Donald Trump and Other Agents of Constitutional Change

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INTRODUCTION

The death of Justice Antonin Scalia and the almost-immediate announcement by Senate Republicans that they would not even consider anyone nominated by President Barack Obama to fill his seat ensured that the 2016 election would have a major impact on American constitutional law. If sufficient numbers of Republicans adhere to their plan to give the public "a voice" in the selection process by rejecting Judge Merrick Garland's nomination,[1] the election will be, among other things, a referendum on Scalia's successor. Given the Court's current division between four justices appointed by Republican presidents, who are all more conservative than the four justices appointed by Democratic presidents, much of the election's influence on constitutional law will run through the appointment process.

Yet appointments to the Supreme Court and the lower federal courts are not the only—and perhaps not even the most important—mechanism by which politics affects the course of constitutional law. Even without a change in Court personnel, "th' supreme coort follows th' iliction returns."[2] Indeed, even a political defeat can result in changes in constitutional understanding.

In this Essay, I begin by enumerating some leading mechanisms by which changes in the Constitution or the dominant understanding of the Constitution can occur in response to political

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1 Amita Kelly, *McConnell: Blocking Supreme Court Nomination 'About a Principle, Not a Person'* (NPR, May 3, 2016), online at http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person (visited May 3, 2016) (Perma archive unavailable) (quoting Senate Majority Leader Mitch McConnell, Senate Judiciary Committee Chair Charles Grassley, and Senator John Cornyn). I find the grounds offered for this position unpersuasive. See Michael C. Dorf, *Senate Republicans Offer Laughable Reasons for Refusing to Confirm an Obama Supreme Court Nominee* (Justia, Feb 24, 2016), archived at http://perma.cc/E4YZ-BG9D.

2 Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (R.H. Russell 1901).

developments, even without any change in Supreme Court personnel. I then turn to the 2016 race and ask how the unusual candidacy of Donald Trump might affect our understanding of the Constitution, even assuming Trump does not become president. I point to two mechanisms of constitutional change suggested by Trump's candidacy: agenda setting and backlash. Trump has placed an aggressively antiegalitarian understanding of the Constitution on the national agenda. I conclude that, ironically, his most lasting contribution to constitutional law could be the rejection of that understanding due to the backlash he inspires.

I. NONAPPOINTMENT MECHANISMS IN HISTORICAL PERSPECTIVE

The mechanisms by which constitutional change—a term I use to encompass changes to both the text and changes in the dominant understanding of unchanged text—occurs without a change in Supreme Court personnel include: constitutional amendments, failed constitutional amendments, the enactment of landmark legislation, and changes in the public's attitude.

A. Constitutional Amendment

Formal changes to the constitutional text are the least controversial means by which the Constitution can change. Indeed, judges and constitutional scholars who consider themselves originalists typically argue that amendments are the *exclusive* means by which the meaning of the Constitution legitimately changes.[3] Constitutional amendments require political organizing, but, because the Constitution assigns no formal role to the president in the process by which amendments are proposed or ratified, movements to enact constitutional amendments can occur largely outside of presidential politics.

Yet presidents and presidential candidates frequently take positions on proposed constitutional amendments, and the conventions that nominate each major party's presidential candidate also approve platforms that may influence candidates for Congress and state legislative office, actors who do play a role in the amendment process.[4] For example, the 2012 Republican Party

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[3] See Joel K. Goldstein, *Constitutional Change, Originalism, and the Vice Presidency*, 16 U Pa J Const L 369, 373–74 & n 10 (2013) (noting that "many originalists identify the procedures of Article V of the Constitution as the exclusive method of changing constitutional meaning" and collecting sources).

[4] US Const Art V.

Platform included or spoke favorably of proposals for five constitutional amendments. These proposals would: require a balanced federal budget,[5] conditionally repeal the Sixteenth Amendment,[6] require a supermajority vote in Congress for any tax increases,[7] ban same-sex marriage,[8] and ban abortion.[9] The 2012 Democratic Party Platform proposed two constitutional amendments. One would authorize campaign finance reform currently blocked by Supreme Court precedent;[10] the other would adopt the Equal Rights Amendment (ERA) to "ensur[e] full equality for women."[11]

B. Failed Constitutional Amendments

Constitutional amendments are rare events. After the Bill of Rights, which was adopted almost contemporaneously with the original Constitution, we have had only seventeen amendments in over two centuries. None of the 2012 proposed constitutional amendments endorsed by either the Republicans or the Democrats was enacted. That is partly evidence of the fact that party platforms are not serious blueprints for governing. A platform plank is often a mere sop for disappointed backers of a failed candidate for the party's nomination or a shared aspiration no one expects to be achieved in the short run.

