—elections and constitutional amendments.⁴⁸

III. Consistency between Revolution and Constitution

A position characterized as self-evident logic by so significant an array of figures must command respectful consideration. Yet I submit that the apparent commonsensicality of the inconsistency claim is misleading,

canism, *supra* note 9. As I have tried to demonstrate, those two contentions are different in important ways. See *supra* text accompanying notes 7–8.

⁴⁶ Wills, *To Keep and Bear Arms*, *supra* note 43, at 69.

⁴⁷ The legal issues surrounding the amendment process are themselves by no means straightforward. For a collection of essays considering these issues, see *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., Princeton Univ. Press 1995) [hereinafter *RESPONDING TO IMPERFECTION*].

⁴⁸ John Marshall offered a similar constitutional argument in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). After tracing the origin of much American land title to conquest of the Indian tribes, he broadly hinted that such origin of title might violate natural justice. See *id.* at 591–92. Even so, if a principle is critical to a constitution's own legitimacy (as conquest was, according to Marshall), then the constitution could not hold that principle illegitimate. “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.” *Id.* at 588. Accordingly, even if the tribes had a natural right to their land, the Constitution could not recognize that right without committing juridical suicide: “[I]f a country has been acquired and held under [a principle]; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.” *Id.* at 591. For a fuller exposition of this interpretation of *Johnson*, see David C. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 411–12 (1994) [hereinafter Williams, *Conquest, Consent, and Community*].

as it paints with too broad a brush. If the only options were that (1) the Constitution protects all revolutions or (2) the Constitution protects no revolutions, then we would perhaps have to choose the second option for the reason that Lincoln, Wills, and others adduce: the Constitution cannot sanction a revolt against itself. But those are not the only options.

Consistent with a presupposition of its own legitimacy, the Constitution could guarantee revolutions made to preserve the Constitution and disallow revolutions made to overturn it. Indeed, such a distinction—protecting conservative revolutions but not others—may be *more* consistent with the Constitution's presupposition of its own legitimacy than would be a disallowance of all revolutions, because it calls upon the people to defend the Constitution in extremis.

Originally and for many centuries, the concept of revolution referred only to what I here call conservative revolutions: the political wheel revolves back to its starting point, and the world witnesses a restoration of a prior order.⁴⁹ Today, the common usage of revolution may refer to linear progress, the substitution of a wholly new order for an old and failed one. That usage, however, rose to a position of dominance only with the French Revolution.⁵⁰ By contrast, as I will consider later, the American War for Independence was a time of changing and multiple meanings. The American revolutionaries sometimes described their revolution as a restoration and sometimes as a substitution.⁵¹

Implicit in the concept of a conservative revolution is the idea that the government does not always represent the Constitution. Indeed, without that idea, it would be impossible for the people to resist the government on behalf of the Constitution, because the government and the Constitution could not be separated. Once we recognize the possibility of separation, however, the logical flaw in the inconsistency claim becomes clear. When government itself seeks to subvert the Constitution, then the government, far from representing the Constitution, actually becomes its opponent. If the people then take up arms to defend the Constitution, their revolution is made to protect the existing structure, not to forge a new one. In such case, the people revolt not against the Constitution (the advocates of which they have become) but only against the sitting government.

Let me return to Garry Wills's argument to illustrate this failure of the inconsistency argument to differentiate the government and the Constitution. Wills uses the term "government" to refer indiscriminately to the Constitution and to federal officeholders. As a result, in his formulation, a revolt against government is made to seem to be tautologically a

⁴⁹ See ARENDT, *supra* note 10, at 35–36.

⁵⁰ See *id.* at 50–52.

⁵¹ See *infra* text accompanying notes 53–63; ARENDT, *supra* note 10, at 42–44.

revolt against the Constitution. If we substitute more precise nouns, the apparent logic of the claim disappears. Consider Wills's statement recast in this way:

Yet the right to overthrow [federal officeholders] is not given by [the Constitution]. It arises when [federal officeholders] no longer ha[ve] authority. One cannot say one rebels by right of that nonexistent authority [of officeholders]. Modern militias say the [Constitution] itself instructs them to overthrow [federal officeholders]—and wacky scholars endorse this view.⁵²

Implicit in the inconsistency claim, in short, is the idea that the government is the only conceivable defender of the Constitution, that inherent in the concept "constitution" is the notion that only officeholders can protect it. That identity of constitution and government may be true for some constitutions, but it is not required by the concept of a constitution as such. Depending on the particular constitution's statist or populist underpinnings, the people may occupy a variety of roles in its interpretation and enforcement.

The Anglo-American legal tradition has endorsed the idea that sometimes the people, rather than the government, may best represent the constitution.⁵³ Locke's doctrine of resistance grows out of the idea that when the government seeks to subvert the terms of the social contract, then it becomes an aggressor against the people, who accordingly have a right to resist.⁵⁴ That idea has passed intact to more contemporary, though perhaps less distinguished, writers—such as the leaders of the militia movement. Thus, one pamphlet declaims: "WHEN ELECTED OFFICIALS BREAK THEIR OATH TO UPHOLD THE CONSTITUTION, IT IS NOT THE PATRIOTIC CITIZEN WHO IS IN REBELLION, BUT THE GOVERNING OFFICIAL."⁵⁵

⁵² Cf. Wills, *To Keep and Bear Arms*, *supra* note 43, at 69.

⁵³

If the Federal Government should overpass the just bounds of its authority, and make tyrannical use of its powers; the people whose creature it is must appeal to the standard they have formed, and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.

THE FEDERALIST NO. 33, at 206 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

⁵⁴ See RICHARD ASHCRAFT, *REVOLUTIONARY POLITICS & LOCKE'S TWO TREATISES OF GOVERNMENT* 296–97 (1986); LOCKE, *Second Treatise*, *supra* note 19, paras. 212–43.

⁵⁵ THE FREE MILITIA, *FIELD MANUAL* § 1, at 11 (1994). To be clear, I should explain that while I believe that the militia movement is correct on this and some other points, I also believe that they are fundamentally mistaken about the relevance of the right to keep and bear arms to modern conditions. See Williams, *The Militia Movement*, *supra* note 41.

