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The Principles of Constitutional Reform

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Abstract

In legal orders around the world, commitments to democracy, liberalism and constitutionalism are increasingly eroding. Although political and constitutional theorists often lament this trend, they invariably adopt frameworks that are indifferent to these commitments. My aims in this article are both critical and constructive. As a critical matter, I will expose the indifference of the leading political and constitutional theories to the emergence, maintenance and refinement of liberal democratic constitutional orders. As a constructive matter, I will draw on Immanuel Kant's constitutional theory to explain why realizing such a form of governance is a public duty and why receding from it is a public wrong.

Keywords: constitutional reform, constitutional amendments, authority, justice, constitutive, regulative, constituent power

In legal orders around the world, commitments to democracy, liberalism and constitutionalism are increasingly eroding (Huq and Ginsburg 2018; Kurlantzick 2014; Plattner 2015; Scheppele 2019). Although political and constitutional theorists often lament this trend, they invariably adopt frameworks that are indifferent to these commitments. My aims in this article are both critical and constructive. As a critical matter, I will expose the indifference of the leading political and constitutional theories to the emergence, maintenance and refinement of liberal democratic constitutional orders. As a constructive matter, I will draw on Immanuel Kant's constitutional theory to explain why realizing such a form of governance is a public duty and why receding from it is a public wrong.

Political and constitutional theorists offer two basic ways of thinking about modifications to an existing constitutional order. The animating principle of the *procedural* paradigm is that the structure of a

constitutional order must answer to the deeply held convictions of the people that it governs. Constitutions enable citizens to transform their convictions into supreme law through a particular procedure, often requiring an enhanced majority. Accordingly, in order to determine whether a particular constitutional amendment is valid, one must ask whether the relevant procedure has been satisfied. The opposing *preservationist* paradigm advances the competing idea that the purpose of a constitutional amendment is to refine the existing order, not to destroy it. Accordingly, in addition to satisfying the relevant procedure, amendments must satisfy a substantive criterion by conforming to the identity of the existing constitutional order. Thus, even an amendment that satisfies the most demanding procedure – say, the unanimous approval of citizens or their representatives – could be invalid.

While these paradigms are often endorsed by theorists committed to liberal democracy, these paradigms do not themselves reflect this commitment. The *procedural* paradigm constrains the way in which an amendment is adopted, but imposes no constraints on the nature of the amendment itself. Consider a hypothetical amendment to the American Constitution that partially repeals the First Amendment: 'Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden' (Ackerman 1991: 14). The constitutional theorist Bruce Ackerman offers a twofold response to this amendment. From the standpoint of his own liberal commitments, he holds that the amendment is 'terribly wrong' insofar as it denies freedom of conscience. But from the standpoint of a constitutional theorist committed to the *procedural* paradigm, Ackerman maintains that the amendment is unobjectionable: the power to amend the constitution is 'open-ended' (1991: 14).[1] Because the *procedural* paradigm is indifferent to the kind of amendment that is introduced, it establishes a mechanism for diminishing or even dissolving the building blocks of liberal democratic governance.

John Rawls rejected Ackerman's view that the amendment process could be deployed to efface American liberal democracy by appealing to the *preservationist* paradigm. In Rawls' words: '[A]n amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world. It is therefore invalid' (1996: 239). Although Rawls endorsed the *preservationist* paradigm in order to safeguard liberal democracy, he failed to observe that the paradigm could also be invoked to preclude the lawful transition to this form of governance. In the nineteenth

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century, American defenders of slavery rallied to the *preservationist* paradigm to deny the validity of liberal amendments that sought to supplant slavery with equal citizenship. Their claim was that slavery was woven so deeply into the fabric of the American constitutional order that there was no lawful way to eradicate it (Calhoun 2003: 165).[2] Because the *preservationist* paradigm is indifferent to the kind of regime that it safeguards, it could preclude the lawful introduction of liberal democratic norms (Schmitt 2008: 151).

This essay looks to Kant's legal and political philosophy to formulate an alternative constitutional paradigm.[3] Its guiding idea is that the justification of public authority imposes a duty of public justice upon whoever wields it. This duty requires the sovereign to direct public authority towards the realization, refinement and maintenance of a liberal democracy as Kant envisioned it, a republican order in which citizens govern themselves in accordance with laws of freedom. Because Kant's paradigm directs all exercises of public authority towards this conception of public justice, I call it the *public justice* paradigm.

Kant's *public justice* paradigm can be distinguished from the *procedural* and *preservationist* paradigms. Unlike the *procedural* paradigm, the *public justice* paradigm rejects the view that the constraints on amending powers are exclusively procedural. Once arrangements that conform to public justice are established, an amendment that would diminish or dissolve them is wrongful regardless of the process that purports to authorize it. By insisting that constitutional amendments are subject to substantive constraints, the *public justice* paradigm might seem to elide with its *preservationist* counterpart. But these paradigms diverge sharply when one considers the nature of the relevant constraints. The constraints recognized by the *preservationist* paradigm are the product of historical facts pertaining to the original identity of the constitutional order. Whether these constraints overlap with the demands of public justice is a contingent matter. In contrast, the *public justice* paradigm holds that historical facts are relevant when considering how reforms are to be implemented and administered, but such facts provide no licence for insulating injustice from reform. Wherever legal arrangements depart from the republican ideal, reform is necessary.

