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The Reign of Constitutional Positivism: Revolution Reconceived in the New Constitutional Age

CONSTITUTIONAL REVOLUTION. By Gary Jeffrey Jacobsohn & Yaniv Roznai. New Haven, CT: Yale University Press. 2020. Pp. xv + 269. \$65.00 (hardcover).

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<Abstract>

In *Constitutional Revolution*, Professors Gary Jeffrey Jacobsohn and Yaniv Roznai survey comparative constitutional experiences around the globe and present a substantive conception of transformative constitutional change, which they call “constitutional revolution.” In this way, *Constitutional Revolution* sheds new light on the idea of revolution in constitutional theory and practice by challenging the conventional wisdom that holds procedural irregularity and legal rupture as the defining feature of constitutional revolutions. *Engaging with Jacobsohn and Roznai’s substantive conception of constitutional revolution, this Review looks into the state of the idea of revolution in the light of the social phenomena that underlie the thesis of Constitutional Revolution and asks why such constitutional practices are associated with the polysemous word revolution. It argues that the idea of constitutional revolution emanating from Jacobsohn and Roznai’s theoretical framework mirrors constitutional positivism in recent constitutional scholarship – under which observation of constitutional phenomena is mediated by master-text constitutions and the attendant institutional practices. With the double move – from free act to changing identity and from lived experience to legal expression – in focus, the notion of constitutional revolution is constructed around the systemic mutation of constitutional orders and its manifestation in constitutional master-texts and jurisprudence. Thus emerges another counterrevolutionary theory of political order aspiring to post-political politics with constitutional revolution and freedom delinked. Departing from the traditional idea derived from revolutionary experiences in the modern political project, Constitutional Revolution speaks to an emerging socio-political phenomenon in constitutionalized politics and thus revolutionizes the idea of revolution.*

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I. INTRODUCTION: WORD, PHENOMENON, AND IDEA

Both “constitution(al)” and “revolution” are familiar examples of polysemy. Each can refer to what lies outside the world of social sciences as denoted in terms such as “human constitution” and “constitutional medicine” for the former¹ and “planetary revolution” for the latter. Both of them can also refer to what interests social scientists most such as “the United States Constitution” and “the French Revolution” and other social phenomena – understood broadly. Thanks to the reification of constitution in the form of a grand master-text and the influence that it exerts on the juridico-political institutions, legal scholars are seeing less trouble with defining the scope of their studies when they refer to constitutions or matters constitutional.² Revolution has no such luck. It is as polysemous today as it was in, say, 1962 when the way to make sense of transformative progress in science was unsettled by Thomas Kuhn’s paradigm-shifting work that includes “scientific revolutions” in its title.³ Since then, we have continued to come across sexual revolution, media revolution, green

¹ See Sarah W. Tracy, *George Draper and American Constitutional Medicine, 1916-1946: Reinventing the Sick Man*, 66 BULL. HIST. MED. 53 (1992).

² A caveat is warranted: the notion of the so-called small-c constitution, the relationship between constitution and constitutional law, and even what constitutes constitutional master-texts are still troubling legal scholars.

³ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

revolution, and even “personal revolution,”⁴ among others. Constitutional revolution is another addition to this continually growing list. As the meaning of revolution varies, the significance of revolution as a *word* becomes less clear even with the help of the “constitutional” modifier, for example. Each revolution variety is more than a set of words but rather refers to a *phenomenon* or a set of practices individually or collectively experienced. Constitutional revolution is no exception. Then, what is the phenomenon of constitutional revolution?

Gary Jeffrey Jacobsohn and Yaniv Roznai’s *Constitutional Revolution* ambitiously takes up this question with a thoughtful conceptual framework. At the heart of this erudite work is “paradigmatic displacement, however achieved, of the conceptual prism through which constitutionalism is experienced in a given polity” (p. 34). Centering on “constitutional vision,” constitutional revolution seems to denote “legal change about a displacement in the way constitutionalism is experienced in a given polity” (p. 179), “marking the onset of a new departure in a nation’s constitutional narrative” (p. 178). Thus formulated, constitutional revolution in Jacobsohn and Roznai’s theory refers to a particular phenomenon in constitutional practice.

Apparently, as acknowledged in *Constitutional Revolution* (pp. 23-24), what has already been framed as constitutional revolution in the literature may not share what the authors have in mind.⁵ On the other hand, that which lies at the heart of their theory of constitutional

⁴ ALLISON TASK, *PERSONAL (R)EVOLUTION: HOW TO BE HAPPY, CHANGE YOUR LIFE, AND DO THAT THING YOU'VE ALWAYS WANTED TO DO* (2018).

⁵ See, e.g., EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1977) [1941]; ULRICH KLAUS PREUSS, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* (Deborah Lucas Schneider trans., 1995); ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* (2000); Nader Sohrabi, *Constitutional Revolutions and State Formations in Comparison: Iran and Turkey*, in *THE OXFORD HANDBOOK OF*

revolution is not one monolithic constitutional practice. Rather, it includes social phenomena of which a given polity experiencing “a substantial reorientation in constitutional practice and understanding” is characteristic (pp. 20-21). Moreover, the social phenomena occupying center and front in *Constitutional Revolution* and their common characteristic feature can be characterized in terms other than revolution such as fundamental reform or even “commensurate transformation.”⁶ Jacobsohn and Roznai’s deliberate choice of the word, revolution, as their nomenclature to characterize orientation or vision changes in constitutional experiences across constitutional realms in *Constitutional Revolution* thus indicates an *idea* – constitutional revolution.⁷ “What is the idea of constitutional revolution conveyed in *Constitutional Revolution*?” is the leading question of this Review.

