

# CONSTITUTIONAL POSSIBILITIES<sup>\*</sup>

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## I. INTRODUCTION: THE PROBLEM OF EPHEMERAL CONSTITUTIONAL POSSIBILITIES

What are our constitutional possibilities? The importance of this question is illustrated by the striking breadth of recent discussions in high constitutional theory:

- Sotirios Barber advocates an interpretation of the same constitution as a guarantee of fundamental economic liberty.<sup>1</sup>
- Randy Barnett proposes that we restore the lost constitution—returning to eighteenth century understandings of federal power and individual liberty.<sup>2</sup>
- James Fleming suggests that we adopt a perfectionist reading of the constitution as a charter for deliberative autonomy.<sup>3</sup>
- Sanford Levinson argues for virtual abandonment of the Constitution of 1789 and proselytizes for a revolutionary program of constitutional redesign.<sup>4</sup>

Theorists like Barber, Barnett, Fleming, and Levinson are conventionally understood as placing constitutional options on the table and as proponents of their adoption—in other words, as advocates of constitutional change. Normative constitutional theory asks the question whether these options are desirable—whether political actors (citizens, legislators, executives, or judges) should take action to bring about their plans for

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<sup>1</sup> SOTIRIOS A. BARBER, *WELFARE AND CONSTITUTION* (Princeton University Press 2005).

<sup>2</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (Princeton University Press 2003).

<sup>3</sup> JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (University of Chicago Press 2006).

<sup>4</sup> SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CHANGE IT)* (Oxford University Press 2006).

constitutional reform or revolution. Frequently, normative constitutional theories are criticized on the ground that they are undesirable, unwise, or inconsistent with the best theory of political morality or legitimate legal authority, but sometimes one hears a very different form of criticism, expressed in locutions such as the following: “That is unrealistic.” “That’s not possible.” “That is pie in the sky.” “You are imagining castles in the air.” “Your suggestion is utopian.” “That isn’t feasible.” These objections invoke the idea of *ephemeral constitutional possibility*—constitutional options that are not real or actual possibilities.

*What are our constitutional possibilities? How should we think about the feasible choice set for constitutional change? What are the differences between ideal and nonideal theory?* These inquiries cross the lines between normative, positive, and conceptual constitutional theory. At the conceptual level, we can ask what phrases like “constitutional possibility,” “ideal theory,” and “the feasible choice set” mean. At the level of positive constitutional theory, we can ask about the forces and institutions that condition constitutional possibility. At the level of normative constitutional theory, we can ask about the implications of constitutional possibility for political morality.

Before we proceed further, we should note a sense of the phrase “constitutional possibility” that is related to, but distinct from, the sense in which the phrase is used in this paper. We could use the phrase “constitutional possibility” to refer to those legal actions (in the broad sense that includes executive actions and orders, rules and legislation, and judicial decisions) that are possibly in compliance with or authorized by the constitution of some jurisdiction—e.g., possibly constitutional under the United States Constitution. Similarly, the phrase “constitutional necessity” could be used to refer to those legal actions that are required by a constitution. And finally, constitutional necessity might be used in connection with the “necessary and proper clause” of the United States Constitution. For the most part, these senses of constitutional possibility and necessity will be set aside for the remainder of this essay.

## II. A CONCEPTUAL TOOLKIT FOR THINKING ABOUT CONSTITUTIONAL POSSIBILITY

How can we think about constitutional possibility? This Part suggests a toolkit with six elements: (1) an explication of the distinction between ideal and nonideal constitutional theory; (2) the idea of a constitutional second best; (3) the notion of the feasible choice set; (4) an investigation of the relationship between possibility, agency, and the scope of decision problem; (5) a quick and dirty guide to the metaphysics of modality; and (6) a very short introduction to positive constitutional theory.

### *A. The Distinction Between Ideal and Nonideal Constitutional Theory*

One way to think about constitutional possibilities begins with the distinction between ideal constitutions and constitutions that are made for a world that is less than ideal. This distinction can be approached by borrowing the distinction between “ideal” and “nonideal” theory from John Rawls.<sup>5</sup> By “ideal theory” Rawls means to refer to a moral or political theory that satisfies a condition of “full compliance.” Thus, we can ask:

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<sup>5</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (revised ed. 1999, Harvard University Press); Michael Phillips, *Reflections on the Transition from Ideal to Non-Ideal Theory*, 19 *NOÛS* 551 (1985).

What principles ought a society to adopt for the purposes of designing its institutional structure on the condition that all of the institutions in society conform to these principles?<sup>6</sup>

The analogous question of normative constitutional theory might be phrased as follows:

What constitution ought a society to adopt for the purposes of designing its basic legal structure on the condition that all the institutions in society conform to the constitution?

In other words, we can ask what constitution we ought to adopt, assuming that perfect compliance—each branch of government always respect the limits on its power and the rights (if any) that the constitution confers on individuals.

By way of contrast, we can ask questions of nonideal constitutional theory:

What constitution ought a society to adopt for the purposes of designing its basic legal structure on the condition that the institutions of society will violate the constitution to the extent and under the circumstances that are predicted by best understandings of human psychology and political science?

That is, we might assume that constitutional actors will sometimes fail to comply with their constitutional duties, exceeding their allocated powers or violating the constitutional rights of individuals. Of course, the conditions for departure from perfect compliance can themselves be varied by making different assumptions about human psychology and institutional behavior or in some other way.

It seems obvious that ideal and nonideal constitutional theories may differ. For example, because ideal constitutional theory assumes perfect compliance, the ideal constitution might dispense with the institution of judicial review—whereas nonideal theory might posit the necessity of such review in order to correct constitutional violations. Similarly, nonideal constitutional theory might adopt a constitutional rule that would not be ideal, but that would produce the best consequences, given imperfect compliance. For example, the executive might be given a sphere of power more constrained than would be ideal, because of the tendency of the executive to overreach and enlarge the sphere of executive power beyond constitutional limits.

