

Constitutional Revolutions: The People, the Text, and the Hermeneutic of Legitimation

Howard Schweber

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Howard Schweber, *Constitutional Revolutions: The People, the Text, and the Hermeneutic of Legitimation*, 81 Md. L. Rev. 226 (2022)

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol81/iss1/8>

This Symposium is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

CONSTITUTIONAL REVOLUTIONS: THE PEOPLE, THE TEXT, AND THE HERMENEUTIC OF LEGITIMATION

HOWARD SCHWEBER*

The term “constitutional revolution” is remarkably hard to specify, as a number of recent authors have demonstrated. For one thing, discussions sometimes conflate the question of definition—what is a constitutional revolution?—with the question of what counts as evidence to demonstrate that such a revolution has occurred. For another, the term “revolution” is used to mean an upheaval, but it contains etymological reference to earlier theories that treated political revolution as a reversal or cyclical motion of the wheel of history. “Revolution” is, of course, the noun form of the verb “revolve,” and describes the turning of a wheel. Classical historical theorists from Polybius to Machiavelli and neo-Aristotelian writers such as Ibn Khaldun presented variations on the idea that history proceeds in cycles.¹ Political upheavals and reversals of orders of dominance represent the turning of the wheel. The idea of revolution of reversal is captured nicely in the title of a song from the Puritan Revolution in England, “The World Turned Upside Down.”² But how are we to decide when a change in the distribution of powers among the branches of government, for example, signifies such a reversal rather than just a rearrangement?

One way to think about these questions is to shift our focus to a single individual. The evidentiary question—when do we know that a revolution has occurred?—depends on mass actions and attitudes. But the definitional question is qualitative—what kind of change in constitutional thinking counts as a revolution? Imagine an individual whose thinking about

© 2021 Howard Schweber.

* Professor of Political Science, affiliate Law School Faculty, University of Wisconsin-Madison. Versions of this paper were previously presented at the University of Wisconsin Political Theory Workshop and the University of Texas-Austin.

1. For examples of cyclical patterns in history in these writers’ works, see MARCUS TULLIUS CICERO, *THE REPUBLIC OF CICERO* bk. I ch. 42–46 (G.W. Featherstonehaugh trans., G. & C. Carvill 1829), <https://www.gutenberg.org/files/54161/54161-h/54161-h.htm>; NICCOLO MACHIAVELLI, *DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS* bk. I, ch. 2 (Ninia Hill Thompson trans., Kegan Paul, Trench & Co. 1883), <https://www.gutenberg.org/cache/epub/10827/pg10827-images.html>; Bruce Lawrence, *Introduction* to IBN KHALDÚN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY – ABRIDGED EDITION* (N.J. Dawood ed., Franz Rosenthal trans., Princeton Univ. Press 2015); POLYBIUS, *THE HISTORIES* 371–413 (Robin Waterfield trans., Oxford World’s Classics 2010).

2. JOHN RENFRO DAVIS, *The World Turned Upside Down* (1643), <http://www.contemplator.com/england/worldtur.html>.

constitutionalism has undergone a change. Under what circumstances would we describe the change in that individual's thinking as "revolutionary"? Moreover, in this setting, the phrase "constitutional revolution" seems inapt; what is being described is more a revolution in constitutionalism, a change in the conception of the kind of political order a constitution creates and the principles on which it is based. The term "constitutional revolution," in other words, should be reserved for situations where the change in constitutional practice reflects an equally deep change in constitutional meaning: hence a revolution in constitutionalism.

In their recent book, Gary Jacobsohn and Yaniv Roznai point in this direction when they describe constitutional revolution as a "paradigm shift in the basic principles or features of the constitutional order."³ The use of the term "paradigm" is evocative, referencing Thomas Kuhn's description of changes in dominant modes of scientific understanding in *The Structure of Scientific Revolutions*. Earlier historians of science had viewed their subject as an uninterrupted story of endless progress, as in Karl Popper's 1937 description: "[A]s a matter of historical fact, the history of science is by and large a history of progress. (Science seems to be the only field of human endeavor of which this can be said)."⁴ Kuhn argued that this was an inaccurate description, and that scientific understanding proceeds by transitions between discontinuous and mutually incomprehensible "paradigms."⁵ Kuhn did not arrive at this idea from nothing. He saw himself applying the same model to the development of science that other historians had applied in numerous other areas, particularly the history of art.⁶

Art history was a particular source of inspiration for Kuhn, and specifically the work of Ernst Gombrich. The first draft of *Structure of Scientific Revolutions*, in fact, had contained extensive discussion of art history in comparison with the history of science; that discussion was removed in order to create a more tightly focused discussion, a decision Kuhn reached only after he exchanged extensive correspondence with Gombrich.⁷ Although Kuhn removed the explicit references to art history, it remained the case that he conceived of his paradigm model as similar to the periodized

3. GARY JEFFREY JACOBSON & YANIV ROZNAI, CONSTITUTIONAL REVOLUTIONS 61 (2020).

4. KARL R. POPPER, THE MYTH OF THE FRAMEWORK: IN DEFENCE OF SCIENCE AND RATIONALITY 12 (M.A. Notturmo ed., 1996).

5. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 1 (1962) ("This Essay attempts to show that we have been misled by [previous understandings] in fundamental ways. Its aim is a sketch of the quite different concept of science that can emerge from the historical record of the research activity itself.")

6. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 208 (2d ed. 1970) (emphasis added).

7. J.C. Pinto de Oliveira, *Thomas Kuhn, the Image of Science and the Image of Art: The First Manuscript of Structure*, 25 PERSPS. ON SCI. 746, 757 (2017).

treatment of art that Gombrich had made famous. “[I]t treats such topics as the role of competing schools and of incommensurable traditions, of changing standards of value, and of altered modes of perception. Topics like these have long been basic for the art historian but are minimally represented in writings on the history of science.”⁸

In a later discussion of the concept, Kuhn clarified both the role and the key elements of a paradigm. The key role of paradigms was to explain the fact of communities of understanding: “A scientific community consists . . . of the practitioners of a scientific specialty. . . . Such communities are characterized by the relative fullness of communication within the group and by the relative unanimity of the group’s judgment in professional matters.”⁹ The core elements of this shared understanding, in turn, comprised a formalized language, accepted models, and agreed-upon exemplar cases.¹⁰

In a later discussion, Kuhn proposed that a more accurate term than “paradigm” might be “disciplinary matrix.”¹¹ In his telling, the core aspects that such a disciplinary matrix would comprise would be a shared set of symbolic generalizations, a set of accepted models, and mutually agreed-upon exemplar cases.¹²

What is true of artists and scientists is equally true of lawyers, construing the term “lawyers” broadly to include attorneys, judges, and legal academics. Legal professionals are a relatively insulated community with high barriers to entry, a technical shared language, and a readily identifiable disciplinary matrix that determines the scope of what counts as respectable practice. In one way, law is more like art than it is like science, as both art and law presume an audience. Shifts in the governing paradigm of artistic representation taught viewers to perceive art differently than they might

8. THOMAS S. KUHN, *Comment on the Relations of Science and Art*, in THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 340, 340 (1977). Gombrich’s description of Picasso’s Cubist period provides a nice illustration of the idea of changes in modes of perception and understanding in painting. In particular, Gombrich opined that Picasso and his contemporaries reasoned:

If we think of an object, let us say a violin, it does not appear before the eye of our mind as we would see it with our bodily eyes. We can, and in fact do, think of its various aspects at the same time. Some of them stand out so clearly that we feel that we can touch and handle them; other[s] are somehow blurred. And yet this strange medley of images represents more of the ‘real’ violin than any single snapshot or meticulous painting could ever contain.

E. H. GOMBRICH, THE STORY OF ART 574 (16th ed. 1995); see generally E. H. GOMBRICH, ART AND ILLUSION: A STUDY IN THE PSYCHOLOGY OF REPRESENTATION (1960).

9. THOMAS S. KUHN, *Second Thoughts on Paradigms*, in THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 293, 296 (1977).

10. *Id.* at 297.

11. *Id.*

12. *Id.* at 297–98.

previously have done. There was never any illusion among viewers that it was the world of represented objects that had changed; Egyptians in the classical period did not believe that all humans were two-dimensional beings who always stood sideways to the perspective of a viewer. In other words, no viewer is unaware of the fact that an artistic image is mediated. To cite a classic illustration, Magritte's ironic caption of his painting of a pipe, "[c]eci n'est pas une pipe," was merely a provocative reminder of the obvious fact that dabs of paint on a canvas are representations of objects rather than the objects themselves.¹³ Perceptions of art encompass internalized and often unexamined norms of interpretation that both empower and constrain the communicative capacity of art experienced as spectatorship.¹⁴

The possibility of a paradigm shift emphasizes the historicity of the experiences of art for viewers as well as artists. The fact of paradigm shifts in the history of art thus belies any notion of natural or essential relationships between artistic representations and perception. The same is true of paradigm shifts in law, although it is often the case that the spectators lack the conscious awareness of mediation that viewers of art bring to their experiences. Thus, one may say that there are two distinct elements of a paradigm shift: (1) the acknowledgement of the constructedness of a mode of expression; and (2) a conditioning of audiences to appreciate and accept the governing construction. Both of these elements are important from a democratic theoretical perspective that imports the term "paradigm" to constitutionalism. In the case of constitutional understanding, as is the case regarding art, spectatorship is a core category of what it is that a paradigm shift entails. The revolutionary artist is one whose work succeeds in both creating and successfully imposing on the viewing public a new and different set of norms of interpretation, of what counts as *legitimate* art. A constitutional paradigm shift should entail a similar consequence. That is, a revolutionary change in constitutional understanding is one in which the standards of legitimacy that define the experience of spectatorship and the relationship between the work of art (the text) and the viewer (citizens) are reconfigured.¹⁵

An analysis of governing paradigms is not an approach that focuses on the form of events, but rather their content. "Legitimacy" may be a test for the replacement of a constitutional system or text with a new one, or it may be a test for what counts as "constitutional." Moreover, there is no assumption (as sometimes bedevils the use of "paradigm" in both the history

13. *This is Not a Pipe—Magritte's Most Famous Painting*, PUB. DELIVERY (Apr. 22, 2021), <https://publicdelivery.org/magritte-not-a-pipe/>.