In this Review, I aim to make sense of the idea at the core of *Constitutional Revolution*, in light of the underlying social phenomena, and why such constitutional practices are associated with the polysemous word revolution. I argue that the idea of constitutional revolution emanating from Jacobsohn and Roznai’s theoretical framework mirrors constitutional positivism in recent constitutional scholarship – under which observation of constitutional phenomena is mediated by master-text constitutions and the attendant

CONTEMPORARY MIDDLE EASTERN AND NORTH AFRICAN HISTORY 68 (Amal Ghazal & Jens Hanssen eds., 2019); Yasuo Hasebe, *Constitutional Revolution, Legal Positivism and Constituent Power*, in REVOLUTIONARY CONSTITUTIONALISM: LAW, LEGITIMACY, POWER 179 (Richard Albert ed., 2020); Charles Kurzman, *The Global Wave of Constitutional Revolutions, 1905–1915*, in REVOLUTIONARY WORLD: GLOBAL UPEAVAL IN THE MODERN AGE 111 (David Motadel ed., 2021). Notably, Hannah Arendt pointed out that the “*constitution* of freedom” was tied to the idea of revolution. HANNAH ARENDT, ON REVOLUTION 35 (1990) [1963] (emphasis added). Cf. BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW (2019).

⁶ Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 150 (Sanford Levinson ed., 1995).

⁷ Arendt already noticed the relationship between word and idea in her classic on revolution. See ARENDT, *supra* note 5, at 42.

institutional practices, including judicial review and constitutional interpretation.⁸ With the double move in *Constitutional Revolution* – from free act to changing identity and from lived experience to legal expression – in focus, I shall show that Jacobsohn and Roznai constructs a notion of constitutional revolution around the systemic mutation of constitutional orders and its manifestation in constitutional master-texts and jurisprudence. Departing from the traditional idea derived from revolutionary experiences in the modern political project, *Constitutional Revolution* speaks to an emerging socio-political phenomenon in constitutionalized politics and marks a paradigm shift – or rather an (anti)revolution, if you will – in the conceptual history of constitutional revolution.

Part II first discusses the alignment of constitution and revolution in the quest for freedom. Part III identifies the departure from free act of agency for systemic mutation concerning identity in Jacobsohn and Roznai's idea of constitutional revolution. Part IV then looks into how the move from lived experiences to legal expressions in their identification of constitutional revolutions suggests an idea of constitutional revolution that mirrors constitutional positivism. Part V offers concluding thoughts on the delinking of constitutional revolution from freedom as the question of power and authority is mediated and thus obscured by the law in the constitutional project.

⁸ Constitutional positivism here refers to the trend to study constitutional orders “scientifically” through “objective” observation of constitutional master-texts or the attitudes of courts and other institutional actors. For a critique of this scientific trend in scholarship on comparative constitutionalism, see Madhav Khosla, ‘Is a Science of Comparative Constitutionalism Possible?’ (28 April 28 2020) (unpublished manuscript) (on file with the authors). See also Ming-Sung Kuo, *A Dubious Montesquieuan Moment in Constitutional Scholarship: Reading the Empirical Turn in Comparative Constitutional Law in Light of William Twining and His Hero*, 4 TRANSNAT’L LEGAL THEORY 487 (2013). For different usage of the term “constitutional positivism,” see Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797, 826-27 (1993); Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 FORDHAM L. REV. 1401, 1404-05 (2005); David Dyzenhaus, *The Incoherence of Constitutional Positivism*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 138, 138-40 (Grant Huscroft ed., 2009).

II. PROJECTS OF FREEDOM

Both constitution and revolution have long been associated with the idea of freedom and related to each other in the modern political project of progress.⁹ Before we tackle the teem-up of constitution and revolution, how each of them pertains to freedom should be examined separately. Consider constitution first. As the modern world emerged from the intensified international armed conflicts in the eighteenth century, constitutions or other legal codes of fundamental importance differently entitled were quickly spreading.¹⁰ Along with the objectives relating to various projects of state building was the promise of freedom.¹¹ Appealing to the legacy of immunities-granting medieval “charters,” constitutions were proclaimed either to rally subjects around the state-building project or to calm civil unrest with the recognition of civil rights and liberties.¹² This corresponds to the idea of the Enlightenment: granted liberty and freedom, people – with the natural or divine gift of reason – were empowered to improve their own lives and the society.¹³ Regardless of their authorship, constitutions were taken as the written proof of promised freedom that was considered essential to the self-improvement of humanity.¹⁴ The world saw its first

⁹ See generally PREUSS, *supra* note 5. This modern constitutional mindset did not penetrate into the British constitution. See MARTIN LOUGHLIN, *THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION* 11-21 (2013).

¹⁰ See generally LINDA COLLEY, *THE GUN, THE SHIP AND THE PEN: WARFARE, CONSTITUTIONS AND THE MAKING OF THE MODERN WORLD* (2021).

¹¹ See *id.* at 83, 91.

¹² See *id.* at 92-103. The French *Charte constitutionnelle* of 1814 was exemplary of the latter, setting an example for what Markus J. Prutsch calls “monarchical constitutionalism” in the nineteenth century. See Markus J. Prutsch, “Monarchical Constitutionalism” in *Post-Napoleonic Europe: Concept and Practice*, in *CONSTITUTIONALISM, LEGITIMACY, AND POWER: NINETEENTH-CENTURY EXPERIENCES* 69, 70-78 (Kelly L. Grotke & Markus J. Prutsch eds., 2014). For the granting of immunities and autonomy in the medieval charters, see ALAN HARDING, *MEDIEVAL LAW AND THE FOUNDATIONS OF THE STATE* 16-17, 35, 211-21 (2002).