But it would be a mistake to dismiss failed efforts at amending the Constitution as irrelevant to constitutional change. Sometimes early failed efforts to secure an amendment lay the groundwork for later success. For example, during Reconstruction, proponents of women's suffrage offered what was envisioned as the Sixteenth Amendment; a half century of failure and struggle culminated in its enactment as the Nineteenth Amendment.[12]

Meanwhile, the Democratic Party's continued commitment to securing passage of the ERA looks like a case of not knowing when to declare victory. The ERA did not secure the support of the

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5 *We Believe in America: Republican Platform 2012* *3–4 (Committee on Arrangements for the 2012 Republican National Convention, 2012), archived at http://perma.cc/3JPK-GRKF.

6 See id at *3.

7 Id at *4.

8 Id at *10.

9 *Republican Platform 2012* at *13–14 (cited in note 5).

10 *Moving America Forward: 2012 Democratic National Platform* *12 (2012), archived at http://perma.cc/2G6D-BANM.

11 Id at *17.

12 See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv L Rev 947, 968–76 (2002).

three-quarters of state legislatures needed for ratification,[13] but proponents of constitutional sex equality achieved more or less the regime sought under the ERA via Supreme Court decisions construing the Fourteenth Amendment[14] (and with respect to the federal government, the Fifth Amendment[15]). The ERA is hardly unique. The forces that place a proposed constitutional amendment on the political agenda may be too weak to overcome the barriers to formal adoption but strong enough to impress a majority of the Supreme Court.[16]

C. Landmark Legislation

Constitutional change also occurs as a consequence of the enactment of important legislation, especially when the constitutionality of that legislation is initially contested. The struggle in the early republic over the First and Second Banks of the United States is instructive. President George Washington accepted Secretary of the Treasury Alexander Hamilton's view that Congress had the power to charter a bank, despite a vigorous protest from Secretary of State Thomas Jefferson and Attorney General Edmund Randolph.[17] The First Bank's charter expired in 1811, however, and as a consequence, the United States nearly lost the War of 1812 for lack of adequate credit.[18] Following the war, President James Madison, whose Jeffersonian party had opposed the Bank, signed the law creating the Second Bank of the United States.[19] When the question of the Bank's constitutionality finally came before the Supreme Court in *McCulloch v Maryland*,[20] what was once hotly debated had been resolved by politics. Chief Justice John Marshall made arguments that echoed Hamilton's case within the Washington administration, but these analytical

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13 Jessica Ravitz, *The New Women Warriors: Reviving the Fight for Equal Rights* (CNN, Apr 16, 2015), archived at http://perma.cc/EV8S-BTXW.

14 See, for example, *United States v Virginia*, 518 US 515, 531–34 (1996) (requiring an "exceedingly persuasive justification" in light of the Fourteenth Amendment to sustain Virginia's use of a sex-based classification).

15 See, for example, *Frontiero v Richardson*, 411 US 677, 690–91 (1973) (holding that a sex-based classification in federal law designed "for the sole purpose of achieving administrative convenience" violated the Fifth Amendment).

16 See David A. Strauss, *The Living Constitution* 125–26 (Oxford 2010) (discussing the failed Child Labor Amendment and the ERA).

17 See Robert E. Wright and David J. Cowen, *Financial Founding Fathers: The Men Who Made America Rich* 11–13 (Chicago 2006).

18 See Ralph C.H. Catterall, *The Second Bank of the United States* 1–2 (Chicago 1903).

19 See id at 21.

20 17 US (4 Wheat) 316 (1819).

moves seemed to be less decisive than the fact that even the Jeffersonians had come around to supporting the Bank.[21]

The converse may also be true: a constitutional challenge to major legislation will be more likely to succeed before that legislation has become broadly embedded in the law and society. Consider a recent example. The initial constitutional challenge to the Patient Protection and Affordable Care Act (ACA or Obamacare) came close to succeeding in completely invalidating the law[22] before the law went into effect. Republican members of Congress continue to introduce bills that aim to repeal the ACA, and at least one Republican presidential candidate in 2016 vowed that, if elected, he would sign legislation to "repeal every word of Obamacare."[23] Yet with each passing year, repeal or invalidation becomes less likely. Entitlement programs build constituencies that make them difficult to repeal, especially when, as with the ACA, powerful economic players like insurance companies are among the constituents.