14. These standard observations from the field of cultural studies received a deep exploration by Walter Benjamin, particularly in his titular essay. See generally WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (J.A. Underwood, trans., PENGUIN BOOKS) (2008).

15. See generally GARY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010).

of art and the history of science) that there are neatly demarcated phases of development in accordance with which one paradigm replaces another; claims of legitimation are always contestable. The test for identifying a constitutional revolution, in other words, may not be entirely separate from a test for identifying an irreconcilable division in constitutional understanding that has the capacity to provide the basis for a constitutional civil war.¹⁶

In this Essay, that is the dimension on which I want to focus: changes in paradigms of constitutionalism understood as conceptual categories of legitimation, not the consequences of applying those categories to practice. In the constitutional context, this breaks down into two inquiries. First, what is the basis of legitimacy? In answering this question, I will explore the idea of constituent power, an old idea that has provoked a good deal of recent discussion. Second, what do different legitimating theories look like—that is, in what ways do they differ such that we can identify a shift from one to another as a revolutionary change? Here, I will examine the idea of constitutional hermeneutics. The argument of this Essay is that a constitutional revolution occurs when there is a change in the governing norms of interpretation that alters the terms of legitimation by creating a shift in the paradigm of interpretation, or in other words, a change in constitutional hermeneutics. Just as a revolution in science involved a shift in the models, exemplar cases, and vocabulary that made up the disciplinary matrix of the enterprise—and just as a shift in the artistic paradigm additionally involved conditioning viewers to experience art in a new and different way—a shift in the constitutional paradigm involves introducing a new and different hermeneutical relationship between the collective readers—the people—and the text. A successful shift in the constitutional paradigm occurs when the dominant understanding of what counts as a legitimate expression of constitutionalism is changed to a degree that it is incommensurate with the understanding that had been dominant in the previous period.

Framing the discussion in this way departs from the common vocabulary of constitutional interpretation. Questions of constitutional interpretation tend to be couched in terms of the roles of specific institutional actors, often judges on constitutional courts.¹⁷ But it is a basic political principle that those actors are agents who *represent* (with all the myriad

16. Juan Linz has famously argued that presidential systems are inherently unstable because their elements—the branches of government—depend on different and incommensurate bases of legitimation. Juan J. Linz, *The Perils of Presidentialism*, J. DEMOCRACY, Winter 1990, at 51–53.

17. The focus on judicial review as a core issue of constitutionalism is in large part a reflection of an uncritical acceptance of a particular institutional arrangement. See generally LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005) (critiquing the excessive focus on judicial actors as the basis for understanding constitutionalism in the American tradition).

variations of that concept¹⁸) the sole authorizing agent, *the people*. Thus, what is ultimately at stake in debates over interpretation is the relation of “the people” to “the text,” because any intermediary role ultimately requires validation by the people for its legitimacy.¹⁹ If our core political commitment is to the idea of constituent power, that relationship should be the focus of our understanding. This inquiry also invites a reconsideration of our conception of constitutional politics. That is, one of the motivations behind this inquiry is a desire to push back against the reduction of constitutionalism to *only* constitutional politics. The argument is that a focus on what Michael Polanyi called “the tacit dimension” of historical knowledge (a concept he applied to scientists and artists as well as historians). The term “tacit dimension” refers to the things that people know without knowing that they know them. That is, how we know things is influenced by assumptions we accept as true without being able to articulate them and by knowledge that we cannot specifically articulate.²⁰ An investigation into the tacit dimension of constitutional politics reveals the powerful influences of competing languages of justification.²¹ In the case of constitutional politics, that language is grounded in an understanding of the hermeneutical relationship between the people and the text.

Asking about the hermeneutic dimensions of the relationship between a people and a text provokes a range of inquiries. One question is normative: Does commitment to a particular form of constitutionalism entail an equal commitment to a definable set of hermeneutic principles? Are there, for example, ways of describing the reader-text relationship that are inconsistent with a commitment to the idea of popular sovereignty and/or constituent power? Alternatively, we might ask a less normative, less provocative, more analytical question: If there is a change in the prevalent way of conceptualizing the hermeneutic relationship between the people and the

18. The literature exploring different conceptions of political representation is far too large to review here. For a few representative exemplars, see generally HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1972); BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (John Dunn et al. eds., 1977); MICHAEL SAWARD, *THE REPRESENTATIVE CLAIM* (2010); Howard Schweber, *The Limits of Political Representation*, 110 AM. POL. SCI. REV. 382 (2016).

19. Bonnie Honig, *Between Decision and Deliberation: Political Paradox in Democratic Theory*, 101 AM. POL. SCI. REV. 1, 12 (2007).