Like Locke and the modern militia movement, the American revolutionaries did not assume that only formal government could defend the constitution. Quite the contrary, they cast the British government as the aggressor against the social contract,⁵⁶ and they saw themselves—in formal committees of correspondence and inspection, ultra vires Continental Congresses⁵⁷—as the true protectors of the British imperial constitution.⁵⁸ Indeed, in its early stages, to a significant extent, the American Revolution was a conservative revolution of precisely the sort that I am describing. To be sure, some revolutionaries maintained that they were exercising a natural right to revolution to protect their other natural rights.⁵⁹ But a large number of revolutionary leaders saw themselves as constitutional conservatives reacting to the aggressive behavior of the British Crown and Parliament.

Their constitutional grievances were of three sorts. First, they believed that they were entitled to the benefit of English law and the rights of Englishmen, but the British government was attempting to govern them through arbitrary power.⁶⁰ Second, they believed that Parliament had no right to govern their internal affairs or to tax them.⁶¹ Third, they believed that the king was seeking to disrupt the traditional balance of estates by bribing Members of Parliament and colonial legislators with places, pensions, and perquisites.⁶² Eventually, the revolutionaries would declare independence of the king and so leave the empire altogether. Even then, however, they would for a time seek to preserve what they believed to be the essence of the British constitutional structure, now transposed to the other side of the Atlantic: their new constitutions enshrined what the revolutionaries took to be the traditional rights of Englishmen,⁶³ and they created state governments modeled on the traditional balance of estates.⁶⁴

⁵⁶ See RAKOVE, *supra* note 24, at 81; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 268-71 (1969).

⁵⁷ See RAKOVE, *supra* note 24, at 65.

⁵⁸ There is considerable disagreement on whether the revolutionaries were *right* about their constitutional claims, but there is no serious dispute about the fact that they portrayed themselves as faithful to the constitution. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); JACK P. GREENE, *PERIPHERIES AND CENTER* (1986); WOOD, *supra* note 56, at 10-13; Barbara Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1157 (1976).

⁵⁹ Whether to invoke natural law or constitutional law or both was one of the first debates entertained by the First Continental Congress. See, e.g., RAKOVE, *supra* note 24, at 54.

⁶⁰ See BAILYN, *supra* note 58, at 77-79; GREENE, *supra* note 58, at 23-28.

⁶¹ See BAILYN, *supra* note 58, at 202-29; Black, *supra* note 58, at 1157-1211; see also RAKOVE, *supra* note 24, at 58-59.

⁶² See BAILYN, *supra* note 58, at 124-25, 131-33; Williams, *Civic Republicanism*, *supra* note 9, at 567-68.

⁶³ See WOOD, *supra* note 56, at 271.

⁶⁴ See *id.* at 197-214. That transposition followed an old pattern for the colonists. They had sought to model their governments on England's, claiming that the imperial

I do not argue that the American revolutionaries never sought to change the British constitution. Eventually, they self-consciously did so in a variety of ways. For example, they created new, more thoroughly republican legislatures,⁶⁵ and they sought to protect natural rights, rather than the traditional rights of Englishmen.⁶⁶ Nor do I argue that the framers of the Constitution *in fact* sought to guarantee a right of conservative revolution in 1787. But I do argue that they *could* have sought to do so, without incoherence, insensibility, or profound inconsistency with their own ideological heritage. They knew from personal experience that government and constitution are not identical concepts, that government can wage war on the constitution, and that sometimes the citizenry is the constitution's only hope.

This distinction between government and constitution specifically addresses both the purpose-inconsistency argument and the form-inconsistency argument. The response to the former is fairly simple: the purpose of a conservative revolution is to protect the constitution against invasion by the government, not to create a new politico-legal order. The revolution arises from an unremedied constitutional grievance, and the goal is to satisfy that grievance by reinstalling the constitutional regime. In this sense, a constitutional right of revolution is the opposite of the "suicide note" described by the inconsistency argument: it is instead a guarantee that the constitution should have multiple protectors—the government in ordinary times, the citizenry in extraordinary ones.

The response to the form-inconsistency claim is slightly more complicated. This claim supposes that when the people take arms against government, the constitution is by definition dissolved, and the nation has entered a state of nature. Again, that formulation poses the options too simply, as polar opposites: we are either in a regime of normal government or in the state of nature. In fact, there is a continuum between those two points, forms of civil association that are neither governmental nor wholly atomistic. It is possible for a constitution to govern at least some of that continuum, even when the conventional government no longer holds authority. For such a situation to hold, of course, the particular constitution would have to include, implicitly or explicitly, a set of norms

constitution sanctioned this home-rule arrangement. See GREENE, *supra* note 58, at 31–32. Formal independence from Great Britain and formation of the Articles of Confederation may therefore have changed the form of the constitution, as the revolutionaries sensed, see RAKOVE, *supra* note 24, at 81–83, 139–41, but perhaps not its basic principles. Charles Fried has argued that the Declaration of Independence and the Articles of Confederation were constitutional because they both rested on state authority under old charters. The early republic did not cleanly break with preexisting legal authority until the Constitution of 1787, with its derivation of authority from the people of the United States, rather than from the states. See Fried, *supra* note 10, at 19–24.

⁶⁵ See BAILYN, *supra* note 58, at 272–301.

⁶⁶ See *id.* at 184–89.

governing how a revolution should be carried out. Many constitutions contain no such norms; they assume that a revolution in fact does initiate a state of nature. But that assumption is implicit only in particular constitutions, not in the concept of constitutionalism itself. Indeed, nothing prevents the framers of a constitution from specifying with great detail the methods and forms that patriots should follow in the event of governmental assault on the constitution.⁶⁷

The Lockean tradition provides an important example of the idea that even when the bonds between government and people are severed, the people do not necessarily lapse into a preconstitutional state. Locke described not one but two social contracts—the popular contract and the rectoral contract.⁶⁸ First, the people contracted among themselves to create society; in this contract, individuals consented to form a single collective body to be ruled by the will of the majority.⁶⁹ Society then contracted with government to create a particular form of commonwealth, delegating certain powers but also placing limits on them.⁷⁰ The making and the breaking of these contracts were separate and independent issues. Locke begins his chapter on the dissolution of government: “He that will with any clearness speak of the *Dissolution of Government*, ought, in the first place to distinguish between the *Dissolution of the Society*, and the *Dissolution of the Government*.”⁷¹ The formation of society is more fundamental than the formation of government, and its dissolution can generally occur only upon foreign invasion:

That which makes the Community, and brings Men out of the loose State of Nature, into *one Politick Society*, is the Agreement which every one has with the rest to incorporate, and act as one Body, and so be one distinct Commonwealth. The usual, and almost only way whereby *this Union is dissolved*, is the Inroad of Foreign Force making a Conquest upon them.⁷²

⁶⁷ Akhil Reed Amar addresses a similar objection to his proposed popular amendment process with a similar response. The objection says: “Perhaps the people do have a right to alter or abolish their government outside Article V, but this right is not a *legal* right, a *constitutional* right. It is something else—supra-constitutional, extralegal, natural, philosophical, or revolutionary, perhaps, but definitely not legal and constitutional in the way that Article V is.” Amar, *supra* note 10, at 499. Amar’s response: “Why not? Surely the Constitution could have said, in so many words: ‘Article V is not exclusive. The People retain the legal right to change the Constitution.’” *Id.*

⁶⁸ I borrow the terms from EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 109 (1988).

⁶⁹ See LOCKE, *Second Treatise*, *supra* note 19, paras. 96–99, 211.

⁷⁰ See *id.* at paras. 132, 149, 243.

⁷¹ *Id.* at para. 211.

⁷² *Id.*

When society is so dissolved, so necessarily is government, because the latter is dependent on the former.⁷³

By contrast, government may be dissolved while society remains intact. Locke explains: "Besides this over-turning from without, *Governments are dissolved from within*"⁷⁴ when government betrays its trust, in various ways that Locke describes in detail.⁷⁵ When the government dissolves, power "*reverts to the Society* [not disconnected individuals], and the People have a Right to act as Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place it in new hands, as they think good."⁷⁶ Society continues even after the dissolution of government "[f]or the *Society* can never, by the fault of another, lose the Native and Original Right it has to preserve it self."⁷⁷ Indeed, the community was created to be perpetual:

*The Power that every individual gave the Society, when he entered into it, can never revert to the Individuals again, as long as the Society lasts, but will always remain in the Community; because without this, there can be no Community, no Commonwealth, which is contrary to the original Agreement.*⁷⁸

By contrast, the contract with government was meant to continue only so long as the government remains true to the terms of the contract.⁷⁹ In short, "the *Community* may be said in this respect to be *always the Supream Power*, but not as considered under any Form of Government, because this Power of the People can never take place till the Government be dissolved."⁸⁰ Thus, even if the rectoral contract has been dissolved, the people are not thereby hurled back into a prepolitical state. Rather, they are still parties to the civil contract and so still governed by a consensual body of rules, such as the commitment to act as a single body subject to majority rule. The people so constituted are able to resist government, conduct a revolution, and reinstate the preexisting relationship between government and citizens, all without ever leaving the domain of constitutional norms.⁸¹

⁷³ *See id.*

⁷⁴ *Id.* at para. 212.

⁷⁵ *See id.* at paras. 212–39.

⁷⁶ *Id.* at para. 243.

⁷⁷ *Id.* at para. 220.

⁷⁸ *Id.* at para. 243.

⁷⁹ *See id.* at para. 243.

⁸⁰ *Id.* at para. 149.

⁸¹ Locke scholars disagree on whether dissolution of the rectoral but not the popular contract necessarily returns the people to a state of nature. Compare ASHCRAFT, *supra* note 54, at 575–76 (people in state of nature), with JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE* 181 (1969) (people not in state of nature); JULIAN H. FRANKLIN, *JOHN LOCKE*

Later social contractarians continued to rely on this dual contract theory to explain revolutionary action in the absence of government.⁸² Radical pamphleteers, for example, analyzed the 1689 Convention Parliament in these terms: the contract between James II and the people of Great Britain had been dissolved, but the people (or, more correctly, their representatives) continued to meet to forge a new contract with William and Mary.⁸³ In Hannah Arendt's view, the American colonies historically—not merely metaphorically—began in popular contracts, mutual promises more fundamental than the contract with government. Accordingly, when the revolutionaries severed the ties with Great Britain, they did not thereby reenter the state of nature; instead, power reverted to the local assemblies, duly constituted by the original civil contracts, that in turn created a new American government. Further, because of this continuity in constituted order, the American revolution never degenerated into lawlessness and violence in the way that the French Revolution did.⁸⁴

The form-inconsistency argument supposes that this middle ground between the individual and the state is barren, that once the state dissolves, no other social forms remain to provide constitutional structure.⁸⁵

AND THE THEORY OF SOVEREIGNTY 107 (1978) (people not in state of nature); Peter Laslett, *Introduction*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 114–15 (Peter Laslett ed., 2d ed. 1967) (Locke confused, but people not in state of nature), and MORGAN, *supra* note 68, at 119–20 (Locke just confused), and MARTIN SELIGER, THE LIBERAL POLITICS OF JOHN LOCKE 105 (1968) (people not in state of nature). This disagreement seems to grow out of two elements: first, when government but not society has been dissolved, the political situation becomes complex and difficult to categorize; second, Locke himself is inconsistent in his usage of the phrase “state of nature.” The two elements are related. On the one hand, Locke sometimes states that individuals leave the state of nature by the creation of common “umpirage” in the legislature, *see* LOCKE, *Second Treatise*, *supra* note 19, at paras. 89, 125, 227; correlatively, he sometimes suggests that with the dissolution of the legislature, the people are cast back into the state of nature, *see id.* at paras. 121, 219–220. On the other hand, Locke sometimes states that people leave the state of nature by the commitment to live as one Body governed by majority will, rather than to live as individuals governed by the Law of Nature, *see id.* at paras. 128, 211. Correlatively, with the dissolution of government, the people are in a state of nature (indeed a state of war) toward the government, *see id.* at para. 227, but not toward one another, *see id.* at para. 243. For present purposes, this disagreement is largely semantic. Even if the people do return to a state of nature, it is not the same state of nature that they occupied as individuals. They have perpetually bound themselves to live together under majority rule. Therefore, when they make a revolution, they do so as a political society constituted by fundamental contractual obligations, rather than as loose individuals linked only by the obligations of natural law. *See, e.g.*, ASHCRAFT, *supra* note 54, at 576–77, 584–85 (arguing that the people have reverted to the state of nature but conceding that they are still bound into a common majoritarian body unlike the original state of nature).

