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Dysfunctional Constitutionalism or Dysfunctional Politics: A Matter of Law, Politics, and Institutional Design

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Abstract The following reflections are an attempt in constitutional theory to address the core elements of the U.S. constitutional crisis. It will first identify structural and normative properties of the U.S. Constitution that may become battlegrounds for adversarial ideas, meanings, logics of appropriateness, and, finally, institutional and constitutional missions, all centering around constitutional liberty. In a second step, it will be shown that institutional theory addresses important links between norms/rules/institutions and actors/citizens that are crucial for a constitution and its potential normative battlegrounds. It is alleged that a constitutional crisis is closely related to incommensurable interpretations of constitutional value choices (e.g., liberty) and the ways actors choose to make their interpretations actionable through the institutional channels of a polity. Constitutional theory, hence, should consider institutional findings in order to come to grips with the phenomenon of constitutional crisis. Third, in this light it will be discussed whether the prevailing models of (U.S.) constitutionalism are able to assimilate defects in the crucial relationship between the constitution and actors, especially when it comes to factionalized and polarized meanings and interpretations—which in turn trigger adversarial institutional/constitutional missions and may lead to constitutional wars. Fourth and finally, these reflections are taken together for an outlook on the prospects of constitutional development in the United States and the challenges that lie ahead.

Keywords Rights · Interpretation · Federalism · Checks and balances · Polarization

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Dysfunktionaler Konstitutionalismus oder dysfunktionale Politik: eine Frage von Recht, Politik und institutionellem Design

Zusammenfassung Der Beitrag intendiert eine primär verfassungstheoretische Untersuchung, die sich der Verfassungskrise der USA über eine Kombination neoinstitutionalistischer und verfassungsrechtlicher sowie -theoretischer Ansätze nähert, um einen potenziell autodestruktiven Kern der US-Verfassung aufzudecken, der unter Bedingungen starker Polarisierung durch die institutionelle Logik des politischen Systems aktiviert wird. Hierfür werden zunächst strukturelle und normative Eigenschaften der US-Verfassung identifiziert, die zu Konfliktzonen für gegensätzliche Ideen, Bedeutungen, Logiken der Angemessenheit sowie institutionelle und konstitutionelle „Missionen“ werden können, die sich vor allem immer wieder um das Verständnis von „Freiheit“ drehen. In einem zweiten Schritt wird gezeigt, dass die Institutionentheorie wichtige Verbindungen zwischen Normen/Regeln/Institutionen und Akteuren/Bürgern thematisiert, die für eine Verfassung und ihre potenziellen normativen Konfliktzonen entscheidend sind. Eine zentrale Annahme ist hierbei, dass eine Verfassungskrise eng mit inkommensurablen Interpretationen verfassungsrechtlicher Wertentscheidungen zusammenhängt, die von Akteuren auf Bundes- und Gliedstaatenebene über die institutionellen Kanäle eines Gemeinwesens eingespeist werden. Drittens wird vor diesem Hintergrund erörtert, ob die vorherrschenden Modelle des (US-)Konstitutionalismus in der Lage sind, Mängel in der entscheidenden Beziehung zwischen der Verfassung und den Akteuren aufzufangen, insbesondere wenn es um parteiische und polarisierte Bedeutungen und Interpretationen geht – die wiederum kontradiktorische institutionelle/konstitutionelle Missionen auslösen und schließlich zu Verfassungskrisen führen können. Viertens und letztens werden diese Überlegungen zu einem Ausblick auf die Perspektiven der Verfassungsentwicklung in den USA und ihre Herausforderungen zusammengeführt.

Schlüsselwörter Rechte · Interpretation · Föderalismus · Gewaltenteilung · Polarisierung

“Who knows what sort of constitutional gray zone our country would have slid into? Who would have been left to correct that wrong?” (Bennie G. Thompson, Chairman; Foreword to Final Report of the Select Committee to Investigate the January 6th Attack on the United States Capitol, December X, 2022, p. x)

“There is no civility, only politics. The Republic is not what it once was. The senate is full of greedy, squabbling delegates. There is no interest in the common good.” (Palpatine, *Star Wars: The Phantom Menace*, 1999)

1 Introduction: Welcome to Some Constitutional Helter-Skelter

All over the world, the democratic constitutional state and its constitutionalism models are perceived to be in crisis mode (cf. Graber et al. 2018; Ginsburg and Huq 2018). Even in established democracies, functional defects and disruptions are

becoming more and more evident (Levitsky and Ziblatt 2018)—and the world's oldest existing democracy, along with its much-vaunted constitution, has seen its political system nearly implode under the auspices of populism, hyperpartisanship, and conspiracy theories, as well as an unprecedented delegitimization of democratic procedures (Greenberg 2021; West 2019). Hence, crisis diagnostics as well as prognostics are booming (Przeworski 2020; Schäfer and Zürn 2021; Applebaum 2020).

In this vein, the attack on the Capitol on January 6, 2021, was a wake-up call for constitutional self-complacency. It demonstrated that the viability of the U.S. Constitution has become questionable in several respects (Griffin 2015; Mann and Ornstein 2016; Levinson and Balkin 2019). Above all, it no longer seems to be useful as a symbol of national integration for “We the People.” The questions of whose constitution this actually is, what the true constitution is, and who should decide about it are becoming increasingly acute. And the answers to these tormenting questions are becoming more and more radical¹—definitions and (self-)attributions of “We the People” as a source of constitutional sovereignty are seriously divided. This development has significance far beyond the U.S. context. It challenges established notions of constitutionalism as well as autological narratives of its success on a broader scale. And it poses important questions for *constitutional theory*: What if constitutions lose their higher law character? What if the constitution and its normative core no longer provide a common ground for the people and the polity? What if basic provisions of the constitution turn against itself and offer windows of opportunity to constitutional decay? Where do we have to look when searching the reasons for normative disintegration of formerly common ground? And which current models of constitutionalism may offer guidance or explanation for what we perceive as a considerable *constitutional crisis*?