How does the distinction between ideal and nonideal theory relate to possibility? One might think that *ideal theory* deals with that which is not *possible*, whereas *nonideal theory* deals with the realm of that which is *possible*, but this would be a mistake. Perfect compliance may be impossible, but there is no *a priori* guarantee that this is so. Indeed, some constitutional provisions regularly result in perfect compliance. No President has been less than 35 years of age; no state has had three Senators seated simultaneously; no state has opted for a monarchical form of government. Indeed, in cases like these, less than perfect compliance may be very unlikely or even “impossible” in some sense. Nonetheless, for a wide range of cases, perfect compliance may not be feasible and nonideal constitutional theory may be the norm.

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<sup>6</sup> Phillips, *supra* note 5, at 553.

### B. The Idea of a Constitutional Second Best

A second tool for reflection of constitutional possibilities is the idea of a constitutional second best. To deploy this tool, we can borrow economic theory's distinction "first-best" and "second-best."<sup>7</sup> The general idea of the theory of the second best can be expressed as follows. Assume a system with multiple variables. Take the most desirable state the whole system could assume and the associated values that all of the variables must assume to produce this state: call this condition, the *first-best* state of the system and call the associated values of the variables, *the first-best values*. Now assume that one variable will not assume the value necessary for the first-best state of the whole system: call this the *constrained variable*. Next take the next to the most desirable state the whole system could assume and the associated values that all the variables must assume to produce this state: call this the *second-best* state of the system. There are systems in which achieving the second-best state will require that at least one variable other than the *constrained variable* assume a value other than the *first-best* value: call the *value* the *second-best* value. One expects that there are examples where many or even all variables must assume *second-best* values.

The idea of a constitutional second best is found in Cass Sunstein and Adrian Vermeule's work on constitutional interpretation and institutional capacity.<sup>8</sup> In the course of making their argument for simple-minded formalism as the second best theory of constitutional interpretation, Sunstein and Vermeule argue that the institutional capacities of judges are a *constraining variable*. In particular, judicial capacity may not be able to assume the value required by the *first-best* theory of constitutional interpretation. Therefore, another variable, i.e. the normative theory of interpretive methodology must assume a *second-best* value in order to produce the *second-best* state of the system of constitutional interpretation. In other words, if the judiciary lacks the institutional capacity to do what *first-best* theories requires, then an institutional theory is required in order to produce second-best outcomes. For this reason, "institutional analysis is necessary, even if not sufficient, to an adequate evaluation of interpretive methods."<sup>9</sup>

The notion of a "constitutional second best" should be differentiated from the role that the second best plays in formal economic theory. In that realm, the notion of a constrained variable is treated as an assumption: assuming that variable  $v$  cannot be assigned its first-best system value  $p$  then the second-best state of the whole system requires that variable,  $u$ , assume value  $r$  and not its first-best system value  $q$ . The notion of a constrained variable operates in a formal model—which may or may not be accurate or useful as a description of the world. Normative constitutional theory is rarely "formal": concepts like "legitimacy," "rights of political morality," and "coherence of the legal materials" create difficult, if not intractable, problems of formalization. So the idea of a constitutional second best should not be understood on the model of an assumed constraint on a variable. Rather, the idea that certain choices or options are outside the set of choices that are feasible or possible.

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<sup>7</sup> See, e.g., R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956) (articulating theory of second best in economics).

<sup>8</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

<sup>9</sup> Sunstein & Vermeule, *supra* note 8, at 915.

### *C. The Notion of the Feasible Choice Set*

The idea of a constitutional second best and the distinction between ideal and nonideal theory are related to a more fundamental notion—the *feasible choice set*. We might think of a variety of *choice sets*: the set of all conceivable or imaginable choices, the set of all actions that specified actors might choose. Of all the possible choices that might be made with respect to a given constitutionally relevant situation, some can be called “feasible” and others “infeasible.”

The term “feasible” as used in the natural language English is vague, ambiguous, and context dependent. Feasibility is vague, because feasibility can be a matter of degrees, with some choices that are neither clearly feasible nor infeasible. Feasibility is ambiguous, because it can refer to possibility, workability, practicality, or costliness. Feasibility is context dependent, because a given action may be considered practical given one constellation of purpose and available alternative actions, but the same action may be considered impractical given different purposes and alternatives. For example, constitutional amendment might be considered “feasible” in the context of a particular constitutional problem, say abortion or equal treatment for women, but “infeasible” in the context of another problem, say treatment of billboards under the first amendment or power of the states to legalize medical uses of marijuana.

Given that “feasibility” is vague, ambiguous, and context dependent, claims that a given constitutional option is inside or outside of the feasible choice set require further specification. At a minimum the criteria for inclusion or exclusion require explicit definition.

### *D. Agency and the Scope of Decision Problem*

Feasibility is a function of both the constitutional option itself and the agent or agents for whom the option is proposed. Constitutional agents range from individual citizens and institutional actors (e.g., Senators, Representatives, Presidents, Legislators, Justices, and Judges) to institutions (e.g., Congress, the Supreme Court, the Illinois State Legislature) and collectivities (e.g., We the People of the United States, the Congress and Legislatures of the Fifty States). A given constitutional option might be infeasible relative to one agent, but feasible relative to another. Ordinarily, constitutional amendments are outside the feasible choice set for individual citizens: the cases in which an individual citizen can bring about the enactment of a constitutional amendment are rare and sometimes difficult to identify. Relative to an individual Senator, Representative, or state Legislator, some constitutional amendments may be feasible (because they have sufficient support from others to create a practical possibility of enactment) and others infeasible (because they lack such support). But relative to the collective actor with the power to propose and ratify (Congress and the State Legislatures), Constitutional Amendments are always feasible, because action by this collectivity is legally sufficient to amend the Constitution. Because feasibility is agent relative, a fully specified claim that a given option is inside or outside the feasible choice set must specify the agent.