⁸² *See* ARENDT, *supra* note 10, at 169–71.

⁸³ *See* MORGAN, *supra* note 68, at 108–10, 119. According to Morgan, this view of the Convention Parliament became retrospectively orthodox by the era of Walpole. *See id.* at 120.

⁸⁴ *See* ARENDT, *supra* note 10, at 165–72.

⁸⁵ This supposition is by no means new. Indeed, in the 18th century, royalists used essentially the same argument to reject any doctrine of revolution: once one allows any

If that supposition were correct, then insurrection could lead only to unrestricted civil war, not to constitutional revolution. This supposition seems to proceed from a set of individualist Hobbesian premises that have become common in the late twentieth century: humans are essentially separate; individuals inevitably try to maximize their own utility, with scant regard for the good of others except as it benefits themselves; they do not and cannot exhibit spontaneous sociability; socialization cannot make people altruistic; and only the coercive hand of government can maintain the market rules necessary to keep individuals from oppressing each other in the pursuit of their separate goods.⁸⁶ Those premises may be plausible for explaining certain phenomena like the international market. As a complete explanation of human nature, however, they are plainly inadequate.⁸⁷ In recent years, as the social consequences of extreme individualism have generated concern, many have argued that reviving “civil society”—that sphere of social life intermediate between the state and individuals, such as the market, culture, private associations, and coffee houses—might help to create a more cohesive polity.⁸⁸ More importantly for present purposes, many constitutionalists of the eighteenth century placed great store in the ability of humans to create such a sphere of civil society.⁸⁹ In addition, the premises of the form-inconsistency argument are simply inconsistent with the fact that, at least in their early phases, some

resistance to formal government, Hobbesian anarchy and chaos inevitably follow, because there is no middle ground. See ASHCRAFT, *supra* note 54, at 293–94.

⁸⁶ These assumptions are perhaps most evident in the writings of some practitioners of neoclassical economics, public choice theory, and law and economics. See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 13, 17–18 (1995) (economic life is deeply embedded in social life); Steven E. Rhoads, *Do Economists Overemphasize Monetary Benefits?*, 45 PUB. ADMIN. REV. 815 (1985) (economists generally overemphasize the importance of money as a human motive and as a source of happiness).

⁸⁷ See, e.g., FUKUYAMA, *supra* note 86, at 19–21 (explaining the descriptive inadequacy of these extreme individualist premises); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985) (economic action is embedded in structure of social relations); Amartya Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFFAIRS 317 (1977) (the modern economic view of man is stylized to answer the question of whether egoistic behavior can achieve public good).

⁸⁸ See E.J. DIONNE, JR., *THEY ONLY LOOK DEAD: WHY PROGRESSIVES WILL DOMINATE THE NEXT POLITICAL ERA* 295–99 (1996); FUKUYAMA, *supra* note 86, at 4–5; *THE REEMERGENCE OF CIVIL SOCIETY IN EASTERN EUROPE AND THE SOVIET UNION* (Zbigniew Rau ed., 1991); MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996); ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992) (discussing the attraction of civil society but ultimately rejecting it as a solution for modern problems).

⁸⁹ See ARENDT, *supra* note 10, at 166–74; Stephen A. Conrad, *The Rhetorical Constitution of “Civil Society” at the Founding: One Lawyer’s Anxious Vision*, 72 IND. L.J. 335 (1997); Jack P. Greene, *Response—Civil Society and the American Founding*, 72 IND. L.J. 375 (1997).

revolutionary movements did exhibit great cohesion, quite without the framework of government.⁹⁰

Particular societies may lack the functional equivalent of a social contract among the people, and for those societies, a constitutional revolution may be a practical impossibility. But constitutional revolution is impossible only under such circumstances; it is not conceptually impossible everywhere and at all times. The idea of a revolutionary movement governed by the constitution does presuppose that the people can directly listen to the still, small voice of the constitution amid the din of war, even without the government telling them what that voice is saying. And as with purpose, so with form, that idea rests on a populist notion of constitutional governance. Some constitutions may not be so populist, but some may be.

In America today, the people's chief rival for such constitutional authority is not the executive or legislative branches but the Supreme Court. Indeed, the Court has sometimes described itself as the ultimate arbiter of constitutional meaning,⁹¹ and many obviously regard it as so. The salience of the Court as constitutional interpreter does not, however, mean that our Constitution could not contain a right of popular revolution against the government. First, the Court's supremacy as constitutional expositor is not and never has been uncontroverted.⁹² Second, even if the Court has traditionally been the supreme interpreter of the Constitution, it still might join with the people in a revolution against the rest of government; indeed, the Court could actually be the instigator of revolution. After all, the conception of courts "speaking truth to power"⁹³ is well-established in Anglo-American and other legal traditions.⁹⁴ Most memorably, Edward Coke played an important part in the background for one revolution in England⁹⁵ and provided much of the constitutional inspiration for another across the Atlantic.⁹⁶

Finally, suppose that the Court is the exclusive interpreter of the Constitution in normal times, and suppose even further that during a revolution the Court either no longer sits or else condemns the revolution.

⁹⁰ See RAKOVE, *supra* note 24, at 109-10; WOOD, *supra* note 56, at 102.

⁹¹ See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 17 (1958) ("[T]he basic principle [is] that the federal judiciary is supreme in the exposition of the law of the Constitution.").

⁹² See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 37-53 (1988) (arguing that many important American thinkers have always disagreed with the idea of judicial supremacy in constitutional interpretation).

⁹³ ROBERT COVER, *The Folktales of Justice: Tales of Jurisdiction*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 173, 186 (1995).

⁹⁴ See *id.* at 178-201.

⁹⁵ See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE* 119-21 (1968); WILLIAM F. SWINDLER, *MAGNA CARTA: LEGEND AND LEGACY* 166-207 (1965).