The following reflections strive to address these questions. They are a cautious endeavor in constitutional theory, combining U.S. and German strands of it with normative–sociological and ideational–interpretive institutionalism. The underlying assumption for this merger is that even the highest law of the land is not self-executing. Its normative guidance depends on *interpretation* and situational *meaning*. Consequently, *interpretation* figures as the *most important (political) activity* of citizens and political actors. As long as such interpretation is based on some common ground, the institutional context provided by a constitution is able to offer logics of appropriateness that individual and collective actors are ready to follow in specific situations. And even when interpretations differ seriously, a functioning constitution should be able to provide accepted basic rules and procedures for managing these conflicts. However, when interpretations become heavily polarized, and basic rules as well as the whole constitution and its meanings are contested, we are confronted with a *constitutional crisis*. Its suspected danger zone, hence, must be located in the mutual relationship between actors’ interpretations and the fitting of rules and situations in all layers of a constitutional system. It is here where constitutional theory

¹ See the notable differences between the 2020 Democratic Party platform and the 2016 Republican Party platform (which applies unchanged in 2020) with regard to the framing and mission of their respective constitutionalisms.

and institutional theory have an intersection of interest: Both are struggling with the problem of how and why (legal/constitutional/institutional) norms shape actors' performances in specific situations and how and why norm compliance is denied or norms are reinterpreted and instrumentalized in order to create new meanings and accounts—paving the way for new institutional or even constitutional missions. When these missions become incommensurable and totally averse, and “aspirational constitutionalism” (cf. Loughlin 2022) trumps everything else, the danger of “constitutional wars” (Les Benedict 2022, pp. 512–545) looms large. This seems to be currently the case in the United States.

Institutionalist constitutional theory, therefore, should be interested in “how constitutions reflect and shape nationhood and identity; how constitutions construct, not merely constrain, politics (e.g., by framing the goals and interests people believe they can pursue in politics); the actors and factors in demanding or bringing about constitutional transformations” (Hirschl 2016, p. 153). We still do not know enough “about how constitutions can contribute to the stability of democratic regimes, the freedom of the citizenry, and other political outcomes, that we might care about” (Whittington 2008, p. 294). Amidst a constitutional crisis, the central question of what effect a constitution as an institutional context has on (political) actors is, and remains, largely unresolved: “The role of the Constitution in such settings, the relationship, both normative and empirical, between judicial interpretations and ‘extra-judicial’ interpretations of the Constitution, and the impacts, if any, of extra-judicial interpretations on public understanding of constitutional meaning are all subjects ripe for both empirical and theoretical investigation. These are also frontiers that, among political scientists, appear to be all but unexplored” (Shane 2006, p. 212).

In order to undertake a *theoretical* investigation in this vein, the following reflections will first identify structural and normative properties of the U.S. Constitution that may become battlegrounds for adversarial ideas, meanings, logics of appropriateness, and, finally, institutional and constitutional missions. In a second step, it will be shown that institutional theory addresses important links between norms/rules/institutions and actors/citizens that are crucial for a constitution and its potential normative battlegrounds. It is alleged that a constitutional crisis is closely related to incommensurable interpretations of constitutional value choices and the ways actors choose to make their interpretations actionable through the institutional channels of a polity. Constitutional theory, hence, should consider institutionalist findings in order to come to grips with the phenomenon of constitutional crisis. Third, in this light it will be discussed whether the prevailing models of (U.S.) constitutionalism are able to assimilate defects in the crucial relationship between the constitution and actors, especially when it comes to factionalized and polarized meanings and interpretations—which in turn trigger adversarial institutional/constitutional missions and may lead to constitutional wars. Fourth and finally, these reflections are taken together for an outlook on the prospects of constitutional development in the United States and the challenges that lie ahead.

2 Normative Properties and Institutional Design of the U.S. Constitution

Disputes about the U.S. Constitution, its content, and the rights resulting from it for citizens and the constitutional bodies have a long tradition in the United States. They are the result of a constitutional construction in which the constituent states preempted and agreed to their incorporation into the new federal state only because far-reaching compromises were made (cf. Klarman 2016; Robertson 2005 and 2017; Bodenhamer 2013). These compromises, however, produced considerable and long-lasting interference between democracy and federalism (Benz 2020, pp. 81–89), which is formative for the political system of the United States and its “fragmentation of the state” (Sonnicksen 2022). Time and again, federalism in particular turned into a “*principal weapon of partisan and institutional conflict in American history*. The Constitution authorized the national government to exercise the tools of national sovereignty and the states to govern everyday life. Political opponents have contested the vague boundary between national and state authority since the beginning. These conflicts have shaped the nation’s most prominent conflicts, including slavery, labor, economic growth, women’s citizenship, and hundreds of others” (Robertson 2016, p. 345; emphasis added).

A common feature of these conflicts was and is their connection to *liberty*.² The vague boundary between federal and state authority is also the vague boundary of the freedom of every citizen as part of “We the people”—be it on the federal or the state level. As Bodenhamer succinctly puts it, “Americans remain *divided over how far their rights extend*. (...) Rights claims, after all, are made by someone who *alleges a denial of liberty* by the government or someone else. *It is hard to think in terms of common values or community when engaged in rights talk; too much focus on individual liberties can skew our sense of the interests we hold in common*. Yet what is most striking about the conflict over rights has been its democratic character. Rights are always a matter of *public debate about the proper balance between order and liberty*. It is a conversation that engaged the framers of the Constitution, and, as has been the case with each successive generation, Americans are continually working out the boundaries of those specific individual liberties that are essential for a just and free society” (Bodenhamer 2018, p. 107; emphasis added).³ This workout, admittedly, exceeds its constitutional limits when different perceptions of reality (Marietta and Barker 2019) and value systems (White 2003) become the basis of factionally transformed and sacralized varieties of constitutionalism in their own right.⁴

² For a comprehensive constitutional history, see Kelly et al. (1991) and Les Benedict (2022).

³ For a comprehensive overview, see Graber et al. (2018): Part IV—Rights.

⁴ Compare with the passages reminiscent of a catechism in the preamble of the (currently amended) Republican platform for 2016 and in the chapter “A Rebirth of Constitutional Government” (pp. 9–16) and the constitutional chapters “Healing the Soul of America” (pp. 39–49) and “Restoring and Strengthening Our Democracy” (pp. 55–60) in the Democratic Party platform for 2020. All passages, but especially those of the Republican platform, are an impressive indication that “actors use meanings [...] to define new institutional missions” and that actor-specific strategies of “discursive recombination” are used to construct new (old) political identities that enable new (old) political alliances (Brandwein 2011, p. 201).