Obviously, even old statutes can be repealed or held unconstitutional, but some constitutional challenges may have a limited window within which they can succeed. Thus, it is notable that even at the height of the "federalism revolution" of the Rehnquist Court, only one justice—Justice Clarence Thomas—endorsed a view of the scope of federal power that would roll back the New Deal.[24] For his colleagues, it was too late in the day for that much retrenchment. If Republicans do not capture the presidency and both houses of Congress in the coming election, it may also be too late for the repeal or invalidation of the ACA.

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[21] See id at 402. For an argument about the extent to which contemporary politics influenced the Marshall Court, see Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 Stud Am Polit Development 229, 256–57 (1998) ("*McCulloch v. Maryland* highlighted [the] increasingly supportive relationship between the judicial and elected branches of government.").

[22] See *National Federation of Independent Business v Sebelius*, 132 S Ct 2566, 2676 (2012) (Scalia, Kennedy, Thomas, and Alito dissenting) (concluding that the entire ACA should fall).

[23] *Transcript of the Republican Presidential Debate in Detroit* (NY Times, Mar 4, 2016), http://www.nytimes.com/2016/03/04/us/politics/transcript-of-the-republican-presidential-debate-in-detroit.html (visited May 4, 2016) (Perma archive unavailable) (statement of Senator Ted Cruz).

[24] See *United States v Lopez*, 514 US 549, 599–602 (1995) (Thomas concurring) (characterizing post–New Deal cases as arguably a "wrong turn"). See also Richard H. Fallon Jr, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U Chi L Rev 429, 486 (2002) ("[I]n cases involving the scope of Congress's power to regulate private conduct under the Commerce Clause, only Justice Thomas has called for the Court to pursue originalist inquiries.").

D. Attitudinal Change

Constitutional change can also happen as a result of changed attitudes and values. "Contentious politics"—social movement actors inside and outside of organizations fighting over their respective visions of society and the state[25]—translates social change into legal change, but we should not overlook the changes in attitudes and values that enable reform programs to succeed where previously they failed.

For example, changes in relations between men and women made the success of the women's movement in the 1960s and 1970s possible even though earlier efforts had stalled.[26] Similarly, changes in attitudes towards sexual orientation[27] made possible the success of the marriage equality movement in the last few years. Of course, just as the mix of attitudes and values that exists at any time circumscribes the field of successful political contention, so contentious politics can reshape attitudes and values. Law, contentious politics, values, and attitudes exist in a complex, dynamic relationship.[28] But often the simplest explanation for why the Constitution is read the way it is at any given moment is that the reading reflects contemporaneous social attitudes.

To explain why Justice Sandra Day O'Connor voted with the majority to permit the prosecution of a gay man under a Georgia sodomy statute in 1986[29] but with a different majority to forbid the prosecution of a gay man under a Texas sodomy statute in 2003, we might point to technical differences between the Georgia and Texas laws.[30] The better explanation, however, is that Americans' attitudes towards homosexuality changed substantially in

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25 Sidney G. Tarrow, *Power in Movement: Social Movements and Contentious Politics* 16 (Cambridge 3d ed 2011).

26 For an explanation of how cultural changes in the 1960s and 1970s contributed to the success of the women's movement, see generally, for example, Ruth Rosen, *The World Split Open: How the Modern Women's Movement Changed America* (Penguin 2006).

27 See *Marriage* (Gallup), online at http://www.gallup.com/poll/117328/marriage.aspx (visited May 17, 2016) (Perma archive unavailable) (reporting the percentage of Americans who believe marriages between same-sex couples should be valid over time).

28 See generally David Cole, *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (Basic 2016) (discussing contemporary movements for gay rights, gun rights, and civil liberties in the war on terror).

29 See *Bowers v Hardwick*, 478 US 186, 187, 189 (1986).

30 See *Lawrence v Texas*, 539 US 558, 582 (2003) (O'Connor concurring in the judgment) (distinguishing the cases on the grounds that *Bowers* concerned "whether the substantive component of the Due Process Clause protected a right to engage in homosexual sodomy," while *Lawrence* addressed "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify . . . ban[ning] homosexual sodomy, but not heterosexual sodomy").

the intervening seventeen years,[31] and O'Connor is an American. *Who* sits on the Supreme Court matters a great deal, but *when* the Court decides a question also matters a great deal.

