Introduction

1. PRELIMINARY OBSERVATIONS

The events in the Middle East and North Africa in late 2010 and early 2011 have been given the label ‘the Arab Spring’, although by now it is widely acknowledged that the label misleadingly suggests a set of events that occurred in a compressed time period.1 The events appeared to need some sort of label because they seemed – at the time and for a while thereafter – to indicate that nations in the region (not all the nations, but many of them) were undergoing substantial transformations in their systems of government. They seemed to be moving from authoritarian systems toward more democratic and constitutionalist ones. The events seemed to resemble those that took place in other regions – in Latin America in the 1970s as authoritarian regimes were replaced by democratic ones, in central and eastern Europe after 1989 as the Soviet empire crumbled and new democratic regimes were installed.

In retrospect, of course, the hopes for rapid and widespread constitutional transformation were unrealistically optimistic. A more realistic view would have understood that substantial changes in governing systems occur not in tightly confined time periods, but extend for many years, even for decades. So, for example, perhaps we should understand the transformations in Latin America as extending from the initial shifts through to the more recent adoption of populist (or ‘Bolivarian’) constitutions in several nations – a period lasting several decades. Or, perhaps we should understand intimations of a reversion to authoritarian rule in Hungary as part of the processes initiated in 1989.

From the perspective even of 2015, though, we can use the events in the Middle East and North Africa as the occasion not for some definitive analysis, which will not be possible for many years, but for an essay

1 See, for example, Muasher (2014). We note that the rapidity of developments has made exposition difficult. We have chosen most often to use the historical present tense for phenomena that have been overtaken by events, except when doing so would be extremely awkward.
identifying some themes brought out in the Arab Spring and its aftermath. Specifically, the Arab Spring encourages scholars to think about two ideas that regularly arise in political, legal, and constitutional theory, the idea of revolutions and the idea of constitutionalism.

First, what are political and constitutional revolutions? Can we develop a ‘theory’ of revolutions that helps us understand events occurring at widely separated times and geographically separated locations? What purposes might such a theory serve? Or, in a more deflationary mood, might the Arab Spring help us understand that there is no unified category of ‘revolution’ about which we can usefully theorize? So, as we will see, Hannah Arendt argued that violence was intrinsic to revolutions as she understood them. But, many of the events of the Arab Spring, although not non-violent, were not accompanied by the kind of violence to which Arendt referred. Should we therefore treat the events as not falling within the analytic category of ‘revolution’, or should we reconsider Arendt’s argument? Such a reconsideration might allow us to think more systematically about the possibly indiscriminate use of the label ‘revolution’ to describe events such as the Color Revolutions in some nations of the former Soviet Union in the early to mid-2000s and ‘peaceful’ revolutions in many nations.

Second, what is constitutionalism? Is it a term applicable only to systems in which constraints on public power generally conform to the prescriptions of liberal political theory? Or, might there be illiberal but non-authoritarian constitutions? The prominence of discussions of the role of Shari’a in post-Arab Spring constitutions makes this a particularly pressing question.

After sketching some aspects of these questions in this Introduction, we turn in the substance of the essay to several case studies of the Arab Spring and its continuing aftermath, with the hope that our presentation will illuminate these questions about revolutions and constitutionalism.

2. THE ARAB SPRING AND THE THEORY OF REVOLUTIONS

This essay focuses primarily on Western political theory. The analysis that we propose builds mainly on revolutionary and constitutional experiences in the United States and France, which were the central examples – along with the Russian Revolution of 1918 – in Arendt’s work. Working from within this intellectual tradition we propose a framework to analyze the events labeled as ‘Arab Spring’. Our analysis does not dismiss the rich and valuable methodological and theoretical
Arab and North African traditions and theories: on the contrary, it aims to place two traditions, ‘Western’ and ‘Arabic’, in constructive dialogue.

The starting point for any contemporary ‘theory’ or account of revolution is Hannah Arendt’s extended essay *On Revolution*. Arendt’s essay is learned, allusive, suggestive — and not as transparent as we might like. For example, Jonathan Schell, writing an introduction to the republished essay in the early 2000s, asserted that the Color Revolutions of that period ‘exhibited a remarkable number of Arendtian characteristics. Most were aimed at establishing conditions of freedom rather than solving social questions … All were largely non-violent, deliberately forgoing revolutionary violence …’. The words ‘remarkable number’ can cover up several difficulties without rendering Schell’s statement inaccurate. Arendt did make ‘establishing the conditions of freedom’ a key element in her understanding of revolution, for example.

Yet, we observe that Arendt wrote not of ‘social questions’ but of ‘the social question’, by which she meant the question of the distribution of wealth in society. At least some of the Color Revolutions, and, more important, later events such as some of those during the Arab Spring, did implicate the Arendtian social question, as those suffering from the lack of basic material goods sought to overthrow kleptocrats (such as Ben Ali in Tunisia) who were leaching wealth away from the society generally. And, perhaps more important, we think that revolutionary violence was central to Arendt’s understanding of ‘true’ revolutions, so that — for her — movements that were ‘largely non-violent’ simply could not count as revolutionary. How else to understand her statement, early in the essay, that ‘revolutions and wars are not even conceivable outside the domain of violence’.