Agency is related to another dimension of feasibility, which we can call “scope of decision.” What do I mean by “scope of decision”? Sometimes our scope of decision is a single action—the decision in a single case. But not all issues take single actions as

their scope of decision. Consider the following example: constitutional actors may choose whether to employ originalism as a methodology for constitutional interpretation. This decision cannot be made on a case-by-case basis. Why not? Suppose you tried to decide in each case whether to deploy originalism as a methodology. How would you make that decision? You might make an ad hoc, all-things-considered judgment whether it would be better to be an originalist or a living constitutionalist. But if you proceeded in that way, then you would already have rejected originalism as a methodology—because your decision in the particular case would ultimately rest on “all things considered” and not the original public meaning of the constitution. In the choice between originalism and living constitutionalism, it’s the method, not the outcome that counts. That entails that the scope of decision between originalism and living constitutionalism cannot be made on a case-by-case basis. Rather, the appropriate scope-of-decision is the application of a practice to the whole domain of constitutional decisionmaking.

Scope of decision interacts with the specification of agency. For an individual judge, the decision whether constitutional interpretation should be guided by an originalist methodology is not a feasible choice: one judge (even a very influential Supreme Court Justice) cannot adopt originalism as a methodology for all the members of the federal judiciary. The most that individual judges can do is decide to adopt originalism as a methodology for their own decisions and to attempt to persuade others to do the same. In the short to medium term, the most that could result from such an individual decision is a mixed regime with some originalist and some nonoriginalist decisionmaking. But if the agent is the collectivity of all American judges, then the adoption of an originalist practice for the whole domain of constitutional decisionmaking is within the feasible choice set.

### *E. A Quick and Dirty Guide to the Metaphysics of Modality*

Few articles on constitutional theory discuss the metaphysics of modality.<sup>10</sup> Even the terms “modal” and “modality” may be unfamiliar when they are used, as here, to refer to ideas about necessity and possibility—although this usage may evoke a dim recollection that “could” and “must” are called “modal verbs.” If unfamiliarity breeds contempt, some readers may be skeptical about the value of a philosophical approach to the modal notions of possibility and necessity for normative constitutional theory. If you are among such readers, know that I shall ask you indulgence for only a page or two.

The primary tool that I shall introduce in this section can be called “possible worlds semantics.” Possible worlds talk translates talk about possibility and necessity into talk about possible worlds. Begin with the notion of a possible world.<sup>11</sup> The idea of a

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<sup>10</sup> But see Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 780 (2006); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 St. Louis U. L.J. 555, 566-67 (2006).

<sup>11</sup> See generally JOHN DIVERS, *POSSIBLE WORLDS* (2002) (providing a comprehensive introduction to possible worlds semantics and the metaphysics of modality); Alvin Plantinga, *Essays in the Metaphysics of Modality* (Matthew Davidson ed. Oxford University Press 2003); SAUL A. KRIPKE, *NAMING AND NECESSITY* (2d prtg. 1981) (discussing model theoretic study of modal logic “possible worlds” semantics); DAVID LEWIS, *ON THE PLURALITY OF WORLDS* (1986) (defending modal realism’s view that our world is one of many, each with its own inhabitants). The idea of possible worlds was introduced by Leibniz. See GOTTFRIED WILHELM FREIHERR VON LEIBNIZ, *The Theodicy: Abridgement of the Argument Reduced to Syllogistic Form*, in LEIBNIZ: SELECTIONS 509, 509-11 (Philip P. Weiner ed., 1951). Leibniz used the idea

“possible world” is similar to the notion of a “state of affairs”—which may be familiar from economics. The philosophical idea of a “possible world” is understood as a state of the whole universe. If some thing, say an event, X is possible, we say that X occurs in some possible world. Complimentary to the concept of possibility is the concept of necessity. Let us say that Y is necessary if Y occurs in all possible worlds.

The next step is to add the notion of the “actual world,” where actual is an indexical term that separates this world from all possible worlds. Thus, an *actual constitution* is a constitution that exists in this world. A *possible constitution* is a constitution that exists in at least one possible world. A *necessary constitution* is a constitution that exists in all possible worlds. Notice that it seems obvious that there are no *necessary constitutions* as there are possible worlds (including the former states of the actual world) in which there are no constitutions at all. But almost any constitution you can imagine or conceive is *possible*, because there we can posit a possible world in which that imaginable or conceivable constitution exists.<sup>12</sup>

Not all possible worlds are implicated in debates about constitutional possibility. The constitutional possibilities with which we are concerned exist in a subset of all possible worlds. We can narrow the set of possible worlds that are the domain of constitutional necessity in a series of steps. Each step can be expressed in terms of the idea of an accessibility relation.<sup>13</sup> This may sound obscure, but an example will make it crystal clear. For practical purposes, normative constitutional theory may sometimes only be interested in those worlds that are possible future states of the actual world. Such worlds share the history of the actual world up to this moment, and we call worlds that have this property “historically accessible.” Notice that talk about historical accessibility frequently can be translated into talk about “path dependency.”<sup>14</sup> The feasible choice set is constrained by history.

But “historical accessibility” is not a sufficient limitation for the purposes of normative constitutional theory. Why not? Because it is logically possible that the future states of the actual world could be just about anything you can imagine; there is no logical contradiction in a possible world that shares the history of the world up until now but in which the United States instantly becomes a parliamentary democracy at the next snap of Jeremy Waldron’s fingers. For the purposes of normative constitutional theory, we should restrict the domain of possible worlds to those that share the basic laws of nature (physics, etc.) with the actual world; these worlds are called “nomologically

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of a possible world in answer to the argument against the existence of good from the problem of evil. See *id.* at 511. The argument is not proven, Leibniz maintained, until it is shown that the actual world is not the best of all possible worlds. See *id.* “World” here refers to the whole universe through time and not just the planet Earth.

<sup>12</sup> One more thing: philosophers debate the question whether all possible worlds are *real* or whether the only *real* world is the *actual world*. We shall lay that question aside, and simply talk *as if* possible worlds were real. Nothing shall hang on this: our investigation of constitutional possibility will be neutral between *modal realism* and *ersatz modal realism*. See, e.g., Alexander Rosenberg, *Is Lewis's 'Genuine Modal Realism' Magical Too?*, 98 MIND 411 (1989); Richard Miller, *Dog Bits Mean: A Defense of Modal Realism*, 67 AUSTRALASIAN JOURNAL OF PHILOSOPHY 476 (1989); Robert M. Adams, *Theories of Actuality*, 8 NOÛS 211 (1974).