20. MICHAEL POLANYI, *THE TACIT DIMENSION* (1996). Polanyi uses the quotidian example of recognizing a face in the crowd. “We know a person’s face, and can recognize it among a thousand, indeed among a million. Yet we usually cannot tell how we recognize a face we know. So most of this knowledge cannot be put into words.” *Id.* at 4. Polanyi argued that the same reliance on inarticulable tacit knowledge underlies popular understandings of economics and politics in any given historical period. In Polanyi’s words, “we . . . know more than we could tell,” a phenomenon he insisted was common to all attempts at taxonomical classification or descriptions of phenomena. *Id.* at 5.

21. *Id.* at 6.

constitutional text, is that a change in the constitutional system—perhaps even a constitutional revolution?

I. CONSTITUTIONAL LEGITIMACY AND CONSTITUENT POWER

A critical element of this discussion is an initial assumption that arguments for constitutional legitimation ultimately derive from a theory of popular sovereignty expressed as “constituent power,” meaning the ultimate power of the people to constitute the sovereign through an act of constitution-making.²² That is, the implications of a theory of hermeneutics for constitutional theory derive from its implications for constituent power.

Scholars take different views about the origin of the idea of constituent power. Andreas Kalyvas traces the idea to Marsilius of Padua’s text, *Defensor Pacis*.²³ N. Srinivassan identified the source of the concept in seventeenth-century English Levellers’ 1648 call for authorized representatives acting on behalf of “the well-affected in every county” to meet with representatives “chosen by the Army” to create a new local political order.²⁴ Looking to a still later source, Lucia Rubinelli cites the French Revolution as the first clear assertion of the concept.²⁵ Regardless, by the eighteenth century the concept was central to certain discourses in Anglo-American political thought.

As the case of a constituent assembly demonstrates, however, in reality “constituent power” is a conceptual model rather than a description of actual events. It is never the case that the moment of constituent power involves the entirety of a “people” gathered in one place and engaging in unmediated deliberation to arrive at a consensus. Instead, as in the example of the Levellers’ proposal cited by Srinivassan, what is at stake is some version of a constituent assembly, a group of representatives selected and authorized in accordance with a set of rules that are accepted as legitimate by the relevant contemporaneous actors. In turn, the question of defining *whose* standards of legitimacy are at issue is, itself, an historical artifact that cannot be justified by reference to a prior moment of authorization. This is the problem of

22. See, e.g., LUCIA RUBINELLI, *CONSTITUENT POWER: A HISTORY* 3 (2020); Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639, 645–46 (2015).

23. Andreas Kalyvas, *Constituent Power*, POL. CONCEPTS 3 (2013), <https://www.politicalconcepts.org/constituentpower/3/>.

24. N. Srinivassan, *The Theory of the Constituent Assembly*, 1 INDIAN J. POL. SCI. 376, 376 (1940).

25. RUBINELLI, *supra* note 22, at 4. The Levellers were seventeenth-century English radicals who favored legal and political equality, religious tolerance, and natural rights. Levellers were prominent participants in the English Civil War; they were liberals in contrast to the more radical “Diggers,” who favored abolition of private property. See CHRISTOPHER HILL, *THE WORLD TURNED UPSIDE DOWN: RADICAL IDEAS DURING THE ENGLISH REVOLUTION* 107–50 (1972).

infinite regress, or what Robert Dahl called the “chicken-egg problem of democracy”: Who has the authority to define the *demos*?²⁶

The identification of “the people” in practice, then, is a brute fact of historicity. But that observation immediately raises a set of profound problems for legitimacy. Rousseau’s paradox was an early expression of the problem.²⁷ For Rousseau, the problem was that in order to become good republican citizens, people had to first experience good laws, yet they could not be expected to accept good laws until they had become good republican citizens.²⁸ To solve this chicken-and-egg paradox, Rousseau focused on the role of a legislator who would use the authority of religion to institute good laws on a people not yet ready to understand them.²⁹ The result, as Bonnie Honig points out, is to remove the problem from the present:

In sum, Rousseau casts the paradox of politics as a paradox of founding in order to reassure his readers, “to imagine another time when it could be resolved” . . . a time when the lawgiver and all he represents would be unnecessary, and politics could be more truly free. In so doing, Rousseau leads his readers to infer that they must just somehow get through the founding, whether by way of a lawgiver’s impositional guidance or if necessary by way of a more explicit violence that can produce by force that which will later come by way of education and culture.³⁰

That solution, however, is unavailable as the basis of legitimation for a constitutional democracy grounded in constituent power. Frank Michelman describes the problem as one of infinite regress; the conditions under which a constituent assembly operates, for example, cannot themselves be legitimated by the authority of that assembly.³¹ We are returned to the brute historical fact of an exercise of power seeking a basis for legitimation to ground the constitutional order that it creates.

The paradox or problem can be couched in terms of the relationship between constituent power and sovereignty (as in authority to make laws), liberalism and democracy, law and politics, or constitutional and ordinary

26. ROBERT A. DAHL, *AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY* 60–61 (1970). For an argument that the constitution of the *demos* necessarily follows the creation of the sovereign state, see Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should be Bounded by the State*, 4 INT’L THEORY 39–68 (2012). For a review of arguments emphasizing the primacy of the identification of a people prior to the assertion of a legitimate state authority, see IAN SHAPIRO & CASIANO HACKER-CORDÓN, *DEMOCRACY’S EDGES* (1999).