In the world of constitutional theory, Kant's thought is typically either ignored or, as I illustrate below, robbed of its insights through distortion. My aim in this essay is to expound Kant's theory of constitutional reform and to contrast it with two of the leading paradigms in contemporary

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constitutional thought. I will argue that these paradigms cannot vindicate the commitment of their adherents to liberal democracy and that Kant's framework offers an attractive and powerful alternative.

I explore the *public justice* paradigm in three sections. The first articulates this paradigm's architecture and distinguishes it from competing paradigms. The second explores how this paradigm conceives of the sovereign's duty to reform the constitutional order. The third shows that Kant offers a way of thinking about constitutional reform that is neither paradoxical nor dangerous.

1. The Principles of Legal Order

Kant's theory of the state proceeds from a familiar distinction. Feeling peckish, you step into an Italian restaurant and order a pizza. A few minutes later, the waiter comes to the table with your meal. You look down at the dish and realize that there has been a mistake. Instead of a pizza, the waiter has brought spaghetti carbonara. You exclaim: 'You call *this* a pizza?' The waiter apologizes, removes the dish, and disappears into the kitchen. Moments later the waiter emerges with a new dish and says: 'Your pizza.' Looking down at the dish, you see a disaster. The crust is thick on one side and razor-thin on the other, with the result that it is simultaneously raw and burnt. The tomato sauce is watery and the cheese has been distributed haphazardly. In frustration, you remark: 'You call *this* a pizza?'

Each of the dishes elicited the same response: 'You call *this* a pizza?' But each time you uttered this phrase you drew attention to a different problem. On the first occasion, the problem was that the waiter brought the wrong kind of thing. You ordered a pizza, but received spaghetti carbonara. Even if it was an exquisite rendition of spaghetti carbonara, it failed to satisfy pizza's *constitutive principle*. On the second occasion, the waiter brought the appropriate thing – a pizza – but it was a defective instance of that thing. Although the item satisfied pizza's *constitutive principle*, it failed to approximate the relevant *regulative principle*. It was a pizza, but an unsuccessful instance of one.

The distinction between constitutive and regulative principles forms the organizing structure of Kant's theory of the state.[4] The constitutive principle articulates what a state is: a set of public authoritative institutions that enable persons to interact with one another in accordance with private rights rather than the force that one happens to command or the goodwill that one happens to extend. The regulative principle articulates

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the nature of a morally adequate (or just) state: a condition in which public authority is fully reconciled with the freedom of each person subject to it. These principles belong to a single theory of the state because each emerges from a conceptually sequenced exploration of the innate right of persons to interact with one another on terms of equal freedom (Weinrib 2019).

Kant conceives of a state as the legal relationship between publicly authoritative institutions and the private persons subject to them. The details of his justification of public authority are controversial, but the basic strategy is clear (Ripstein 2009: 145–81). Kant's aim is to show that persons entitled to interact with others on terms of equal freedom must submit themselves to public institutions because they cannot interact with one another rightfully in their absence. Since Kant conceives of rights as reciprocal constraints on conduct, rightful interaction requires that persons be subject to a common set of norms that protect the freedom of each in relation to every other. In the absence of a legislative institution, rights cannot be enjoyed because no private person has standing to subject all others to a common set of norms. In the absence of an adjudicative institution, rights cannot be enjoyed because no private person has standing to resolve disputes by providing a binding interpretation of what these norms require with respect to particular cases. Finally, in the absence of an executive institution that implements legislation and judicial verdicts, persons might disregard the common standards that these institutions establish and elaborate. Because private persons cannot interact with one another rightfully in the absence of the public institutions that form a state, submission to these institutions is obligatory.

Kant formulates this duty in what he terms the *postulate of public right*: 'when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition' (*MM*, 6: 305–6). In turn, a *rightful condition* is defined as the 'relation of human beings among one another ... under which alone everyone is able to *enjoy* his rights' (*MM*, 6: 305–6). The postulate of public right is the state's constitutive principle; it underwrites the authority of the set of public institutions that form a state.

Whereas the postulate of public right is the key to Kant's account of what a state is, the idea of the original contract forms the regulative principle for assessing a state's moral adequacy and directing its reform. For Kant, public authority resolves one problem but presents another. It resolves a problem by introducing institutions that enable persons to interact with

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one another in accordance with rights. The further problem is that these very institutions might impose constraints on the freedom of the ruled that legal order does not itself require. Thus, the solution to the problem of domination at the hands of other private persons creates a new relationship into which domination might enter, the relationship between rulers and ruled. This is the problem to which the idea of the original contract responds. Pushing back against theorists who take the existence of states for granted and then ask, all things considered, what purpose (or purposes) they should advance, the idea of the original contract is a principle that demands that public authority be exercised in accordance with the terms of its justification. Since public authority is premised on the inalienable right of each person to freedom, every system of public authority enters the world with an internal moral standard for evaluating its adequacy and directing its exercise. A legal system is adequate (or just) to the extent that public authority leaves the freedom of those subject to it 'undiminished' (*MM*, 6: 316; *Refl*, 19: 504). In turn, public authority is exercised in a justifiable manner to the extent that it brings the legal order into the deepest possible conformity to this standard (*TP*, 8: 297). As I will argue below, the idea of the original contract requires the sovereign to direct public authority towards the realization and refinement of a republican vision of liberal democracy.