⁹⁶ See HOWARD, *supra* note 95, at 18-19, 118-19, 122-24; Black, *supra* note 58, at 1174-1210.

In such a case, it is still not inevitable that the revolution be unconstitutional since judicial supremacy may apply only in normal times, not revolutionary ones. It would be coherent to imagine the doctrine of constitutional interpretation thus: the people made the Constitution and committed it to the Court for safekeeping during settled times, but they reserved to themselves the ultimate right to protect it during times of governmental faithlessness which the Court could not or would not control.⁹⁷

The fact that constitutional revolutions are possible in theory does not mean that they are likely or even desirable in practice. In particular, the violence that is part of their definition makes it likely that revolutions will become anarchic, divisive, and ungoverned by constitutional norms. Hannah Arendt powerfully expressed the contradiction between violence and politics of any sort:

Where violence rules absolutely, as for instance in the concentration camps of totalitarian regimes, not only the laws . . . but everything and everybody must fall silent. It is because of this silence that violence is a marginal phenomenon in the political realm; for man, to the extent that he is a political being, is endowed with the power of speech.⁹⁸

This worry about violence may be part of the animating concern of the inconsistency claim as well. Americans like to imagine that the Constitution provides some guarantee of justice, of government by consent, of minimal political decency.⁹⁹ By contrast, in revolution, the sword prevails, and there is no guarantee that the just will win. Therefore, constitution

⁹⁷That doctrine would also be consistent with (though not demanded by) some weighty case law. In announcing the principle of judicial review, John Marshall explained:

That the people have an original right to establish, for their future governance, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

Marbury v. Madison, 5 U.S. 137, 176 (1803). The people, in other words, create the Constitution, but then because they are seldom able to act, they leave it alone, in the care of the judiciary. There remains always the possibility, however, that they would undertake the "very great exertion" of that "original right" again.

⁹⁸ARENDT, *supra* note 10, at 18–19.

⁹⁹At times, this veneration seems to become a civil religion. See Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 21–25 (1984); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 123–25 (1979).

and revolution must be contradictory because revolution stands for violence and constitution for reason.

That formulation, however, once more overstates the distinction between revolution and constitution. While the Constitution might rest in part on justice and consent, it also has rested in part on oppression and injustice. For example, the Constitution acquired jurisdiction over American Indians, African-Americans, other involuntary immigrants, and women without their consent, and for many years exercised jurisdiction over them without allowing them representation.¹⁰⁰ Indeed, every state and, therefore, every constitution ultimately rests on some degree of coercion.¹⁰¹ And just as constitutions can be less than wholly peaceful, revolutions can be less than wholly violent. Again, Hannah Arendt phrases the point powerfully:

To be sure, not even wars, let alone revolutions, are ever completely determined by violence Because of [its] speechlessness political theory has little to say about the phenomenon of violence and must leave its discussion to the technicians A theory of war or a theory of revolution, therefore, can only deal with the justification of violence because this justification constitutes its political limitation.¹⁰²

In short, constitutionalism—like other political theory—can provide a limit on the justification of violence. While there can be no guarantee that revolutions will heed that limit, there is no certainty that they will not either. In any event, without an articulation of limits, revolutionary violence is more likely to become simply anarchic.

IV. Limits on a Constitutional Right to Revolution

The inconsistency argument is thus mistaken in claiming that revolution and constitution are always in contradiction. Nonetheless, the argument does suggest a number of conceptual limits on any constitutional right to revolution. Many of these limits are implicit in the foregoing, but it is worth enumerating and elaborating them to show just how significant they are. Taken together, these limits may be so severe that few if any real-world revolutions could satisfy them. In practice, armed resistance to

¹⁰⁰ See Williams, *Conquest, Consent, and Community*, *supra* note 48, at 416–29.

¹⁰¹ See ROBERT M. COVER, *Nomos and Narrative*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95, 155–63 (1995); BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE: THE MILITARY FOUNDATIONS OF MODERN POLITICS* (1994).

¹⁰² ARENDT, *supra* note 10, at 18–19.

government may be so untamable that it inevitably jumps the constitutionalist fence into the field of unfettered normative argument.

The purpose-inconsistency argument places two conceptual limits on any constitutional right to revolution. First, the revolution must arise from a genuine constitutional grievance—for example, the government must be engaged in a sustained attack on the constitution, and the revolution must respond to that attack. Second, the long-term goal of the revolution must be the restoration of the preexisting constitutional order, not the substitution of some new form of government.¹⁰³

The form-inconsistency claim places several additional conceptual limits on a constitutional right of revolution. First, the constitution must, implicitly or explicitly, prescribe governing rules for the conduct of a revolution; second, the revolution must follow those rules. As to the first, probably very few constitutions—perhaps none—overtly detail how a revolution should be conducted. But if a constitution does guarantee a right of revolution, it would seem reasonable to infer the constitutional forms for revolution by making analogies to the constitutional forms for ordinary government. For example, it is entirely implausible that the U.S. Constitution would recognize a revolution conducted by a revolutionary dictatorship. Instead, an American constitutional revolutionary movement would have to exhibit, to some degree, the elements central to our constitutional tradition: democracy, federalism, separation of powers, and individual liberty. As revolutions create exigent times, the Constitution might not require a revolutionary movement to exhibit those elements to the same degree as in more settled times—just as the Constitution allows the government more flexibility during exigent, nonrevolutionary times.¹⁰⁴ But constitutional flexibility is not the same as constitutional desuetude.¹⁰⁵

¹⁰³The Declaration of Independence overtly violated this limit. It relied not on a constitutional right of revolution but on a right secured by “nature and . . . nature’s God” when it declared the right of the people to start anew—to “alter or abolish” oppressive government, and to “institute new government, laying it’s [sic] foundation on such principles, & organizing it’s [sic] powers in such form, as to them shall seem most likely to effect their safety & happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁰⁴See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).

