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Authenticity: The Ultimate Challenge in the Quest for Lasting Constitutional Legitimacy*

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Abstract— The recent upsurge of populism has prompted a wave of theoretical reflections on constitutional democracy. Echoing Max Weber’s sociology of legitimate authority, Bruce Ackerman’s *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* stands out from the crowd by providing an ambitious trichotomy of constitutional legitimacy – revolutionary, establishmentarian, and elitist –, with a focus on the revolutionary pathway. Engaging with Ackerman’s theoretical modelling of the relationship between constitutionalism and legitimate authority, I argue that the resurgence of We the People in populist rhetoric indicates the centrality of authenticity in constitutional democracy as constitutional authenticity is underpinned by the ethics of being true to the people’s originality. Yet, with the ethics of authenticity assuming its pathological form, the focus has been shifting from making sense of the constitution to the people’s self-identification with individual politicians. The latest wave of populism crystallizes anti-ethics of authenticity in our quest for lasting constitutional legitimacy.

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* A review of Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap 2019).

1. INTRODUCTION

The future of constitutional democracy is plunged into uncertainty again amidst the new wave of populism.¹ Plenty of prescriptions have been written for how to save constitutional democracy from the populist threat.² Parting company with his liberal comrades who are striving to find the solution to the populist challenge,³ Bruce Ackerman invites readers to take a step back in his recent book *Revolutionary Constitutions*.⁴ Echoing Nadia Urbinati's view that 'populism [is] a democratic phenomenon'⁵ and 'seeks to occupy the space of the constituent power',⁶ Ackerman urges that the populist challenge be treated with the utmost seriousness and embarks on a tour de force in comparative constitutional law in this first volume of his planned trilogy on the 'ideal types' of constitutional legitimacy.⁷ Instead of joining those who attempt to shield constitutional democracy against populist attacks with better design of constitutional change,⁸ he retraces how the constitution contributes to the legitimacy of political rule without passing judgment.⁹ With his 'discovery' of the pivotal role of We the People in the successes and failures of revolutionary constitutions in his selected examples, Ackerman effectively rejects claims that popular sovereignty is dangerous to the project of constitutional self-government, despite the revolutionary tradition giving way to what Andrew Arato calls the 'post-sovereign' paradigm in constitution-making.¹⁰ To see whether Ackerman's continuing celebration of popular sovereignty is legitimate

¹ Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016) 18; Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Harvard University Press 2019).

² See eg Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018).

³ For a representative exception, see Robert Howse, 'Epilogue: In Defense of Disruptive Democracy—A Critique of Anti-Populism' 17 *ICON* 641-60.

⁴ Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap 2019).

⁵ Urbinati (n 1) 14. Issues concerning populism will be further discussed in Section 4.B.

⁶ Ibid 4 (citation omitted).

⁷ Ackerman (n 4) 1-7. The theoretical foundation is laid down in Chapter 1. In the following twelve chapters, Ackerman discusses revolutionary movements in India, South Africa, France, Italy, Poland, Israel, Myanmar, and Iran as well as the United States (US).

⁸ See eg Andrew Arato, *The Adventures of the Constituent Power: Beyond Revolutions?* (CUP 2017); Richard Albert, *Constitutional Amendments: Making Breaking, and Changing Constitutions* (OUP 2019).

⁹ Ackerman (n 4) 34-35.

¹⁰ Andrew Arato, *Post Sovereign Constitution Making* (OUP 2016).

amidst the populist wave, we need to dive with him deep into the concept of constitutional legitimacy and his modelled comparative narratives of ‘revolutionary constitutionalism’.¹¹

Instead of conducting a strict scrutiny of Ackerman’s case studies in this essay,¹² I engage with Ackerman’s theoretical modelling of the relationship between constitutionalism and legitimate authority, with an eye to bringing the question of authenticity to the fore of constitutional theory. It is argued that the resurgence of We the People in populist rhetoric testifies to the centrality of authenticity to constitutional democracy as alluded to in *Revolutionary Constitutions*. Yet, Ackerman does not quite get to the heart of the authenticity question in his ideal types of constitutional legitimacy. As will be further discussed, authenticity not only poses challenges to what he calls the ‘elite construction’ of constitutions such as the 1949 German Basic Law and the 1978 Spanish Constitution.¹³ It also raises serious issues for the endurance of constitutional authority otherwise constructed. As a whole, all Ackerman’s ideal types of constitutional legitimacy are constructed around popular sovereignty. With constitutional orders challenged to prove their authenticity by populists, how a momentous political action can stand the test of time is thrown into sharp relief. That the authenticity question comes to the fore amidst the populist resurgence is not so much a transient deviation in constitutional democracy as a symptom of popular sovereignty being given short shrift in contemporary constitutional theory and practice. The preoccupation with authenticity in populist politics reflects the pathology of anti-ethics of authenticity.

This essay first provides an overview of the theoretical part of *Revolutionary Constitutions*, with a focus on whether Ackerman’s idea of constitutional legitimacy revises Max Weber’s famous ideal types of legitimate domination with the weighted role of constitutions in the legitimation of political power. It then focuses on the revolutionary ideal type, suggesting that Ackerman distinctively situates revolutionary constitution-making

¹¹ Cf Stephen Gardbaum, ‘Revolutionary Constitutionalism’ (2017) 15 *ICON* 173-200. Unless otherwise specified, revolutionary constitutionalism refers to Ackerman’s object in *Revolutionary Constitutions*.

¹² See eg ‘Book Review Symposium’ (2019) 17 *ICON* 681-700.

¹³ Ackerman (n 4) 6-7, 18-21.

in an extended timeframe in the hope of overcoming the limits of time in the constitutional project with the law, yet his proposed legalistic solution cannot escape the authenticity question. Finally, it relates the authenticity question to constitutional legitimacy in general and points out that all the distinct challenges Ackerman identifies in the three ideal types of constitutional legitimacy are attributed to popular sovereignty – which has been mistaken for the culprit of unravelling constitutional authority under the contemporary anti-ethics of authenticity.

2. WHAT IS CONSTITUTIONAL LEGITIMACY? RETHINKING LEGITIMATE AUTHORITY IN THE AGE OF CONSTITUTIONALISM

The concept of legitimacy is not new to constitutional lawyers. While the question of legitimacy has traditionally been related to the role of courts in constitutional democracy,¹⁴ current comparative constitutional studies suggest that even autocratic regimes benefit from their own constitutions.¹⁵ Yet, how constitutions exactly contribute to the legitimization of political power besides their attributed functions remains unclear. Ackerman intervenes to fill the gap. Unfolding *Revolutionary Constitutions* with the crisp claim, ‘Law legitimates power. Constitutionalism is part of this larger dynamic’,¹⁶ Ackerman relates his grand project to Max Weber’s sociology of domination (*Herrschaft*) – the three ideal types of legitimate authority: legal/ bureaucratic, traditional, and charismatic.¹⁷ Yet, Ackerman suggests that Weber’s trichotomy requires bringing up to date as it does not do justice to the contemporary role of constitutions in the legitimization of political power.¹⁸

According to Ackerman, the rule of law deals broadly with ‘the techniques by which

¹⁴ See eg Alexander M Bickel, *The Least Dangerous Branch: Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986); John Hart Ely, *Democracy and Distrust: Theory of Judicial Review* (Harvard University Press 1980).

¹⁵ Mark Tushnet, ‘Authoritarian Constitutionalism’ (2015) 100 *Cornell L Rev* 391, 427-45.

¹⁶ Ackerman (n 4) 1. See also Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1968) 215-16.

¹⁷ Ackerman (n 4) 1.

¹⁸ Ibid.

top decision-makers try to control everybody else.’¹⁹ Aligned with Weber’s ideal type of ‘legal authority’,²⁰ ‘the rule of law is a fundamental legitimating principle in its own right’.²¹ In contrast, ‘[c]onstitutionalism...involves the imposition of significant legal constraints on top decision-makers.’²² Thus, Ackerman attributes the legitimating role of the constitution in political rule to the limited character of government power. By separating constitutionalism from the rule of law in the legitimation of political power, Ackerman seems to indicate that a limited government legitimates itself.