The constitutive and regulative principles of legal order can be distinguished on a variety of grounds, including (1) the rights and duties that each principle imparts to rulers and ruled, (2) the conditions under which each principle is applicable, and (3) the arrangements that satisfy the demands that issue from each principle. I take up each of these bases of distinction in turn.

The constitutive and regulative principles of legal order are moral principles that articulate the rights and duties of sovereign and subject. The postulate of public right establishes that the sovereign possesses a right that no private person can hold, the right to bind private persons by enacting, interpreting and implementing legal norms. The idea of the original contract connects right and duty from the opposite direction. Whereas the postulate concerns the right of the sovereign and the corresponding duty of the subjects, the idea of the original contract recognizes the (non-coercive) right of subjects to just governance and the corresponding duty of the sovereign (*TP*, 8: 304). These principles distinguish the juridical situation of private persons and public officials. Private persons have no obligatory ends: each person may direct her powers towards

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self-chosen ends. The same cannot be said of public officials. Given the terms on which public authority is justified, it must be directed towards bringing the existing legal order into the deepest possible conformity with the freedom of all who are subject to it (*CF*, 7: 92).[5] Kant calls this 'the final end of all public right' (*MM*, 6: 341).

Each of the principles of legal order possesses its own condition of application. The postulate of public right, the constitutive principle of legal order, applies whenever private persons interact with one another. When such interaction occurs within a lawless condition, the postulate requires persons to submit themselves to the publicly authoritative institutions that form a state (*MM*, 6: 307). Alternately, when interaction occurs within a state, private persons are under a duty to act in accordance with the strictures set out by its public institutions (*MM*, 6: 318–23). The idea of the original contract, the regulative principle of legal order, concerns the adequacy of the relationship between sovereign and subject. Accordingly, where this relationship has not been forged, the idea of the original contract is inapplicable. Whereas the idea of the original contract is applicable only within a legal system, the postulate of public right is also applicable outside of one.

These principles can be further distinguished by identifying the condition under which each is satisfied. The postulate of public right is satisfied when private persons conduct themselves in accordance with the strictures of public institutions that secure the rights of each private person in relation to one another. From the standpoint of the postulate, whether the legislative institution is '*autocratic*, *aristocratic*, or *democratic*' makes no difference; each of these arrangements is capable of subjecting a multitude to common standards of conduct that protect the rights of each in relation to every other (*MM*, 6: 338). This does not mean, as Kant's critics sometimes suggest, that every regime satisfies the postulate, possesses public authority and demands obedience (Finnis 2007).[6] The postulate underwrites the public authority of arrangements that secure the freedom of each private person in relation to every other. It follows that arrangements that do not meet this standard possess no authority. Kant refers to such arrangements as *barbarous*.[7] A barbarous arrangement violates the state's constitutive principle by denying the capacity of some private persons to limit the conduct of others by virtue of their freedom. This is the principle that the Spartans violated when they engaged in the wholesale slaughter of the Helots. The Nazis violated the same principle even before they exterminated their perceived opponents. For the Nazi regime was

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orientated by the precept that certain persons were necessarily lacking in rights and, as such, could neither impose duties on others nor be wronged by their conduct.

Unlike the postulate of public right, the idea of the original contract is not satisfied by the mere submission of private persons to publicly authoritative institutions. The idea of the original contract calls for a legal order that to the greatest possible extent reconciles public authority with the right of each person who is subject to it to freedom. Although Kant does not use the term *liberal democracy*,[8] his mature theory of the state endorses the idea for systematic reasons. On the one hand, he holds that 'those who obey the law should also act as a unified body of legislators' (*CF*, 7: 90). Kant's argument for democracy turns on the distinction between the constitutive and regulative principles of public right. Legislative power might be held by a single person (an autocrat), a plurality of persons (an aristocracy) or by the people itself (democracy) (*MM*, 6: 338–9). Each of these arrangements satisfies the postulate of public right by subjecting a multitude of persons to common lawgiving. However, autocracy and aristocracy run afoul of the idea of the original contract by imposing a constraint on freedom that legal order does not itself require, the subjection of citizens to laws that they do not themselves enact. Of the three ways of arranging legislative power, democracy alone avoids this problem. Accordingly, the creation and refinement of a democratic form of lawgiving is a public duty. Turning from the legislative process demanded by the idea of the original contract to the substance of lawgiving, Kant holds that legislative authority must govern the people in accordance with 'laws of freedom' (*CF*, 7: 90). This duty requires the lawgiver to engage in a comprehensive programme of reforms in which arrangements that are incompatible with the freedom of each subject are brought into accordance with the regulative principle of legal order. As Kant formulates his liberal and democratic commitments: 'Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies)' (*MM*, 6: 341).