We do not assert that Schell was *wrong* in what he wrote, precisely because Arendt’s work is open to a number of interpretations. Here we offer our alternative interpretation, in which violence plays a central role in revolution.

The closest Arendt comes to offering a definition of the term *revolution* is this: ‘only where change occurs in the sense of a new beginning, where violence is used to constitute an altogether different form of government, to bring about the formation of a new body politic, where liberation from oppression aims at least at the constitution of freedom can we speak of

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3 Ibid 8.
revolution’.4 Earlier, she writes, ‘Crucial, then, to any understanding of revolution in the modern age is that the idea of freedom and the experience of a new beginning should coincide’.5 The thought here appears to be that revolutions require novelty, and that the pre-revolutionary situation of the oppressed people is such that they can achieve novelty only by engaging in revolutionary violence. Violence motivates the new beginning by demonstrating to the participants themselves that they have a new capacity to act politically. This is the ‘revolutionary spirit’6 which has as one key component, ‘the experience … which those who are engaged in this grave business are bound to have [of] the exhilarating awareness of the human capacity of beginning, the high spirits which have always attended the birth of something new on earth’.7 One difficulty with Arendt’s position is, perhaps oddly, historical. She derives her concept of revolution from an extended analysis of the French Revolution, a somewhat briefer analysis of the American Revolution, and some allusions to the Russian Revolution, with only passing references to events in China and Hungary that others might have described as revolutions, and no mention at all of, for example, the Kemalist revolution in Turkey. Some revolutionary events do have the characteristic of beginning anew, as a nation’s people transform themselves. The French Revolution notably made the king’s subjects into the republic’s citizens. Colonial revolutions similarly involve the transformation of subjects into citizens, as Pratap Bhanu Mehta emphasizes in connection with India.8 Yet, the Indian example suggests that a transformation of national identity need not occur only through revolutionary violence.

Further, once the classical revolutions Arendt studied made the ideas of citizenship and freedom available in their nations of origin, they became available everywhere. Put another way, truly new beginnings are no longer possible, only new beginnings for specific nations. And, even here, Arendt’s analysis seems to us to require qualification. She argued that a nation’s people, or at least its subordinated political elites, understood

5 Ibid 19.
6 Ibid 36.
7 Ibid 215. Richard Albert, ‘Democratic Revolutions’ (unpublished manuscript) offers a thorough survey of the role theorists of revolution have given violence. For us, Arendt’s account linking violence and the emergence of new self-conscious political actors remains the subtlest and most provocative.
themselves to be subjects (as in France) or to have some subordinated civic identity, such as being colonial subjects, and that such a self-understanding could be eradicated and transformed only through revolutionary violence. She expressly distinguished between the mere oppression that produced rebellions that did not mark a new beginning and the transformations characteristic of revolutions.9

Yet, it seems to us that many modern events, including those of the Arab Spring, do not, and perhaps cannot, involve transformations in national self-understanding. With the idea of freedom now universally available, everyone everywhere understands himself or herself to be ‘merely’ oppressed politically.10 A nation’s people need not transform itself from one thing into another, it needs only to be liberated from oppression.

We have said that ‘new beginnings’ of the sort Arendt envisioned are no longer possible because the idea of freedom is universally available. But, one might respond, any specific nation might begin anew. Yet, that response faces difficulties of its own. First, as just noted, with the idea of freedom universally available, no nation’s inhabitants are likely to understand themselves to be merely subjects, and so no nation’s inhabitants are likely to believe that a truly new beginning is necessary. Second, for perhaps two centuries the idea of freedom was available in the general sense that intellectuals everywhere, even in the most oppressive regimes, could understand themselves to be (true) citizens who happened to be oppressed, but whose true nature could be released – not created – by overthrowing (or in Arendt’s terms, merely rebelling against) the existing regime. But, perhaps, during much of that period the idea of freedom was not really available to everyone. As we emphasize in the case studies that follow, the development of the new social media changes things dramatically. Today the idea of freedom is indeed universally available. Transforming subjects into citizens today may well

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9 Arendt (n 2) 24.
10 We note two complications. First, we refer only to political self-understandings, so as to put to one side questions about religion-based self-understandings, particularly in connection with gender. Second, we note, though with some skepticism, the possibility that subjects of truly totalitarian regimes absorb over time their oppressors’ characterizations of their identity, in a way suggested by Arthur Koestler in *Darkness at Noon*. In the Middle East and North Africa, only Muammar Gaddafi appears to have attempted to develop a totalitarian, identity-generating ideology, in the so-called Green Book, and, as we suggest in Chapter Three below, the attempt failed.
be *locally* transformative, but it is not the conceptual novelty that Arendt appears to take as defining ‘revolution’.