II. DONALD TRUMP'S CONTRIBUTIONS TO CONSTITUTIONAL POLITICS

Trump is a constitutional dunce. Despite the fact that his sister is a federal appeals court judge, Trump lacks even a *Schoolhouse Rock* understanding of the respective functions of the branches of American government. During a televised debate, Trump responded to a criticism of his sister's judicial record by stating that Justice Samuel Alito had "signed th[e] [same] bill" that he imagined his sister had signed.[32] On another occasion, Trump announced that he would appoint Supreme Court justices who "would look very seriously" at former Secretary of State Hillary Clinton's use of a private email server,[33] in the apparent belief that the United States has a civil law system in which judges investigate alleged criminal conduct. Yet despite—or perhaps because of—Trump's ignorance, his candidacy has important consequences for the Constitution. It suggests two additional mechanisms by which contentious politics can affect constitutional law outside of the appointments process: agenda setting and backlash.

A. Agenda Setting

Professor Jack Balkin has written insightfully about how understandings of the Constitution that were at one point considered "crackpot and off-the-wall" come to be accepted.[34] Balkin emphasizes the movement actors who persuade their fellow Americans to consider a view they are inclined to dismiss. Some

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[31] In 1986, only 32 percent of Americans supported the "legality" of "gay or lesbian relations," but that number had risen to just under 60 percent by 2003. Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal* (Gallup, May 14, 2012), online at http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx (visited May 5, 2016) (Perma archive unavailable).

[32] See *Transcript of the Republican Presidential Debate in Houston* (NY Times, Feb 25, 2016), online at http://www.nytimes.com/2016/02/26/us/politics/transcript-of-the-republican-presidential-debate-in-houston.html (visited May 5, 2016) (Perma archive unavailable).

[33] Rebecca Savransky, *Trump: I'd Pick Supreme Court Justice Who Would Look at Clinton's Emails* (The Hill, Mar 30, 2016), archived at http://perma.cc/T6ZU-D3PB.

[34] Jack M. Balkin, *Living Originalism* 18 (Belknap 2011).

of Trump's most provocative claims illustrate a related phenomenon: how an off-the-wall idea comes to be placed on the national agenda in the first place.

Consider three issues Trump placed on the agenda through his various statements and tweets: (1) US citizenship could be denied to children born in the United States to undocumented immigrant parents even without an amendment to § 1 of the Fourteenth Amendment;[35] (2) a person (specifically Senator Ted Cruz) born in Canada to a US citizen mother is not a "natural-born citizen" eligible to be president;[36] and (3) an immigration policy that excludes "all Muslims" (presumably excepting Muslim US citizens) from entry into the United States would be valid.[37] Each of these claims was at first widely dismissed,[38] but the very fact that a presidential candidate raised them led serious scholars to question their initial assumptions.

Conventional wisdom pre-Trump mostly held that *United States v Wong Kim Ark*[39] settled the citizenship status of children born in the United States to undocumented immigrant parents, but Trump's brash assertion to the contrary led scholars (including me) to acknowledge that *Wong Kim Ark* did not fully resolve the question.[40] Trump did not invent the key argument. He couldn't have. But by shoving the view into the news, he did more for it than the serious scholars who first proposed the argument.[41] Meanwhile, Trump's questions about Cruz's eligibility have led to a flood of scholarship on the meaning of the Citizenship Clause,

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35 See Max Ehrenfreund, *Understanding Trump's Plan to End Citizenship for Undocumented Immigrants' Kids* (Wash Post, Aug 17, 2015), archived at http://perma.cc/L6KE-C8SH.

36 See Jeremy Diamond, *Trump Raises Cruz's Eligibility to Run for President* (CNN, Jan 6, 2016), archived at http://perma.cc/Z2XW-G898.

37 See Andrew Gyory, *Don't Think Trump Will Ever Pass a Muslim Exclusion Act? Just Ask Sen. James G. Blaine.* (Wash Post, Dec 8, 2015), archived at http://perma.cc/9UBS-6RGB.

38 See, for example, Jonathan H. Adler, *More Scholars Weigh In on Whether Ted Cruz Is a 'Natural Born' Citizen* (Wash Post, Jan 15, 2016), archived at http://perma.cc/SL69-WR2R.

39 169 US 649 (1898).

40 See Michael C. Dorf, *People Born in the United States Are Properly Citizens* (Aug 26, 2015), archived at http://perma.cc/PV88-GEHE. See also generally, for example, Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 Cardozo L Rev 1185 (2016) (reexamining *Wong Kim Ark* in light of leading Republican presidential candidates' calls to end birthright citizenship); Gerald Walpin, David B. Rivkin Jr, and John C. Yoo, *Birthright Citizenship: Two Perspectives*, 17 Engage 18 (Feb 2016).