Kant's *public justice* paradigm departs from its *preservationist* and *procedural* counterparts. Each departure stems from the thought that what constitutes a state must be brought into conformity with its regulative principle.

The *preservationist* paradigm denies the distinction between what a state is and what it must become. Carl Schmitt, a pioneer of the *preservationist*

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paradigm, held that the power to amend the constitution must be distinguished from the power to annihilate it (Schmitt 2008: 150). Accordingly, the amendment power cannot be used to change the identity of the existing order. Liberals – from John Rawls to the American constitutional lawyer Laurence Tribe – have embraced Schmitt's view because it prevents the amendment power from being used to dismantle a liberal democracy (Rawls 1996: 237–40; Tribe 2008: 33–4). They fail to observe the implication of Schmitt's position: an undemocratic or illiberal order offers no 'legal means' of realizing liberal democracy (Schmitt 2008: 151). The same point would preclude the lawful transformation of an illiberal constitutional order into a liberal one. Kant's response to the preservationist is straightforward. Public authority must be exercised in accordance with the terms of its justification. Accordingly, any arrangement that is inconsistent with the idea of the original contract stands in need of reform. A constitutional theory that insulates injustice from reform 'make[s] improvement impossible and perpetuate[s] ... violations of right' (*TP*, 8: 373).

The relationship between the regulative and constitutive principles of public right also distinguishes Kant's *public justice* paradigm from the proceduralist view. Although the *procedural* paradigm does not preclude progressive reforms, it provides no standard for distinguishing reform from regress. To the extent that proponents of this paradigm assess the moral adequacy of alterations to the constitutional order, they must appeal to normative considerations extrinsic to their constitutional theory. Proceduralists might be committed to progressive reform, but their constitutional theory is equally hospitable to regression.

The distinction between the constitutive and regulative principles generates an exhaustive classification of legal order. A just state satisfies both constitutive and regulative principles by reconciling the authority of law with the freedom of each person subject to it. An unjust state satisfies the constitutive principle but not the regulative one because the state has not reconciled public authority with individual freedom. Because existing states depart from the regulative principle to varying extents, they fall within this category and stand in need of reform. Finally, a condition in which private persons cannot enjoy their freedom in relation to one another fails to satisfy the constitutive principle and is therefore not a state. The remaining category, in which the regulative principle alone is satisfied, is a conceptual impossibility. After all, the regulative principle is the standard for assessing the moral adequacy of a state. But if the constitutive principle has not been satisfied, then the regulative principle

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lacks its condition of application. For one cannot evaluate the moral quality of a state that does not exist.

Kant's distinction between the constitutive and regulative principles of a state makes it possible to explain how a legal system can be authoritative even if it is defective on its own internal standard of adequacy. Once this possibility is acknowledged, we stand in need of an account of how defective states are to be reformed into republics. It is to this aspect of Kant's constitutional theory that I now turn.

2. Realizing the Regulative Principle

Constitutional theorists often claim that the more abstract a theory is, the more it is incapable of articulating the nature of legal and political reform. Because Kant's theory of the state emerges from abstract principles rather than historical or sociological facts, he has become the leading target of this criticism. The constitutional theorist Martin Loughlin holds that abstraction and irrelevance go hand-in-hand in Kant's thought: '[T]he precision of [Kant's] rational law is acquired only by virtue of its abstraction from the material concerns of particular societies. Kant's conceptual solution to the search for a science of political right is achieved only at a cost of its socio-political relevance' (Loughlin 2010: 129). Similarly, Ackerman suggests that timeless philosophic theories are incapable of engaging with the contingent crises that inevitably confront existing constitutional orders. For Ackerman, the modern American constitution:

> is the product of ongoing political struggle ... The guiding image should be Neurath's Boat, not Kant's Critique. In the aftermath of the Civil War, Americans ripped gaping holes in the traditional structure, replacing them with new planks that didn't fit the old design. The question was whether the ship would keep sailing during such a shattering reconstruction, not whether its overall design would survive a philosophy seminar. (Ackerman 1994: 520)

Loughlin and Ackerman hold that a theory that excludes particularity lacks the resources to explain anything particular. Because constitutional reform must respond to the concrete circumstances of an existing society, reform cannot be illuminated by abstract principles.

These objections overlook the way in which particularity enters Kant's theory. As I argued in the prior section, a division of labour obtains between the constitutive and regulative principles of Kant's theory of

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the state. The constitutive principle underwrites the public authority of the legal system, including constitutional norms, legislation, institutional powers, judicial doctrines and conventions. These publicly authoritative norms are historically and sociologically contingent – they reflect how public authority happens to have been exercised in the context of a particular time and place. In contrast, the regulative principle provides the critical moral standard for assessing the sum of publicly authoritative arrangements. Because such a standard cannot be formulated by looking to the way in which public authority has been exercised, it must 'be derived *a priori* by reason from the ideal of a rightful association of human beings under public laws as such' (*MM*, 6: 355). As the regulative principle, the role of the idea of the original contract is not to introduce particularity, but to provide the moral standard for assessing the adequacy of the sum of authoritative particulars that the constitutive principle underwrites. Within Kant's framework, the concrete circumstances of existing legal systems form the subject matter to which the idea of the original contract applies.