¹⁰⁵Akhil Amar describes an analogous process in the context of constitutional amendment. He argues that Article V specifies only the process that government must follow to initiate constitutional amendments; the people, by contrast, are free to amend the Constitution by simple majority vote. See Amar, *supra* note 10, at 458. The Constitution, however, does not even mention, let alone specify procedures for this alternative amendment process. At one point, Amar recognizes the difficulty in defining such procedures but then evades offering a solution: “Of course in implementing *either* Amendment path,

Both the form-inconsistency and the purpose-inconsistency arguments create limits inherent in the concept of constitutionalism, so they would apply to all constitutional revolutions. In addition, particular constitutions might also prescribe additional limits on any local right of constitutional revolution. For example, I have argued elsewhere that the Second Amendment's right to arms applies only to a civic republican citizenry, characterized by a high degree of civic virtue and homogeneity and organized into a universal militia.¹⁰⁶ Without these features, the right to possess arms to make a revolution becomes meaningless in its own terms—and so presumably would any implicit constitutional right to make a revolution with those arms.

Two issues problematize the exact scope of all of these limits: constitutional change and constitutional interpretation. All constitutions change, and many of them do so according to processes prescribed by the constitutions themselves. In the U.S. Constitution, for example, Article V prescribes supermajoritarian steps for making amendments. By hypothesis, the Constitution itself recognizes and regulates this form of change, and so we might call it internal change. In contrast is external change, change forced on the Constitution by the power of events from without, against the constitution's will. To illustrate, the Nineteenth Amendment, passed according to Article V's formal procedures after prolonged nationwide debate, is a clear product of internal change. By contrast, the forcible suspension of the Constitution by a military coup d'état would be the product of external change.

Constitutional revolutions must be essentially conservative, in the sense that they must seek to preserve the constitutional structure intact, but they need not be static: they may in fact change the constitutional

faithful constitutional interpreters will confront a host of difficult questions . . . I leave these implementation issues for another day." Amar, *supra* note 10, at 500. At another point, however, he imagines the following overt version of his proposed reading of the Constitution: "The [p]eople retain the legal right to change the Constitution by legal mechanisms *akin to the legal mechanisms by which they ordained and established it.*" *Id.* at 499 (emphasis added). Later, Amar suggests that we could develop procedures, borrowing from judicial models and updating the old convention process, to ensure an adequately deliberative process. He observes: "There thus remains considerable room for flexibility in implementing the deliberation requirement." *See id.* at 503. Charles Fried's objection to this implicit amendment process is as relevant to an implicit revolution process:

It is not just a cavil to ask who exactly would set up this extraordinarily complex encounter of the whole citizenry, and who and what would be authorized to mobilize the people in such a way. We can conjure spirits from the vasty deep, but will they come when we do call them?

Fried, *supra* note 10, at 30.

¹⁰⁶See Williams, *Civic Republicanism*, *supra* note 9, at 588–96 (arguing that the right to bear arms was intended to relate only to the maintenance of a popular, free, civic militia).

structure as long as they do so according to the constitution's own norms for change. Revolutions often occur during times of considerable constitutional change; they may cause further constitutional change; and they may themselves be constitutionally significant events. As a result, the constitution might be very different before and after the revolution. But such change does not mean that the revolution necessarily departed from constitutional terrain. Instead, all of that change may have occurred according to the constitution's internal rules. Furthermore, the constitution's internal rules for change during revolutionary times may be more permissive than its rules for change during settled times.¹⁰⁷ As a result, constitutional change may occur thick and fast during a revolution, and it may often seem that the constitution poses few real limits on a revolution. Indeed, the difference between the people creating new government under a natural right of revolution, and the people following processes of constitutional change under a constitutional right of revolution, may all but disappear from the perspective of those engaged in the change.

Similarly, issues of constitutional interpretation may render the limits on constitutional revolution somewhat problematic. In a diverse nation such as ours, disagreement on the meaning of the Constitution is perhaps inevitable—not only over its substantive content, but even over the appropriate interpretive technique to divine that substantive content.¹⁰⁸ During settled times, the existence of a semiauthoritative interpreter such as the Supreme Court might help to cabin that disagreement.¹⁰⁹ During revolutionary times, however, such an interpreter may be relatively less available, as, by definition, the people have taken power back into their own hands and the normal structure of government has been disrupted.¹¹⁰

It is important not to overstate the differences between normal times and revolutionary ones on this score. Even during normal times, in this country, the existence of the Supreme Court does not forestall vigorous, even violent, disagreement on the Constitution's meaning. Again, the status of the Supreme Court as the Constitution's authoritative exponent is itself a point of constitutional interpretation, on which there exists significant disagreement.¹¹¹ Furthermore, during revolutionary times, the

¹⁰⁷For example, Akhil Amar's claim that the people may at any time change the Constitution by majority vote, *see supra* note 105, has, perhaps, more resonance during revolutionary activity than during other periods.

¹⁰⁸*See* Williams, *The Militia Movement*, *supra* note 41, at 940–42 (arguing that epistemological disagreement over constitutional interpretation is inevitable).

¹⁰⁹*See* LEVINSON, *supra* note 92, at 37 (discussing this viewpoint).

¹¹⁰In this sense, in Sanford Levinson's terms, revolution may be the ultimate "protestant" constitutional activity. *See* LEVINSON, *supra* note 92, at 37–53 (elucidating a theoretical framework of constitutional "protestantism" in which each citizen is not bound by the interpretation of courts, but determines the correct meaning of the Constitution for herself).

¹¹¹*See supra* note 92 and accompanying text.

Court may continue to sit as the people's constitutional court,¹¹² or an alternative tribunal—like the Continental Congresses—may arise to cabin constitutional controversy.¹¹³ As a result, the revolutionary movement may be relatively unified on the meaning of the constitution.

Even so, disagreement on the constitution's meaning will typically be more severe during revolutionary times. Even if the revolutionary movement is itself unified, there are always two sides in a revolution, those allied with the rebels and those allied with the government. Both may see themselves as protectors of the constitution, but neither recognizes political relations with the other or with an overarching political authority. As a result, resolution of the controversy by settled institutional mechanisms is not possible. Indeed, the American Revolution and the Civil War may both have become inevitable when one or both sides realized that agreement on a neutral tribunal or a neutral decisional procedure was not possible.