It is doubtful that limitation alone can serve as the basis of the legitimacy of political power on a par with ‘tradition’, ‘faith’, and ‘enactment’ – each of which corresponds to traditional, charismatic, and legal authority, respectively²³ – as Ackerman alludes to. In contrast to the bases of legitimacy that Weber attributed to *belief* in the sacredness of conventions from time immemorial, the personal gift of grace, and the impersonal bureaucratic rationality,²⁴ limitation is an actual condition. How a social or political order reaches the condition of limitation is a matter of interpretation of various factors and their dynamics beyond the actual condition itself. It borders on circular reasoning to explain the legitimacy of limited government by pointing to its power being limited. Thus, even though Ackerman manages to separate constitutionalism from the rule of law, he does not shed much light on whether and, if so, how constitutionalism stands as a basis of legitimacy in its own right. If so, what is the role of the constitution in legitimate authority? How does the constitution help with the legitimation of political power? Ackerman gives away his answer to these fundamental questions about his grand project when departing Weber’s ideal types of legitimate authority for his own trichotomy of constitutional legitimacy.

Paralleling Weber’s classical trichotomy of legitimate authority, Ackerman sets out a

¹⁹ Ibid 2.

²⁰ See Weber (n 16) 217-26.

²¹ Ackerman (n 4) 2.

²² Ibid.

²³ Weber listed tradition, faith, and positive enactment in law as the main bases on which social actors ascribe legitimacy to a social order. Weber (n 16) 36. For the relationship between the bases of legitimacy and the ideal types of legitimate authority in Weber’s theory, see Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995) 137-41.

²⁴ Weber (n 16) 36-38, 215-16.

tripartite typology of how constitutions achieve legitimacy and therefore contribute to the legitimization of constitutional states. Ackerman uses ‘ideal type’, ‘pathway’, or simply ‘path’ interchangeably in his elaboration on the proposed typology. According to Ackerman, there is no one-size-fits-all approach to the way that constitutions achieve legitimacy. Rather, there are three pathways towards that end: revolutionary, establishmentarian, and elitist.²⁵ Notably, Ackerman has the major players in the (re)making of constitutional orders in mind in laying out the three pathways. This is no surprise as the outsiders-vs-insiders struggle has long been considered the matrix of fundamental political changes in social theory.²⁶ Along this line of thinking, Ackerman sets out the first two pathways around the struggle between ‘revolutionary outsiders’ and ‘responsible insiders’, or rather, the establishment.²⁷ Under the revolutionary ideal type, the insurgents eventually displace the establishment after enduring sacrifice and struggle, giving the political order a fresh start with a new constitutional framework.²⁸ In contrast, the fundamental political change travels down the establishmentarian path if the ‘seasoned elites’ of the existing regime in the face of a crisis pragmatically ‘make[] strategic concessions’ to emerging insurgent outsiders and thus co-opt revolutionary forces into the establishment with codified fundamental reforms.²⁹ In this way, the elite insiders responsibly set the established political regime in a new constitutional direction without going down the revolutionary path.³⁰

As regards the third pathway, it remains centred on the dynamic of the outsiders-vs-insiders struggle. Yet, in contrast to the revolutionary and establishmentarian pathways, the constitution conceived under the third pathway is an ‘elite construction’ as there is no revolutionary insurgency involved. The elitist pathway mostly emerges when the existing regime collapses as a result of ‘accident and force’ instead of ‘reflection and

²⁵ Ackerman (n 4) 3-6.

²⁶ See eg RR Palmer, *The World of the French Revolution* (Routledge 1971) 80-81.

²⁷ Ackerman (n 4) 5-6.

²⁸ Ibid 3-5.

²⁹ Ibid 5-6, 10-11.

³⁰ Apart from the United Kingdom and other Commonwealth countries (Australia, Canada, and New Zealand), Ackerman simply notes that establishmentarian constitutionalism has emerged in Scandinavia, Latin America, and Africa. Ibid 5.

choice'.³¹ As exemplified in Spain's transition to democracy following Caudillo Franco's death and the building of constitutional order in Germany and Japan under the Allies' belligerent occupation in the end of World War II,³² it is the elites from outside as well as inside the regime that drove the fundamental change in such cases. The constitution emerging from the elitist pathway amounts to an 'insider-outsider compact', even though it may incorporate rhetoric of popular sovereignty and receive formal approval by popular votes.³³

Apart from the revolutionary pathway, the picture of establishmentarian and elitist constitutionalism as drawn in *Revolutionary Constitutions* is sketchy. Nevertheless, it is revelatory of how constitutions achieve legitimacy under Ackerman's trichotomy. Let us first take a quick look at revolutionary constitutionalism. As the subtitle of *Revolutionary Constitutions* – 'charismatic leadership and the rule of law' – suggests, the revolutionary pathway pivots on charisma. Echoing Weber's concerns about the 'routinization of charisma',³⁴ Ackerman holds the continuation of charisma through a constitutional framework to be the key to its success.³⁵ For establishmentarian constitutionalism to function, it not only requires the seasoned elite insiders to make timely strategic concessions.³⁶ Moreover, its continuing success pivots on an extended socializing process through which governing elites are instilled with the conventions and precedents formed in the political processes. Submission to conventions and precedents underlies the functioning of establishmentarian constitutions.³⁷ Seen in this light, the establishmentarian pathway comes close to what Weber said of the traditional ideal type of legitimate authority.³⁸ As regards the elitist constitution, the continuing adherence to the terms enshrined in it is the

³¹ Alexander Hamilton, 'The Federalist No 1' in Jacob E Cooke (ed), *The Federalist* (Wesleyan University Press 1961) 3, 3.

³² Ackerman (n 4) 6-7.

³³ Ibid 6.

³⁴ Weber (n 16) 246-54.

³⁵ Ackerman (n 4) 7-10, 35-36.

³⁶ Ibid 10.

³⁷ Ibid 5, 11-2.

³⁸ Compare ibid 4-5, 17-18, with Weber (n 16) 36-37, 226-271

lynchpin.³⁹ As there is no mobilized popular participation in the making of the elitist constitution, ‘We the *absent* People’ must be brought around the codified constitutional terms hammered out by the elites at its founding. The constitutional terms themselves, instead of the elite driving forces behind them, must be able to hold differing forces in society together. As in Weber’s ideal type of legal authority that relies on the impersonal and rational character of rules,⁴⁰ elitist constitutionalism turns to the impersonal legalistic approach to the elites-negotiated constitutional terms for its success.⁴¹ In sum, Ackerman’s three pathways are reminiscent of Weber’s three ideal types: the legitimacy of revolutionary, establishmentarian, and elitist constitutionalism is attributed to charisma, tradition, and legality, respectively.

Taken together, Ackerman does not supersede Weber by identifying a fourth ideal type of legitimate authority in constitutionalism. Rather, he attributes the legitimacy of constitutions to one of the bases of legitimacy that Weber identified almost a century ago in the light of their chosen path. Thus, constitutional legitimacy does not point to another logic of legitimating political power in its own right as Ackerman sometimes borders on. Centring on the dynamic relationship between constitutions and political rule, constitutional legitimacy is better understood and defined by its opposite. A political order bequeathed with a constitutional framework that denies top decision-makers absolute power will likely no longer be considered legitimate authority if top decision-makers systematically defy constitutional constraints and thus turn the political order into one of unlimited character. To the extent that a constitution constrains political powers, it helps to maintain the legitimacy of political rule even if it does not give the political order legitimacy on its own. Thus, constitutional legitimacy concerns a necessary condition for a political order to claim continuing legitimate authority: it remains subject to meaningful constraints engendered by the existing constitutional framework.

³⁹ Ackerman (n 4) 6, 20-21.