The distinguishing feature of Kant's *public justice* paradigm is the idea that the right to exercise public authority is always accompanied by an overarching duty to bring the existing state into the deepest possible conformity to its own regulative standard. This idea prompts Kant to reconceive the nature of politics and the role of those who exercise political power (Weinrib 2014).

According to a familiar understanding, politics is a prudential activity aimed at acquiring and consolidating public power for the pursuit of discretionary ends. From the standpoint of Kantian right, this view of politics is problematic because it loses sight of the internal end of all public authority. Instead of bringing public authority into the deepest possible conformity to the freedom of each person subject to it, the familiar understanding makes public authority an instrument of the 'private advantage' of those who wield it (*TPP*, 8: 373). The wrongfulness of politics, so conceived, can be put in terms of the relationship between the right to exercise public authority and the duty that accompanies it. One cannot retain the right while eschewing the duty if both spring from the same justificatory basis, the right of persons to interact on terms of equal freedom. As Kant puts it, 'apart from [the idea of the original contract], no right over a people can be thought' (*TPP*, 8: 344).

If politics is to cohere with public justice, then it must be reconceived. Considered as a morally justifiable enterprise, politics consists in carrying

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out the doctrine of right (*TPP*, 8: 370). Moral politics consists in the application of principles drawn from 'experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately' (*ERP*, 8: 429). In other words, moral politics is an answer to the question: How can the idea of the original contract be most fully achieved in the contingent context of the prevailing legal system?

Moral politics imposes a heavy burden on the sovereign:

> A moral politician will make it his principle that, once defects that could not have been prevented are found within the constitution of the state or in the relation of states, it is a duty, especially for heads of state, to be concerned about how they can be improved as soon as possible and brought into conformity with natural right, which stands before us as a model in the idea of reason, even at the cost of sacrifices to their self-seeking [inclinations]. (*PP*, 8: 372)

The activity of moral politics can be broken down into three steps. First, the moral politician surveys the entirety of publicly authoritative arrangements, including constitutional norms, legislation, doctrines and conventions. Second, she then considers the adequacy of these arrangements from the standpoint of the idea of the original contract in order to identify discrepancies between what is publicly authoritative and what public justice demands (*MM*, 6: 340–1). Third, wherever such a discrepancy obtains, she develops and deploys an overarching programme designed to transform the legal order from an aggregate of inherited customs and traditions into a system of equal freedom: 'To reform the state in accordance with principles is not merely to patch it up' (DTPP, 23: 162).

The permissibility of public criticism is integral to the practice of moral politics. Kant calls '*freedom of the pen* ... the sole palladium of the people's right' because it enables a legal subject to 'make known publicly his opinions about what it is in the ruler's arrangements that seems to him to be a wrong against the commonwealth' (*TP*, 8: 301; WIE, 8: 39). Rulers who deprive their subjects of the capacity to make complaints about public arrangements violate the idea of the original contract in two respects. On the one hand, they violate the idea of the original contract by constraining freedom in a manner that freedom does not itself require. On the other, the constraint deprives rulers of 'knowledge of matters' relevant to the duty's ongoing discharge (*TP*, 8: 304). As Kant puts the

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point: 'Writings must enable the ruler, like the people, to examine injustices' (DTP, 23: 134).

The idea of the original contract forms the standpoint for distinguishing those aspects of the legal order that must ultimately be reformed from those that may persist in perpetuity. Accordingly, Kant's *public justice* paradigm provides a response to those that seek to establish the permanence of arrangements that violate the idea of the original contract, whether by appealing to positive law or to the benefits that particular arrangements bring.

Positive law provides no authorization for maintaining arrangements that violate the idea of the original contract. Suppose that a state enacts a law establishing that the privileges enjoyed by the nobility are unalterable. The law purports to provide legal authorization for an ongoing violation of the idea of the original contract. But since the idea simply attends the exercise of public authority, it is not displaced by acts that violate it. Accordingly, the idea persists and requires government to repeal statutes that insulate injustice and to reform the underlying defect. It makes no difference whether the wrongful norm is found in an ordinary statute or in a constitutional provision because the idea of the original contract forms the moral standard for assessing whatever is publicly authoritative.

Nor may beneficiaries of an injustice claim an entitlement to its permanence. In his discussion of hereditary nobility, Kant confronts the claim that a ruler is not 'authorized to annul this preeminence of estate entirely, or that if he does this he has deprived his (noble) subjects of what was *theirs*' (*MM*, 6: 370). Kant's response to this claim is twofold. On the one hand, he emphasizes that these entitlements are the product of the way that public authority has been exercised within the state (*MM*, 6: 370). On the other, he notes that these entitlements impose no constraint on its future exercise. When these privileges are washed away by reforms, 'someone who loses his title and precedence cannot say that he was deprived of what was his, since he could call it his only under the condition that this form of state continued' (*MM*, 6: 370). Once again, Kant's position reflects the distinction between the constitutive and regulative principles of legal order. The postulate of public right might authorize a nobility but, by the same token, might also authorize its annulment. So long as a nobility is not required to maintain the state, the postulate is indifferent to it. In contrast, the idea of the original contract demands the elimination of hereditary nobility because it prevents some citizens from holding public office without reference to their conduct. Because