Hence, in terms of both constitutional and institutional theory, the problem of (not only U.S.) constitutionalism is this: How can liberty and democracy (as ideational and actionable constitutional components) harmonize in a “compound republic”? Obviously, the “presumption of liberty” (Barnett 2014) as a constitutional guiding idea can unfold in completely different ways when constitutional opportunity structures are given. In the United States, for example, it is apparently no problem to position oneself decidedly against a strong “federal government” and its encroachments on the individual’s sphere of freedom and at the same time support laws and policies at the member-state level that massively encroach on individual freedom.⁵ American constitutional history up to the present is replete with examples of “how easily attitudes toward liberty and coercion still cohabit in minds of single individuals. This cohabitation runs so deep and is so widespread that it deserves to be regarded as a core element of the American way” (Gerstle 2018, p. 4). What makes this cohabitation especially relevant, then, is how and when it may be nurtured and effectuated by the institutional design of the constitution itself. Ultimately, this could bear the possibility that basic elements of the normative–institutional makeup of the polity would not only contain the seeds of its failure but would even promote it under certain conditions (cf. Anderson 2004).

As a consequence, constitutionalism evolving around such potential fallacies obsessively addresses the question of what “auxiliary precautions” (*Federalist No. 51*) must be built into the institutional architecture of a political system to prevent or at least compensate for dysfunction. The U.S. Constitution is deeply imbued with a fear of dysfunction in the layout of its institutional design. *Rights* and *checks and balances* are prescriptions against encroaching state power (whether monarchical or democratic in nature) born out of individual or group fear; the principle of representation, in turn, processes fear of a nonmediated exercise of power in (mass) democracy and its volatile, factionalist-driven majorities. In the last resort, this fear of dysfunction is directed toward the containment of the political and its institutional and procedural enclosure by the constitution. The hidden agenda, hence, is the immunization of the constitution and the taming of the political realm by a sophisticated institutional design.

In a federal state like the United States, this agenda is especially challenging because the question of sovereignty was somehow left open; sovereignty, instead, became mediated and divided in a hybrid republic (Lhotta 2010). This has significant consequences: A state composed of states multiplies the realm of the political (cf. Schmitt 1993, p. 371). Therefore, the division of competence and power be-

⁵ The Republican platform clearly reflects this contradiction; this is especially evident where federalism is offensively linked to a states’ rights doctrine and thereby (!) figures as a guarantor of individual liberty (cf. Republican platform 2016: 16—“The Tenth Amendment: Federalism as the Foundation of Personal Liberty”). Against the background of the states’ rights revival in Supreme Court jurisprudence that began with the Rehnquist court and the restrictions on freedom in the areas of voting rights, reproductive self-determination, the “carceral state,” etc., which have been loosely based on party politics and ideology up to the present, it is not surprising that hyperpartisanship at the level of the member states is then also used to massively expand “state constitutionalism.” *Shelby County v. Holder*, 570 U.S. (2013) and *Dobbs et al. v. Jackson Women’s Health Organization et al.*, 597 U.S. (2022) have catapulted this trend into a seemingly absurd situation of federally fragmented legal insecurity, which has taken on grotesque forms in the case of abortion law (cf. Cohen et al. 2023).

tween the (complementary, competing, or even inverse) spheres of the political is of outstanding importance. The “compound republic” (cf. Derthick 2001) offers an institutional design that is supposed to open up the possibility of cherished majority rule. Majority rule, in turn, is mediatized by *checks and balances* as well as *private rights*. The proper function of this sophisticated design, however, relies on a slippery condition: “The stated goal of republican government is *to protect private rights while empowering majority rule*. Moreover, the ‘principles’ for achieving this goal are found less in the ‘interior’ design of institutions [...] than in the *quality of pluralism*. Where this condition is satisfied, the task of institutional design is to harness this pluralism with factional competition” (Kernell 2003, p. 119; emphasis added).

There is much to suggest that the condition just mentioned is not (or no longer) fulfilled in the United States, for much of what constitutes the current constitutional crisis obviously has to do with a decline in the quality of pluralism. Factionalist fragmentation or singularization of fundamental ideas and values such as *liberty* and their almost existential charge (Brownstein 2021) have effectuated a scenario in which the nightmare of the founders and in particular of Publius has become reality (Kagan 2021): The sophisticated interior design of institutions in the U.S. Constitution seems no longer able to keep the balance—because it is not a “machine that would go for itself” (Kammen 2006). On the contrary, it depends on the agency of individual and collective actors (cf. Lhotta 2021), and because humans are not angels, we face the possibility that “constitutionalism won’t redeem a dysfunctional politics” (MacDougall 2022).

In terms of constitutional and institutional theory, the connection between the *liberty workout*, *institutional design*, and its (*federal*) *multiplicity* seems to be of fundamental importance for an understanding of the constitutional crisis in the United States. In this vein, leading U.S.-Constitutional historian *Michael Les Benedict* diagnoses the following in the latest edition of his standard work *The Blessings of Liberty* (sic!):

“Large numbers of Americans, perhaps most Americans, had lost faith in the constitutional system’s ability to deal with pressing problems. They had divided completely and evenly on a host of cultural and economic issues. Each side believed *constitutional liberty itself* was at stake. Each defined *constitutional liberty differently* and believed the other side was consciously and purposely subverting it. Fewer political leaders tried to bridge the gap and those that did were denounced by the activists of their parties. Partisan hostility grew and violations of constitutional norms seemed justified to counteract the violation of norms by opponents” (Les Benedict 2022, p. 572; emphasis added).

From the beginning of the United States, the idea of how liberty should actually be shaped has been contested (cf. Banning 2004)—and the contest has been nurtured by the opportunity structures of federalism as well as representation and checks and balances. Irreconcilable interpretations and meanings of liberty, from time to time, turned “We the people” into a “bitterly fractured unity” (Collinson 2021) and a mere “ghostly body politic” (Miller 1988 and 1991, pp. 105–129).

Huntington's perceptive analysis of the “Promise of Disharmony” implanted in the U.S. Constitution and institutional design picked up on this in the early 1980s when he addressed the aporias of the *American Creed* in terms of its “basic political values and beliefs.” He pointed out that there was an ever-present gap between “American political ideals and American political institutions and practice” (Huntington 1981, p. 4). Indeed, there is a persistent kind of “bigotry” (Kagan 2021), and it is exactly this bigotry *Gerstle* is addressing when he points out that “many Americans were blind to, or chose not to see, the coercion inherent in state governments that made too little provision for protecting the rights of minorities from the will of the majority”—with the consequence that “many who argue for getting the federal government off their backs don’t think much about what the consequences of restoring power to the states might be. Or they are surprisingly comfortable taking a libertarian stand with regard to federal government policies while supporting initiatives in their states that are plainly coercive in intent and effect” (Gerstle 2018, p. 4).