⁴⁰ Weber (n 16) 36-37, 217-20.

⁴¹ Ackerman alludes to the success of the German Basic Law in this regard. See Ackerman (n 4) 19-21. See also Christoph Möllers, “‘We are (afraid of) the people’: Constituent Power in German Constitutionalism’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 87-105.

Seen in this light, the objective of Ackerman's grand project of constitutional legitimacy becomes clear. Considering that constitutional legitimacy deals with issues of political rule arising under an existing constitution, Ackerman attempts to shed light on the way such a legitimating constitutional framework is established in the interaction between the major political actors with his ideal types. Ackerman's project does not aim to provide a full analysis of the systemic factors endogenous to individual functioning constitutions.⁴² Rather, *Revolutionary Constitutions* – as well as its expected siblings – sets out a narrative structure for stories about how political actors manage to set a legitimating constitutional framework in motion through the lens of an action project.⁴³ It is time to focus on what lies at the heart of *Revolutionary Constitutions*: time.

3. LIVING BEYOND THE MOMENT: THE ISSUE OF AUTHENTICITY AND ITS LEGALISTIC SOLUTION IN REVOLUTIONARY CONSTITUTIONS

All political orders face an existential challenge posed by time. How to turn a momentous action into a lasting political order lies at the core of every political project.⁴⁴ The question is especially acute in those originating in revolutionary movements. To how to avoid the tragedy of permanent revolution, Hannah Arendt responded with the answer of constitution-making.⁴⁵ Drawing upon her comparison of the French and the American revolution experiences, students of constitutional law and theory have taken a deep dive into how constitutional enactment can be channelled through procedures with the exercise of the constituent power being tamed.⁴⁶ Seen in this light, constitution-making is anything but a

⁴² Ackerman (n 4) 3.

⁴³ Gary Jeffrey Jacobsohn, 'Theorizing the Constitutional Revolution' (2014) 2 *Journal of Law and Courts* 1, 13 suggests a systemic view of 'constitutional revolutions'. For the framing of order as a self-organizing system or as a project of intentional action, see Paul W Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press 2019).

⁴⁴ Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2001) 9-16.

⁴⁵ Hannah Arendt, *On Revolution* (Penguin 1990) (1963).

⁴⁶ See eg Arato (n 8); Arato (n 10); Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012); William Partlett, 'The Dangers of Constitution-Making' (2012) 38 *Brooklyn Journal of International Law* 193-238; Kim Lane Scheppele, 'Unconstitutional Constituent Power' in Rogers M Smith and Richard R Beeman (eds), *Modern Constitutions* (University of Pennsylvania

creation *ex nihilo*. Rather, detached from what Arato calls ‘organ sovereignty’,⁴⁷ the constituent power manifests itself in channelled citizen participation and multistage negotiations among rivalling political camps leading to a new constitutional order.⁴⁸ A constitution enacted this way is expected to function as an enduring political settlement with legitimacy gained procedurally.⁴⁹ In this way, the revolutionary tradition of constitution-making as Arendt identified is seen to be replaced by regulated constitutional enactment.⁵⁰ Popular sovereignty no longer appeals in the post-sovereign era of constitution-making – which is a process of institutionalized learning under some continuing legal form, not a voluntarist act of political decision.⁵¹

Noticeably, Ackerman barely engages with the post-sovereign attitude towards constitution-making. He underlines the role of ‘collective agency’ in constitution-making when upholding the constituent power against scepticism from rationalists.⁵² Taking issue with the post-sovereign model of negotiation-steered constitution-making, Ackerman unabashedly accentuates the role of passion in the political project of constitutional self-government.⁵³ To paraphrase, Ackerman disengages himself from the post-sovereign paradigm under which the objective of comparative modelling of constitution-making is prescriptive. In contrast, his modelled comparative narratives of revolutionary constitutionalism aim to understand how existing constitutions have come into being and further enabled the continuing legitimate authority of the political order as the project of constitutional self-government works through passionate politics.⁵⁴ Instead of

Press 2020) (forthcoming).

⁴⁷ Arato (n 8) 23, 151-52;

⁴⁸ Ibid; Arato (n 10) 61-66, 90-157; Colón-Ríos (n 46) 177-78; Partlett (n 46) 203-09, 234-38. But see Martin, Loughlin, ‘The Concept of Constituent Power’ (2014) 13 *European Journal of Political Theory* 218, 231-34; Mark Tushnet, ‘Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power’ (2015) 13 *ICON* 639, 644-53.

⁴⁹ Gardbaum (n 11) 190-91; Abrak Saati, ‘Participatory Constitution-Making as a Transnational Legal Norm: Why Does It “Stick” in Some Contexts and Not in Others?’ in Gregory Shaffer, Tom Ginsburg, and Terence C Halliday (eds), *Constitution-Making and Transnational Legal Order* (CUP 2019) 283-311.

⁵⁰ Arato (n 8) 185-256.

⁵¹ Arato (n 10) 91-92; Partlett (n 46) 234-38.

⁵² Ackerman (n 4) 40-41. Cf Loughlin (n 48); Tushnet (n 48).

⁵³ Ackerman (n 4) 36-40.

⁵⁴ Ibid 40. Stephen Gardbaum approaches ‘revolutionary constitutionalism’ differently. In his view, ‘the process and content of constitution-making’ contributes to the legitimation of the post-revolutionary political

disenchanting, popular sovereignty remains appealing through the lens of *Revolutionary Constitutions*.

Embracing the ‘startling unexpectedness’ that Arendt recognized in political action,⁵⁵ Ackerman thus approaches the time question in constitution-making from a particular perspective. First, Ackerman leaves out ‘total revolutions’ such as Lenin’s in Russia and Mao’s in China from his portrayal of revolutionary constitutionalism on purpose, with his eyes fixed on what he calls ‘revolutions on a human scale’.⁵⁶ In contrast to the ‘totalizing variant’, Ackerman argues, those on a human scale ‘focus on particular sphere(s) of social or political life’ with an eye to ‘repudiat[ing] currently dominant beliefs and practices within the target of revolutionary concern’.⁵⁷ While the ‘radical reorganization in the target domain(s) may lead to significant transformations in other spheres’,⁵⁸ to Ackerman, the benchmark of a successful revolution on a human scale is ‘when it fundamentally reorganizes dominant beliefs and practices in a *relatively* short period of time’.⁵⁹ Thus, the question of whether a social or political change other than a total revolution is a non-revolutionary reform or a revolution on a human scale or something else cannot be answered without exercising judgment.⁶⁰

Second, the solution that the revolutionary pathway suggests to the time question comes down to charismatic leadership. For this reason, Ackerman’s revolutionary constitutionalism does not take account of what Stephen Gardbaum calls ‘uncharismatic revolutions’, which are virtually spontaneous and leaderless.⁶¹ By focusing on the role of

order. Gardbaum (n 11) 190-91.

⁵⁵ Hannah Arendt, *The Human Condition* (2nd edn, University of Chicago Press 1998) 176-78. In contrast to the close examination of the contested legality of the making of the US Constitution and its connection to the Articles of Confederation in Bruce Ackerman, *We the People, Volume 2* (Belknap 1998) 34-65, Arato notes Ackerman’s ‘de-emphasis’ of the legal dimension of constitution-making in *Revolutionary Constitutions*. Arato (n 8) 260.

⁵⁶ Ackerman (n 4) 27-28.

⁵⁷ Ibid 28.

⁵⁸ Ibid (emphasis added).

⁵⁹ Ibid (emphasis in original).

⁶⁰ Arato notes Ackerman’s implicit inflation of the concept of revolution as a revolution on a human scale seems to be conflated with a series of ‘revolutionary reforms’ in Ackerman (n 4) 28-29. See Arato (n 8) 260.