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a hereditary nobility must be dissolved through reform, Kant defines it as a '*temporary* fraternity authorized by the state' (*MM*, 6: 370; my emphasis).[9] His preoccupation with hereditary nobility reflects the circumstances of his time, but his underlying idea remains relevant: a state has 'the *right*, indeed the *duty* ... to alter any foundation if it is opposed to the preservation of the state and its progress to the better' (*MM*, 6: 369; my emphasis). The right of the state is its authority, as underwritten by the postulate of public right; the unremitting duty to reform itself is imposed by the idea of the original contract.

The idea of the original contract prohibits regressive changes to the constitutional order for the same reason it demands progressive reform: all public authority must be directed towards bringing the existing legal order into the deepest possible conformity with public justice. In the *Doctrine of Right*, Kant comments on an episode that preceded the French Revolution. When Louis XVI summoned the Estates General and invited the people to take the state's debts 'on itself and distribute it as it saw fit ... the legislative authority naturally came into the people's hands, not only with regard to the taxation of subjects but also with regard to the government, namely to prevent it from incurring new debts by extravagance or war' (*MM*, 6: 341). Here, Kant makes a narrow point about the nature of sovereignty and a broader point about the duty that attends its exercise. The narrow point is that the sovereignty of the king consists in representing the people as a whole (Pinzani 2008; Ludwig 2009: 277). Accordingly, a king who enables the people to represent itself is no longer sovereign – he is 'nothing' (*Refl*, 19: 596). The broader point is often overlooked. It concerns the wrongfulness of retrogression: 'a republic, once established, no longer has to let the reins of government out of its hands and give them over again to those who previously held them and could again nullify all new institutions by their absolute choice' (*MM*, 6: 341; see also *MM*, 6: 370). A self-governing people finds itself in a different situation from a people governed by an autocrat or an aristocracy. When sovereignty is held by an autocrat or an aristocracy, the idea of the original contract requires the transition to a republican form of government in which sovereignty is held by the citizenry. But the reverse is not the case. Once the citizenry acquires sovereignty, the idea of the original contract requires that the citizenry retain it. Backsliding away from a republican mode of governance is a public wrong.

3. Constituent Power for Kantians

Constituent power consists in the public authority to establish, modify or repeal constitutional norms. Kant's *public justice* paradigm relies on the

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idea of constituent power insofar as it recognizes that public authority is 'under obligation to change the kind of government gradually and continually so that it harmonizes *in its effect* with the only constitution that accords with right, that of a pure republic' (*MM*, 6: 340). The idea of constituent power has come in for a rough ride from legal and political theorists, who regard it as an idea that is both paradoxical and dangerous (Dyzenhaus 2012: 230–7). Constituent power is *paradoxical* when it is invoked as the legitimating basis of public authority. By conceiving of the people acting to establish public authority, proponents of constituent power fail to observe that a people cannot act as a unified entity in the absence of an authoritative public body that represents them. Constituent power is *dangerous* when it invites the conclusion that any arrangements that *We the People* enact are unimpeachable. In what follows, I take up each of these objections to the notion of constituent power in turn. My claim is not that constituent power is unobjectionable, but that these familiar objections pose no threat to the role that constituent power plays within Kant's *public justice* paradigm.

In 'What is the Third Estate?', Abbé Emmanuel Joseph Sieyès offered a distinction that denied the authority of France's *Ancien Régime* and propelled the ensuing revolution. Sieyès' broader political vision has fallen into obscurity, but his distinction between *constituted power* and *constituent power* remains the starting point for contemporary discussions of constitutional reform. Constituted power consists in the ordinary authority to govern in conformity with the legal framework set out in the constitution. In order to explain how constituted power could be legitimate, Sieyès introduces the idea of constituent power. Constituent power consists in the extraordinary capacity of the nation (or the people) to establish a constitutional framework for governance (Sieyès 2003: 136). For Sieyès, any claim to exercise constituted power must be underwritten by the prior exercise of the nation's constituent power. This idea has two important implications. The first is that constituted power exists only where it is preceded by a legitimating act. The reason why the *Ancien Régime* lacked constituted power was because the French nation had, as a historical matter, never authorized it. If the French nation was to be subject to a constituted power in the future, then the nation itself would have to exercise its constituent power and, in so doing, act as 'the origin of all legality' (Sieyès 2003: 137). The second is that constituent power constrains all constituted power, including the power to amend the constitution. Both the *procedural* and *preservationist* paradigms accept this idea. The paradigms are distinguished by whether these constraints are understood to be merely procedural or also substantive.

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For more than two hundred years, Sieyès' distinction has taken centre stage in debates about constitutional reform. Constitutional theorists gravitate to it because it offers a simple way of determining whether public authority is legitimate and for explaining why even legitimate authorities are subject to ongoing revision. But critics worry that, on closer inspection, Sieyès' framework neither possesses the resources to legitimate public authority nor to direct its reform. I will unpack each of these objections and explain why Kant's *public justice* paradigm is not susceptible to them.