¹³ See PREUSS, *supra* note 5, at 6-7.

¹⁴ See *id.* at 124.

“constitutional age” in the nineteenth century.¹⁵

The spawning of written constitutions was not the only phenomenon that featured in the nineteenth century. As Eric Hobsbawm told us, the period 1789-1848 was marked by revolutions. To be more precise, the period 1789-1848 introduced the “age of revolution” that continued into the twentieth century and has since cast a long shadow on modern political experiences.¹⁶ Thanks to Hanna Arendt’s classic work, we know that the said age of revolution reflects a curtailed history of modern revolutions with the historical significance of the revolution of 1776-89 obscured.¹⁷ While the modern *variety* of revolution began with the American Revolution, the modern *tradition* of revolution has been constructively imagined around the French Revolution and its progeny.¹⁸ Embedded in this tradition, revolution points to the “constitution of freedom” through a forceful political change that not only brings about liberation from oppression but also leads to a new beginning in history.¹⁹ Regardless of their less bright characteristics, revolutions moulded in the modern political tradition share with their forgotten American precursor one salient feature: the idea of freedom. To the oppressed and those who dare to attempt at the end of the oppression, both of whom Arendt would call the “men of the revolutions,”²⁰ the idea of revolution continues to sound the calls of freedom. Revolution is the means to the end – freedom.²¹

¹⁵ Kelly L. Grotke & Markus J. Prutsch, *Introduction*, in CONSTITUTIONALISM, LEGITIMACY, AND POWER: NINETEENTH-CENTURY EXPERIENCES, *supra* note 12, at 3, 3.

¹⁶ *See generally* ERIC HOBSBAWN, THE AGE OF REVOLUTION, 1789–1848 (1996) [1962].

¹⁷ *See id.* at 2. Arendt’s account of the American Revolution starts with the Declaration of Independence in 1776 and extends to the making of the United State Constitution in 1787-89. *See* ARENDT, *supra* note 5, at 141-54, 192-94, 236-39, 248-55.

¹⁸ *Compare* ARENDT, *supra* note 5, at 50-57, with HOBSBAWN, *supra* note 16, at 1-2, 53-55.

¹⁹ ARENDT, *supra* note 10, at 35.

²⁰ *See id.* at 115-16.

²¹ *Cf.* PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE 265-68 (2005).

After teasing out how constitution and revolution are each related to the idea of freedom, it is not hard to see how they have partnered to set out a long influential legacy in constitutional ordering: revolutionary constitutionalism.²² While not all constitutions are revolutionary in character,²³ a revolution that fails to institute a constitutional form either degenerates into a (dis)order of permanent revolution tainted with political purge and violence or ends up being a failed coup, military and otherwise.²⁴ In this revolutionary tradition of constitutionalism, constitution and revolution move in tandem towards freedom, jointly constituting the political project of constitutional emancipation.²⁵ Entangled with the constitutional framing of political rule, all political revolutions are constitutional, if you will.

Yet, just as not all constitutions result from revolutions,²⁶ they may even enter into a relationship of tension and conflict, competing with each other in finding the way to freedom.²⁷ As manifested in the Marxist tradition, constitutions are far from the blueprint for freedom. Instead, they are deemed complicit in the bourgeois subjugation of the working class and the perpetuation of the unjust capitalist social structure.²⁸ The coming of free society relies on the omnipotent power free of constitutional constraints. Only by revolution will the oppressed be empowered to obtain the freedom denied to them and reach the goal of the

²² See ACKERMAN, *supra* note 5; see also REVOLUTIONARY CONSTITUTIONALISM: LAW, LEGITIMACY, POWER, *supra* note 5; see also Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 INT'L J. CONST. L. 173 (2017).

²³ See ACKERMAN, *supra* note 5, at 3-21.

²⁴ See PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 73 (1997).

²⁵ See ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 10-11 (2014); see also PREUSS, *supra* note 5; András Sajó & Renáta Uitz, *THE CONSTITUTION OF FREEDOM: AN INTRODUCTION TO LEGAL CONSTITUTIONALISM* 13-15 (2017).

²⁶ See ACKERMAN, *supra* note 5, at 3-7.

²⁷ See PREUSS, *supra* note 5, at 41-53.

²⁸ Compare PREUSS, *supra* note 5, at 63-66, 86-87, with Karl Loewenstein, *Constitutions and Constitutional Law in the West and in the East*, 30 *Indian J. Pol. Sci.* 203, 232-33 (1969).

Enlightenment: the self-improvement of humanity.²⁹ Societies are made free by virtue of revolution, not constitution. A free society also makes the constitution redundant.³⁰ Seen in this light, the characteristic feature of the idea of revolution in the modern *tradition* – including the Marxist variant – appears to be the deliberate resort to forceful change and the attendant violence rather than the constitution of freedom.³¹

The foregoing schematic account of how constitution and revolution encounter each other in the pursuit of political freedom in the modern society show that both are regarded as instrumental to political transformation because they appeal to the human capacity to act – agency – in critical juncture. Specifically, the idea of revolution is capable of upsetting an unjust society with popular support because revolutions mark the culmination of what Arendt called “action,” the exercise of humankind’s free agency in politics;³² the appeal of revolutionary constitutionalism lies in the political traits of constitutions – constitutions are more than legal codes; they result from acts of political freedom under this particular constitutional tradition.³³ In sum, regardless of the permutations of their relationship, what underlies constitution and revolution in modern history and theory is that humankind can plan and bring about political changes through the free exercise of agency. Both revolution and constitution are manifestations of trying to make political order by project.³⁴

III. FROM TWO FREEDOM WAYS TO ONE CONSTITUTIONAL

²⁹ See PREUSS, *supra* note 5, at 66-68, 111-12.