⁶¹ Stephen Gardbaum, ‘Uncharismatic Revolutionary Constitutionalism’ in Richard Albert (ed), *Revolutionary Constitutionalism: Law, Legitimacy, Power* (Hart 2020) 133-54.

charisma in highly mobilized constitutional politics, Ackerman envisages different political dynamics underpinning revolutionary constitution-making.⁶²

Last but not least, Ackerman situates revolutionary constitution-building in a much broader timeframe than current comparative modelling of constitution-making suggests.⁶³ It is within this extended timeframe, not in the regulated process of constitutional enactment, that constitutions sustain the legitimacy of political authority.⁶⁴ As evidence of his difference with the rationalist view of constitution-making, Ackerman's lacking engagement with various proposals for linking constitution-making to legal procedures under the post-sovereign model reveals his envisaged revolutionary dynamics of constitutional law and politics: the mobilized masses under the charismatic leadership are engaged in a long, rancorous struggle for political meaning.⁶⁵ To engage critically with Ackerman's view of constitution-building, a close examination of how revolutionary constitutionalists turn to the law to answer the authenticity challenge posed by the constraints of time and the limitations of this legalistic strategy is in order.⁶⁶

A. The Multifaceted Question of Authenticity in Revolutionary Constitutionalism

While constitutional scholars have long taken great interest in revolutionary insurgency and constitution-making and framed them as conjoined historical events in a continuing political moment,⁶⁷ Ackerman extends the time horizon of revolutionary constitutionalism even further. Under Ackerman's framework, a revolutionary constitution shapes up in four stages: the revolutionary struggle (Time One), the constitution-making (Time Two), the

⁶² Cf Tom Ginsburg, 'Charismatic Fictions and Constitutional Politics' in Albert (ed) (n 61) 115-32.

⁶³ See generally David Landau and Hanna Lerner (eds), *Comparative Constitution Making* (Edward Elgar 2019).

⁶⁴ Cf Saati (n 49).

⁶⁵ Ackerman (n 4) 28-35.

⁶⁶ As my present purpose is to bring the authenticity question in constitutional legitimacy to the fore through a dissection of Ackerman's characterization of revolutionary constitutionalism, whether Ackerman offers better interpretation of revolutionary constitution-making than rationalists is not addressed in this essay.

⁶⁷ Arato (n 8) 257-362; Gardbaum (n 11) 176-77; Arendt (n 45) 141-78; Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr and ed, Duke University Press 2008) 75-76. See also Martin Loughlin, *Foundations of Public Law* (OUP 2010) 282-87.

succession crisis (Time Three), and the eventual consolidation (Time Four).⁶⁸ Ackerman thereby sets himself apart from other scholars on the relationship between revolution and constitution, extending the time horizon of revolutionary constitutionalism beyond Time One (revolution) and Time Two (founding) to the winding process of constitutional consolidation. Moreover, Ackerman's account of Time One and Time Two is distinct. In the standard account of the relationship between revolution and constitution, the focus is on the immediate events surrounding the collapse of the old regime that would lead eventually to the adoption of a new constitution.⁶⁹ In line with his extended time horizon of revolutionary constitutionalism, Ackerman instead looks back far beyond the moment of the old regime's downfall. Time One begins with the revolutionary pioneers' early underground work and decades-long continuing struggle preceding the actual downfall.⁷⁰ In sum, the political time conceived of in Ackerman's theory is generational in nature, suggesting an extended political moment of revolutionary constitutionalism that starts before the fall of the old regime, continues beyond constitution-making, and crosses generations.

The generational character of Ackerman's political time underlies the subtlety of his effort to constitutionalize the idea of charisma as the enabler of the continuing legitimate authority of a revolutionary political order in the face of the passage of time. Mindful of Weber's observation that the strictly personal character of charisma in and of itself cannot sustain a permanent relationship, Ackerman follows in Weber's steps and turns to organization to overcome the transitory political relationship based on strictly personal charisma.⁷¹ Yet, as Ackerman situates charismatic leaders and their revolutionary struggles in a generations-long Time One, it follows that charisma is conceived of beyond the personal gift of grace. In this way, Ackerman skilfully revises Weber's idea of charisma with 'organizational charisma' introduced alongside the Weberian personal strain, which he calls

⁶⁸ Ackerman (n 4) 8-10.

⁶⁹ See Richard Albert, Menaka Guruswamy, and Nishchal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart 2019).

⁷⁰ Ackerman (n 4) 4. Conspicuous cases of a well-extended Time One include India, South Africa, Israel, and Iran. See *ibid* 56-59, 81-89, 296-302, 328-32.

⁷¹ Weber (n 16) 246.

‘leadership charisma’.⁷²

Notably, organization did not escape Weber’s attention when he took on the issues surrounding ‘the routinization of charisma’.⁷³ What distinguishes Ackerman from Weber is that in Ackerman’s framework, organization is not a challenge to overcome in the ideal type of charismatic authority as Weber indicated.⁷⁴ According to Weber, the routinization of charisma through organization may either turn charismatic authority into other types of legitimate authority⁷⁵ or change the legitimating logic of charisma completely with the role of ‘recognition’ in routinized charismatic authority reversed from a ‘consequence’ to the ‘basis’ of legitimacy.⁷⁶ In contrast, Ackerman regards organization as part of charisma. Both (personal) leadership and organization underlie the project to constitutionalize charisma in revolutionary constitutionalism.⁷⁷

With his revised, organizational conception of charisma, Ackerman consigns the fundamental challenge of legitimacy facing revolutionary constitutionalism to Time Three when the founding generation die out.⁷⁸ To be clear, the transition from Time One to Time Two is anything but challenge-free in Ackerman’s account. How to translate the meaning of the revolutionary struggle and sacrifice into a constitutional document is a daunting task for the founding generation. Yet, under his four-stage model, the challenge concerning the transition from Time One to Time Two is not about legitimacy. During Time Two, as Ackerman’s paradigm case of revolutionary constitutionalism – India – demonstrates, it is the living memory of the founding generation rather than the constitutional text that sustains the legitimacy of the political order born out of the revolution.⁷⁹ Time does not raise the legitimacy challenge in the transition from Time One to Time Two. Specifically, organizational charisma harboured by insurgent movement parties carry their legitimacy won

⁷² Ackerman (n 4) 35-36.

⁷³ Weber (n 16) 246-49.

⁷⁴ Ibid 246.

⁷⁵ Ibid 247-48.

⁷⁶ Recognition paves the way for reconceiving charismatic authority in terms of democratic legitimacy. Ibid 266-68.

⁷⁷ Whether these two components stand on an equal footing is addressed in section 3.B.

⁷⁸ Ackerman (n 4) 9-10.

⁷⁹ Ibid 64.

amidst revolutionary struggles into the founding of constitutional orders. Moreover, the leadership of movement parties, regardless of whether they are personally charismatic or not, are indiscriminately attributed as the founding fathers and mothers of the constitutional order thanks to organizational charisma. Ackerman's revised, organizational conception of charisma makes it conceptually possible for the movement party to stand as the common reference point for the living memory of the revolution, pushing back the moment of crisis posed by time in revolutionary constitutionalism.

Yet, the question of legitimacy comes to a head at Time Three. When the founding generation pass away and a gap looms between organizational and personal charisma, the meaning of the revolution hammered out in Time One can no longer be reinvigorated through the founding generation's narratives on the insurgent bravery and sacrifice. Rather, the meaning that the political order is expected to live out is now sublimated into fixed constitutional text awaiting interpretation and construction. Yet, when focus shifts from the charismatic leadership's narratives to the abstract constitutional document written at Time Two,⁸⁰ the question of the authenticity of the meaning of the revolution becomes acute. How can the constitution embody the authentic meaning of the revolutionary struggle? This is not a question confined to elitist constitutionalism as Ackerman sometimes alludes to.⁸¹ Rather, it is at the core of the succession crisis. Time Three is the revolutionary path's moment of truth, calling the legitimacy of the revolutionary constitution into question with its authentic meaning contested.