27. See Honig, *supra* note 19, at 3.

28. See *id.*

29. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT & DISCOURSES* 37 (1923).

30. Honig, *supra* note 19, at 3 (quoting WILLIAM CONNOLLY, *THE ETHOS OF PLURALIZATION* 137 (1995)).

31. Frank I. Michelman, *Constitutional Authorship*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* 64, 90 (Larry Alexander ed., 1998).

law. Regardless of the formulation, the core of the problem is the conflict between competing claims of legitimation and the difficulty of grounding either without first assuming the other. As Bonnie Honig frames the issue, we have to assume the fiction of a true and unconstrained exercise of constituent power to legitimate democratic self-rule, but we simultaneously have to assume the fiction of true and unconstrained democratic self-rule in order to establish a moment of constituent power.³²

Constitutionalism, as Honig notes, recasts the problem by making time a central category:

In place of the synchronic paradox of politics (in which will of all and general will may be mutually inhabited), and in place of the paradox of democratic legitimation's difficulty of securing general will over will of all, we now have the still difficult but far less knotty problem of how to find freedom in relation to a past we are stuck with and did not author³³

Honig reviews several attempts to resolve this paradox. In Honig's assessment of the agonistic approach of Chantal Mouffe, the problem is simply irresolvable; constituent power and sovereignty, law and politics, liberal rights, and democratic self-rule are necessarily in competition for supremacy. The most that we can do is observe which is ascendant in a given place and moment. The tensions between these concepts can never be resolved; instead, "pragmatic negotiations between political forces . . . always establish the hegemony of one of them."³⁴ As an example of a contrasting approach, Honig presents Jürgen Habermas's response to Michelman's challenge that legitimation based on a set of initial circumstances produces an infinite regress, proposes to treat the elements of the various binaries as "co-original" by a process of retroactive legitimation in which the moment of constitutional founding *becomes* legitimate through subsequent actions that validate the terms of the discourse established at the moment of founding. Habermas pointedly argues that what Michelman describes as an infinite regress is the inescapable consequence of the "future-oriented" character of any democratic constitution:

[I]n my view, a constitution that is democratic—not just in its content but also according to its source of legitimation—is a tradition-building project with a clearly marked beginning in time. All the later generations have the task of actualizing the still-

32. See Honig, *supra* note 19, at 5.

33. *Id.* at 9.

34. CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 5 (2000).

untapped normative substance of the system of rights laid down in the original document of the constitution.³⁵

The necessary assumption here is that the moment of founding provided material adequate for its own legitimation. But even that problem, according to Habermas, can be overcome by treating the founding moment as a subject of spectatorship; it is the veneration with which the moment of founding is regarded that legitimates the project of its reenactment. Habermas notes that Kant used the French Revolution as a signifier for the possibility of moral progress, but in doing so removed the event from its historicity: “[I]n the theory itself we find no trace of the constitutional assemblies of Philadelphia and Paris—at least not the *reasonable* trace of a great, dual historical event that we can now see in retrospect as an entirely new beginning.”³⁶

For Honig, Habermas’s solution replaces one paradox with another—the reference to a time and place of a founding moment to supplement his purely proceduralist, discourse-oriented version of constitutionalism. Honig explains:

Habermas needs Philadelphia and Paris to motivate his “constitutional patriotism.” Without the events to conjure up a colorful human world of passion, loyalty, betrayal, idealism, and reason, the idea of affectively attaching to a constitution (which, after its characteristic nods to the people’s virtue, is simply a list of offices, procedures, and rules) is about as attractive as kissing a typewriter. *With* the place names, however, a Pandora’s box opens. Philadelphia and Paris represent not simply “constitutionalism” but two distinct revolutions and foundings, each characterized by its own unique, contingent drama, intrigue, public spiritedness, and remnants. In the U.S. case, “Philadelphia” conjures not only the assembly that produced the new national constitution but also the many competing conceptions of the American experiment that were sidelined or minoritized by the assembly and its constitution. . . . If they are unreclected in Habermas’ invocation of “Philadelphia,” that is because they are not, for him, part of its “reasonable trace.” It is the trace, not the event, that he seeks to recollect.³⁷

Habermas proposed that ideal conditions of discourse characterized by equality and mutual respect produce a basis for legitimating the outcomes of political deliberation. This is a weak answer to Michelman’s point that in reality all political activities—including moments of constitution-making—

35. Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?*, 29 POL. THEORY 766, 774 (2001).

36. *Id.* at 768.

37. Honig, *supra* note 19, at 12.

take place in conditions that have very little to do with such idealized conceptions of democratic discourse.³⁸

Ironically, as a matter of constitutionalism, Habermas presents us with yet another Hobson's choice between two equally unattractive alternatives: accepting the very non-ideal conditions of "the founding" as constraints on the future possibility of constitutional change, or abandoning the substitution of constitution for revolution as the subject of retrospective spectatorial enthusiasm. In other words, a return to treating an assertion of constitutive power as a brute historical fact.