The problems of constitutional change and constitutional interpretation are most acute when they go hand in hand and compound each other. In such cases, the issue in contention is the interpretation of how constitutional change occurs and whether it has occurred. This coincidence of the problems of constitutional change and interpretation was at the heart of the transatlantic dispute leading to American independence in the 1770s. The British imperial constitution plainly was changing during the eighteenth century, and all sensed the drift. Disagreement occurred, however, not only on the nature of the change but also on how the change could occur, and the twentieth century has not seen a resolution of the controversy.¹¹⁴

At the most general level, Americans and Britons disagreed on whether (1) the constitution could limit Parliamentary innovation or (2) Parliamentary power was of its nature unlimited. In the process, the colonists and the home country came to very different definitions of constitution—for the former, a series of prescriptive "higher law" limits on government, for the latter a simple description of the structure of extant government.¹¹⁵ Both ideas were relatively new, but each side defended its favored theory as the current state of the British constitution.¹¹⁶ From this basic division,

¹¹² See *supra* text accompanying notes 93–96.

¹¹³ For a description of the remarkable early authority of the Continental Congresses, see RAKOVE, *supra* note 24, at 32–41, 66–69, 71, 108–09.

¹¹⁴ Compare CHARLES MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* (1923) (sympathetic to the Americans' case); Black, *supra* note 58, at 1207–11, and GREENE, *supra* note 58, with Julius Goebel, Book Review, 30 COLUM. L. REV. 273 (1930) (unsympathetic to the Americans' case), and ROBERT SHUYLER, *PARLIAMENT AND THE BRITISH EMPIRE* (1927) (historical justification of British jurisdiction over colonies).

¹¹⁵ See BAILYN, *supra* note 58, at 175–84; WOOD, *supra* note 56, at 259–68; Black, *supra* note 58, at 1172–75.

¹¹⁶ See BAILYN, *supra* note 58, at 189–91 (relative novelty of the colonists' view), 200–02 (relative novelty of idea of Parliamentary omnipotence).

opinion fractured into a variety of more subtle distinctions. Eighteenth century and/or modern commentators have taken the following views on when, exactly, the American revolution stopped being constitutional:

1. The American revolution violated the British constitution as soon as it denied Parliamentary supremacy, because by 1770, the essence of the constitution had become Parliamentary omnipotence.¹¹⁷

2. By 1776, the essence of the constitution had become or was moving toward legislative home rule for many of the units of the Empire, all united in allegiance to the British crown. The American revolution therefore violated the British constitution when it announced independence from the British crown in 1776.¹¹⁸

3. By 1776, the essence of the constitution was the local charters granting home rule to the individual colonies, which later became states. The American Revolution therefore violated the British constitution not when it announced independence from George III but when the Constitution of 1787 derived its power from the people, rather than the states.¹¹⁹

4. By 1776, the essence of the constitution was mixed government and the traditional rights of Englishmen. The American Revolution therefore violated the British constitution not when it derived power from the people but when it embraced wholly democratic government and natural rights without regard to their traditional underpinnings.¹²⁰

Doubtless there are many other possible views as well. Despite their substantive differences, these positions all purport to be interpretations of the new state of the British constitution in the late eighteenth century. Without an authoritative interpreter, we will probably never have a definitive interpretation—and without such an interpretation, it is difficult to discern the exact limits that constitutionality placed on the Revolution of 1776.

Even today, Americans interpret the nature of legitimate constitutional change differently. According to some elements of the modern militia movement, the “true” Constitution forbids a federal income tax and limits full citizenship to white males, because the Fourteenth, Fifteenth, and Sixteenth Amendments were not enacted according to proper constitutional procedures.¹²¹ Within the legal academy, the amendment process has recently become a subject of considerable controversy.¹²² Article V lays out a complicated, supermajoritarian process that any amendment must survive. Akhil Amar has argued, however, that Article V prescribes only those steps that government must take to amend the Consti-

¹¹⁷ See Black, *supra* note 58, at 1203–07.

¹¹⁸ See *id.*, at 1200–03.

¹¹⁹ See Fried, *supra* note 10, at 19–27.

¹²⁰ See *supra* text accompanying notes 65–66.

¹²¹ See Williams, *The Militia Movement*, *supra* note 41, at 929–31, 937–40.

¹²² For a collection of essays illustrating the range of the present debate, see RESPONDING TO IMPERFECTION, *supra* note 47.

tution; the people, by contrast, may meet at any time in convention and change the Constitution by simple majority vote.¹²³ Bruce Ackerman offers a different route for amendment outside of Article V: the meaning of the Constitution can de facto change at those rare moments when the people engage in prolonged, self-conscious, deliberative constitutional discourse, and all three branches of government concur in a fundamental shift.¹²⁴ Charles Fried pointedly rejects both of these views, arguing that Article V is the only route for constitutional amendment.¹²⁵ Again, despite their diversity, all these arguments share one important feature: they all purport to be explanations of the Constitution's own mechanisms for internal change.

In practice, then, the conceptual limits on constitutional revolution may prove to be obscure because of the uncertainties involved in constitutional change and interpretation. In theory, however, the limits are quite severe: constitutional revolutions must arise from a constitutional grievance, seek only the restoration of the constitutional order, take only constitutional forms, and instigate change only according to constitutional rules interpreted according to constitutional techniques. Probably no revolution in history has ever satisfied these stringent requirements. Indeed, there may be something in the dynamics of revolutionary movements that causes them to break these bounds. While revolutionaries may aspire to constitutionalism during the early, resistance phase of a revolution, they usually abandon it by the reconstruction phase.

In short, then, the claim that some revolutions might be constitutional would seem to have little significance in the real world. On the one hand, constitutional limits will be very difficult to satisfy in theory. On the other hand, those limits will be highly flexible—perhaps even illusory—in practice. Would it then be best simply to conclude that even if theoretically a constitution might guarantee a right of revolution, such a right must be so narrow and ambiguous as to have very little importance?

Conclusion

Despite the problems enumerated above, the recognition of a constitutional right to revolution might have several important consequences. First, constitutional discourse is, at least theoretically, tethered to a particular legal framework, however ambiguous. This framework might supply some important intellectual discipline for loose talk about revolution: to exercise a constitutional right of revolution, one must persuasively claim to have satisfied all of the foregoing requirements. Such discipline

¹²³ See Amar, *supra* note 10, at 458–59.

¹²⁴ See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266–94 (1991).