Yet, upon closer examination, the authenticity question – which is attributable to the existential constraints imposed by time – has already existed before the succession crisis strikes at Time Three, only to be disguised under Ackerman's revised, organizational conception of charisma. As noted above, by virtue of organizational charisma, Ackerman conveniently unburdens himself of the issues at the core of Weber's routinized charismatic authority. The interaction between charismatic authority and other ideal types of legitimate

⁸⁰ Ibid 8-9.

⁸¹ Ackerman notes that Poland, one of the case studies of revolutionary constitutionalism, also suffers the authenticity critique. Ibid 166.

authority and its transmutation to one that is based on recognition, or rather, democratic legitimacy, that concerned Weber are buried deep in Ackerman's revised conception of charisma. Yet, those issues are not just what requires tackling in interpreting legitimate authority in sociological terms.⁸² Rather, they are the central issues concerning how a self-designated vanguard force in the revolutionary struggle turns itself into the authentic agent of the mobilized masses. The process of organization not only changes the relationship among the members of the movement party that the charismatic leader helps to establish but it also impacts the dynamics of the movement party vis-à-vis its followers from without.

Yet, to Ackerman, the relationship between the revolutionary pioneers and the mass followers is an issue of 'coordination' to which organization provides the solution.⁸³ In contrast to Weber, who took the gap resulting from the organization of personal charisma and the corresponding legitimacy-related issues seriously, Ackerman assumes the interlocking of personality and organization. When they are split as the experience of the Fourth Republic of France illustrates, it betrays a case of failed execution or incompleteness instead of suggesting flawed modelling.⁸⁴

To be fair, Ackerman does address the charismatic leader's struggle with his revolutionary comrades within the movement party to be the authentic voice of the mobilized masses. In his case study of Poland, for example, Ackerman notes how the Polish people felt alienated from the final drive for a new constitution in the wake of the demoralizing infighting in the Solidarity movement after the end of the Communist regime. Yet, Ackerman attributes the disappointing execution of revolutionary constitutionalism in post-Communist Poland mainly to the adoption of the French style of semi-presidentialism that institutionalizes intra-movement split with the designed 'executive dualism'.⁸⁵ To

⁸² Weber addressed these issues in Weber (n 16) 246-54.

⁸³ Ackerman (n 4) 224.

⁸⁴ Ibid 130.

⁸⁵ Ibid 257-81. For executive dualism, see Jan Herman Reestman, 'Presidential Elements in Government: Introduction' (2006) 2 *EuConst* 54, 54-55.

Ackerman, it is the tragic institutional choice to blame.⁸⁶

With respect to the charismatic leader's struggle with his revolutionary comrades within the movement party, Ackerman further notes the problem of 'political isolation' resulting from the long absence of charismatic leaders – such as the prisoned Mandela of South Africa and the exiled Khomeini of Iran – from the frontline of the revolutionary movement. Such political isolation prevented these charismatic leaders from imposing their personal will on their revolutionary comrades. According to Ackerman, they turned to constitution-making to solve their problems of political isolation.⁸⁷ Again, Ackerman leaves unaddressed how a legal document – the constitution – can resolve the issues surrounding the struggle between the charismatic leader and his revolutionary comrades in the scenario of political isolation. Ackerman does not tell us much about whether this marks a transition from charisma to legality in the middle of the revolutionary pathway. Nor does he elucidate how such a constitutional document substantiates itself as the authentic embodiment of the meaning of the revolution in respect of which rivalling partisans have their respective living memories. This raises the issues surrounding the transition from Time One to Time Two.

As noted above, in Ackerman's account, the challenge engendered by the transition from Time One to Time Two does not concern legitimacy. This challenges the conventional wisdom. As has been well discussed in literature, the legitimacy of revolutionary constitutions pivots on how revolutionary insurgency transits to constitution-making.⁸⁸ That is why the process of constitution-making is considered crucial to the legitimacy of the resulting constitutional order.⁸⁹ And the question of who participates in, not to mention dominates, the constituent assembly and the like lie at the heart of the genesis of every constitution.⁹⁰ It is true that all the revolutionary parties deserve their seats in the constituent assembly for their heroic role during Time One.

⁸⁶ But see Tomasz Tadeusz Konieczny, 'Understanding Polish Pacted (R)evolution(s) of 1989 and the Politics of Resentment of 2015-18 and beyond' (2019) 17 *ICON* 695, 697-98.

⁸⁷ See Ackerman (n 4) 87-89, 333-36.

⁸⁸ See Arato (n 8) 257-362; Arendt (n 45) 256-75.

⁸⁹ See Gardbaum (n 11) 186-96; Saati (n 49).

⁹⁰ Gardbaum (n 11) 195.

Nevertheless, writing a constitution is anything but conducting an insurgency. A revolutionary party's performance in the constituent assembly cannot be assumed. Thus, the authenticity of the constitution hammered out by the revolutionary vanguards in the transition from Time One to Time Two is susceptible to the test of whether its content embodies the meaning of the revolution created during Time One.⁹¹ Yet, by virtue of organizational charisma, Ackerman automatically invests the revolutionary party with the constitution-maker's gift.

In sum, with his conceptual manoeuvre on charisma, Ackerman smartly identifies the existential challenge posed by time in revolutionary constitutionalism with the succession crisis, which does not arise until Time Three, – only with the authenticity question posed by the transition from Time One to Time Two shrouded.

B. Revolution on the Lawyer's Scale: Interrogating the Authenticity of Judicial Consolidation

Before proceeding straight to Time Four, it is noteworthy that not all the cases of revolutionary constitutionalism under Ackerman's examination comprise all the four stages. Only in the success stories does the four-stage timeframe develop in full. Those with a curtailed timeframe instead serve as the examples of failure where hard lessons can be learnt. On the end of success are India, South Africa,⁹² and Italy. Poland, Israel, Myanmar, and Iran all sit closer to the other end. They find themselves in the category of incomplete revolutions for different reasons.⁹³ There is one case left yet – France. The case of France is tricky. Of post-war France, Ackerman makes a two-act drama: one deals with the Fourth

⁹¹ Ibid 190-91.

⁹² South Africa as a constitutional democracy is too young to see through the fourth stage. Ackerman (n 4) 109-15. For a post-sovereign, non-revolutionary account of South Africa's path towards constitutional democracy, see Arato (n 8) 233-56.

⁹³ According to Ackerman, Poland failed on its problematic institutional choice; Myanmar swerved to bargaining with the military establishment; Israel fell short in the 'race against time' to constitutionalize charisma. Ackerman (n 4) 257-81, 294-95, 302-23. Arato gives a post-sovereign, non-revolutionary interpretation of the case of Poland in Arato (n 8) 187-206. Notably, Ackerman includes Iran in his scorebook of legitimate revolutionary constitutions. Ackerman (n 4) 360. Yet, contradicting his own ideal type, the consolidation of the Iranian revolutionary constitution rests on the balance of power rather than legal professionalism. Ackerman (n 4) 353-60.

Republic; the other with the Fifth Republic.⁹⁴ There are two ways to look at both constitutions in the post-war France. Taken as a whole, both are the constituents of a single successful instance of revolutionary constitutionalism. On this view, the Fourth Republic is treated as part of the long Time One of the Fifth Republic. In contrast, considered separately, the Fourth Republic falls into the category of incomplete revolutions, while the Fifth Republic sits alongside other examples of successful revolutionary constitutionalism. In sum, the last stage – consolidation – is integral to the ideal type of revolutionary constitutionalism.