Against the backdrop of more than 200 years of contradictory and paradoxical interpretations of constitutional liberty between the federal government and the constituent states, as well as the expansion and restriction of private rights amidst this conflict (Farhang 2010; Kersch 2004; Klarman 2004; Zackin 2013; Gerstle 2018), it is obvious to conceive of constitutional liberty as a crucial value choice of the American Constitution that is as central as it is permanently contested. This value choice was framed with a complex institutional design, which, in turn, was repeatedly put under stress and pushed to the limits of its capacity by irreconcilable meanings and interpretations paving their way through the institutional opportunity structures of the constitution.

3 Engaging Constitutional Theory with Institutionalism

Given the presumed importance of interpretations and meanings of liberty as constitutional value choice, an institutionalist view lends itself to be particularly promising. It understands the constitution as an institutional context that guides actors in a meaningful way along certain logics of appropriateness. Hence, actors—which include every member of “We the People”—are guided by an institutional context that provides orientation in specific situations. Meaning is generated and situationally specified through interpretation. According to this, a constitutional crisis is likely to be displayed in the “interrelation between action and different institutional settings” (Norgaard 1996, p. 33) that the constitution enables or establishes. (Political) actors in such constitutional/institutional settings are

“flexible, varied, malleable, culture-dependent and socially constructed. Intentional, calculative action is embedded in rules and institutions that are constituted, sustained, and interpreted in a political system. The core notion is that life is organized by sets of shared meaning and practices that come to be taken as given for a long time. Political actors act and organize themselves in accordance with rules and practices which are socially constructed, publicly known,

anticipated and accepted. Actions of individuals and collectivities occur within these shared meanings and practices, which can be called institutions and identities” (March and Olsen 1996, p. 249).

Institutions—which include the constitution in the broadest sense—are to be understood as “a relatively *enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances*” (March and Olsen 2006a, p. 3; emphasis added). A constitutional crisis could, hence, be suspected if the properties of *enduring*, *invariant*, and *resilient* were to become fragile and idiosyncratic, partialized, and irreconcilable.

Accordingly, it makes sense to explore the multiple facets of “institutional design in democratic contexts” (Olsen 1998) and the “civic basis of identities” (March and Olsen 1994, p. 256) when approaching the complex phenomenology of constitutional crises in general and the American constitutional crisis in particular. A (democratic) constitution is a “complex institutional ecology” (Olsen 1996, p. 24) and a “complex adaptive system” (Olsen 2009, p. 19, p. 138) in which there are reciprocal effects of actors and institutions that can set institutional change in motion. Of particular relevance here are processes of *situation-specific interpretation*, in which actors follow logics of appropriateness,⁶ which can compete, be transformed, or even be substituted; this is why democracies are ultimately an “open-ended project” (Olsen 1997, p. 206, 2010, p. 14).

The complex task of institutions in the democratic constitutional state is to accommodate and regulate the “interplay of vested interests and the interaction of political institutions with wider institutional contexts” (Lowndes 2002, p. 99) without trading freedom, openness, and pluralism for determinism (Olsen 2009, p. 22; March and Olsen 1996, p. 249). The founders worked excessively to inscribe an institutional design suitable for this purpose in the U.S. Constitution, and the *Federalist Papers* tried their best to justify it (sometimes counterintuitively) and to sell it well for ratification in the constituent states (Lhotta 2021). What the original intent of it all was, however, is still not agreed upon (see Gibson 2009 and 2010). In any case, the U.S. Constitution—like other constitutions—contains a complex construct “of partly autonomous yet interdependent and interconnected institutions with separate origins, histories, and traditions and different internal and external organizations. There are many, often ‘inefficient’ and not necessarily synchronized and coordinated, institutional processes of will formation, decision-making, experiential learning, and adaptation. Therefore, the *whole configuration of institutions across levels of government and institutional spheres has to be taken into account*” (Olsen 2009, p. 24; emphasis added).

⁶ March and Olsen emphasize that the “logic of appropriateness” is *normatively indifferent*: “There is no assumption about normative superiority. A logic of appropriateness may produce truth telling, fairness, honesty, trust, and generosity, but also blood feuds, vendettas, and ethnic conflicts in different cultures” (March and Olsen 2006a, p. 7, footnote 3). In this respect, it is neither “liberal” nor “conservative”!

In order to address constitutional crises adequately, constitutional theory should take this holistic claim seriously, as well as the fact that “a constitution, polity, or regime inevitably involves *value choice that may shape how we understand and organize facts*. A constitution imparts, even if indirectly, a ‘way of life.’ In this sense, the regime, polity, or constitution moves far beyond what we normally consider politics. Indeed, the regime shapes, or constitutes, what we consider politics. If we think of the separation of church and state, the division between public and private, or the balance between liberty and democracy in the American polity, they are all the result of—indeed constituted by—*value choices*” (Thomas 2011, pp. 291–292; emphasis added). When such constitutive value choices are contested and/or reconstructed or reinterpreted, logics of appropriateness become contested, too. This is crucial, because they are identity-forming and convey standards for “right” and “wrong” action (Olsen 2008, p. 30). Incommensurable interpretations of value choices profit from the plurality and openness of democracy—but they put stress on *integrative institutions*, which normally convey (hitherto consensual) logics of appropriateness, identities, and preferences to the people. As March and Olsen aptly explain, “Democracy is partly a structure of laws and incentives by which less-than-perfect individuals are induced to act in the common good while pursuing their own. It is also a set of institutions within which *individual potentials, identities, and preferences* are created and elaborated. *Any one individual* has a potential for accommodating *many alternative interpretations* of those identities, thus of *all kinds of action*” (March and Olsen 1995, p. 49; emphasis added).