When contemporary constitutional theorists attempt to articulate the basis of public authority, they often turn to Sieyès' account of constituent power (Loughlin 2004: 99). For Sieyès, the constituted power of government can be generated only by a nation's antecedent exercise of constituent power (2003: 134). A nation creates the constituted power of government through its choice. The difficulty with this view, as Sieyès at times acknowledged, is that an aggregate of private persons cannot act as a unified entity – a nation or a people – if its members are not represented by a public institution (2003: 97).[10] The constituted power of government creates the nation. Thus, the nation plays two incompatible roles within Sieyès' framework: the nation is both the effect that follows the establishment of government's constituted power and its prior legitimating cause. Each of these possibilities undermines Sieyès' attempt to legitimate constituted power. If the nation results from the constituted power of government, then the nation cannot legitimate that power through a prior act. Alternately, if the nation is the legitimating cause of the constituted power of government, then Sieyès owes his readers an account of how there can be a nation (as opposed to a multitude of private wills) capable of acting as a unified whole prior to being represented by public institutions.

Even if the constituted power of government could *somehow* be legitimated by the constituent power of the nation, a further objection remains. For apart from the requirement that the constituted power must be authorized by the nation (or *We the People*), the notion of constituent power offers no further basis for scrutinizing the moral merits of a legal order (Dyzenhaus 2012: 230–1). For its liberal critics, the danger of constituent power is that it fails to elevate liberal democracy over forms of government that are illiberal and undemocratic (Kumm 2010: 210). From the standpoint of the distinction between constituted and constituent power, it makes no difference whether the nation transforms an

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autocracy into a liberal democracy, or whether a liberal democracy is transformed into an autocracy. As Sieyès puts it, whatever constitutional arrangements happen to prevail, 'the Nation would still be the master to change them' (2003: 141).[11] On this view, even if Sieyès' anarchism could be overcome, his framework would suffer from quietism: it offers no resources for the moral criticism of constituted powers that nations legitimate.

Kant's *public justice* paradigm retains Sieyès' idea that public authority must be legitimated while avoiding the spectre of anarchism. On the one hand, Kant rejects the role that the people plays within Sieyès' account. Instead of following Sieyès' claim that the people somehow creates the state, Kant holds that the state creates the people by subjecting a multitude of persons to common lawgiving (*MM*, 6: 311). On the other hand, Kant rejects Sieyès' general strategy for justifying public authority. For Sieyès, if public authority is legitimate, then there must be some act that legitimates it. If there is an act, there must be an agent. Since those who exercise constituted power cannot legitimate their own authority, that authority must be legitimated by those subject to it. Thus, Sieyès' view that some act is required to legitimate public authority pushes him to embrace the paradoxical claim that the people is capable of acting as a unified whole prior to being represented by public institutions. Kant cuts this line of thought off at the root by rejecting Sieyès' underlying idea that public institutions are legitimated by a historical act. For Kant, the question of whether a power is a public authority is answered not by investigating facts about its origin, but by asking whether public institutions are in place that secure freedom between private persons (*MM*, 6: 372). Where such institutions are present, persons are bound by them. Whether the 'ultimate origin of the authority now ruling' descends from 'an actual contract of submission ... as a fact, or whether power came first and law arrived only afterwards' makes no difference (*MM*, 6: 318–19; see also *MM*, 6: 339–40, 371–2). No fact about the origin of public institutions can deprive them of authority. To suppose otherwise would be to subvert the condition in which persons can interact in accordance with rights.

Kant's *public justice* paradigm retains Sieyès' idea that a legal order is open to revision, while rejecting the quietist idea that revision is morally unconstrained. Here, Kant's guiding thought is that all exercises of public authority must conform to the idea of the original contract. Since constitutional reform involves the exercise of public authority, it too is subject to this duty. Whereas each private person may use her means to advance

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her own self-chosen ends, public authority must be directed towards realizing the 'final end of all public right' (*MM*, 6: 341). As we saw in the prior section, arrangements that are inconsistent with the idea of the original contract must be dismantled, while arrangements that the idea demands must persist.

Anarchism and quietism stem from a shared confusion, which involves blurring the distinction between the state's constitutive and regulative principles. Anarchism is the result of applying the state's regulative principle as if it was constitutive. If justice is the condition of law's authority, then what is unjust cannot be authoritative. Quietism commits the opposite error by applying the state's constitutive principle as if it was regulative. If that which is authoritative forms the standard for assessing the moral adequacy of a state, then no state can fail to be morally adequate.

Far from confusing the constitutive and regulative principles of a state, Kant's theory of the state is an elaborate defence of this distinction. The result is a theory that is neither anarchist nor quietist. Kant rejects the anarchist claim that conformity to justice is the condition of law's authority by insisting that questions of public justice arise only in the context of publicly authoritative arrangements. If the constitutive principle of a state has not been satisfied, the regulative principle lacks its condition of application. Kant also rejects the quietist claim that what is publicly authoritative cannot be unjust. The justification of the constitutive principle of the state implicates a distinct moral standard for critically assessing the moral adequacy of its instances.