As discussed above, Ackerman's revolutionary pathway does not keep its constitutional framework from the challenge posed by time. With his extended timeframe and revised conception of charisma, the legitimacy question posed by the elapse of time – whether the post-revolutionary constitutional order is the authentic embodiment of the meaning of the revolution – is not seen to arise until Time Three. As has been noted above, the success of Ackerman's revised conception of charisma in postponing the challenge of legitimacy pivots on the assumed interlocking of personal and organizational charisma. When they are decoupled, the revolutionary path towards constitutionalism hits the dead end. At Time Three, the decoupling becomes a brute fact. With the charismatic leader gone with the founding generation, an unbridgeable gap occurs between personal and organizational charisma. That the moment of crisis in Ackerman's revolutionary constitutionalism does not arrive until Time Three suggests that an organization emptied of personal charisma can no longer work the miracle of charismatic authority. Personal charisma turns out to be the underpinning of Ackerman's revolutionary ideal type of constitutional legitimacy.⁹⁵ Only during Time Three does Ackerman come to terms with the issues with which Weber was preoccupied when he addressed the routinization of charisma – only this time Ackerman does not turn to organization in general. It is the legal profession that completes the revolutionary pathway and consolidates revolutionary constitutionalism following the

⁹⁴ Chapter 4 deals with the Fourth Republic; Chapter 7-8 discusses the birth and growth of the Fifth Republic.

⁹⁵ This apparently edges Ackerman's revolutionary constitutionalism towards populism of which charismatic figures are the lynchpin. Müller (n 1) 20.

succession crisis during Time Four.

Under Ackerman's revolutionary pathway, the contest for the baton left by the charismatic leadership plunges the constitutional order into crisis. On the one hand, the living memory of the founding generation about the revolution is fading and the demised charismatic leader is no longer around to replenish the meaning of the revolution with his own words and deeds during Time Three. On the other hand, none of the contestants for the leadership is bequeathed with the personal gift of grace – charisma – to persuade the post-founding generation that he has access to the authentic meaning of the revolution. Thus, none of their narratives on the constitution can work miracles in the way the heroic charismatic leader reads the meaning of the revolution into the constitution through his interpretation and construction during Time Two. With the charismatic leader departed, the authentic meaning of the revolution and its link to the constitution get lost in the leadership contest.⁹⁶

After identifying the succession crisis as a legitimacy challenge facing revolutionary constitutions, Ackerman makes a smart move in his solution to the crisis. Instead of focusing on the succession crisis itself and pinning the solution on the choice of the successor as Weber did,⁹⁷ Ackerman treats the succession crisis at Time Three as the crisis of the revolutionary *constitution*. As none of the potential leaders of the post-founding generation can claim a personal and direct access to the meaning of the revolution, the link between the meaning of the revolution and the constitutional order must be found somewhere else than in personality. The solution to the succession crisis lies in the impersonal rendering of the constitution with an eye to reflecting the authentic meaning of the revolution. This is why Ackerman argues that the legalistic interpretation of the constitution provides the way out of the succession crisis.⁹⁸ In this way, Ackerman pivots the success of the project of revolutionary constitutionalism on the law, or rather, legality – the legalistic approach to rendering the constitution – rather than charisma. And the legal profession is pivotal in

⁹⁶ Ackerman (n 4) 8-10, 65-71.

⁹⁷ Weber (n 16) 246-49.

⁹⁸ Ackerman (n 4) 8-10.

making this legalistic solution work.⁹⁹

According to Ackerman, the legal profession does not find the space required for a legalistic approach to rendering the constitution until the departure of the founding generation. Moreover, with the elapse of time, the legal profession in Time Four are in a position to draw upon the seminal jurisprudence set out by the courts during Time Two to shape the post-succession crisis political order in the direction as indicated in their interpretations of the constitution. The rise of the Indian Supreme Court in the 1970s testifies to the completion of revolutionary constitutionalism with the rise of the judicial power.¹⁰⁰ Revolutionary constitutions find their consolidation in the hands of the judiciary under the guidance of legality. Seen in this light, what sets out the pathway towards revolutionary constitutionalism is a revolution indeed, only on the lawyer's scale.

As Weber suggested, charisma may be joined with legality as the basis of legitimacy in the age of democracy.¹⁰¹ Thus, Ackerman's turn to legality in his attempt to theorize the constitutionalization of charisma in revolutionary constitutionalism comes as no surprise. Yet, the attribution of the ultimate consolidation of revolutionary constitutions to the judiciary and the legalistic approach raises two fundamental issues. First, it suggests that Ackerman premises his conception of revolutionary constitutionalism on a particular understanding of the constitution, which centres on the role of courts and the corresponding development of the judicialization of politics.¹⁰² As a result, revolutionary constitutionalism is eventually resolved into judicial constitutionalism during Time Four, although its early stages are more political than legal. Second, the pivoting of the consolidation of revolutionary constitutions on the judiciary and legality itself does not explain why the judiciary can escape the authenticity challenge. How can the judiciary establish themselves as the ordained oracle of the authentic meaning of the revolution as revealed in their constitutional renderings?

⁹⁹ Ibid 9-10.

¹⁰⁰ Ibid 66-73.

¹⁰¹ Weber (n 16) 267.

¹⁰² Ackerman (n 4) 9-10.

Ackerman is aware that judicial consolidation is not the foregone conclusion of the revolutionary path. Lawyers are destined to compete with politicians in the struggle for the authentic meaning of the revolutionary constitution.¹⁰³ Pinning the success of revolutionary constitutionalism on the completion of Time Four, Ackerman seems to suggest that legal professionalism will eventually prevail over political stratagem.¹⁰⁴ Yet, as his critique of the substitution of landmark judicial decisions for formal constitutional redrafting in the US suggests,¹⁰⁵ there is no reason to believe that the people will automatically come around the judicial renderings of the constitution. In sum, Ackerman intensifies the question of authenticity posed by the elapse of time in revolutionary constitutionalism with the revolution placed on the lawyer's scale, which is easily upset in the face of We the People.

4. FACING THE CHALLENGE OF AUTHENTICITY: WHEN THE PATHWAYS MEET THE PEOPLE

If We the People that underpins revolutionary constitutionalism also poses the ultimate challenge of authenticity to the project to constitutionalize charisma with judicial consolidation, can other ideal types of constitutionalism stay out of the shadow of We the People? Is the constitutional order destined to the authenticity challenge? Does this suggest the end of constitutionalism? To answer these questions, let us start with a search for We the People in other constitutional pathways than the revolutionary one.

A. Three Constitutional Pathways or One Revolutionary Road? Feeling the Way Towards Constitutional Authenticity

Each pathway under Ackerman's trichotomy has its own challenge. According to Ackerman, the fundamental challenge facing revolutionary constitutionalism is how to constitutionalize charisma with the elapse of time and the fading of revolutionary memory.¹⁰⁶

¹⁰³ Ibid 10.

¹⁰⁴ Ibid 9.

¹⁰⁵ Ibid 397-99.

¹⁰⁶ Ibid 7.

As discussed above, it turns out that the succession crisis at Time Three is in essence a question of authenticity to which *pace* Ackerman, the legalistic approach provides no answer as it is We the People that poses the authenticity challenge. Notably, Ackerman identifies We the People and authenticity as the respective fundamental challenges facing establishmentarian and elitist constitutionalism.

Travelling down the establishmentarian path, the masses play a role at the crunch time, paving the way for the elite insiders' strategic concession and co-optation of the revolutionary outsiders into the establishment. As discussed above, such pragmatist politics underlies the operation of establishmentarian constitutionalism. Thus, to Ackerman, 'disestablishment' poses the fundamental challenge in establishmentarian constitutionalism.¹⁰⁷ To put it simply, establishmentarian constitutionalism falters when the establishment can no longer bring the insurgent forces into the fold. Drawing upon the British experience, Ackerman argues that the introduction of nationwide referenda disables the establishment and challenges the established institutions to the core. The constitutional chaos following the Brexit referendum is a case in point. The Parliament has remained legally sovereign indeed.¹⁰⁸ Yet, when the referendum result pointed in the direction opposite to the parliamentary government's policy, the Parliament could not live up to its task without aligning its position with the result. With the introduction of referenda, the establishment can no longer hide behind the conventions and established institutions as demagogic politicians now find a way to present the authentic will of We the People outside the legislative chambers.¹⁰⁹ To Ackerman, how to avoid disestablishment is the fundamental challenge facing establishmentarian constitutionalism.¹¹⁰ Establishmentarian constitutionalism lives in the shadow of popular sovereignty as We the People no longer channels feelings only through the parliamentarians in the age of popular referenda.¹¹¹

¹⁰⁷ Ibid 10.