Now, this individual potential for all possible interpretations and resulting actions is also the most original republican liberty and “individual popular sovereignty” (Barnett 2014), which the democratic constitutional state strives to channel, nurture, and transform institutionally (March and Olsen 1995, p. 51) in order to ensure a balance of conflicting concepts of freedom and meaningful interpretations based on them (March and Olsen 2006b, p. 699). The problem to be solved primarily through institutional design is thus “how *inconsistencies among subjective judgments of collective and individual needs* can be reconciled in ways that *offend neither the demands for community coherence nor the demands for individual liberty*” (March and Olsen 1995, pp. 128–129; emphasis added). Liberty-focused democratic constitutions may multiply this problem if federalism is part of their institutional design. This is the case in the U.S. (cf. Levinson 2013; Bulman-Pozen 2014). Federalism and the states produce a multitude of “*changing inventories of meanings, identities, and accounts* distributed over a population and woven into social and political relationships. They exhibit conflict among institutionalized rules and rule regimes, institutional pluralism, and hybrid organizations. Democratic, political institutions seem to be based on *layers of partly ambiguous, inconsistent, changing, and competing ideals and beliefs*, rather than on coherent stable doctrines. Different actors adopt different identities and learn different rules at different times as the varieties of their histories are coded into the varieties of their institutions” (March and Olsen 1995, pp. 173–174; emphasis added).

The aforementioned federal trigger of *difference*, however, can change everything: Under the auspices of creedal passion and excessive factionalism, situational uncertainty and ambiguity of the right meaning and logic of appropriateness are

multiplied and amplified on the federal and the state levels. This affects the standard operating procedures of rules and institutions in a constitutional democracy, including the supreme law of the land. The function of rules is based on acceptance and action of the rule addressees (Tamanaha 2001, p. 163). If the most important activity of all citizens that precedes political action is *interpretation*, that is, the matching of situation and rules, then actionable difference indeed makes the difference. The ubiquitous activity of situational rule interpretation and creation of meaning on all levels of the polity thus becomes the vital core of constitutional self-government (Eisgruber 2001, p. 44), if not the very core element of the political (cf. March and Olsen 1994, p. 267). *Interpretation*, the creation of meaning for a situation and the alignment of action with rules, experiences, traditions, narratives, identities, and roles, is a genuinely republican activity. Working out this liberty of choice together with other members of “We the People” permanently renews the institutions and their meanings. This may result in “new institutional missions” that are justified with the help of new accounts and meanings (Brandwein 2011, p. 209). Projects of “discursive recombination” are launched for this purpose via suitable institutional channels of representation; however, modes of “self-authorized representation” (Urbinati and Warren 2008, p. 403) may become parts of new institutional missions directed against the old or “wrong” system. Coupled with adverse perceptions of reality, adverse accounts and identities emerge from this. Given the vital importance of creating specific (counter)narratives and accounts, it becomes obvious that the influence of highly tendentious mass media and internet platforms (cf. Rosenwald 2019; Hemmer 2018; Berry and Sobieraj 2016) can be fatal under these circumstances. If “*the ground of politics, the site of change*” (Hattam and Lowndes 2007, p. 204) basically lie in the sphere of interpretation and discursive recombination, then the fragmentation and decoupling of the ideational–institutional basis of a polity is a marker of constitutional crisis.

4 What Constitutionalism? The Relation of Institutional Design, Constitutional Values, and Actors

Discursive recombinations with regard to basic constitutional value choices address “the essential make-up of the polity—its foundations and identity” (Thomas 2011, p. 291). Thus, they also affect the legal–normative character of the constitution as the supreme law of the land. Here, an institutionalist perspective on constitutional law and the constitutional crisis is equally worthwhile. The reason is obvious: Constitutional law and its (often ambiguous) norms are also relegated to transformative–interpretative activity. Constitutional and institutional theory therefore need “to keep a close eye on what *people*—legal actors and non-legal actors—are actually *doing* relative to law, and to discover and pay attention to the *ideas* that inform their *actions*. *These ideas, beliefs, and actions give rise to law, determine the uses to which law is put, and constitute the reactions to, and consequences of law*” (Tamanaha 2006, pp. 165–166; emphasis added). All of this cannot be strictly uniform because democracies, as March and Olsen outline, do not only form communities of shared experiences, communication, interpretative traditions, and memory but are

also “glued together by shared debates, controversies, and contestations and by fairly broad agreement on some basic rules for coping with conflicts” (March and Olsen 1989, p. 699). This open and procedurally civilized contestation of opinions, ideas, and interpretations (cf. Pettit 1999, p. 185) is exactly what *James Madison* had in mind for the U.S. Constitution when he accentuated the importance of a republican “commerce of ideas” (Sheehan 2009, pp. 84–106).

However, through the already outlined individual interpretive activity of the citizens, the constitution remains ultimately the proprium of its sovereign—the people. The rules and symbolically represented values standardized in the constitution thereby function as an offer for all members of the constitutional community “to exercise their *own best judgment about moral and political principles*” (Eisgruber 2001, p. 205; emphasis added). This constitutional self-government of *citizens as constitutional interpreters* (Michelman 1988, p. 1529) is the most fundamental liberty to which they are entitled as constitutional sovereigns—and the claim to this “individual popular sovereignty” (Barnett 2014, p. 361) can bear totally different (e.g., liberal and conservative) connotations. Under normal conditions—or, rather, in the ideal case—citizens are active in all the “arenas of citizenship” (Michelman 1988, p. 1535) that the institutional design of the constitution opens up for differentiated and complementary representation (cf. Eisgruber 2001, p. 205–206) and interpretive activity. Ideally, this results in a

“potentially transformative dialogue. Understandings of the social world that are all contested and shaped in the daily encounters and transactions of civil society at large are of course *conveyed to our representative arenas*. They also, obviously, enter into determinations of policy that occur within nominally private settings but that can affect people’s lives no less profoundly than government action. Those encounters and transactions are, then, to be counted among the *sources and channels of republican self-government and jurisgenerative politics*. They are arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but *respected and self-respecting presence*—distinct and audible voice—in *public and social life at large*” (Michelman 1988, p. 1531; emphasis added).

In this best of all constitutional worlds, the encompassing presence of citizens is fostered by democratic institutions as “places where citizens come together to deal with their common weal and the problems of living together. The will of the people is discovered through deliberation by reasoning citizens and rulers seeking to find the general welfare *within a context of shared social values*” (March and Olsen 1994, p. 264; emphasis added).