Lurking in Arendt’s presentation is an issue that has surfaced repeatedly in connection with the events following the Arab Spring, the question of political leadership after the revolution. In discussing the French Revolution, Arendt points out that its leaders ‘had no experiences to fall back upon, only ideas and principles untested by reality to guide and inspire them’, because during the *ancien régime* “the public realm was invisible to them”.¹¹ For Arendt, the lack of experience induced a kind of fanatical idealism that led ultimately to the Terror. Modern revolutions (or whatever we choose to call them) face a related difficulty. As the case studies repeatedly show, oppression suppresses the accumulation of political experience as much as, or even more than, the experience of subjecthood does. After modern revolutions, the question of who will organize politics, in nations where those able to lead a new regime have been politically suppressed, is a recurrent question, which we examine in our case studies.

Even before Arendt, Hans Kelsen offered what Gary Jacobsohn describes as ‘the standard instance’ of a revolution: ‘[a] revolution occurs “whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way … not prescribed by the first legal order.”’¹² Our previous discussion suggests our misgivings about this definition: It is parasitic on the claim that the grounds for change prescribed by the first legal order are – definitionally, apparently – legitimate and that others are not. Yet, that claim seems either wrong or in need of so substantial a qualification that it hardly seems useful. Perhaps we can make sense of the claim that British rule over the American colonies was legitimate in some sense, and even that the *ancien régime* was legitimate. And, perhaps British acquiescence in the creation of the nation of India might show that the new order came into being by means prescribed by the British themselves.

But, modern examples of highly authoritarian regimes pose a challenge to Kelsen. Before the events of the Arab Spring, Egypt and Libya had constitutions that prescribed rules for their own replacement. Those rules were not followed after the Arab Spring, so the second part of Kelsen’s definition is satisfied. But, we think it odd to describe the events as an ‘illegitimate’ replacement of the old regimes. We might resuscitate

¹¹ Ibid 111 and 115.
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Kelsen’s definition by postulating that the twentieth-century rights revolution makes some substantial degree of democracy a condition for a regime’s legitimacy in the first place. Egypt and Libya then would be regimes that lacked legitimacy, so the criterion of ‘illegitimate’ means of replacement would be inapposite.

Richard Albert suggests a modification of Kelsen’s formulation: revolutionary transformations occur through ‘nonconstitutional means’, not illegitimate ones. Here the account is straight-forwardly positivist. A regime’s constitution prescribes rules for its own amendment and even replacement. When those means are used, the transformation, no matter how substantial, does not count as a revolution. Only when revolutionaries act outside the existing constitution – whether in the streets or in the creation of their own governing institutions that they simply take to be authoritative – can we say that a revolution has occurred. This formulation avoids the difficulty we have identified with Kelsen’s version.

Yet, here too some misgivings should be noted. First, the late twentieth century saw numerous negotiated regime transitions, as in South Africa and many nations in central and eastern Europe. Typically, the negotiators respected the existing constitutions’ formal requirements, to the point where, in Hungary, the new regime did not change the existing constitution at all. Still, it does not seem to us wrong to describe South Africa and like nations as having undergone revolutionary transformations. Second, ongoing processes in Latin America put pressure on the idea that revolutionary transformation cannot respect existing constitutional forms. The so-called Bolivarian constitutions of Venezuela, Ecuador, and Bolivia might qualify as revolutionary, particularly to the extent that they mark the emergence of those nations’ indigenous populations into full participatory citizenship, and yet they were accomplished through the forms of the existing constitution.

Gary Jacobsohn has offered a different definition of ‘constitutional revolution’. For Jacobsohn, the term is defined thus: ‘a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity’. Jacobsohn’s definition is in the same class as Arendt’s, at least in its emphasis on how constitutionalism is experienced. But, note that Jacobsohn’s approach

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13 Albert (n 7).
14 One might question this assertion with respect to the Venezuelan process, because there a politically misguided boycott of the constitutional process by Hugo Chavez’s political opponents was an important part of the transformation process.
15 Jacobsohn (n 12).
also resembles Kelsen’s. Jacobsohn appears to assume that constitutionalism was experienced in the polity before the displacement occurred, just as Kelsen appears to have assumed that the prior regime was legitimate (in some sense). But, we think, the events of the Arab Spring and thereafter pose a challenge to that assumption. It seems to us at the very least an open question whether ‘constitutionalism’ was experienced at all in Tunisia, Libya, or Egypt, so that asking whether there was ‘a clearly defined and profoundly felt directional shift in constitutional orientation’ seems odd. In one sense, of course there was such a shift: from an orientation in which constitutionalism was absent to one in which it was present. The relevant ‘conceptual prism’ would be constitutionalism itself. Yet, it then becomes unclear what the analytical apparatus has achieved.

Jacobsohn offers an interpretation of the post-Arab Spring events in Egypt, characterizing them as merely ‘a nominal constitutional revolution’. Nominal only, because there were strong textual continuities between the 1971 Constitution and the constitution drafted to replace it, ‘most notably’, Jacobsohn writes, ‘Article 2, which affirmed that the Principles of Islamic Shari’a are the principal source of legislation’. (Note that our query about South Africa and Hungary has some bearing here.) Nominal as well because ‘long-standing rivals embrac[ed] contrasting understandings of the revolution’s meaning’. That is, in Egypt long-standing disagreements were not resolved by Mubarak’s overthrow, but, for Jacobsohn the persistence of long-standing disagreements shows that there was no ‘directional shift in constitutional orientation’. A word-play suggests itself: Jacobsohn’s position is nominalist, because it attaches labels to events without explaining why it matters that one set of events is merely a nominal constitutional revolution while another ‘meet[s] the more rigorous requirements of the substantive model of the constitutional revolution’.