³⁰ See *id.* at 86-89. This does not mean ruling out constitutions after the socialist revolution. See Loewenstein, *supra* note 28, at 232-37.

³¹ See ARENDT, *supra* note 5, at 50-55, 57-58.

³² See HANNAH ARENDT, *THE HUMAN CONDITION* 175-247 (1998) [1958].

³³ See ACKERMAN, *supra* note 5.

³⁴ PAUL W. KAHN, *ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION* at ix-xiii, 81-90 (2019).

ROAD

Obviously, having a project does not guarantee ordered politics. The project may be ill-considered or it may simply go awry in implementation. Instead of order, chaos may result from a bad constitution or a bloody revolution. Revolution and constitution in the modern age are nothing but the means and process in the execution of the project aimed at a political order where freedom can thrive.³⁵ Neither constitution nor revolution nor their partnering can guarantee the realization of freedom. That is why the call for revolution and the act of constitution making are appealing and unsettling at once.³⁶ Given the uncertainties about revolution and its constitutional variant in the modern project of (re)ordering politics, taking a substantive turn in rethinking constitutional revolution seems to be a safe and natural choice. Here Jacobsohn and Roznai depart from the modern political project of constitutional emancipation for their substantive conception of constitutional revolution.

In setting the tone for their theory of constitutional revolution, Jacobsohn and Roznai note, “[W]e argue for a broader conceptual understanding of constitutional revolution, one that shifts attention from category-defining questions of *process* to ones of *substance*” (p. 5). With this substantive turn, a constitutional revolution manifests itself where there happens “paradigmatic displacement, *however achieved*, of the conceptual prism through which constitutionalism is experienced in a given polity” (p. 34, emphasis added). With their argument unfolding in a wide-ranging survey, the focus is on the substance of “constitutional vision” (p. 34) as expressed “in a nation’s constitutional narrative” (p. 178).

³⁵ See *id.* at ix-xiii.

³⁶ The democratic movements’ reservations about popular sovereignty at the collapse of Communist regimes in central and eastern Europe in the 1990s is a well-discussed example. See PREUSS, *supra* note 5, at 91-98.

Whether the “*legal* change about a displacement in the way constitutionalism is experienced” (p. 179) can be taken as epitomizing a nation’s narrative that gives expression to (re)orientation in constitutional practice and understanding as Jacobsohn and Roznai suggest is not my present concern.³⁷ What interests me here is their substantive notion of constitutional revolution. Under their theoretical framework, in judging whether a constitutional change deserves the treasured designation of constitutional revolution, we need to answer one key question, “Does the constitutional change result in ‘a substantial reorientation in constitutional practice and understanding[?] (pp. 15, 20)’” If our answer is “No,” the case is closed – no constitutional revolution ever occurred, no matter what led to the said change. In contrast, answering “Yes” leads to the conclusion that a constitutional revolution has happened, however achieved.

For present purposes, let us leave aside the question of how to *identify* – vis-à-vis *define* –constitutional (re)orientation for the time being. From Jacobsohn and Roznai’s rich case studies, we know that constitutional amendment – in series or at one fell swoop – can accommodate a constitutional revolution without formally replacing the existing master-text constitution.³⁸ We also see how a constitutional revolution can be induced by the apex court through its jurisprudence.³⁹ Of course, the making of a new master-text constitution can lead to a constitutional revolution, too.⁴⁰ Taken together, constitutional revolutions – understood in the substantive sense – can be channelled through multiple routes of constitutional change and driven by different actors. Whatever process and whoever agent, constitutional

³⁷ I will discuss this question further in Section IV.

³⁸ Examples include Chile, Hungary, Japan, Norway, South Korea, and Taiwan (pp. 65-75, 78-88).

³⁹ Germany, India, and Israel are discussed (pp. 102-223).

⁴⁰ The enactment of the 2011 “Fundamental Law” in Hungary is an example (pp. 89-93).

revolution signifies the changed orientation in constitutional practice and understanding.

Departing from the processual, agency-oriented modern tradition of revolution for their substantive conception of constitutional revolution, Jacobsohn and Roznai seem to entertain a systemic view of constitutional order that stands in contrast to one based on the idea of project.⁴¹ Yet, a closer look at what is implicated in the orientation change on constitutional practice and understanding reveals a more complex picture. According to Jacobsohn and Roznai, “the hallmark of the thing [they] are trying to illuminate” is “*substantial* change in constitutional identity,” which they call constitutional revolution (p. 6). As orientation in constitutional practice and understanding underlies constitutional identity, a constitutional revolution occurs when constitutional identity substantially changes because of the fundamental reorientation in constitutional practice and understanding. A heuristic helps us see where the pivoting of constitutional revolution on identity leads us. In determining whether a particular constitutional order has experienced a revolution between Time One and Time Two in its development, what we need to know is the state of constitutional identity at each of these two points of time. If there is no substantial or critical change on the state of constitutional identity from Time One to Time Two, we can conclude that no constitutional revolution ever occurred during that period. If a substantial change is observed of constitutional identity between Time One and Time Two, a constitutional revolution has taken place. Applied to multiple points of time in constitutional development, this substantive stance can further identify how many constitutional revolutions have materialized by looking into the state of constitutional identity at different points of time. The state of constitutional

⁴¹ Cf. KAHN, *supra* note 34, at 12.

identity provides the point of access to constitutional revolutions that may have slipped the attention of observers.