But life is a bitch sometimes. The constitution and its institutional design are not a panacea; they simply open up pathways for action that are open-ended and indifferent to content, and thus are “practical instruments for self-government” (Eisgruber 2001, p. 44). Nevertheless, the different ways in which these offers for self-government are used by political actors and members of “We the People” can be “degenerative of political order” (Thomas 2011, p. 276) if they become factionally politicized and give rise to a “constitution obscured in a haze of partisan passion and ignorance” (McCoy 1991, p. 122). The “ghostly body politic,” then, can bring

the “bitterly fractured unity” to bear through incommensurable value choices and an overheated “individual popular sovereignty” (Barnett 2014, p. 361). Therefore, the republican idea of constitutional interpretation as a public process (Häberle 1978, p. 123; Lhotta 2016) based on (maximum individual) liberty may turn against itself in times of strong factional polarization.

In a status of “constitution war,” nearly everything is framed by “foundations and identity” (Thomas 2011, p. 291) and their enforcement against competing designs that do not correspond to the “true” constitution and its values. These are, instead, perceived and addressed as enemies.⁷ The cognitive and normative orientation toward fundamental *ideas* about the purpose and form of living together in a polity (Kaiser 2006, p. 319) becomes factionally charged and transformed into incommensurable identities (cf. West 2019) that pursue adverse institutional missions. Other interpretations, value choices, and identities must be attacked and delegitimized to expose and reprogram their “false” institutional logic (cf. Chafetz and Pozen 2018; Huq and Ginsburg 2018). The constitution becomes a grab bag for “apsirational constitutionalisms” (Loughlin 2022) of all kinds and self-referential claims for the one and only true intent. Its function as a system of meaning and an interface of ideas and behavioral structuring “represented and envisioned through experience, practices, and interpretation” (Kaiser 2006, p. 323) degenerates into compartmentalized constitutionalist monads or bubbles. The “structuring, action-guiding, and community-founding effect” (Vorländer 2002, p. 20; author’s translation) for the entire polity gives way to “constitutional incivility” (Les Benedict 2022, p. 520).

The structurally induced tragedy of this constitutional incivility unfolding is rooted in the constitutional opportunity structures for an adversarial and disintegrative *constitutionalism of singularities* that become activated in a factionalist way.⁸ Actors thereby increasingly put the institutional design of the polity under stress with incommensurable logics of appropriateness by feeding them in via the constitutionally established institutional framework and, above all, by trying to enforce them through law (cf. Farhang 2010; Greene 2021; Gersen 2023). Ideally, this can be done in two ways: either through lawmaking, including constitutional amendments (for which no majorities can be achieved in the deadlocked U.S. system) or through the courts. Under the prevailing conditions, this explains the excessively ideologized politics of appointing judges (Keck 2010; Teles 2012; Zirin 2016).

⁷ The comparison of the 2016 Republican Party platform and the 2020 Democratic Party platform make this abundantly clear.

⁸ Striking examples of this are the exuberant zeal with which Republican-governed states manipulate election laws not only to make it more difficult for “hostile” voters to vote and to install Republican “safe harbors” by cutting electoral districts but also to significantly lower the intervention thresholds for certifying and verifying elections and to consistently replace the “state officials” who will be responsible for this in the future—not to mention the attempts to use “property rights,” “commerce,” etc., to lower environmental protection standards and to restrict the freedoms of certain individuals or groups of individuals, for whom the pejorative catch-all label “woke” has now been established.

5 Two Models of Constitutionalism on the Verge of Failure

Unfortunately, the two (ideal-type) models of constitutionalism that stand at the origin of the U.S. Constitution are not convincing when it comes to processing and mediating “constitutional retrogression” (Huq and Ginsburg 2018) as described above—the opposite is the case. Following *Madison* and *Hamilton*, constitutional theorist *Martin Loughlin* differentiates two variants: “*republican constitutionalism*” on the one hand and “*liberal constitutionalism*” on the other. Both variants are initially united in that “the constitutional objective was to establish an *institutional configuration* that would, through the *reason of its principles*, generate the *allegiance of the nation*. The *differences* flow mainly from the *kind of safeguards* each believed to be conducive to the realization of that objective” (Loughlin 2010, p. 56; emphasis added). In republican constitutionalism, the constitution is “conceived as *establishing an elaborate institutional configuration* through which *all political action is channeled*, but is *held in tension*—in a *state of irresolution*. [...] By dividing, channeling, and opposing political power in this manner, *constitutional meaning*—the *proper ordering of constitutional values*—remains the subject of *continuing structured political contestation*. Constitutional maintenance is a political task” (Loughlin 2010, pp. 56–57; emphasis added). One important consequence of this logic is that constitutional courts, as the authoritative interpretive instance for the proper ordering of constitutional values, are *not* solitarily assigned this function. Instead, they are entrusted to political competition within an institutional design of checks and balances. *James Madison*, who inaugurated this model, later increasingly emphasized the importance of a “commerce of ideas” in the public sphere (cf. Sheehan 2009, pp. 84–106). Together with sociopolitical change, this is—especially in a compound republic—the fuel for a “kinetic constitution” (cf. Lhotta 2016) or living constitution. It evolves in ongoing constitutional dialogues (Fisher 1988) between the public, political institutions, and courts, so that over time, the constitution becomes an “intergenerational synthesis” (cf. Ackermann 1991, 1998, 2014).

Constitutional courts can play an important (but not exclusive) role here by identifying constitutionalized “logics of appropriateness,” placing them in relation to one another, and prioritizing them on a case-by-case basis before feeding them back into the “open society of constitutional interpreters” (Häberle 1978; author’s translation).⁹ However, this model of constitutionalism depends on a certain *quality of pluralism* (see above) and *shared values*. It is somehow helpless when confronted with interpretive and discursive missions that factionally overhaul the institutional design of the constitution. This type of constitutionalism aims at an ongoing balanced production of constitutional meaning. The proper ordering of constitutional values is the subject of continuing structured political contestation. If, however, incommensurable constitutional meanings are latently fed in, this continuing structured political contestation becomes destructured and instead shifts into a state of constitutional war. Pluralism is overhauled by factionalism; hence, it is no longer possible to iden-

⁹ Ackerman (2014), p. 336: “But I encourage each of you to take up this task in your own efforts to make sense of the Constitution. Almost every important problem requires an interpreter to integrate principles inherited [...]”

tify core areas that are conducive to common interpretation and meaning. The value choices are too aversive, resulting in equally aversive institutional missions.