Our presentation of Arendt’s position – or better, what we characterize as Arendt’s position – and of Jacobsohn’s raises an important question, which we explore indirectly in this essay’s case studies: why do we need a ‘theory’ of revolution? Or, as those of a pragmatic bent might put it, what work does a theory of revolution do that is not done by accounts of discrete revolutions? Understandably, for Arendt, the exiled German philosopher who had found a new home in the United States, the central

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16 Jacobsohn (n 12).
17 Ibid 11–12.
18 Ibid 12.
19 Ibid.
examples (indeed, almost the only ones mentioned in the essay) were the American, French, and Russian revolutions. She sought both to understand what those revolutions were in their own terms – hence her emphasis on freedom in connection with the American Revolution and on revolutionary violence in the French and Russian ones – and to identify aspects of other large-scale political transformations that might have some resemblance to her paradigmatic revolutions. But what, in the end, turns on the fact that some political events (which some people want to call revolutions) were not accompanied by revolutionary violence aimed at making the world anew?

For a concrete example, consider the events of late 1989 in Romania. We know that Nicolae Ceaușescu was removed from office, and the regime that he headed crumbled. For some, the events were a revolution, for others a coup d’etat. Why should it matter which it was? Perhaps calling the events a revolution implies that they had a specific normative character (positive or negative), whereas calling them a coup d’état implies that they did not have that character. But, we suggest, analytic clarity is promoted by examining the normative questions directly, rather than by arguing over the label one should give the events. Or perhaps those who call the events a revolution do so because they believe that the events inaugurated something quite new.20

Jacobsohn prefaces his substantive discussion with an observation by a colleague: “‘Revolution’ means a large change in a short period of time” – nothing more.21 We suggest that Jacobsohn’s colleague was right, and that efforts to ‘define’ the term, by offering necessary and/or sufficient conditions, are fundamentally incomplete. Only after one knows why it matters that some political phenomenon is (or is not) a revolution can one fruitfully begin to say, ‘This was (or was not) a revolution’. So, for example, perhaps political activists who call their movement revolutionary will be able to mobilize support (or generate opposition) more readily than if they call it reformist: their analysis of their political circumstances will lead them to the definition they seek. Or, as another example, a new regime might find it easier (or more difficult) to generate authority, understood in Hart-ian terms as a social fact, for its constitutional innovations if it characterizes the transition from the old regime to the new one as ‘revolutionary’, and again their analysis of their situation will lead them to the definition. But, we suggest, asking ‘Was that set of

20 Here and elsewhere we are indebted to Martin Krygier for comments on a draft of this chapter.
21 Jacobsohn (n 12) 5.
events a revolution?’, as a free-standing inquiry, untethered to some analytical or political purposes, is likely to be unproductive. We discuss various components of definitions that others have offered of the concept ‘revolution’ in our case studies, but primarily with the deflationary aim of seeking to shift focus from the general term to the specific phenomena.

Jacobsohn concludes his argument with this paragraph:

All constitutions are crafted over time in the sense that their meaning and identity evolve gradually in ways determined by a dynamic fueled by their internal tensions and contradictions and their confrontations with a social order over which they have limited influence. In time a constitutional order is constructed and shaped, and the ambitions inscribed in, or attributed to, the constitution will have been realized or not or, more likely, approximated to a greater or lesser degree. And that is the moment for assessment of the constitutional revolution.\(^\text{22}\)

We heartily agree: Scholars can apply the term ‘constitutional revolution’ only in retrospect – at which point one could wonder why doing so would matter anyway. In any event, the time for this sort of retrospective assessment of the events of the Arab Spring and thereafter rather clearly has not yet arrived. What we try to do in our case studies is pick out the outlines of some developments that might come into clearer focus over the next decades, without worrying about whether the events were or were not constitutional revolutions. In that sense, we interpret the events of the Arab Spring and thereafter as a contribution to the Western account of revolutionary transformation.

3. THE ARAB SPRING AND VARIETIES OF CONSTITUTIONALISM

Scholarship in comparative constitutional law has historically centered on a dichotomy between liberal constitutionalism and authoritarianism. Recent developments in politics, political science, and comparative constitutional law have opened up the possibility of expanding the range of concern. Scholars should consider that constitutionalism may be a variable rather than a dichotomy. The constitutional efforts undertaken during the long Arab Spring suggest, for example, the possibility of a non-liberal and non-authoritarian Islamic constitutionalism. To consider

\(^{22}\) Ibid 30.
that possibility, we need not endorse such a constitutionalism as normatively more attractive than liberal constitutionalism, but we believe that for scholars interested in understanding the world of constitutionalism, the possibility should be entertained seriously. Of course, one characterizes systems as ‘liberal’ or ‘authoritarian’ for various purposes, and sometimes the purposes for which we classify systems will be adequately served by the dichotomy. But, we suggest, sometimes our purposes will be better served by distinguishing among varieties of liberal and non-liberal constitutionalism.