¹⁰⁸ Keith Ewing, 'Brexit and Parliamentary Sovereignty' (2017) 80 *MLR* 711, 718-21.

¹⁰⁹ Ackerman (n 4) 12-18.

¹¹⁰ Ackerman seems to pin hopes on statesmanship. Ibid 18.

¹¹¹ For the future of establishmentarian constitutionalism in Britain, Ackerman has proposed that the British constitutional terms be redefined through a well-designed process of constitutional enactment, including a

As regards elitist constitutionalism, Ackerman is explicit that ‘authenticity’ is the fundamental problem and attributes it to the distinctive character of its origin.¹¹² Ackerman notes that in contrast to revolutionary constitution-making, the elitist pathway is not laid down by revolutionary movements. Furthermore, most of the elites that enter into the constitutional compact come from outside the establishment and thus lack the trust the establishment have won with their pragmatist attitude and experience as the elite insiders do under establishmentarian constitutionalism. The distinctive genesis of elitist constitutions underlies the problem of authenticity.¹¹³ Seen in this light, elitist constitutions seem to be born with a birth defect in terms of legitimacy. How does elitist constitutionalism then stand on a par with the revolutionary and establishmentarian pathways as the third ideal type of constitutionalism?

Ackerman defers his full answer until his planned elitist sequel to *Revolutionary Constitutions*.¹¹⁴ Nevertheless, as discussed above, the source of the legitimacy of elitist constitutions boils down to legality.¹¹⁵ Thus, the authenticity question that Ackerman identifies in the elitist pathway is not so much about its distinctive genesis as about legality being the viable source of its legitimacy. Due to the absence of the masses in its origin, an elitist constitution pivots its success on We the People coming around it through legalistic constitutional interpretations. The fundamental challenge of authenticity in elitist constitutionalism lies in the limitation of the legalistic approach to the rendering of the constitution in the face of We the People.

Taken together, the authenticity challenge pervades all of Ackerman’s three ideal types of constitutionalism. Moreover, the unsettling role of We the People in constitutional orders intensifies the authenticity challenge posed by the elapse of time. In contrast to revolutionary constitutionalism, Ackerman virtually attributes the challenges facing the

referendum. Bruce Ackerman, ‘Why Britain Needs a Written Constitution—and Can’t Wait for Parliament to Write One’ (2018) 89 *Political Quarterly* 584, 588.

¹¹² Ackerman (n 4) 18.

¹¹³ Ibid.

¹¹⁴ Ibid 21.

¹¹⁵ See text accompanied by notes 39-41.

establishmentarian and the elitist ideal types to their origins in which popular sovereignty is absent. Viewed thus, both the establishmentarian and the elitist ideal types appear to be malformed revolutionary constitutionalism. Ackerman's three pathways towards constitutional legitimacy turn out to be one single revolutionary road. Yet, as discussed above, the revolutionary road itself cannot steer clear of the authenticity challenge in the face of We the People, either, even if it is embedded in popular sovereignty. Is there a way towards constitutional authenticity in the looming shadow of We the People?

B. From the Dreadful People to Anti-Ethics of Authenticity: The Ultimate Question of Constitutional Legitimacy

The latest wave of populism in a wide range of constitutional democracies is not only a testament to but also intensifies the authenticity challenge. As Jan-Werner Müller suggests, populism represents an antiestablishmentarian, antipluralist politics of exclusionary representation under a leader by appealing to identity.¹¹⁶ In the name of We the People, populists appeal to popular sovereignty, accusing the established democratic institutions of failing to represent the authentic democratic will. Movements thus surge at the cost of traditional parties; referenda and other expressions of immediate democracy become populists' favoured channel for decision-making.¹¹⁷ Through the lens of constitutional legitimacy as discussed above, the current populist challenge confronts constitutional democracy with the fundamental question of authenticity in a particular way: the existing democratic intermediaries have lost their representative status as they stand in the way of the people fighting for the ownership of their political project. Instead of centring on the meaning of the political project of constitutional self-government as Ackerman identifies in revolutionary constitutionalism, the authenticity question is thus reframed in line with 'a particular moralistic imagination of politics' entertained by present-day populists.¹¹⁸ It is about the identity of the 'right' people who assert the exclusive ownership of the state,¹¹⁹ not

¹¹⁶ Müller (n 1) 1-4.

¹¹⁷ Urbinati (n 1) 41-44, 124-25.

¹¹⁸ Müller (n 1) 19 (emphasis omitted).

¹¹⁹ Urbinati (n 1) 44-45, 191-92.

the identity of the political project – ie, the authenticity of the meaning emanating from the long struggle of We the People.¹²⁰ As a result, the ‘juridical’ meaning of We the People is replaced by the question of who can claim to be authentic in reflecting the democratic will of the right people.¹²¹ Viewed thus, populism suggests a new form of representation to answer the authenticity question when constitutional legitimacy is questioned.¹²²

To repel the populist challenge, a rethink and redesign of the institution of democratic representation is certainly needed.¹²³ Yet, as Ackerman demonstrates in *Revolutionary Constitutions*, we need first to understand how we get here before we find where to go. How can populists easily reframe the authenticity question and redirect it away from the quest for the meaning of the political project of constitutional self-government? The meaning of authenticity holds the key.

As Charles Taylor points out, the contemporary appeal of authenticity is grounded in the idea of ‘being true to oneself’, meaning ‘being true to [one’s] originality’.¹²⁴ At its core is the moral idea of self-fulfilment through self-definition. More importantly, self-definition means ‘finding what is significant in [one’s] difference from others’ through one’s ability to articulate such significance to others.¹²⁵ In this way, an individual gives meaning to her life and herself in the world while others can make sense of her defining difference. Such ethics of authenticity mark the moral progress associated with modernity.¹²⁶ Failing to articulate, whether it is due to the lack of the ability to articulate or the inarticulatable difference, she just keeps to herself. Notably, finding that significant difference that distinguishes oneself from others involves a choice. And, this is where the ethics of authenticity take a subjectivist turn, prioritizing choice over articulation.¹²⁷ What

¹²⁰ See Ming-Sung Kuo, ‘Between Fact and Norm: Narrative and the Constitutionalization of Founding Moments’ in Albert, Guruswamy, and Basnyat (eds) (n 69) 11, 27-30.

¹²¹ Urbinati (n 1) 45.

¹²² Ibid 158-90; Ming-Sung Kuo, ‘Against Instantaneous Democracy’ (2019) 17 *ICON* 554, 558-59.

¹²³ William A Galston, ‘The Populist Challenge to Liberal Democracy’ (2018) 29 (2) *Journal of Democracy* 5, 15.

¹²⁴ Charles Taylor, *The Ethics of Authenticity* (Harvard University Press 1991) 29.

¹²⁵ Ibid 35-37.

¹²⁶ Ibid 25-29.

¹²⁷ Ibid 36-37.

matters is no longer the sense or meaning attributed to the defining difference through articulation. What is important is difference – perceived or not – being chosen just because the choosing individual feels that way.¹²⁸ Authenticity is thus not embedded in the dialogical relationship whereby articulation takes place and an individual defines herself and finds her identity.¹²⁹ Instead, authenticity slides from the moral to the aesthetical. Authenticity is all about self-expression.¹³⁰ This is what Taylor has said of the deviant mode of authenticity and self-fulfilment in the contemporary culture, namely, the pathology of anti-ethics of authenticity.¹³¹

With the moral appeal of authenticity and its mutation revealed, it is not hard to see why constitutional democracies are put on the back foot amidst the populist wave. Longing for self-government, We the People raises issues of authenticity over the constitution when the constitutional order no longer makes sense in the public eye.¹³² Being true to the people's originality through the questioning of the constitutional order is exactly the meaning of popular sovereignty. Yet, as the ethics of authenticity assume a pathological form in the contemporary culture, We the People also shifts attention from making sense of the constitution to following the expressive performances of constitutional actors.¹³³ This corresponds to contemporary politics in which individual politicians have long been placed before the institution.¹³⁴ Riding the wave of social media and other advancements in communications technology, individual politicians are now able to glue themselves to their followers.¹³⁵ The latest wave of populism is just the culmination of this long-existing political phenomenon.¹³⁶ Finding a direct connection with the masses in an instantaneous

¹²⁸ Ibid 36.