In contrast, the model of liberal constitutionalism, which is more closely associated with *Hamilton*, emphasizes the relevance of a strong central government and a small elite for “maintaining political power and constitutional stability.” In addition, the judiciary is assigned the important role of declaring all acts contrary to the manifest tenor (sic!) of the Constitution void. The constitution thus becomes the highest-ranking law, from which the judges must derive the true meaning on a case-by-case basis. The judges, therefore, face the problem of generating acceptance and compliance for their decisions, which often imply value choices. They must maintain the appearance of the greatest possible neutrality, impartiality, and objectivity. Ideally, this is achieved by judicial self-restraint and by methods and principles of interpretation that make decisions appear rational, comprehensible, and acceptable. In times of creedal passion and polarization, this becomes an almost insoluble problem.

This is illustrated by the somehow misleading label of *liberal constitutionalism* and its counterpart: In the United States, the common distinction between liberal constitutionalism and conservative constitutionalism (cf. Les Benedict 2022) does not so much concern the role of the judiciary but rather *the way* in which the courts *interpret* the Constitution. And in the blink of an eye, here we are again amidst the crossfire of discursive reconstruction and institutional missions grounded in interpretation. No wonder the last decades have witnessed long-running attempts at discursive and interpretive reconstruction, with a focus on the Supreme Court (cf. Millhiser 2021; Hartmann 2019; Lamparello and Swann 2016; Teles 2012; Feldman 2012; Keck 2010) by liberal and conservative camps. This coincides with growing fundamental differences regarding which (liberty) rights are explicitly or implicitly enshrined in the Constitution (cf. Tushnet et al. 2015, Part IV: Rights); how to read them out of or into the Constitution; whether protection and guarantee of these rights should take place at the federal level or at the level of the member states (Gerstle 2018); and whether this, in turn, should be primarily a matter for the people and their representatives or for the courts (cf. Waldron 1999; Kramer 2005; Tushnet 2020). In such a setting, the Supreme Court has become the final arbiter of value-based controversies that cannot be resolved by means of legal rationality anymore. Hence, it is perceived as a partisan institution, packed with partisan judges and perpetually distorted by partisan appointments to the bench—a deadly sting for the functioning of both republican and liberal constitutionalism.

The aporia of these fallacies, however, is that the judicial machinery keeps on running because the political deadlock condemns the courts into the role of last-exit providers of decisions in factional gridlock. In times of social fragmentation and isolation as well as the territorial and social (group-specific) location of such (value) fragmentations, interpretive controversies are still conducted in the mode of “adversarial legalism” (Kagan 2019) and through the never-ending (and strategic) claim of subjective rights (Greene 2021). The “litigation state” (Farhang 2010) thus multiplies the opportunities to feed the system with incommensurable values, interpretations, and institutional missions. Polarization, factionalism, and creedal passion come in the disguise of legal procedures and decisions. In such a situation,

the model of republican constitutionalism simply runs empty. It relies on a (balanced) political process and a commerce of ideas, but both are gone with the wind. Instead, the constitutional–institutional “proxy” of the polity fails because existential value conflicts are fed into arenas that originally had a different logic and institutional mission and are now riddled with “friend–foe” distinctions. Existentially charged value choices, however, can no longer be proceduralized and mediated dialogically/deliberatively (White 2003; Schier and Eberly 2016; West 2019)—an effect that is clearly displayed by the performance of both chambers of Congress, and now also in the Supreme Court (Hume 2019).¹⁰ What is more, existentially charged value choices can also not be handled by liberal constitutionalism; its heavy bias toward courts and private rights and liberty becomes divisive when the courts perform as partisan institutions (or are perceived as partisan) and are forced into a role that does not fit into the “least dangerous branch.”

The dystopic consequence is that the institutional–procedural consensus of the constitution and thus basic, previously consented values can be attacked from within, that is, from the institutional design of the constitution (Courser et al. 2018; Chafetz and Pozen 2018). Playing “constitutional hardball” (Tushnet 2004) is a telling example. When the institutional design of the Constitution is factionally overhauled, and institutional segments of the horizontal and vertical separation and entanglement of powers are used to conduct politics in war mode, the system of checks and balances shifts into “kill switch” mode (Jentleson 2021). Total deadlock of the political system is the consequence (cf. Schier and Eberly 2016), which in turn is used to attack and delegitimize the institutional design and thus the rules of the game itself (Courser et al. 2018; Chafetz and Pozen 2018)—and to launch a new institutional mission. In the United States, this was the political tool of choice during Trump’s presidency (West 2019), but it had already been devised as a Republican strategy during the 1990s Gingrich revolution (Kabaservice 2012; Richardson 2021; Benen 2020), making Congress, and here especially the Senate, increasingly dysfunctional (Jentleson 2021; Mann and Ornstein 2016). This brings, most prominently, the courts into the game—they take over the function of a fail-safe mechanism for a polity that has run into deadlock.

As if that were not enough, apart from the resulting distortion of the separation of powers, this power shift has—once again—a deeply rooted federal dimension. Significant parts of the framing of (liberty) rights have always been within the competence of the constituent states and their police power (Gerstle 2018). The extent to which they are bound by the Bill of Rights of the U.S. Constitution and the Reconstruction Amendments has always been contested. Weaponizing federalism, hence, made the states into hot spots of backlash against Reconstruction, the New Deal, the Great Society or the Rights Revolution, and the jurisprudence of the Warren and Burger courts. The states became the new battleground for the factionalist redefinition of constitutional liberty (cf. Robertson 2016; Karch 2016). Time and again, this playground became used in partisan politics to fight over highly sensitive rights such as equality, the right to vote, sexual and reproductive self-determination,

¹⁰ See also <https://edition.cnn.com/2023/06/29/politics/clarence-thomas-ketanji-brown-jackson-supreme-court-affirmative-action/index.html?dicbo=v2-iE0mE03>

the purchase and carrying of weapons, and religious freedom (cf. Nolette 2015; Fulman-Pozen 2014).¹¹ The strategy of “all blue” and “all red” states fueled by hyperpartisanship has thus made state constitutionalism an area of highly dynamic development (Les Benedict 2022, pp. 448–449; Levinson 2013), and the states took over the role of highly dynamic laboratories and strategic targets for bringing up lawsuits in contested matters.