We immediately put to one side a reasonably obvious, but for our purposes relatively uninteresting, possibility. The idea of a liberal Islamic constitutionalism has been widely bruited about.23 Consider these views, identifying ‘a set of principles’ that help identify a government as Islamic:

Salient among these principles are *shura* (consultation), *bay’ah* (pledge of allegiance), general consensus (*ijma’*), public welfare (*maslahah*), and justice, all of which the Islamic government is committed to uphold. Any system of government which implements them repels turmoil (*fitnah*), establishes peace and order, and qualifies as Islamic … Islamic governance … is … neither theocretic nor totally secular but has characteristics of its own. It is a limited, as opposed to a totalitarian, form of government with powers constrained by reference to the definitive injunctions and guidelines of the Qur’an and authenticated Sunnah … The Islamic system of rule may also be described as a qualified democracy that is participatory and must conduct its affairs through consultation. … Islam advocates a limited government in which the individual enjoys considerable autonomy. There are, for example, restrictions on the legislative capabilities of the state, which may not introduce laws contrary to Islamic principles … . Islam does not advocate a totalitarian government, as many aspects of civilian life remain outside the domain of law and government.24

At the level of generality on which these principles are stated, almost nothing distinctively Islamic appears. ‘Almost’, because the description

makes clear that its subject is not constitutions in nations with Muslim majorities, nor constitutions whose descriptive parts such as preambles note that the nation is a Muslim nation (or similar formulations), but rather constitutions that have built what are characterized as Islamic principles into them.

Of course the limitations on government power Kamali describes are derived from ‘the Qur’an and authenticated Sunnah’, but without additional specification we cannot know how an Islamic constitution consistent with these principles would differ from a Western liberal constitution, if at all. Our interest in this essay is in the possibility of a non-liberal and non-totalitarian Islamic constitutionalism. Our case studies suggest that such a possibility is a real (and theoretically interesting) one, though again we emphasize that it is too soon to be more than tentative about that.

As we will see, much of the constitutional discussion in connection with Islamic constitutionalism in the Middle East and North Africa involves the relation between Shari’a and the new Islamic constitutions: is Shari’a to be a source of law (including constitutional law), the source of law, or the only source of law?\(^{25}\) All analysts agree, though, that what Shari’a law is, is contested among Muslims, including Muslim scholars of Islamic law. And, in particular, there appears to be general agreement that a (Western) liberal constitutionalism is consistent with some interpretations of Shari’a. For example, one can generate a liberal notion of the relation between the constitutional state and religion out of the proposition embedded in Islamic law, ‘No coercion in religion’, and indeed some Islamic scholars have done so.

If one treats liberal Islamic constitutionalism as the only one on offer, one need not consider the possibility of pluralizing the very idea of constitutionalism. But, as we will show in the case studies that constitute the bulk of this essay, liberal Islamic constitutionalism has played a rather small role in the constitutional debates following the Arab Spring. The actual content of those debates leads us to offer a sketch of what a

\(^{25}\) For reports on two studies attempting to measure the ‘Islamicity’ of various constitutions, concluding that the three most ‘Islamic’ are the Pakistani, the Saudi Arabian, and the Iranian, see Corri Zoll and Emily Schneider, ‘How Islamic is Pakistan’s Constitution?’ Foreign Policy (Washington, DC, 15 May 2014) <http://foreignpolicy.com/2014/05/15/how-islamic-is-pakistans-constitution/> accessed 13 March 2015 and Dawood Ahmed, ‘How “Islamic” is Pakistan’s Constitution?’ (IConnect Blog, 17 May 2014) <http://www.iconnectblog.com/2014/05/how-islamic-is-pakistans-constitution/> accessed 13 March 2015.
continuum extending from liberal constitutionalism to authoritarianism might look like.

1. Authoritarianism. We begin with a short description of authoritarianism, a system in which the exercise of public power is unconstrained by law. We emphasize the last two words because the exercise of power in authoritarian systems may be constrained in various other ways. Political contention within an authoritarian leadership group (‘the Party’) may produce temporarily effective constraints on the power exercised by that group, for example. Indeed, sometimes an authoritarian leadership group may find it useful to place legal constraints on itself. Yet, we note immediately that this is subject to the ever-present possibility that the group will revoke those constraints as soon as the constraints really matter. As one of our students put it in connection with the People’s Republic of China (PRC), the PRC could have liberal constitutionalism whenever the Central Committee of the Communist Party decided to have it – and for as long as the Central Committee wanted it. The possibility of revoking constitutional constraints limits their effectiveness.