<sup>13</sup> See LEWIS, *supra* note 11, at 7-8.

<sup>14</sup> See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AMERICAN POLITICAL SCIENCE REVIEW 251 (2000); PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (Princeton University Press 2004).

accessible.” In nomologically accessible worlds, Waldron’s finger snaps do not produce constitutional revolutions. The historically and nomologically accessible worlds, then, are those that share the history of the actual world up to now and that share our laws of nature.

At this point it useful to introduce the idea of “distance” between the actual world and some possible world. Adjacent possible worlds are “close” to the actual world. A possible world that was just like the actual world—except that this Essay was never written—would be very close, i.e., adjacent, to the actual world in which the Essay was written for the Schmooze. Remote worlds are “distant” from the actual world. A possible world in which complete essays appear without effort, simply by snapping one’s fingers would be more remote.

The constitutional possibilities that concern normative constitutional theory are primarily those that exist in historically and nomologically accessible possible worlds.<sup>15</sup> But there is set of accessibility relationships that are especially relevant to constitutional discourse. These relationships concern human psychology, social norms, and political attitudes. Some constitutional options will not work, given what we know about human psychology—they make unrealistic assumptions about what officials or citizens are capable of doing. Other constitutional options would require dramatic changes in social norms—their success relies on unrealistic assumptions about what citizens and officials believe is acceptable or unacceptable conduct. And yet other constitutional options are politically infeasible—they presuppose political attitudes that only exist in possible worlds that are remote from the actual world. But normative constitutional discourse requires what we might call “normative space.” That is, normative discourse assumes that minds can be changed and the attitudes are not entirely fixed. We can call worlds that conform to the laws of psychology and political science, “psychologically and politically accessible.”

Sometimes normative constitutional theory has practical aims—it is concerned with how we should act in the actual world. Let us call constitutional action in the actual world, “constitutional practice.” Constitutional practice is not concerned with historically and nomologically accessible possible worlds that cannot come into being given the limits on human choices. If there is nothing that any agent (individual, institutional, or collective) could do that would bring a possible future state of the world about, then the constitutional configuration of that world is irrelevant to normative. Let us call the worlds that are open to human choice, “practically accessible.” A practically accessible world is, by definition, also nomologically and historically accessible. Constitutional practice is, by definition, concerned with possible worlds that are “practically accessible.” Such worlds are relatively close to the actual world.

One final accessibility relation requires a brief mention. We can distinguish between those worlds that are consistent with our knowledge of the actual world and those which are inconsistent with such knowledge. We can use the phrase “epistemologically

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<sup>15</sup> For some purposes, however, constitutional theory may wish to investigate questions of alternative constitutional history. These are “what if” questions. What if *Brown v. Board* had been decided the other way? What if *The Slaughterhouse Cases* hadn’t nullified the privileges and immunities clause of the 14<sup>th</sup> amendment? What if President Roosevelt had chosen the path of constitutional amendment rather than transformational appointment to implement the New Deal’s constitutional program? In each case, we imagine a nomologically accessible possible world that was historically accessible from a prior state of the actual world.

accessible” to capture this idea. Worlds that are consistent with our knowledge of the actual world are epistemologically accessible. Worlds that have a feature contradicted by our knowledge of the actual world are epistemologically inaccessible.

We are now in a position to revisit the idea of a feasible choice set. A claim that a given constitutional option is outside the feasible choice set is a claim about constitutional practice, and hence a claim about which possible worlds are practically accessible. Usually, a claim that a given constitutional option is infeasible will rest (either explicitly or implicitly) on a claim about human psychology or political science. For example, the claim that a constitutional amendment banning abortion is politically infeasible, if fully articulated, would rest on claims: (i) about the legal requirements for constitutional amendments, (ii) about beliefs and desires causally relevant to the motivations of constitutional actors such as congresspersons and state legislators, and (iii) about the beliefs and desires of citizens. Given the legal requirements, the motives of those who assent is legally required for a constitutional amendment, and the attitudes of voters, a constitutional amendment banning abortion is impossible. In possible worlds talk, we might say that worlds in which such amendments become law are relatively remote from our own; in these worlds, political actors behave much differently or many citizens have different attitudes about abortion or the legal requirements for a constitutional amendment have been altered. This remoteness is the underlying reason for our judgment that such a constitutional amendment is outside the feasible choice set.

Constitutional options that exist only in possible worlds that are either historically or nomologically inaccessible are outside the feasible choice set in a very strong sense. They cannot come about in a future state of the actual world given the natural laws that govern this world. Constitutional options that exist in historically and nomologically accessible worlds may nonetheless be only *remote possibilities*—they may depend on changes in beliefs, desires, or institutions that depend on unlikely contingencies. When such possibilities are sufficiently remote, we may say they are outside the feasible choice set—but if we speak in this way, we are using “feasibility” in a sense that diverges from historical and nomological possibility.

#### *F. A Very Short Introduction to Positive Constitutional Theory*

So far, the investigation of constitutional possibility has been entirely conceptual. But claims about which options are inside or outside of the feasible choice set are claims in positive constitutional theory; that is, they are claims about the laws of human psychology, sociology, and political science that govern those human actions that enable constitutional possibilities. The social and human sciences are, of course, a vast topic—even for a very short introduction. Nonetheless, a very brief mapping of the territory is possible.

We can begin with the dominant and (allegedly most successful<sup>16</sup>) tool for the explanation of human and social behavior, which at a very high level of abstraction can be called “rational choice theory.”<sup>17</sup> The basic assumption of rational choice theory is that individual humans act rationally—where rationality is defined in terms of the

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<sup>16</sup> But see DONALD GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (Yale University Press 1996).