Ultimately, this development may effect a “constitutionalism of singularities”¹² nurturing the establishment of segmented constitutions with different value choices, and thus ultimately leading to fragmentation and disintegration of the constitutional “alliance of the nation.” The fatal built-in dynamic, however, is that litigation continues to increase, not only because the number of rights claims increases (Greene 2021) but also because lawsuits are used strategically to influence the transformation of (constitutional) law (cf. Gersen 2023) through sheer quantity and presence.¹³ The consequences are an ever-rising importance of courts and an increasing settlement of sociopolitical conflicts by them. They thus become substitutive political actors and foster a democracy-averse dominance of nonmajoritarian institutions (Schäfer and Zürn 2021), which weakens the representational capacity of democratic institutions. The problem is exacerbated when judges—under the pretension of purely legal arguments—prioritize values and thus transmute into actors with factionalist affinities, or at least open up the chance that they will be appropriated by factionalists. Yet in doing so, they wind up firm enemies of “We the People,” from whom the disposition over the Constitution must be wrested in order to return it to the people (Fisher 2019; Tushnet 2020). Or it leads them to represent only one part of “We the People” at a time with their decisions and to be reproached by the other parts for selectively doing just that (cf. Whittington 2020).¹⁴

¹¹ The Republican platform’s section on the “Rebirth of Constitutional Government” picks up precisely at this point and declines all these rights as an expression of basic “constitutional liberty,” which are to be wrested from the grasp of the “federal government” by all means. It is also remarkable how the “liberal” jurisprudence of the Supreme Court is criticized and judicial restraint is advocated in order to promote, in the same breath, the staffing of the Supreme Court with judges who—not at all activist (sic!)—are to turn the wheel back again; see <https://edition.cnn.com/2023/06/30/politics/conservatives-remake-america-courts/index.html>

¹² This is borrowed and adapted from Reckwitz (2019), who coined the notion of a “society of singularities.”

¹³ The possibly faked lawsuit that made its way to the Supreme Court docket and finally resulted in *303 Creative LLC et al. v. Elenis et al.*, June 30, 2023, and a 6:3 decision against the Colorado Antidiscrimination Act is the latest deplorable outcome of the widespread strategy to gamble the judicial system; see the telling list of amicus curiae briefs in this case. See also <https://edition.cnn.com/2023/06/30/politics/supreme-court-303-creative-lgbtq-rights-colorado/index.html>

¹⁴ See again <https://edition.cnn.com/2023/06/30/politics/conservatives-remake-america-courts/index.html>

6 Downhill from Everywhere

Viewed¹⁵ through the lens of an institutionalist–constitutional theory, these developments do not bode well: The phenomenology of the American constitutional crisis in terms of constitutional and institutional theory indicates tendencies of decay of the democratic order (Huq and Ginsburg 2018). The polity and its normative identity display a fundamentally disturbed resonance relationship between its citizens and the political sphere (cf. Rosa 2020, pp. 362–380). A hypertrophic “constitutionalism of singularities” focuses on self-authorized representation and varieties of liberty that are predominantly self-referential. There is no more place for the associative, republican “vision of *common action* and the productive, transformative *appropriation* of public spheres and institutions” (Rosa 2020, p. 370; author’s translation) and “hegemonial liberalism” (cf. Vorländer 1997) has somehow turned against itself. Incommensurable interpretations and ideas of liberty compete under a constitution that allows for territorially differentiated conceptions of liberty along with subjective and group-specific liberties and ensures that these can be fed in as well as contested through a wide variety of institutional layers and sites of the polity. Together, this leads to a “great alignment” (Abramowitz 2018) with multiple fronts in the struggle for liberty—in the guise of and invoking (constitutional) law, which, however, is no longer perceived as something common. This alignment of struggles may, in turn, tie into a larger constitutional crisis, as for instance, Volkmann ascertains: “Constitutional democracy, whatever else it may be and might be, is and was conceived as a *common* project of citizens who want to solve their *common* problems within a *common* framework. From a certain point on, extreme polarization dissolves this *common* ground and thus strikes at the very core of the project, which is what sustains it in the first place. In this respect, it is not merely an external indicator or symptom of the crisis, but this crisis itself” (Volkmann 2019, p. 650; author’s translation; emphasis added).

The erosion or even dissolution of the common ground, however, is not a process with either *conservative* or *liberal* connotations but rather the inherent developmental possibility of a constitutional design that exhibits this as an opportunity structure. Indeed, it only pretends to have a common core and wants to secure it with “auxiliary precautions” of institutional design. In reality, the ostensibly common core is actually an ember core of the political (cf. Lhotta 2021, p. 190) that can be fanned both conservatively and liberally. This is currently the case in the United States, where the Republican Party has distinguished itself as a constitutional firebrand to a particular degree. Notwithstanding this, the U.S. constitutional crisis is a cautionary example that the “promises of democracy” (cf. Buchstein 2013) do not fulfill themselves.

Every polity, especially in its manifestation as a democratic and liberal constitutional state, is a precarious and contingent affair. It cannot constitutionalize its preconditions for success; at best, it can make constitutional provisions for constitutional success, but these are neither self-executing nor reliably effective as a fail-safe mechanism. The failure or at least partial failure of such precautions, which ultimately manifests as the strategic delegitimization and weakening of constitutional

¹⁵ Album & title track by Jackson Browne, Downhill from Everywhere, 2021.

bodies or institutions, democratic procedures, and guarantees of liberty, equality, and participation rights (cf. Levitsky and Ziblatt 2018; Huq and Ginsburg 2018), is an indicator that constitutional engineering, no matter how sophisticated and well meaning, together with a corresponding institutional design, are no guarantee that constitutionalism is and will remain a model of success. The authors of the *Federalist Papers* were already painfully aware of this. A preliminary lesson of the recent crisis of the U.S. Constitution could thus be “Constitutionalism won’t redeem a dysfunctional politics” (MacDougall 2022).

The urgent appeal of this observation lies in its direction against the narrative of a seemingly successful and self-complacent constitutionalism, which has repeatedly accommodated itself with its dropouts. Time and again, the U.S. Constitution was hallowed as a symbol of national union, a kind of catchall remedy and a promise of salvation. Presumably, it is just because the Constitution is accorded such high value in the United States that political disputes recurrently take place within a constitutional framing. Even with counterintuitive evidence, the Constitution remains a “precommitment device” (Whittington 2008, p. 290), a promise and a commitment to do well and better. Too much aspirational constitutionalism, however, is counterproductive (Loughlin 2022),¹⁶ especially when polarized and factionalized value choices are processed through the institutional design of the polity and, thereby, destroy its common ground from within.

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¹⁶ Also instructive in this regard are the 2016 Republican Party platform and the 2020 Democratic Party platform sections referred to previously.

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