One of us has described ‘authoritarian constitutionalism’ as a system with some authoritarian characteristics but also some characteristics associated with liberal constitutionalism, such as reasonably free and fair elections and some level of officially tolerated political dissent. Sometimes authoritarian constitutionalism is associated with what political scientists have called hybrid regimes, though not always, and the normative dimensions of authoritarian constitutionalism are sometimes neglected or given only brief attention by those political scientists. For present purposes, it is enough to note that the authoritarian constitutionalism, distinct from pure authoritarianism, is another indication of the possibility of pluralizing the idea of constitutionalism.

2. Liberal constitutionalism. At the other end of the continuum is liberal constitutionalism. Liberal constitutionalism is not the simple negation of authoritarianism, though. There are systems, sometimes

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called ‘rule by law’ systems, in which the exercise of public power is constrained by the minimal ‘rule of law’ requirements identified by Lon Fuller: publicly announced rules generally followed by officials, applied prospectively, and the like. For us, though, liberal constitutionalism is thicker than ‘rule by law’ constitutionalism.

Liberal constitutionalism, as we present it, requires reasonably free and fair regular elections with a relatively comprehensive franchise, and an array of generally honored civil rights and civil liberties – civic and political (and perhaps social) equality, freedom of expression, and the like. But, this informal definition conceals many complexities. We consider three, which we call problems of reasonable disagreement, ‘shortfall’ problems, and problems of historical contingency.

2 (a) Problems of reasonable disagreement. The problems of reasonable disagreement occur because the precise specification of liberal constitutionalism’s principles – that is, how they apply in varying real-world circumstances – is subject to reasonable disagreement. Consider two examples, civic equality and freedom of expression. It is well known that political systems with generally liberal characteristics have different interpretations of the requirements of civic equality. In some, such as the United States, the central tendency is to say that civic equality is satisfied as long as statutes apply to all in equal terms (and, in particular, when statutes make no reference in terms to race, gender, and other so-called suspect classifications). This is true even if those statutes have differential effects on different groups, for example, disadvantaging racial minorities more than a racial majority. And, indeed, in some systems, again with generally liberal characteristics, statutes that refer to specific groups, for example for purposes of positive discrimination/affirmative action, are treated as inconsistent with principles of civic equality. But, in other systems, civic equality is understood to require equality of outcome. In such systems, differential adverse effects on some groups of facially neutral statutes show that the statutes deny civic equality.

With respect to freedom of expression, differences among generally liberal systems over the regulation of hate speech and sexually explicit material are well known too. Regulations of hate speech that are required by the domestic constitution and international law in some generally

28 Gordon Silverstein, ‘Singapore: the exception that proves rules matter’ in Ginsburg and Moustafa (n 26).

29 Perhaps Fuller believed that his minimal requirements entailed thicker commitments, though that is a matter of controversy among scholars of his work.
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liberal systems are constitutionally prohibited in the United States, for example.30 Consider as well the principle of militant democracy, which according to one description, involves ‘prima facie illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime’.31 Some unquestionably liberal constitutional regimes are committed to militant democracy, others are not. This might reflect reasonable disagreement about whether or when the prima facie case against such measures can be overcome.

As noted earlier, perhaps there are some purposes for which it might be helpful to classify the United States as lacking a commitment to liberal constitutionalism, defined as requiring outcome-equality and hate-speech regulation. But, we think it better in general to understand the differences between the U.S. approach and that taken in other liberal constitutional systems as disagreements within liberal constitutionalism, arising from reasonable disagreement about what the general commitments to civic equality and freedom of expression require in specific circumstances.

2 (b) ‘Shortfalls’. An alternative understanding of these disagreements is that they reflect the fact that all liberal constitutional systems inevitably fall short of fully achieving what liberal constitutionalism actually requires. From one perspective, for example, the principles of militant democracy might seem to exemplify a shortfall. A full-scale argument about ‘shortfalls’ obviously requires a detailed specification of what liberal constitutionalism actually requires, and attempting to provide such a specification would take us too far afield (and would almost certainly produce disagreement between this essay’s authors!). Instead, we simply want to note that shortfalls are inevitable, and that observing a deviation from what an observer regards as the full-scale requirements of liberal constitutionalism need not lead the observer to remove the system from the class of liberal constitutional systems. But, once again, for some purposes identifying a practice as a shortfall – rather than as an example of reasonable disagreement within liberal constitutionalism – may be useful.

30 Hate speech regulation is not required by international law in the United States because the United States entered a reservation to that requirement when it ratified the International Covenant on Civil and Political Rights. We note, though, that some might contend that the requirement that nations ban hate speech has become a non-derogable jus cogens obligation.

Problems of historical contingency. Liberal constitutionalism is a historical achievement, in the sense that some polities increasingly satisfy the requirements of liberal constitutionalism. Freedom of expression, for example, has expanded widely, so that the remaining areas of reasonable disagreement can be treated as residual categories within a wide range of general agreement. Today almost every liberal constitutionalist polity allows quite vigorous criticism of government policies, with punishment for such speech allowed only in those rare cases where the prosecution can show an extremely close connection between the critical speech and ensuing lawbreaking or an extremely high likelihood thereof. (Again, this is subject to the problems of reasonable disagreement and shortfalls. The British statute authorizing punishment for indirect encouragement of terrorism, which authorizes convictions on a much lesser showing of causation, might be an example of either reasonable disagreement with respect to a well-defined and narrow problem or of a shortfall.)