<sup>17</sup> See, e.g., *RATIONAL CHOICE* (Jon Elster ed. NYU Press 1986).

relationship between beliefs, desires, and actions. An action is rational just in case it is an action that would satisfy the agent's desires (or preferences) given the agent's beliefs (the information available to the agent). The most familiar example of rational choice theory is neoclassical microeconomics and another important form is game theory.<sup>18</sup>

As applied to the domain of the political, rational choice theory is expressed as "positive political theory"<sup>19</sup> and "public choice theory".<sup>20</sup> For example, the question whether a given constitutional amendment can pass could be addressed *via* a formal model of voting behavior in the House, the Senate, and the various state legislatures. Such a model might assume that each member of these legislative bodies has a set of policy preferences that can be expressed as a position on a real line (from right to left) in ideological space. Whether a given constitutional amendment would pass could depend on whether the *median voter* in the House, the Senate, and in two-thirds of the state legislatures would view the state of affairs that would obtain after the amendment was passed (represented as a point on the line) as an improvement over the status quo (represented as a point on the line). This model might be grounded in a more basic explanation of legislator behavior in terms of their preferences for gaining and retaining office. Typically, rational choice theories (including positive political theory and public choice theory) are expressed in formal models, although such models may also be explicated informally or through precise analysis of the conceptual content of the claims made by the models.

Of course, rational choice theory has rivals and variants. For example, recent work in behavioral economics<sup>21</sup> emphasizes cognitive mechanisms that may produce behavior that traditional rational choice theory would label irrational. Another approach emphasizes the role of causal mechanisms or microfoundations<sup>22</sup> in the social sciences. One strand of the sociological tradition emphasizes the functional role that institutions and other social phenomena may play in producing social stability or cohesion. Marxist explanations might describe the limits on constitutional possibility in terms of the functional role of law in relationship to class interests.<sup>23</sup> Less formally, the limits of constitutional possibility might be described by stories or historical narratives that identified the motives and beliefs of particular constitutional actors. Comparative constitutionalism and constitutional history offer additional tools; constitutional possibilities may be established by pointing to constitutional models in other societies or in our own history.

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<sup>18</sup> See, e.g., DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* (MIT Press, 1991).

<sup>19</sup> See, e.g., W. H. RIKER & P.C. ORDESHOOK, *AN INTRODUCTION TO POSITIVE POLITICAL THEORY* (Prentice-Hall, 1973).

<sup>20</sup> DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (Cambridge: Cambridge University Press 1958); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (Ann Arbor: University of Michigan Press 1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (Cambridge: Harvard University Press 1965).

<sup>21</sup> See, e.g., *BEHAVIORAL LAW AND ECONOMICS* (Cass R. Sunstein ed. Cambridge University Press 2000); *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic, & Amos Tversky eds. Cambridge University Press 1982).

<sup>22</sup> See, e.g., *SOCIAL MECHANISMS: AN ANALYTICAL APPROACH TO SOCIAL THEORY* (Peter Hedström & Richard Swedberg eds. Cambridge University Press 1998); JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* (Cambridge University Press 1989).

<sup>23</sup> G.A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (Princeton University Press 1992).

Social science can provide the tools for systematic and rigorous discussion of constitutional possibility in the service of normative constitutional theory, but such tools might be deployed in various ways to undermine or criticize normativity. In an extreme form, rational choice theory or its alternatives can be deployed in a reductionist or eliminativist program. That is, normative constitutional theory can itself be explained as rational self-interested behavior or as an ideology that serves the interests of the ruling class. The most extreme version of such reductionism might characterize normative constitutional theory as mere “cheap talk” or as the *post hoc* rationalization of constitutional politics that is driven entirely by interests or forces outside the realm of normative theory. Positive constitutional theory might swallow normativity in another way, by making claims about constitutional determinism—the thesis that constitutional actors lack “free will” and hence that our constitutional fate is preordained. As a practical matter, normative constitutional theory assumes the viability of libertarian or compatibilist views<sup>24</sup> about constitutional choice. The intellectual division of labor among the disciplines assumes that normative constitutional theorists are entitled to get on with the business of evaluating constitutional choices; the deep questions posed by reductionism and determinism are properly deferred to other disciplines, theorists, and occasions.

The point of this brief survey of positive constitutional theory is simply to suggest constitutional theorists can access a wide variety of tools for arguing about constitutional possibility. These tools range from the formal, game-theoretic work of positive political theorists to the informal, narrative and historical efforts of new institutionalists. All of these approaches provide models for developing claims about constitutional possibilities that go beyond hand waving and mere assertion.

### III. IMPLICATIONS OF CONSTITUTIONAL POSSIBILITIES

What are the implications of a richer understanding of constitutional possibility for constitutional theory and practice? This question can be answered in two different ways. First, we can examine the general implications of constitutional possibility for normative theory, and second, we can formulate standards for making sound arguments about constitutional possibilities and necessities.

#### *A. Implications for Normative Constitutional Theory*

A systematic investigation of constitutional possibility has some direct implications for normative constitutional theory. Let’s begin with the most basic point—ought implies can.

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<sup>24</sup> DAVID DENNETT, *ELBOW ROOM: VARIETIES OF FREE WILL WORTH WANTING* (MIT Press 1984); Michael McKenna, Compatibilism, Stanford Encyclopedia of Philosophy, 2004, <http://plato.stanford.edu/entries/compatibilism/>.

## *1. Ought Implies Can and the Possibility of Collective Action*

The maxim, “ought implies can,” is associated with Immanuel Kant,<sup>25</sup> and on one interpretation the maxim authorizes an inference from an “ought proposition” (expressing an obligation) to a modal assertion that it is possible to do the action which ought to be done. The conventional understanding interprets the “implies” in “ought implies can” as material implication: hence, “ought implies can” is logically equivalent to “if a given action, *x*, is not possible, then that action is not obligatory.”<sup>26</sup> Thus, no one can be obligated to do the impossible: humans are not obligated to perform miracles.