Honig's alternative solution is based on a dissolution of the binaries: law/politics, constituent power/sovereignty, and liberalism/democracy.³⁹ In Honig's view, there is neither the possibility of one element triumphing over the other nor of both being unified in a single legitimating scheme.⁴⁰ Instead, (constitutional) politics is what takes place in the unresolved and unresolvable tension between claims of "law" and claims of "democracy," decision and deliberation, and the competing legitimating principles that they entail in a process that never reaches resolution but rather persists in an endless productive tension.⁴¹

This brief review of an important discussion of core democratic theoretic principles is sufficient to clarify two key points about the discussion of constitutional revolution. First, a shift in constitutional paradigm is a shift in the understanding of the relation among the elements of the binaries that Honig wishes to deconstruct: the people as political sovereign and the people as authors/authorizers of a constitutional order. Second, while Honig's approach is both valuable and persuasive as applied to a theory of the political, it is insufficient if there is a need to characterize different bases for the assertion of constitutional legitimacy. The question can be presented as descriptive rather than normative. Given that people *do* tend to think of sovereignty and constituent power as binary opposites, what kind of change in thinking about that relationship constitutes a "revolution" in the paradigm of constitutional legitimation? Agonistic dominance and discursive co-originality similarly do little to provide even an analytic description (let alone normative criteria) for legitimacy, a category that is strangely absent from these discussions.

Returning to earlier comments about the "brute historicity" of foundational events, the invocation of constituent power is a contestable discourse of legitimation rather than an historical description. The impossibility of a normatively self-justifying definition of "the people" is

38. See generally Michelman, *supra* note 31.

39. See Honig, *supra* note 19.

40. *Id.* at 9.

41. *Id.* at 15.

thus folded into the problem of legitimation for the constitutional order. What remains is the vocabulary and conceptual apparatus for testing the legitimacy of a claim.

More specifically, these arguments do little to provide an account of the legitimacy of a constitutional *text*. For that, the discussion has to be recast in terms of hermeneutics. The relationship of people-as-sovereign to people-as-constituent authority is carried forward in time by the existence of a constitutional text. A change in constitutional legitimation, then, may be expressed in a change in constitutional hermeneutics.

II. CONSTITUTIONAL HERMENEUTICS AND CONSTITUTIONAL LEGITIMACY

The term “hermeneutics” has ancient Greek roots, but in its more modern usage—beginning in approximately the seventeenth century—it refers to religious and specifically Christian principles of textual interpretation.⁴² The idea that there may be analogous principles of interpretations appropriate for legal and constitutional texts is not new; one important articulation of the idea appears in the nineteenth-century writings of Francis Lieber.⁴³ Lieber drew less on specific religious practices of interpretation and more on general theories of language, employing a sign-referent theory going back to Hobbes in which there is an ascertainable and fixed correct assignment of meaning to a linguistic term. In more recent times, Jaroslav Pelikan has drawn a more direct analogy between the interpretation of constitutional and religious texts, arguing that the U.S. Constitution serves as the American sacred text because it “speaks to” Americans in a way that is not true of other foundational documents.⁴⁴ These approaches may be described as “exegetical.”⁴⁵ The meaning of the text is located either within itself (as in Lieber’s positivistic theories of language) or in a source outside both the text and its interpreters (as in a divine source of revelation). The orientation to time is past-looking, to a moment of authorship, revelation, or recording. The idea of hermeneutics is the search

42. The etymology of “hermeneutics” reaches back to the Greek god Hermes. As a philosophical term it refers to various specific theories of interpretation starting with Johann Conrad Dannhauer’s 1630 text in which he introduced the term *hermeneutica*. In the nineteenth century, starting with Friedrich Schleiermacher, the idea of hermeneutics was applied to secular human affairs. See C. Mantzavinos, *Hermeneutics*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://stanford.library.sydney.edu.au/archives/spr2017/entries/hermeneutics/>.

43. FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* ch. 1–5 (1853), https://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Legal-and-Political-Hermeneutics.pdf.

44. JAROSLAV PELIKAN, *INTERPRETING THE BIBLE & THE CONSTITUTION* 48–49 (2004).

45. The term “exegetical” refers to the word “exegesis,” meaning the derivation of meaning by the interpretation of a text. *Exegesis*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/exegesis> (last visited Oct. 9, 2021). Exegesis is contrasted with “eisegesis,” meaning the practice of reading a meaning *into* a text.

for the correct or true meaning of the text as fixed at the moment of its creation.

This classical tradition of hermeneutics was supplemented in the twentieth century by a series of writers who explored the relationship between reader and text in less structuralist, more critical terms, particularly by writers in the post-Marxian Critical Theory movement. The core tenet of that intellectual movement was a rejection of the Kantian ideal of a transcendental subjectivity in favor of a recognition of an objective, historically conditioned subject, an idea most fully developed after Marx by Lukacs and Adorno.⁴⁶ But objective did not mean determined; critique, and therefore emancipation, remained a possibility by the exercise of self-directed application of the historical conditions of subjectivity as the basis for political action. In other words, the constraining effects of historically received understandings could be overcome once they were made evident, as could an understanding of the roles played by technology, culture, and science in reinforcing dominant modes of understanding. Once, and only once, we recognize the effects of received understandings on our own thinking and undertake to critically examine the consequences of this tacit level of our own understanding, we can attempt to seek alternative ways of understanding and thus expand (if never escape) our hermeneutic horizons.