Moreover, the shift of attention to constitutional identity in the substantive conception as characterized above suggests an alternative understanding of how a constitutional revolution occurs to those based on the idea of project. By looking deep into how each identity change is induced in all the instances of constitutional revolution, we can identify the pattern of change and the characteristic features and thus bring out the law of revolution immanent in the constitutional order concerned. Thus viewed, constitutional revolution is more a function of the systemic law of a constitutional order than intentional action. This assumes a constitutional order that comes closer to a constitutional system coded with its internal operational rules than to a political project of free agents.⁴²

It is true that Jacobsohn and Roznai's focus is on reconceptualizing constitutional revolution in a substantive way. The law of revolution immanent in individual constitutional orders is not "the thing" they try to illuminate in *Constitutional Revolution*. Nevertheless, they do not completely leave out how constitutional revolutions take place given that they pin constitutional revolutions to the dynamics of constitutional identity. Extending what Jacobsohn has already presented in his previous solo,⁴³ Jacobsohn and Roznai attribute the change of constitutional identity as manifested in "the radical displacement of constitutional norms and practices" (p. 15) – i.e., constitutional revolution – to the "condition of disharmony" (p. 15). Such conditions exist where there are "contradictions and imbalances internal to the constitution itself" or when a "sharp discontinuity" between the constitution and the society

⁴² Cf. *id.* at 187-88.

⁴³ GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010).

prevents agreement from forming.⁴⁴ The condition of disharmony is one of tension, if not conflict. Disharmony “functions as the engine for change” in constitutional orders and underlies all constitutional revolutions when the change is substantial and concerns constitutional identity (p. 15). By this light, constitutional revolution is a consequence of the constitutional system conditioned by disharmony. Constitution and revolution are no longer considered two pathways to freedom. Rather, revolution becomes part of constitutional dynamics. The revolutionary drive merges into the constitutional road.

Notably, under the condition of disharmony, constitutional identity is not fixed in time but rather dynamic in character (p. 22).⁴⁵ Yet, not all dynamic changes surrounding constitutional identity are considered constitutional revolutions by Jacobsohn and Roznai. Only when such changes are “substantial” or “critical” does the designation of constitutional revolution apply (pp. 6, 15). As Jacobsohn and Roznai only focus on the general condition of constitutional ordering – disharmony – and the state of constitutional identity – the orientation in constitutional practice and understanding, their idea of constitutional revolution does not tell us how the dynamically fluctuating constitutional identity experiences substantial changes. As a result, we are left wondering how the constitutional system alters apart from being told that the condition of disharmony is the engine for change.⁴⁶ Yet, lacking the manual for the engine and without knowing the internal law of systemic change, we are led to seeing each constitutional revolution as a discrete instance of identity change entailed by the condition of disharmony. Thus viewed, constitutional revolution appears as the systemic

⁴⁴ *See id.* at 87.

⁴⁵ *See also id.* at 87-88.

⁴⁶ Jacobsohn and Roznai note a separate question “how much change in identity is necessary to merit the designation ‘revolutionary,’” which they leave unaddressed (p. 15).

mutation of constitutional orders. Emerging from Jacobsohn and Roznai's theory is an idea of constitutional revolution that blends the two paths to freedom in the modern political project – constitution and revolution – into one dynamically changing constitutional system.

IV. BETWEEN LAW AND EXPERIENCE

As Paul Kahn endeavors to explain, a political order may be seen as the product of a project or as the function of a system.⁴⁷ So the question of whether the idea of constitutional revolution suggests a systemic view of changing constitutional orders or signifies intentional changes on the constitutional project through political action, in and of itself, does not matter that much. Each is an imaginary and both are indispensable to grasping our experience of how constitutional (re)ordering is possible.⁴⁸ Yet, when considered together with its other characteristics, the seemingly systemic idea of constitutional revolution suggested in Jacobsohn and Roznai's theoretical framework turns out to be not as innocent as it seems. Here enters the yet-to-be-answered question of identification: How do we *identify* a substantial and thus revolutionary change on constitutional identity even if we know how constitutional revolution is *defined*? Is there a telltale of a constitutional revolution? If so, what is it?

Jacobsohn and Roznai gives away their answer in one of their formulations of constitutional revolution – the “*legal* change about a displacement in the way constitutionalism is experienced in a given polity” (p. 179, emphasis added). Reading the law – constitutional master-texts and case law – thus holds the key to identify constitutional revolutions when they are seen as systemic mutations of a constitutional order. On this view, since constitutional

⁴⁷ See KAHN, *supra* note 34.

⁴⁸ See *id.* at 3-4, 237-56.

identity as manifested in legal decision making is indicative of the state of the constitutional order, reading the law enables the readers to know whether constitutional identity has experienced substantial or critical changes. Where the law records a substantial change on constitutional identity in constitutional jurisprudence or altered constitutional master-texts, the readers are told that a constitutional revolution has been taking place. To find identity and its change – constitutional revolution – in legal expression raises fundamental questions in constitutional theory: Can we find constitutional identity in law? Is the question of constitutional identity one to be answered by law?