In other words, our practical constitutional obligations are constrained by our practical constitutional possibilities. At that level of abstraction, “constitutional ought implies constitutional can,” is likely to gain wide assent. But agreement is likely to break down once problems of cooperation and group versus individual agency are introduced. Consider the following hypothetical example: suppose that we could have a better constitution—one without equal suffrage for the states, without an electoral college, with provisions for the removal of incompetent presidents and judges, and so forth. Relative to some collective agent (e.g., “We the People” or “Congress and the state legislatures”), radical constitutional change is a practical possibility. But relative to any individual agent, extensive revision or replacement of the Constitution may be a practical impossibility. Nothing that I can do will bring about a constitutional amendment—and therefore, I have no obligation of political morality to attempt to bring about such a change. Even the most powerful individual actors (e.g., the Speaker of the House or the Senate Majority Leader) are rarely in a position to act so as to create a significant probability that a constitutional amendment would actually become law.<sup>27</sup> But if constitutional obligations are conceived as the exclusive domain of individual agents, then the pervasiveness of constitutional cannots would imply that there are almost no constitutional oughts.

These issues are deep ones. If they are resolvable, this is not the occasion for their resolution. The very modest point of raising them is to emphasize the need for normative constitutional theory to be clear about agency and possibility in making claims about constitutional obligation. Claims that the existing constitutional order falls short of the constitution of ideal theory are one thing; claims that individuals or institutions have violated an obligation of political morality by failing to cooperate in a program of constitutional reform or revolution are another.

## *2. Ideal Theory Distinguished from Bad Utopianism*

Ideal theory has an important role to play in normative constitutional theory. Ideal theory is arguably part of an intrinsically valuable activity—the discovery of normative truths—even if that activity does not or cannot change constitutional practice. Moreover,

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<sup>25</sup> Paul Guyer, *Immanuel Kant (1724-1804)*, Routledge Encyclopedia of Philosophy, <http://www.rep.routledge.com/article/DB047SECT11> (visited November 26, 2006).

<sup>26</sup>  $O(x) \rightarrow P(x) \leftrightarrow \neg P(x) \rightarrow \neg O(x)$ , which can be parsed as “*x* is obligatory implies that *x* is possible if and only if *x* is not possible implies that *x* is not obligatory.”

<sup>27</sup> There may be “critical junctures” at which individual action would become obligatory. On the idea of a “critical juncture,” see RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA* (new edition, University of Notre Dame Press 2002).

ideal theory may provide ideas, arguments, and standards that are relevant to nonideal theory. For example, it might be the case, that the constitution of ideal theory would provide the *telos* or goal that constitutional practice should strive to achieve.<sup>28</sup>

But ideal theory should be distinguished from what might be called “bad utopianism”—a theoretical practice that relies on false assumptions about human nature or institutional capacities in order to argue for constitutional arrangements that exist only in nomologically inaccessible worlds. Recall that in the Rawlsian sense, ideal theory makes idealizing assumptions about compliance, but it does not make counterfactual assumptions about human or institutional capacities. Of course, it is possible that a given ideal theory would exemplify bad utopianism. This possibility would be exemplified by a constitutional theory that sought to establish the practical normative significance of an ideal constitution, but failed to acknowledge that the ideal’s attractiveness rested on an assumption of imperfect compliance that is inconsistent with actual human nature.

### *3. The Best of All Possible Constitutions, Comparative Constitutionalism, and Constitutional Second Bests*

The question whether either ideal theory or a constitutional model exemplified in another society should provide the normative standard for actual constitutional practice is strongly connected to the ideas about path dependency and the constitutional second best. Consider two ideas: (1) because of path dependency, constitutional comparisons are insufficient to establish practical possibility, and (2) the constitutional second best may not be the closest approximation to best of all possible constitutions. These two ideas can be fleshed out in the context of an example—the case for parliamentary democracy as a constitutional ideal.

Let’s suppose for the sake of argument that the best of all possible constitutions would be a parliamentary democracy with an institutional structure that approximates that which exists in the United Kingdom. The case for this constitution might rest on the idea that democratic governance is justified by considerations of equality and deliberative autonomy and that the parliamentary form does the best job of protecting the basic liberties. From the premise that parliamentary democracy is the ideal, one might argue that incremental changes in the actual constitution of the United States should move constitutional practice in the direction of this model. For example, it might be argued that the direct election of Senators<sup>29</sup> (as provided by the 17<sup>th</sup> Amendment<sup>30</sup>) was justified, because it moved the United States Constitution in the direction of the parliamentary model. The “real world” feasibility and desirability of the parliamentary model might be established by comparative constitutional analysis—pointing to the United Kingdom and other parliamentary democracies as models.

But granting the premises that parliamentary democracy is the key feature of the best of all possible constitutions and that comparative analysis establishes its feasibility, it does not follow that incremental changes that move in the direction of the parliamentary model are normatively attractive. First, it is not necessarily the case that the feasible

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<sup>28</sup> But this is not necessarily the case. See Part III.A.3, “The Best of All Possible Constitutions, Comparative Constitutionalism, and Constitutional Second Bests,” *infra* p. 13.

<sup>29</sup> See Direct Election of Senators, United States Senate, [http://www.senate.gov/artandhistory/history/common/briefing/Direct\\_Election\\_Senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm)

<sup>30</sup> United States Constitution amend. 17.

choice set includes the establishment of a parliamentary democracy in the United States—except in the very long run or in the cases of a catastrophic constitutional crisis. For example, it might be the case that no constitutional amendment abolishing equal suffrage of the States in the Senate could gain the assent of three-quarters of the state legislatures; moreover, Article V of the Constitution purports to insulate equal suffrage in the Senate from change by amendment.<sup>31</sup> If parliamentary democracy is outside the feasible choice set, then moves in that direction cannot be justified as steps on the path towards the ideal. Second, it is not necessarily the case the constitutional second best for the United States is the closest possible approximation of parliamentary democracy. The constitutional second best might be even more distant from parliamentary democracy than the status quo: for example, it is conceivable that more vigorous judicial supervision of policy would counteract the Senate’s antimajoritarian structure in ways that systematically produced better outcomes than the more “parliamentary” alternative—a highly deferential practice of judicial review.

### *B. Standards for Modal Constitutional Arguments*

“Modal constitutional arguments” are arguments about constitutional possibilities—about what constitutional actions and events are possible or necessary. What are the implications of our investigation of constitutional possibility for sound arguments of this sort?