¹²⁵ See Fried, *supra* note 10, at 27–33.

would be particularly important in the early, resistance phase of revolutions when many revolutionaries are concerned with preserving continuity with the old order. By comparison, discussion of revolution predicated on a natural right to revolution can be remarkably imprecise and unfocused. For example, many writers vociferously argue that the Second Amendment protects a popular right to own arms so as to make a revolution, but these same writers become resoundingly silent on when and how a revolution might legitimately occur.¹²⁶ Apparently, the People, in their instinctive wisdom, will just know by consulting their sense of abstract right.¹²⁷

Second, if revolution is a natural right, constitutionalizing that right could help to reduce schism during revolutionary times by providing a common frame of reference. At best, this frame may help to preserve some degree of connection between the contending sides in a revolution. For example, revolutionary moderates hoped to keep open the possibility of a formal alliance with Great Britain by limiting their pleas to a restoration of the constitutional status quo ante.¹²⁸ Similarly, the Civil War might have been delayed by the fact that both sides claimed to be acting within basic constitutional principles, however differently they may have understood them; after the war, that common framework may also have facilitated the reintegration of the Confederate states back into the Union.

Even when government and revolutionaries are irreconcilably divided, preservation of a constitutional framework may help to promote unity within the revolutionary movement itself. Once the movement leaves constitutional terrain for the more open fields of natural equity, everything is up for grabs, and submerged differences may become all too apparent.¹²⁹

The first two benefits of a constitutional right of revolution focus on the advantages of stability and continuity—the qualities that a constitution can bring to revolution. By contrast, the third benefit focuses on the benefits that revolution can bring to a constitution. However limited its significance as a practical matter, recognition of a constitutional right to

¹²⁶ See Williams, *The Militia Movement*, *supra* note 41, at 911–15.

¹²⁷ I call this phenomenon “conjuring with the people,” and I examine it at greater length in Williams, *The Militia Movement*, *supra* note 41. Glenn Harlan Reynolds alone has sought to introduce into Second Amendment scholarship some discussion of when a revolution might be justified. In particular, he has argued, echoing *Dennis v. United States*, 341 U.S. 494, 501 (1951), that revolution would never be justified as long as democratic redress at the polls is possible. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 505–07 (1995). What is most remarkable about Reynolds’s work, however, is that his call for a discussion of standards has not been answered by others working in the field.

¹²⁸ See RAKOVE, *supra* note 24, at 54, 71–72, 141.

¹²⁹ For example, the colonists were united as long as they were concerned about Britain’s assault on what they regarded as their constitutional liberties. See RAKOVE, *supra* note 24, at 107–10. Upon independence, as they had to design new governments, the Americans fell into rancorous disagreement. See *id.* at 119–26.

revolution would be important as a symbol of the continuing importance of revolutionary principles, such as the legitimacy of direct popular action to prompt rapid political change. Popular recognition of a *natural* right of revolution is easy to distance from present circumstances—an abstract acknowledgment only that all people have a right to resist tyranny. By contrast, recognition of a *constitutional* right of revolution is an assertion that Americans all presently have a legal, affirmative right to overthrow unconstitutional government, and that right is part of what constitutes them a nation.

That recognition might help to restore the idea of revolution to the American political vocabulary. From early in our history, prominent Americans have engaged in revisionist histories of the War for Independence to minimize its revolutionary quality.¹³⁰ In this century, America, the nation founded in revolution, has notoriously become the most antirevolutionary major power, except when it is cynically promoting foreign insurgency movements for its own interests.¹³¹ And when would-be revolutionaries have tried to claim the legacy of the revolution, government and business have denounced them on the authority of the Constitution.¹³²

This posing of revolution and constitution as polar opposites—order and disorder, stability and change, governmental regularity and popular clamor—has artificially delimited the possibilities for American political expression. In this scheme, fundamentally, the constitution stands for order; it embraces liberty and democracy, but only within a clear, regular, and antirevolutionary structure. Therefore, to be loyal to the Constitution is necessarily to reject revolution. Conversely, to be revolutionary is to place oneself outside the Constitution's structure. Accordingly, when some argue that revolutionaries possess only a natural right to revolution, the implication is clear: by preaching revolution, they have exiled themselves from the constitutional homeland. As a result, one need not respond to their arguments as constitutional claims, only as abstract assertions of natural justice. Several decades ago, Communists bore the brunt of this charge; today, right-wing revolutionaries do. In both cases, the charge converted a whiff of revolutionary sympathy into an odor of constitutional heresy.

This antonymous rendering of constitution and revolution leaves us only with unsatisfactory options. If we embrace revolution, we must surrender constitutionalism, with its promise of stability, procedural regularity, and predictability. We must decide to trust the revolutionary people

¹³⁰ See MICHAEL KAMMEN, *A SEASON OF YOUTH: THE AMERICAN REVOLUTION AND THE HISTORICAL IMAGINATION* 36–49, 59–65, 70–74 (1978).

¹³¹ See, e.g., WALTER LAFEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* (expanded ed. 1984).

¹³² See *supra* text accompanying notes 24–26.

under all circumstances, and so we must forget the revolutionary horrors of the past. If we embrace constitutionalism, we must surrender all possibility of popular revolution, with its promise of political engagement, self-rule, and populist control. We must decide to trust the government under all circumstances, and we must forget the totalitarian horrors of the past. Either course seems naive and unbalanced.

Happily, the conceptual world is not so simple. The advantage of a constitutional right to revolution is that it rejects the antonymous view of the political world: we need not be divided into revolutionaries and constitutionalists. Instead, we can be both at the same time, wedded both to governmental regularity and the possibility of direct democracy, to incremental reform and the possibility of dramatic change. We can hope that government will always be faithful to its constitutional mandate, but if it is not, we can hope that the people will force a restoration. We can seek to preserve constitutional structure while opening government to direct popular involvement, and we can endorse revolutionary movements while seeking to limit them within preexisting constitutional norms. Combining all of these desiderata in the real world would be hugely difficult, perhaps virtually impossible, under present conditions. The task will be forever impossible, however, if we believe that revolution and constitution are inherently, conceptually incompatible. Recognition of a constitutional right to revolution would thus, at least, provide a symbol allowing us to imagine a world in which we need not choose between our most deeply held political values.