Anarchists and quietists lack the resources to engage with the simple observation that existing constitutional orders are not 'free from imperfections' and that 'Amendments will be necessary' (Washington 1797: 311). This observation relies on the idea that a constitutional framework might be both authoritative and yet defective on its own internal standard of moral adequacy. This idea is unintelligible to both anarchists and quietists. The former insists that what is unjust cannot be authoritative. The latter holds that what is authoritative cannot be unjust. By failing to distinguish between the constitutive and regulative principles of a state, anarchism and quietism converge on the shared conclusion that what is authoritative needs no reform. Kant does not share this conclusion. By distinguishing between what a state is and what it must become, his theory vindicates the basic presupposition of constitutional reformers: a 'constitution may be afflicted with great defects and gross faults and be in need eventually of important improvements' (*MM*, 6: 372).

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4. Conclusion

The philosophic ambition of Kant's constitutional theory often makes proponents of liberal democracy hesitant to embrace it. Instead, they incline towards paradigms that seem easier to defend. Kant's constitutional theory is more complex than competing constitutional paradigms, but the question for proponents of liberal democracy is whether there is a simpler way of defending this form of governance. Instead of defending liberal democracy, the *procedural* paradigm defends the processes that might destroy it, while the *preservationist* paradigm maintains that some legal systems lack the power to lawfully establish it. Kant's alternative focuses on the idea that public authority *as such* must realize and refine a liberal democratic order. His argument for this claim is nuanced, but it reflects a simple idea: one cannot defend a form of governance without actually offering a defence of it.[12]

Notes

1 For further elaboration of the *procedural* paradigm, see Loughlin (2003: 113) and Loughlin (2014: 219).

2 Of course, liberal preservationists might argue that, on the correct interpretation of the American Constitution, slavery was a peripheral feature of the constitutional order that could therefore be abolished through amendment. But this makes the possibility of eradicating slavery turn on the wrong consideration, contingent facts about the composition of the existing order rather than the moral abhorrence of slavery.

3 Parenthetical references to Kant's writings give the volume and page number(s) of the Royal Prussian Academy edition (*Kants gesammelte Schriften*), which are included in the margins of the translations. I use the following abbreviations: *A* = *Anthropology from a Pragmatic Point of View*; CF = *Conflict of the Faculties*; DTP = Drafts for Theory and Practice; DTPP = Drafts for Toward Perpetual Peace; ERP = 'On a Supposed Right to Lie from Philanthropy'; MM = *Metaphysics of Morals*; *Refl* = *Reflections on the Philosophy of Right*; *TP* = *Theory and Practice*; *TPP* = *Toward Perpetual Peace*; and WIE = 'An Answer to the Question: What is Enlightenment?'. English translations are from the *Cambridge Edition of the Works of Immanuel Kant*. Specifically, English translations of *TP*, *TPP*, WIE, ERP, and *MM* are from the *Cambridge Edition of the Works of Immanuel Kant*. English translations of *Refl*, DTP and DTPP are from Kant (2016). English translations of *CF* are from Kant (1992).

4 In what follows, my aim is simply to expound the role that constitutive and regulative principles play within Kant's theory of public right. I cannot explore the role that these principles play in other domains of Kant's critical philosophy here.

5 Kant writes that approximation of 'constitutions corresponding to the requirements of reason (particularly in a legal sense)' is 'an obligation, not of the citizens, but of the sovereign'. See also (*Refl*, 19: 504).

6 Finnis cites Alexy for the proposition that, for Kant, any arrangement can be publicly authoritative. Alexy's contribution to the present volume indicates that he no longer holds this view.

7 For Kant's central discussion of barbarism, see (*A*, 7: 330–1). For interpretation and commentary, see Ebbinghaus (1953); Joerden (1995); Maliks (2013); Ripstein (2009: 325–52); and Weinrib (2016: 76–107).

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8 In his early writings, Kant associates the term *democracy* with its Athenian version, which he criticizes for lacking a separation of powers. See, for example, *Refl*, 19: 595; DTPP, 23: 166–67; *TPP*, 8: 351–2. His mature position, as expounded in *MM*, acknowledges the possibility of combining democratic lawgiving with the separation of powers and treats this union as the form of state that the original contract demands. For a careful discussion of the evolution of Kant's views on democracy, see Ludwig (2009: 265–78).

9 Kant refers to arrangements that satisfy the postulate but not the idea of the original contract as '*provisional*' (*MM*, 6: 341; emphasis in original).

10 'What is a nation? It is a body of associates living under a *common* law, represented by the same *legislature*, etc.' But at other points, Sieyès suggests that a nation consists in a 'number of isolated individuals seeking to unite' (2003: 134), is 'formed solely by natural law' (2003: 136–7) and that a 'nation never leaves the state of nature' (2003: 139).

11 For Sieyès, however, unlike later proponents of constituent power, there are certain arrangements to which the nation is incapable of giving its assent. His examples involve features of the *Ancien Régime*, including minority rule and hereditary privilege (2003: 142).

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