#### *1. The Criteria for Modal Claims Should Be Articulated*

Claims about constitutional possibility and necessity are ambiguous. For example, the claim that a given constitutional action or event is “impossible” is almost never a claim about logical possibility, but the precise nature of the modal claim is rarely specified. When that lacuna is combined with a failure to specify the relevant agent and scope of decision, there is a good chance of misunderstanding and confusion.

The remedy is the articulation of criteria for modal claims. In what sense, is a given constitutional action or event possible or impossible, feasible or infeasible? In particular, it is important for constitutional impossibility claims to make it clear whether the claim is based on path dependency (historical accessibility), facts about human nature or institutional capacity (nomological accessibility), or the existing attitudes, beliefs, and desires of constitutionally relevant agents.

Meeting the articulation standard will require more precision than is usually found in contemporary constitutional theory and practice, but it does not require any particular vocabulary. Possible worlds semantics provides a convenient and precise vocabulary, but the resources of ordinary English provide sufficient resources for full articulation of claims about the possibility or impossibility of constitutional options.

#### *2. The Evidence for Impossibility Claims Should Be Stated*

Sometimes, claims about constitutional possibility are made without supporting evidence. Of course, claims that a given constitutional option is either possible or

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<sup>31</sup> United States Constitution art. V.

impossible do not always require evidence—some things are obvious and uncontroversial. But when a normative constitutional claim rests on the assertion that an alternative option is impossible or infeasible, discourse will be improved if evidence for the assertion is made explicit. Once the evidence is on the table, it is subject to scrutiny and possible refutation. Moreover, there is no general or *a priori* reason to believe that impossibility claims do not require evidence. And the claim that a given constitutional option is outside the feasible choice set may turn out to be controversial and contestable.

### 3. Double Standards Should Be Avoided

Finally and importantly, arguments about constitutional possibility should avoid double standards. That is, if one argues against a constitutional alternative on the ground that it is outside the feasible choice set, then one is obligated to show that the preferred option or options are inside the set—on the basis of the same criteria and in light of available evidence.

The possibility of a constitutional double standard can be illustrated by reference to a hypothetical dispute between advocates of constitutional originalism and Dworkin's view of law as integrity. Originalists might claim that their approach is superior because it provides objective standards for correct constitutional interpretation. A Dworkinian might attempt to refute this claim by arguing actual judges are incapable discerning the original public meaning of the constitution; in the actual world, the argument might go, judges and justices lack both the historical chops and the capacity to set aside their own preferences. But if the Dworkinian were then to appeal to Dworkin's ideal judge, Hercules, when the feasibility of law as integrity were assessed, a double standard would have been imposed. In the actual world, the same judges who lack historical chops may lack Hercules's capacity to construct the theory that best fits and justifies the law as a whole; in the actual world, the same biases that distort originalist judges could distort the method of law as integrity. Of course, we can easily imagine that the tables are turned and that it is the originalists who deploy a double standard.

## IV. A CASE STUDY IN CONSTITUTIONAL POSSIBILITY: CONSTITUTIONAL REVOLUTION

In his recent book, *Our Undemocratic Constitution*, Sandy Levinson argues that the United States Constitution suffers from grievous defects. These defects include: (1) the allocation of power to the Senate in which representatives of substantial minority of citizens hold a majority of votes; (2) the very high probability that a presidential dictatorship would follow a catastrophic attack on members of Congress; (3) too much power for the President; (4) the electoral college which permits the election of Presidents by a minority of voters; (5) the long period that lame duck Presidents and Congresses serve; (6) the limitation of impeachment to high crimes and misdemeanors and the absence of a mechanism for removal of the President on grounds of incompetency; (7) the functional impossibility of constitutional amendment.<sup>32</sup> But are solutions to these grievous ills possible? This question has special urgency because Levinson's indictment of Article V rests fundamentally on the claim that constitutional amendments are functionally impossible.

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<sup>32</sup> See Levinson, *supra* note 4, at 167.

Levinson argues that some of these defects can be corrected through constitutional amendments passed through ordinary political processes; for example, the problem of continuity in government in the event of a catastrophic attack on Congress could be corrected by a constitutional amendment that could garner the support of current or future members of Congress and state legislatures.<sup>33</sup> But when it comes to the most significant structural defects—for example, the equal suffrage of large and small states in the Senate, Levinson is quite frank that remedies through ordinary political mechanisms are infeasible. As Levinson puts it, “It may seem almost frivolous to suggest ordinary politics is the way to correct these defects.”<sup>34</sup> Even if Senators from large states attempted to form a coalition that would lobby for a constitutional amendment, the incentives provided by the institutional structure of the Senate would provide powerful incentives for logrolling as usual.<sup>35</sup> In other words, Levinson does a very credible job of articulating the criteria for feasibility, providing evidence for his claims, and he explicitly acknowledges the need to avoid double standards.<sup>36</sup>

So what is the solution? Again, Levinson’s frankness is admirable—he is adamant that his suggestions be treated as the start of a conversation and not as definitive answers to the problem of constitutional possibility.<sup>37</sup> The core of his tentative suggestion is collective action by individual citizens, starting with conversations among friends and neighbors, progressing to grass roots organizing, and proceeding to a petition drive for a new constitutional convention.<sup>38</sup> If petitions directed at Congress fail, Levinson suggests citizen lobbying of state legislatures—triggering the Article V procedure for calling a constitutional convention in response to a petition from two-thirds of the state legislatures.<sup>39</sup>

What are we to make of this proposal? Is a mass movement for wholesale constitutional reform really feasible? Of course, there is one sense in which it is obvious that such a movement is feasible. The collective agent that consists of “We the People,” the citizenry of the United States, could engage in the actions that Levinson describes. But Levinson cannot consistently focus on this collective agent as the solution to his problem. *Why not?* Because for “We the People,” Article V does not make constitutional amendments a “functional impossibility.” If “We the People” are the relevant agent, then constitutional amendments are within the feasible choice set. So, Levinson cannot appeal to collective agency as the solution to the problem of constitutional possibility without employing a double standard.