The question of the scope of the franchise is probably the most obvious example of historical contingency. Again, depending on one’s purposes, one might want to characterize Britain or the United States in the late nineteenth century as liberal constitutionalist systems with shortfalls (in the United States, most obviously in connection with the then-prevalent system of racial segregation), even though women were denied the franchise and, in the United States, many African-Americans were as well. But, one would also want to acknowledge the history of extensions of the franchise, noting that Britain and the United States became ‘more’ liberal constitutionalist over time.

One feature of the issue of the scope of the franchise is worth emphasizing. The political dynamics of franchise expansion are quite complicated, because those who benefit from expanding the franchise do not – by definition – have it at the outset and so cannot directly influence the electoral process. Rather, those who benefit from continuing to restrict the franchise – men, in our example – must be persuaded, usually by a combination of arguments of principle and politics, that they would not be worse off were the franchise expanded, here to include women.

The reason for acknowledging historical contingency is clear: We can observe systems that are not ‘fully’ liberal constitutionalist at the time we observe them, for example because the franchise is restricted in ways that seem inconsistent with norms of civic and political equality, and yet think that the same kinds of historical transformation that we see in other polities might occur in the system we are observing. Here, the judgment might be not that the system is not liberal constitutionalist, but that it is not yet fully liberal constitutionalist. As we will show in the ensuing case studies, some of the constitutional arrangements at present in place after the Arab Spring
are rather clearly not fully liberal constitutionalist, but a subset of those might be examples of the problem of historical contingency.

3. Non-liberal constitutionalism? With these distinctions in hand, we turn to the possibility that there can be non-liberal but non-authoritarian constitutional systems.

We begin by developing an important qualification to the account of the problem of historical contingency. We have suggested that problems of historical contingency can be alleviated over time. But, there is some possibility that the problems of reasonable disagreement and shortfalls might interact in ways that obstruct movement in the direction of a more complete liberal constitutionalism. Here the best example may be the issue of campaign finance in the United States. The U.S. Supreme Court has interpreted principles of free expression to bar substantial regulation of campaign expenditures. The result is an election system that is rather tightly constrained and self-reinforcing, in which only those who are able to raise large amounts of campaign funds have a fair chance of competing for office – and in which those who donate funds for campaigns have political views that do not range widely across the possibilities. One might fairly characterize the election system as one in which there are not reasonably free and fair elections because of the relatively narrow policy terrain on which elections are fought.

One might treat the current state of the law as an example of historical contingency. Critics of the Court’s decisions contend that the decisions are simply mistaken interpretations of liberal principles. For them, the United States falls short of liberal constitutionalism because of its system of campaign finance. Alternatively, perhaps the U.S. Court has adopted a specification of free expression principles in connection with campaign finance that falls within the range of reasonable disagreement. In either case, though, the effect might be that the system of campaign finance makes impossible or extremely difficult movement away from the current constricted range of effective political debate. The problem of historical contingency would then not be resolved in the ordinary way, by changes over time.32

The effect, then, would be a system with a permanent and (in the eyes of the Supreme Court’s critics) substantial shortfall from the requirements of full liberal constitutionalism, because elections, while free,

32 We note, though, that restrictions on the scope of the franchise have a similar self-reinforcing character, and yet historically we observe significant movement in the direction of an increasingly comprehensive franchise.
might not be reasonably fair. The United States would then be an example of a non-liberal constitutionalist system.

On the account of the United States we have offered – which, we emphasize, we have done in order to illustrate the analytical possibility of non-liberal constitutionalism, not to endorse the account – the United States has a seemingly competitive two-party system, but the campaign finance system sharply limits the range of disagreement between the parties.33

A variant of this account can be offered for political systems in which one party dominates the political landscape for a long time. One-party dominant states come in several varieties, depending on the degree to which the party’s dominance fairly reflects the actual and undistorted preferences of the nation’s voters. Consider, then, a one-party dominant state in which the party maintains its dominance by a combination of standard political actions, such as channeling government resources to individuals and constituencies who regularly support the governing party (‘patronage’, in a reasonably classical sense), with some nontrivial restrictions on the ability of the government’s critics to disseminate their criticisms. Tushnet argues that contemporary Singapore is an example.34 Such a state need not be authoritarian in the sense we have defined, as exercising public power unconstrained by law.

Though the one-party dominant state need not be authoritarian, neither need it be liberal constitutionalist. The fact that its dominance is maintained in part by illiberal restrictions on criticism – again, even if those restrictions are not fully authoritarian – takes it out of the class of liberal constitutionalist systems. It is, in short, an example of non-liberal constitutionalism.

Under threat, the leaders of the dominant party might move in the direction of authoritarianism, revealing that their commitment to liberal principles was merely strategic. Yet, there is evidence that such leaders sometimes hope for and attain continued electoral victories for a while before they find themselves losing.35 Given that they could have retained power by moving toward authoritarian rule, this evidence suggests that

33 The standard observation used to support that claim is that politicians who are described in the United States as rather liberal Democrats would be described in Europe as either slightly left of center or slightly right of center, and that politicians who are described in the United States as conservative Republicans would be described in Europe as extremely conservative or reactionary.