¹²⁹ Ibid 47.

¹³⁰ Ibid 64-67.

¹³¹ Ibid 55.

¹³² Urbinati (n 1) 207.

¹³³ Jeffrey Edward Green, *The Eyes of the People: Democracy in an Age of Spectatorship* (OUP 2010).

¹³⁴ Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harv L Rev* 633, 660-63. Presidentialization of the executive power is another result of this development. Pierre Rosanvallon, *Good Government: Democracy beyond Elections* (Malcolm DeBevoise tr, Harvard University Press 2018) 2-9, 104-13.

¹³⁵ Urbinati (n 1) 182-85.

¹³⁶ Benjamin Moffitt and Simon Tormey, 'Rethinking Populism: Politics, Mediatisation and Political Style' (2014) 62 *Political Studies* 381-97.

and unmediated way,¹³⁷ present-day populist leaders are in a position to claim to be authentic in reflecting the democratic will of the right people, of which past populists could only dream.

Moreover, with individual politicians and their followers glued to each other, the latter find themselves in the former's performances in the political arena and beyond. A politician who is true to himself is seen as expressing authenticity.¹³⁸ Vulgarism is not rude to others but can be a way of being demonstrably true to oneself; breaking the protocols, even the rules, attests to the ability to think and act out of the box, showing his being true to his originality.¹³⁹ In this way, the populist leader can turn the focus of the public from constitutional authenticity to his personality through which his followers find themselves represented and feel ownership for the constitution.¹⁴⁰ Under the pathology of anti-ethics of authenticity, revolutionary constitutionalism and popular sovereignty give way to a 'tyranny of authenticity',¹⁴¹ which centres on constructed personal charisma with little or nothing to do with the quest for the authentic meaning of the political project of constitutional self-government.

To sum up, the authenticity challenge facing constitutional democracy endures because it reflects the people's attempts to (re)define the meaning of the constitution. There is no escaping this challenge. Nor is forgetting about the people the solution. With the ethics of authenticity assuming its pathological form and the authenticity question reframed, the authenticity challenge becomes more testing. Without due appreciation of the current authenticity challenge, Ackerman's buoyant salutation to We the People may inadvertently lend support to those who attempt to create a false sense of constitutional authenticity around constructed charisma. Capitalizing on the anti-ethics of authenticity, the latest wave of populism as a new form of representation is shaking constitutional democracies to the

¹³⁷ Kuo (n 122) 556-61.

¹³⁸ See Urbinati (n 1) 122-23.

¹³⁹ Kuo (n 122) 558-61.

¹⁴⁰ Urbinati (n 1) 117-21.

¹⁴¹ Catherine Fieschi, *Populocracy: The Tyranny of Authenticity and the Rise of Populism* (Agenda 2019).

core,¹⁴² whether they owe their origins to the revolution, the establishment's pragmatism, or the elite construction.

5. CONCLUSION

Eric Hobsbawm dubbed the period 1789-1848 'the age of revolution'.¹⁴³ Yet, it was not just a period filled with revolutionary passion. It also marked the beginning of a 'constitutional age' as written constitutions spread throughout Europe and beyond in the nineteenth century.¹⁴⁴ Yet, not all constitutions written in the age of revolution and afterwards were the children of revolutions, although revolutions have long been regarded as the begetter of *modern* constitutions.¹⁴⁵ As the French example of *Charte constitutionnelle* illustrated, some constitutions were enacted to counter the revolutionaries.¹⁴⁶ Nevertheless, both revolutions and constitutions concerned the question of legitimacy.¹⁴⁷ Ackerman's project of pathways towards constitutional legitimacy reminds us that the long quest for constitutional legitimacy has never been unitary.

Studies of the constitutional experiences in the nineteenth century have shown that not all constitutions were based on popular sovereignty. Tradition, legality, and charisma all played a role in the legitimation of individual constitutional orders.¹⁴⁸ As has been revealed above, Ackerman's three ideal types of constitutional legitimacy – revolutionary, establishmentarian, and elitist – also turn out to pivot on charisma, tradition, and legality, respectively. Yet, the nineteenth-century experiences also tell us that constitutions whose legitimacy relies on tradition or legality eventually yielded to the spirit of democratic

¹⁴² Urbinati (n 1).

¹⁴³ Eric Hobsbawm, *The Age of Revolution, 1789-1848* (Vintage 1996) (1962).

¹⁴⁴ Kelly L Grotke and Markus J Prutsch, 'Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences' in Kelly L Grotke and Markus J Prutsch (eds), *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (OUP 2014) 3, 3. Obviously, Britain took a different path in this constitutional age. See Jo Eric Khushf Murkens, 'Unintended Democracy: Parliamentary Reform in the United Kingdom' in the same collection.

¹⁴⁵ Loughlin (n 67) 276.

¹⁴⁶ Markus J Prutsch, "'Monarchical Constitutionalism'" in Post-Napoleonic Europe: Concept and Practice' in Grotke and Prutsch (eds) (n 144) 69, 70-74.

¹⁴⁷ Volker Sellin, 'Restorations and Constitutions' in Grotke and Prutsch (eds) (n 144) 84-103.

¹⁴⁸ See *ibid.*

constitutionalism.¹⁴⁹ The spirit of democratic constitutionalism has since carried on. This is why, as analyzed above, Ackerman's three constitutional pathways merge into one revolutionary road. Before popular sovereignty, the authenticity of the constitutional order is constantly questioned.

Ackerman's project of constitutional legitimacy as set out in *Revolutionary Constitutions* shows us the continuity of our struggle for constitutional legitimacy in both the diverse paths and the enduring authenticity challenge posed by We the People. Ackerman is right that populism is part of our continuing collective constitutional heritage. Yet, Ackerman fails to tell the novelty of the authenticity challenge crystallized in the latest wave of populism. The anti-ethics of authenticity provides fertile ground for contemporary populists to deprive the constitutional project of meaning, turning the question of authenticity about making sense of the constitution into gazing at politicians' fashionable performances. This is the newest chapter on the authenticity question in our long quest for lasting constitutional legitimacy. Pinning his hopes for constitutional rejuvenation on the referendum without taking account of the novelty of the authenticity challenge,¹⁵⁰ Ackerman is susceptible to the lure of plebiscites as were many opinion leaders in the nineteenth century¹⁵¹ and thus loses sight of what constitutional authenticity is really about. Ackerman's intervention proves that authenticity is a long overdue subject in constitutional theory. Authenticity deserves better attention.

¹⁴⁹ Prutsch (n 146) 82-83.

¹⁵⁰ Ackerman considers the referendum a means to generate public debate that would enable We the People to make an informed decision on the constitutional future. Ackerman (n 4) 400-01; Ackerman (n 111) 588-89. Yet, the empirical evidence points referenda on constitution-making in the direction of confirmation, not decision, suggesting their susceptibility to elite influence. See Zachary Elkins and Alexander Hudson, 'The Constitutional Referendum in Historical Perspective' in Landau and Lerner (eds) (n 63) 142-64.

¹⁵¹ Markus J Prutsch, *Caesarism in the Post-Revolutionary Age: Crisis, Populace and Leadership* (Bloomsbury 2020) 30-31, 115-17.