In order to avoid a double standard of constitutional possibility, Levinson can (and seemingly does) appeal to citizens as individuals. Thus, he suggests that individual citizens might purchase and share his book as a very preliminary step towards the creation of a mass movement. But this solution has obvious problems—problems of collective action that are familiar to economists and political scientists.

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<sup>33</sup> *See id.* at 168-69.

<sup>34</sup> *Id.* at 169.

<sup>35</sup> *See id.* at 171-72.

<sup>36</sup> *See id.* at 171 (“Given the central thesis of this book, it would be almost self-contradictory to say that the remedy to our most basic ills lies in ordinary politics.”).

<sup>37</sup> *See id.* at 172.

<sup>38</sup> *See id.* at 172-73.

<sup>39</sup> *See id.* at 173-74.

One way to frame the collective action problem that Levinson's solution faces is to ask the following question: do I have an obligation of political morality to participate in such a movement? The structure of the choice situation is conventionally captured by the game theoretic analysis of prisoner's dilemmas and free rider problems. Let's take a very simple version of the problem. Suppose that I have two options. Option one is to join the democratic constitution movement in its current early and informal phase by purchasing and distributing several copies of Levinson's book, participating in meetings about its ideas, and writing letters to my Senators and Representatives urging them to introduce and support several constitutional amendments. Option two is to expend these resources on another project (which might be efforts in support of the Global Fund and Oxfam but could just as well be writing a book or reading a few dozen novels). Suppose that I reason as follows: if there is sufficient political support for Levinson's program, then my efforts have a vanishingly small chance of making the difference between success and failure, but if there isn't sufficient political support, then my efforts will be ineffectual. In either case, I will incur significant opportunity costs by investing time and resources in the democratic constitution movement. Therefore, it would be irrational for me to join the movement.

One solution to collective action problems of this sort is an agreement. Perhaps, Levinson could establish a website that would enable me to pledge to take various actions in support of the movement which would be triggered by numerical thresholds. I would pledge to go discuss Levinson's ideas with at least two friends if 100 other citizens would do so as well. I would pledge to purchase and distribute ten copies of Levinson's book, when at least 1,000 other citizens had made that pledge. I would pledge to use meetup.com to organize a local meeting on the democratic constitutions movement, when at least 10,000 other citizens had made a similar pledge. I would pledge to attend a mass rally when at least 100,000 other citizens had made a similar pledge.

There are familiar problems with agreements of this sort—for example, monitoring compliance with the agreement would be costly, creating a secondary collective action problem. But meetup.com provides a fairly inexpensive mechanism for monitoring compliance, self-reporting of compliance is likely to be reasonably accurate, and there might be reasons to believe that modest defection from the agreement would be consistent with the rationality of general compliance. My commitment of each additional increment of resources would be conditional on the success of the prior stage, so the opportunity costs would become more substantial only after the likelihood of overcoming the collective action problem became more significant. At some point, the number of participants would reach a level where the commitment of resources by each individual member of the movement would decline. Once there were a few million members, then a few email messages to one's representatives in Congress and the state legislature plus a modest donation to the Democratic Constitution Alliance would be sufficient.

Is this story plausible? Recent experience with political organization *via* the Internet suggests that it is not wholly implausible. The limited success of Howard Dean's presidential campaign and the continued ability of moveon.org to raise significant funds provide evidence that the low cost of transacting over the Internet can change the dynamic of grass roots political organizing. One suspects that one critical phase in the development of such a grass roots movement for constitutional reform would be the earliest phases. In the first phase, the only member of the movement would be Levinson

himself and the opportunity costs for his continued involvement after publication of his book could be substantial indeed. In the next phase, concerted effort by a small group would be required in order to establish the infrastructure for a mass movement. No one is likely to claim that such a movement will necessarily succeed. A more likely assessment is that a movement for wholesale constitutional reform has only a slim possibility of success. And if this technique does have practical possibility of success, then the same technique might work to enable constitutional amendments on other topics through the normal Article V process—undercutting Levinson’s claim that such amendments are a functional impossibility.

My discussion of the speculative possibilities is even more tentative than Levinson’s. And my point is not to advocate for (or against) such a movement or to claim that such a movement is inside (or outside) the feasible choice set. Rather, my very limited ambition is to attempt to deploy some of the available tools to frame the discussion in a way that permits rigorous, coherent, and consistent discussion of constitutional possibility.

## V. CONCLUSION: THE PROBLEM OF FALSE CONSTITUTIONAL NECESSITY

This essay began with the problem of ephemeral constitutional possibilities. That problem can be addressed with a variety of tools. Constitutional theorists can recognize that there is an important role for ideal constitutional theory, while recognizing the dangers of bad utopianism. They can play close attention to idea of a constitutional second best and rigorously define the criteria for inclusion in the feasible choice set. Constitutional theorists can explicitly articulate assumptions about agency and the scope of decision. They can be disambiguate the various sense of possibility and utilize the tools of positive constitutional theory to construct sound arguments about constitutional possibility.

The problem of ephemeral constitutional possibility has an evil twin, the problem of false constitutional necessity.<sup>40</sup> It requires little effort to make the case the constitutional change is a practical impossibility and draw the conclusion that questions of constitutional design should be off the table of constitutional theory. At any given time, the chance that action by any given individual would make a crucial contribution and enable a constitutional reform that would otherwise fail surely approach zero. But just as surely, constitutional revolutions occur. The constitution of 1789, the Reconstruction Amendments, popular election of Senators, and the franchise for women are all part of the history of the actual world. Although some constitutional possibilities may be ephemeral, it is surely true that in the long run, there are few constitutional necessities. And if one believes that normative constitutional theory should take the long view—should seek constitutional knowledge with relevance that transcends particular moments in constitutional history, then most claims of constitutional necessity are false. Practical constitutional theory operates in the space between ephemeral constitutional possibilities and true constitutional necessity.

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<sup>40</sup> ROBERTO MANGABEIRA UNGER, 1 POLITICS: FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (Revised Edition, Verso Press 2004); False Necessity: Antinecessitarian Social Theory in the Service of Radical Democracy (the complete text), <http://www.law.harvard.edu/faculty/unger/english/falnec.php>.