To answer these questions brings up the polysemous character of constitutional identity.⁴⁹ To some, it may refer to the continuity of the fundamental decision made at the making of the master-text constitution;⁵⁰ to others, it instead means the selfhood of a people as manifested in constitutional culture and the construction of citizenship.⁵¹ Understood in the first manner, constitutional identity concerns issues that are to be resolved through legal and constitutional interpretation.⁵² It does not suggest that law plays no role in shaping constitutional culture and constructing citizenship under this view. It only means that how the law bears on the people's selfhood as expressed through constitutional culture is to be considered distinctly from the question of constitutional identity, which concerns the continuity and alteration of the fundamental decision as codified in the master-text constitution. In contrast, framed in terms

⁴⁹ See Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756, 756-57 (Michel Rosenfeld & András Sajó eds., 2012).

⁵⁰ CARL SCHMITT, CONSTITUTIONAL THEORY 150-52 (Jeffrey Seitzer trans., 2008) [1928]; cf. Monika Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, 14 INT'L J. CONST. L. 411 (2016).

⁵¹ See generally MICHEL ROSENFELD, THE IDENTITY OF CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY (2010).

⁵² See Polzein, *supra* note 50, at 429-31.

of culture and social construct, constitutional identity is not confined to the legal realm.⁵³ To be accurate, constitutional identity is always larger than identity discoursed in constitutional master-texts or case law. Law may speak to such constitutional identity. But legal representation of constitutional identity is not a sure thing.⁵⁴ The relationship between constitutional identity and law varies among constitutional realms.

Jacobsohn and Roznai are fully aware of the dynamics of constitutional identity in the legal system. To them, at the core of constitutional identity lies the “[o]rientation in constitutional practice and understanding,” which is also “the way constitutionalism is experienced” (p. 179). Such orientation and real-word constitutionalism are “a mix of political aspirations and commitments that are expressive of a nation’s past as well as the determinations of those within the society who seek ... to transcend that past” as elaborated in Jacobsohn’s abovementioned constitutional solo.⁵⁵ Under what he calls “the disharmonic constitution” – i.e., the condition of disharmony, societal forces are constantly competing to reshape the identity of constitutional orders, underlying all constitutional revolutions.⁵⁶

Yet, the “actual face” that Jacobsohn puts on his way of seeing the identity of constitutions turns out to be the law: the question of constitutional amendment in Turkey and the South Korean constitutional jurisprudence on the family.⁵⁷ When it comes to the sites where constitutional identity manifests itself, the real-word constitutional experience becomes identified with master-text constitutions and judicial decisions as well as other legal

⁵³ See Robert Post, *The Supreme Court, 2002 Term-Forward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 8, 37 (2003); cf. ROSENFELD, *supra* note 51.

⁵⁴ See Paul W. Kahn, *Law and Representation: Observations from an American Constitutionalist*, TELOS 11 (summer 2021).

⁵⁵ JACOBSON, *supra* note 43, at 7.

⁵⁶ See *id.* at 346-55.

⁵⁷ See *id.* at 327-46.

expressions (p. 269). It follows that in Jacobsohn and Roznai's joint work, constitutional revolution – substantial or critical change on constitutional identity – is to be seen through the legal spectacles (p. 179). As the relationship between the legal expression and the lived experience varies among societies and cultures, the foregoing view entertains a particular understanding of such relationship: the law gives expression to the real-world experience. There is nothing wrong with understanding the relationship between the law and the lived experience this way. Law and experience can move in tandem in a constitutional realm. To apply it globally in making sense of constitutional identity and its critical change, however, such understanding is simply assumed.⁵⁸ Instead of representing, the law replaces lived experiences under this assumption. Constitutional revolutions are identified in the critical changes in the world of positive law that is assumed to give expression to constitutional identity.

The centrality of the question of legality to Jacobsohn and Roznai's theoretical framework illustrates the positivist assumption in *Constitutional Revolution*. On the top of the “propositions” the “truth” of which *Constitutional Revolution* aims to demonstrate sits the blurring of “legal and illegal transformation” in revolutionary changes of constitutional orders (p. 15). To drive this point home, Jacobsohn and Roznai pay close attention to how the legal procedures under the old constitutional framework have been facilitative of revolutionary changes in their case studies. Drawing on a wide range of examples such as Taiwan in the 1990s and Germany in 1918-19, they argue that a close look at such examples reveals that beneath the surface of the attributed new beginning in revolutionary changes is continuing

⁵⁸ See also Kahn, *supra* note 54, at 16-23.

legality (pp. 50, 67-68). Despite irregularities,⁵⁹ there is no legal break in the revolutionary changes under inspection. Institutional continuity fostered by the to-be-replaced legal framework is instrumental to transformative constitutional changes, while the cover of legality bolsters the legitimacy of revolutionary alteration of the constitutional order (pp. 31-36). Can such phenomena identified in Jacobsohn and Roznai's various examples prove their top proposition – "[t]he distinction between legal and illegal transformation is not determinative in establishing the existence of a constitutional revolution, although it can help differentiate among its types" (p. 15) – to be true?

The answer rests on the notion of legality. Let us examine this notoriously ambiguous notion⁶⁰ in light of Jacobsohn and Roznai's top proposition. As suggested above, their top proposition concerns whether a particular transformation, which they characterize as a constitutional revolution, is legal or illegal. To say that a certain human behavior – call it X – is *legal* means that the lawfulness of X is positively assessed against a certain systematic set of norms that we call a legal order. Thus, to distinguish X from Y, a behavior negatively assessed under the same set of norms, presupposes the existence of such a legal order.⁶¹ Regardless of the jurisprudential debate over the property of law and what makes a legal order,⁶² a legal order cannot effectively function if the majority of those who are subject to it disobey what it requires.⁶³ Despite not ruling out the option of force, general compliance with the law relies on its authority.⁶⁴ When a legal order no longer carries authority, the

⁵⁹ This is what Bruce Ackerman and Neal Katyal calls "unconventionality." See Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 *U. Chi. L. Rev.* 475, 558-59 (1995).