41 See generally, for example, Peter H. Schuck and Rogers M. Smith, *Citizenship without Consent: Illegal Aliens in the American Polity* (Yale 1985).

with many fine scholars lining up to contest the supposed consensus that a person born outside of the United States who was, by statute, a citizen at the time of birth, is, ipso facto, a natural-born citizen.[42] And a respected immigration law scholar took to the Opinion Pages of the *New York Times* to argue that Trump's proposal to bar Muslims is awful but constitutional.[43] In each instance, Trump's mere proposing of policies that were off-the-wall placed them on the table for discussion.

B. Backlash

The foregoing policy proposals reflect a core commitment by Trump and his supporters to nativism, xenophobia, and religious bigotry. Looking at Trump's campaign and persona, it appears that misogyny rounds out his worldview. Should Trump actually become president, his election would signal a major shift away from egalitarian values. In the event that general election voters reject Trump, that too will be constitutionally significant. Backlash against Trump would reaffirm the national commitment to at least some measure of egalitarianism.

Backlash is a complex and often unpredictable phenomenon. For example, Professor Michael Klarman has argued that *Brown v Board of Education of Topeka*[44] marginalized moderate white Southern opinion, in turn leading to extreme defenses of Jim Crow, which in turn catalyzed the civil rights movement.[45] That seems right, but could anyone have predicted this course of events in advance? To his credit, even as Klarman took note of backlash against judicial rulings in favor of gay rights, as early as 2005 he foresaw the inevitability of same-sex marriage.[46] Yet many events that seem inevitable in retrospect feel anything but inevitable as they unfold. The Trump candidacy could inspire backlash that advances an egalitarian understanding of the Constitution, but a

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42 See, for example, Brief *Amicus Curiae* of Prof. Einer Elhauge on the Justiciability and Meaning of the Natural Born Citizen Requirement, *Elliott v Cruz*, No 29 MAP 2016, *22–26 (Pa filed Mar 22, 2016) (collecting scholarship on the meaning of the Citizenship Clause), archived at http://perma.cc/ZFS4-JZLJ.

43 See Peter J. Spiro, *Trump's Anti-Muslim Plan Is Awful. And Constitutional.* (NY Times, Dec 8, 2015), online at http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html (visited May 5, 2016) (Perma archive unavailable).

44 347 US 483 (1954).

45 See generally Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J Am Hist 81 (1994).

46 See Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 Mich L Rev 431, 483–86 (2005).

pro-Trump counterbacklash could lead his ugly vision to triumph after all.

CONCLUSION

As we have seen, backlash is just one of the mechanisms by which constitutions change over time, but it is arguably the most important, because constitution writers and amenders react to past evils; they institutionalize backlash. The German Constitution—especially its protection for human dignity—institutionalizes backlash against Nazism.[47] The Fourth Amendment reflects Revolutionary-era backlash against general warrants and writs of assistance.[48] The Reconstruction Amendments embody backlash against slavery and caste.[49]

Even without formal text, backlash can become embedded in our constitutional understanding. For example, eventual backlash against internment of persons of Japanese ancestry inscribes at least a minimally antiracist principle in our constitutional order.[50] Trump's startling expression of sympathy for the discredited internment policy[51] should be understood as an effort to repeal or revise that antiracist principle. Conversely, Trump's defeat would reinforce the egalitarian understanding of our Constitution. Ironically, the most lasting impact of Trump's candidacy could be to strengthen the vision of our Constitution and nation that he attacks.

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47 See Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 Utah L Rev 963, 967–68.

48 See Christopher Slobogin, *Government Dragnets*, 73 L & Contemp Probs 107, 107 (2010).

49 See Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 Yale L J 2003, 2004 (1999) ("One cannot explain either the intellectual roots or the specific language of the Reconstruction Amendments without devoting some attention to the antebellum era, and especially to the abolitionist movement.").

50 See Jamal Greene, *The Anticanon*, 125 Harv L Rev 379, 385–404 (2011) (explaining how *Korematsu v United States*, 323 US 214 (1944), has become "antiprecedent" in the minds of judges and scholars).

51 See Michael Scherer, *Exclusive: Donald Trump Says He Might Have Supported Japanese Internment* (Time, Dec 8, 2015), archived at http://perma.cc/Q2KF-RLLE.