What this intellectual movement meant for hermeneutics—legal and otherwise—was that the exercise of textual interpretation came to be recognized as an exercise in *Selbstkritik* (self-critique) that could illuminate otherwise unrecognized horizons of understanding. The modern starting point for this later approach is Hans-Georg Gadamer's *Truth and Method*.⁴⁷ Gadamer deployed the concept of hermeneutic horizons, boundaries on the capacity of readers to understand concepts. Because each reader or generation of readers works within their own horizons, the understanding of historical texts that emerges reflects the limitations of that perspective. And because both text and reader are bound by horizons of understanding, a reader's engagement with a text takes the form of a dialogue in which a "fusion" of horizons occurs. To illustrate this principle, Paul Ricoeur draws a distinction between "understanding" versus "interpretation," in which "understanding" reflects a recognition that written texts stand outside their authors' epoche and are subject to being interpreted within the readers' own hermeneutic horizons, while "interpretation" refers to the fruitless endeavor of discerning a meaning that is independent of the reader's worldview.⁴⁸

46. See generally ANDREW ARATO & PAUL BREINES, *THE YOUNG LUKACS AND THE ORIGINS OF WESTERN MARXISM* (1979).

47. See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* (1975).

48. PAUL RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES: ESSAYS ON LANGUAGE, ACTION AND INTERPRETATION* 21 (John B. Thompson ed. & trans., Cambridge Univ. Press 1981).

Gregory Leyh specifically applies the implications of modern philosophical hermeneutics for American constitutional understanding (in Ricouer's sense of the term). More importantly, Leyh explores the ways in which philosophical hermeneutics provides a basis for critique of interpretive approaches generally. "[P]hilosophical hermeneutics does not pose as a methodology for accurately reading texts, but instead offers a standard for the evaluation of all methodological practices whose aim is the understanding of textual meaning."⁴⁹ Leyh's call for a theory of constitutionally acceptable modes of constitutional interpretation is the critical hermeneutic project in a nutshell. This approach reveals the inescapably political nature of an hermeneutic choice. Just as Leyh asks what mode(s) of interpretation are consistent with our constitutional commitments, one might ask whether there is a particular theory of hermeneutics or prescribable hermeneutic practices that follow necessarily from, say, a commitment to Lockean liberalism.⁵⁰

The fundamental distinction in forms of constitutional hermeneutics is nicely captured in the contrast between Pelikan's description of a religious text as one that "speaks to" rather than "speaks for" its readers.⁵¹ A religious text that is received from an external authority speaks to its readers; the author's voice is heard through the act of reading but those readers play no part in the construction of that meaning. Their only task is to hear clearly. By contrast, the text "speaks for" the reader in Ricouer's and Habermas's analyses, as the ultimate result is an understanding of the interpreter's horizons of understanding. These distinct (even binary?) approaches, in turn, map nicely onto the binaries of constituent power and sovereignty, past and present. Constituent power refers to the idea of a people's authority to define its constitutional order—hence the constitutional text speaks for the people. By contrast, a traditional understanding of "sovereign" is a figure standing outside the people who decrees law. And yet, another binary distinction might be layered onto this understanding: the distinction between constative and performative exercises of interpretation. Jason Frank illustrates the way narratives of constituent power changed over American history and were

49. Gregory Leyh, *Toward a Constitutional Hermeneutics*, 32 AM. J. POL. SCI., 369, 380 (1988).

50. The term "Lockean liberalism" refers to John Locke, a seventh-century Scottish philosopher who is considered the father of liberalism. Locke posited a "social contract" whereby individuals would surrender some of their natural rights to create a commonwealth governed by a legislature, which would protect individuals in the exercise of their remaining rights. Lockean liberalism is associated with strong notions of individual rights and a limited conception of the role of liberalism. Lockean liberalism is one of the most influential political theories in American thought in the period of the founding along with civic humanism. See Isaac Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3–32 (1988).

51. PELIKAN, *supra* note 44.

reflected in dominant constitutional understandings.⁵² As Frank points out, this ongoing intervention in the meaning of texts shifts the performative moment from the past to the present.⁵³ What I referred to earlier as the brute historical fact of an assertion of constituent power is an example of the constative. By relegating that constative moment to the past, the possibility is opened of a performative form of constitutionalism in the present—the same move Rousseau relied upon to relegate the disruptive moment of revolutionary founding to the past in order to make room for constitutionalism.⁵⁴

III. REVOLUTIONS IN CONSTITUTIONALISM

We can thus formalize an as-yet-undeconstructed binary opposition between two versions of constitutional paradigms identified by their hermeneutic approach to the paradox of constituent power. Where a constitution is understood as “speaking to” we find:

- (1) A past moment that was performative, and is therefore experienced in the present as constative (a simple example is a theory of authorial intent a la Lieber).
- (2) A location of textual meaning outside the hermeneutic horizons of understanding of the reader.
- (3) An effective relegation of the constituent “people” to a position of spectatorship grounded in a past and completed moment of performance.
- (4) Legitimation based on the assertion of “correct” understanding.