⁶⁰ See Scott J Shapiro, *Legality* 4-7 & 404 n. 3 (2011).

⁶¹ See *id.* at 5.

⁶² See *id.*

⁶³ See H.L.A HART, *THE CONCEPT OF LAW* 202-03 (2d ed. 1994).

⁶⁴ See *id.* at 201-03; cf. FREDERICK SCHAUER, *THE FORCE OF LAW* 82-85 (2015). As Nicole Roughan notes,

precepts produced pursuant to its own law-making procedure also cease being the criterion against which the lawfulness of X and Y is to be assessed. Such precepts at the collapse of the authority of the legal order may remain on the law books or continue to be referenced from time to time. Yet, they are denied the privileged status as part of a legal order that is capable of distinguishing between X and Y in terms of legality because the authority that holds the relevant legal order together is now gone.⁶⁵ In sum, to say that X is legal and Y is illegal, or to put it differently, to decide on the legality of X and Y, presupposes the existence of a legal order that is able to claim authority.

Yet, as their argument unfolds, the notion of legality that Jacobsohn and Roznai suggest in their case studies is shifting. Specifically, with an eye to proving the blurring of legal and illegal transformation in constitutional revolutions (p. 15), they set themselves the task of challenging the conventional association of legal break with revolutionary changes in a constitutional order at the outset (pp. 4-5). Yet, with the progression of their argument, the distinction between legal and illegal transformation no longer guides their interrogation of the legal break thesis in scholarship on revolutionary changes on constitutional orders.⁶⁶ Rather, their focus shifts to the fact that revolutionary changes on the master-text constitution in various examples have been pushed through by making (sometimes irregular) use of the amendment procedure or other institutional arrangements provided for by the existing master-text constitution (pp. 46-101). The authority of the existing master-text constitution and its

the principle of effectiveness is indispensable to discussion of authority, although authority in jurisprudence is grounded in justification and thus requires more than effectiveness. See NICOLE ROUGHAN, *AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY* 29-30 (2013).

⁶⁵ See Schauer, *supra* note 6.

⁶⁶ For the legal break thesis, see Michael S. Green, *Legal Revolutions: Six Mistakes about Discontinuity in the Legal Order*, 83 N.C.L. REV. 331 (2005).

corresponding general legal order is pushed to the background.⁶⁷ Jacobsohn and Roznai characterize the strategic use of the institutional arrangements under the soon-to-be-replaced master-text constitution as adherence to legality. In this way, legality becomes a “façade” (p. 8) instead of indicating the normative quality of the transformation as assessed against a systematic set of legal norms. Jacobsohn and Roznai thus credit this ostensible legality that they identify in their case studies with contributing to the legitimacy of the revolutionary changes on the master-text constitution (pp. 14 -15, 56, 62-65, 232-34). Grafted to the entanglement of legality and legitimacy (pp. 100, 234-60), Jacobsohn and Roznai’s notion of legality turns out to be the mirror image of what Max Weber characterized as the belief in impersonal bureaucratic rationality, which underpins his legal/bureaucratic ideal type of domination (*Herrschaft*).⁶⁸ This Weberian sociological legality is not the jurisprudential criterion under which a legal act can be distinguished from an illegal one.

Taken as a whole, the legal trappings added onto revolutionary changes serve as the identifier of Jacobsohn and Roznai’s constitutional revolutions.⁶⁹ With attention shifting to such legal expressions, master-text constitutions and the attendant institutional practices replace lived constitutional experiences in the identification of constitutional revolutions. The idea of constitutional revolution constructed this way corresponds to the trend of constitutional positivism in recent scholarship on comparative constitutional law.⁷⁰ What

⁶⁷ Jacobsohn and Roznai notes the distinction between “regime continuity” and “legal continuity” (p. 98). It is unclear how this distinction relates to the question of the (il)legality of revolution raised in their top proposition (p. 15).

⁶⁸ Max Weber, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 217-26 (Guenther Roth & Claus Wittich eds., 1968).

⁶⁹ This reflects the shift of attention to “positivity” in the modern legal mind. See TIM MURPHY, *THE OLDEST SOCIAL SCIENCE? CONFIGURATIONS OF LAW AND MODERNITY* 109-53 (1997).

⁷⁰ See Khosla, *supra* note 8.

does this positivist idea of constitutional revolution tell us about the state of the constitutional project and its prospect?

V. IN LIEU OF CONCLUSION: COUNTERREVOLUTIONARY THEORY AND THE REVOLUTION OF AN IDEA

In concluding their theoretical exploration, Jacobsohn and Roznai reveal the aim of their joint enterprise: to establish “a [conceptual] basis for *affirming* the reality of a constitutional revolution” that takes the form of an amendment or a landmark judicial decision (p. 269, emphasis added). Notably, this is not the first time reality has prompted theoretical reflections on constitutional revolution. To illuminate the puzzling deliberate avoidance of the “revolution” label in the constitutional wave at the collapse of Communist regimes in Central and Eastern Europe (CEE) in the early 1990s, Ulrich Preuss revived the idea of constitutional revolution whose origin Arendt attributed to the American Revolution.⁷¹ In his own way, Preuss identified the characteristics of constitutional revolution by juxtaposing it to what he called “social revolutions.”⁷² Echoing Arendt’s classic study of the American Revolution, Preuss’s idea of constitutional revolution focused on the embedding of the exercise of constituent power in organizational forms and the immanence of normative authority in the revolutionary (re)making of political order.⁷³ It is in this sense that the power to induce a constitutional revolution is always constituted and the authority to establish a new order through a constitutional revolution – ie, the constituent power – is immanent in the way the

⁷¹ See PREUSS, *supra* note 5, at 82-84, 91.