34 Tushnet (n 27).

35 Edward Friedman and Joseph Wong (eds), Political Transitions in Dominant Party Systems: Learning to Lose (Routledge 2008).
sometimes leaders of a state in which their party has been dominant might have a principled commitment to something resembling liberal constitutionalism. The possibility of principled commitments to something resembling, but well short of, liberal constitutionalism, leads us to the topic of the possibility of a non-liberal Islamic constitutionalism.

4. Non-liberal but non-authoritarian Islamic constitutionalism. To this point much of our discussion of the possibility of non-liberal constitutionalism has focused on the political conditions under which it might occur. We do not abandon that focus in the case studies that follow, but we devote more attention to the substance of non-liberal constitutionalism as instantiated in the constitutional discussions we examine. We do so because, at least to this point, the fluidity of politics in the Middle East and North Africa makes it hazardous even to speculate about how reasonably stable political arrangements might support non-liberal constitutionalism.

Fluidity affects our ability to describe much of the substance of any actual non-liberal constitutional arrangements. So, instead, we offer a sketch of some possibilities.

First, as to institutional arrangements. Liberal constitutionalism accommodates a wide range of basic institutional designs. Both parliamentary and separation-of-powers systems, for example, are plainly compatible with liberal constitutionalism. Courts with some substantial degree of independence of the political branches may be necessary for constitutionalism (liberal or otherwise) to flourish. Yet, this does not mean that judicial enforcement of constitutional limits on government power is necessary, at least in systems with an appropriately embedded political culture of constitutionalism: the United Kingdom got by with pure parliamentary supremacy until the Human Rights Act 1998 took effect, for example.

Scholars of Islamic constitutionalism, as we have defined it above to distinguish it from constitutionalism in majority-Muslim nations, take a similar position, that, while Islamic law is committed to some notion of separation of powers, the precise institutional form of separation of powers can vary substantially.36 Shari’a plays both a substantive and an institutional role in Islamic constitutionalism. As is widely acknowledged, there are different ‘schools’ of interpretation of Shari’a, each with

a claim to legitimacy and even primacy in interpretation. As we will show, some constitutional discussions after the Arab Spring dealt with how to embed expert interpretation, located outside the state apparatus, into constitutional arrangements.

Substantively, the comprehensive scope of Shari’a as a law governing all aspects of life obviously raises the possibility that some applications of Shari’a in public law will be illiberal even as other applications are made by non-governmental institutions. Were a system to hold that public law would apply Shari’a throughout its full scope, that system would almost certainly be both illiberal and authoritarian. Perhaps one might say that in such a system public power was limited by law, specifically by Shari’a. Yet, Shari’a would not effectively limit the scope of public power because of Shari’a’s comprehensive scope.

The question of interest here is whether it is possible for the applications of Shari’a to have a limited domain, so that the system as a whole could still be regarded as non-authoritarian although non-liberal. Some obvious candidates for substantively illiberal rules with a relatively limited domain are: prohibitions on apostacy from the Muslim faith, which, we note, were enforced in the celebrated Lina Joy case in Malaysia; anti-proselytizing rules, such as those held incompatible with the European Convention on Human Rights (ECHR) in the Kokkinakis case; and substantial restrictions on the place non-Muslim religions can have in public spaces. Most of the constitutional discussions we examine were conducted at a sufficiently high level of abstraction that it is difficult to know whether the resulting constitutions would give Shari’a an illiberal non-authoritarian role.

Finally, we note that issues of civic equality arose persistently in those discussions, especially with respect to the role of women in the constitutional system, but also with respect to the role of religious and linguistic minorities. As we have noted, it is sometimes difficult to determine whether restrictions on civic equality should be regarded as examples of a commitment to non-liberal principles or as examples of the problem of historical contingency. The nature of this essay makes it impossible for us to offer much insight into that question, but we do our best to flag the occasions on which it arose.

4. CONCLUSION

The events that we now describe as ‘the Arab Spring’ continue to unfold more than five years after their initiation in Tunisia. Well-grounded comprehensive evaluations of those events will be impossible for many
years. But, we know enough about the events to use them as ways of probing two concepts important in comparative constitutional law – revolution and constitutionalism. The chapters that follow in this essay begin in Chapter One with an overview of what the Arab Spring might tell us about the concept of revolution and continue in Chapter Two with a similar overview as to constitutionalism. The remaining chapters examine in more detail the specific developments relevant to the ideas of revolution and constitutionalism in several nations affected by the Arab Spring: Tunisia, Morocco, Libya, and Egypt, with occasional allusions to similar events elsewhere in the Middle East and North Africa. Although we caution the reader that it is in the nature of an essay that we do not attempt either a complete account of the events or a full-scale evaluation of them along all dimensions of interest, we believe that the case studies help deepen the understanding of the concepts of revolution and constitutionalism.