Where a constitution is understood in terms of a present-oriented critical hermeneutic, we find a very different constellation of ideas:

- (1) A past moment of constative assertion (brute historical fact) is now experienced as the material for performative intervention.
- (2) A diachronic project of ongoing and retrospective legitimation that focuses on the Derridean “trace”⁵⁵ of the originary moment—

52. See generally JASON FRANK, *CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POSTREVOLUTIONARY AMERICA* (2010).

53. *Id.* at 243.

54. This argument adopts Judith Shklar’s identification of the general will with constituent power or constitution-making. Judith N. Shklar, *We the People: Foundations*, 86 AM. POL. SCI. REV. 775, 776 (1992) (book review); see also David Lay Williams, *Justice and the General Will: Affirming Rousseau’s Ancient Orientation*, 66 J. HIST. IDEAS 383, 385–86 (2005).

55. The term “Derridean” refers to French philosopher Jacques Derrida, who is considered one of the founders of the school of Deconstructionism. One of Derrida’s key points was his challenge to Western logocentrism, by which he meant the tendency to treat words as having fixed and absolute meanings attached to objectively real referents. Derrida argued that meaning in language derives from the play of differences among words rather than from reference to an objectively verifiable external object; the term “*différance*” captured the difference(s) between sign and object,

whether or not one embraces Honig's assertion of an inescapable tension in the face of the need for affective bonds of constitutional fidelity.⁵⁶

- (3) Legitimation based on the assertion of an understanding valid within the self-critical assessment of present hermeneutic horizons.
- (4) A project that is fundamentally incomplete, and hence always subject to supplementation.

The argument of this Essay is that a move from one of these fundamentally different hermeneutics of constituent power constitutes a constitutional paradigm shift, and hence a constitutional revolution. This approach complicates the relationships among constitutional, political, and legal revolutions. As described here, a shift in the hermeneutic of constitutional legitimation may occur without any substantial change in the arrangement or operations of political institutions and without dramatic change in the content of legal rules; conversely, political and legal revolutions may not constitute revolutions in constitutionalism.

Interestingly, one can go further and situate the idea of "constitutional revolution" in each paradigm. In the "speaking to" understanding, a constitutional revolution is a displacement of the sovereign people's constative assertion of the true understanding of a historical moment in favor of a rival assertion. The analogy is to the hermeneutic of interpretation appropriate for religious texts, where divisions among different schools of understanding turn on questions of who is the authorized sovereign with legitimate authority to declare the people's true constitutional understanding. By contrast, in a "speaking for" approach, a constitutional revolution would be an event that signifies a sufficient shift in the horizons of understanding that a present performative intervention yields results that would not be capable of legitimation by the understanding of an earlier period. This, too, is the idea of revolutionary change in the hermeneutic of legitimation and hence in the paradigm of constitutionalism, as the "speaking for" model is

while "trace" identified the exclusions of possible meanings that is necessarily packed into the initial definition of a sign. An historical originary trace, then, refers to the excluded possibilities of meaning that were involved in the original construction of strict meaning categories. The influence of that exclusion can be found in a close examination of subsequent thinking, hence the "trace" of the excluded meanings remains apparent. Thus, for example, Derrida argues that the Declaration of Independence contains a paradoxical moment in that there could be no authorized signer of the Declaration until the Declaration was signed, so that the Declaration and all the thinking about it that followed is marked by the "trace" of the excluded possibilities of other signers or the necessity of some kind of prior authorization to make the act of signing possible. Jacques Derrida, *Declarations of Independence*, 7 NEW POL. SCI. 7, 10 (1986). For a general review of Derrida's thought, see *Jacques Derrida*, STAN. ENCYCLOPEDIA PHIL. (Aug. 27, 2021), <https://plato.stanford.edu/entries/derrida/#LifWor>.

56. In this understanding, the "trace" of the foundational moments that Habermas refers to are better understood as ghosts called up to participate in the performances of the living.

distinguishable from the “speaking to” model precisely in that the former permits the possibility of a change in constitutional paradigm without the overthrow of an existing sovereign.

CONCLUSION

The argument of this Essay complicates the relationships among political, legal, and constitutional revolutions. If there is no revolutionary change in constitutionalism, by this analysis, even a dramatic change in the organization and practices of institutions or the content of legal rules ought not to be considered a constitutional revolution. Conversely, where there is a revolutionary change in the hermeneutic of legitimation, then a revolution in constitutionalism has occurred, regardless of whether the present political arrangements are immediately altered as a result. And where two incommensurate versions of constitutionalism coexist, the text for constitutional revolution becomes something more disturbing; a test for the conditions of the possibility of constitutional civil war. So long as such divisions in the constitutionalist basis of legitimacy are not reflected in incommensurate political claims, such a conflict may remain only potential. But at those moments where recourse to fundamental legitimating principles becomes necessary, the conflict between a constitutionalism of “speaking to” and a constitutionalism of “speaking for” presents the paradox of constitutive power. That paradox threatens to burst through the various attempts to reconcile the two moments of the people: one as sovereign and one as constitution-maker.