⁷² *Id.* at 82. What Preuss calls social revolution is akin to the “totalizing” variant in Ackerman’s classification of revolutions. See Ackerman, *supra* note 5, at 28-29.

⁷³ See PREUSS, *supra* note 5, at 25-40, 82-86, 87-88, 91-98. See also ARENDT, *supra* note 5, at 141-214.

power to induce a constitutional revolution is exercised. Thus, to Preuss, what matters in constitutional revolutions is the question of authority, not legality. To answer the question of authority, we need to see through the veil of institutional continuity.

While the avoidance of revolutionary rhetoric was a puzzle to outside observers, including Preuss, the CEE constitutional wave in the early 1990s broke with its Communist legacy of social revolutions. Looking to the tradition of constitutional revolutions, the post-Communist constitutional movements instead put emphasis on the moral foundation of equal freedom.⁷⁴ To Preuss, the absence of revolutionary rhetoric did not render the CEE experience less than revolutionary. The popular protest and the yearning for resting the new authority on a normative foundation made it every inch a constitutional revolution.⁷⁵ Action of political freedom defines constitutional revolution.

Jacobsohn and Roznai put forward their own version of constitutional revolution when the CEE experience of the early 1990s has long given way to another wave of political reordering.⁷⁶ Despite sharing Preuss's interest in the role of institutional continuity in the (re)making of constitutional orders,⁷⁷ they are more interested in the question of legality than that of authority (p. 15). Moreover, in contrast to Preuss who was puzzled by the deliberate avoidance of the revolution label in the revolutionary CEE experience, Jacobsohn and Roznai are not concerned whether popular protests have been involved in their case studies or the yearning for a new authoritative authority has propelled such constitutional changes. Instead, they deliberately apply the label "revolution" to what they see as critical changes on

⁷⁴ See PREUSS, *supra* note 5, at 87.

⁷⁵ See *id.* at 96.

⁷⁶ Jacobsohn and Roznai note the spectre of popular sovereignty in the current political landscape (p. 274).

⁷⁷ See PREUSS, *supra* note 5, at 94-95.

constitutional identity as expressed in constitutional amendments and landmark judicial rulings, suggesting a scientific study of changes in authoritative constitutional discourse that corresponds to the positivist trend in comparative constitutional studies. As a result, Jacobsohn and Roznai's *Constitutional Revolution* stands closer to Kuhn's *The Structure of Scientific Revolutions* than to Preuss's *Constitutional Revolution*.

Mirroring the phenomenon of national apex courts continuing to rise in the new age of constitutions,⁷⁸ Jacobsohn and Roznai's idea of constitutional revolution suggests an imaginary through which the political world is only seen as part of constitutionalized politics increasingly mediated by the judicial power. It is not unreasonable to see legal expressions in constitutional master-texts and jurisprudence as the mirror image of the constitutional vision crystallized through the lived experiences of members of a given polity. Yet, it remains to be seen whether the court and the amending power can stand as the only sites where political freedom can really find itself. This is a question that neither the court nor the amending power can answer on its own.⁷⁹ Until then, using the set of words "constitutional revolution" to denote such legal expressions amounts to a theoretical resistance to the latent revolutionary spell that has enthralled generations of men and women of the revolutions.

By leaving out the elements of process and movement from their conceptual construct,⁸⁰

⁷⁸ Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT'L REV. L. & ECON. 1, 16-17 (2014) (noting three waves of constitution-making in the post-Second World War era).

⁷⁹ See generally PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2011).

⁸⁰ The resurgent interest in the idea of constituent power in current scholarship reflects attempts at constitutional taming of revolution through procedures. See, e.g., William Partlett, *The Dangers of Constitution-Making*, 38 Brooklyn J. Int'l L. 193 (2012); ANDREW ARATO, THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS? (2017); Joel Colón-Ríos, *Constituent Power and the Law* (2020). See also Abrak Saati, Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 283 (Gregory Shaffer et al., 2019); Sergio Verdugo & Marcela Prieto, *The Dual Aversion of Chile's*

Jacobsohn and Roznai not only dissociate constitutional revolution from the modern idea of beginning anew by breaking with the past. They also free constitutional revolution of suggestions of “returning” in the direction of movement at the etymological roots of revolution.⁸¹ In this way, they effectively suggest revolutionizing the *idea* of revolution by applying the *word* “revolution” to denote the phenomenon of paradigm shifts in authoritative constitutional discourse. Emerging from *Constitutional Revolution* is another “counterrevolutionary theory” of political order aspiring to post-political politics,⁸² which Jacobsohn and Roznai calls constitutional revolution.

Constitution-Making Process, 19 INT’L J. CONST. L. 149 (2021). For phenomenological discussion of the exercise of constituent power in revolutionary movements in recent scholarship, see ACKERMAN, *supra* note 10; Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218, 231-34 (2014); Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639, 644-53 (2015).

⁸¹ See ARENDT, *supra* note 5, at 42-44. Although the element of “overturning” makes the Glorious Revolution a political revolution, it is an instance of “overturning as *returning*,” which brings it to the premodern age in the history of revolutions (emphasis added). See Thomas Nickles, *Scientific Revolutions*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017) at <<https://plato.stanford.edu/archives/win2017/entries/scientific-revolutions/>>.

⁸² See KAHN, *supra* note 76, at 123-52.