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UNCHARISMATIC REVOLUTIONARY CONSTITUTIONALISM

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Uncharismatic Revolutionary Constitutionalism

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In his magisterial opening volume of *The Rise of World Constitutionalism*, Bruce Ackerman distinguishes between two broad types of modern revolutions, "totalizing" and "revolutions on a human scale," and then focuses on revolutionary constitutionalism as an important instance of the latter.¹ He insightfully and persuasively identifies the multi-stage dynamics of revolutionary constitutionalism and diagnoses its characteristic legitimacy problem through detailed study of some of its major examples (India, South Africa, France and Italy immediately following World War II, Poland, Israel and Iran) in the twentieth century. This common legitimacy problem is the succession crisis faced by the regime when the charismatic revolutionary party leadership and generation that had engineered the revolution eventually passes from the scene at the third of the four developmental stages, to be replaced by a "normalized" or routinized party elite, typically a decade or more after its founding and constitution.²

This chapter first identifies a distinct, but no less common, type of revolutionary constitutionalism that Ackerman does not consider in his analysis; namely, the spontaneous, leaderless or movement-less constitutionalist revolution. Prominent examples of such successful "uncharismatic" revolutions over the past century include the Mexican (1910-1920), the

^{*} MacArthur Foundation Professor of International Justice and Human Rights, UCLA School of Law. Thanks to Bruce Ackerman and Richard Albert for inviting me to participate in the book symposium held at Yale Law School on August 24-25, 2018, and to panel chair Daniel Markovits and fellow participants for very helpful questions and comments on the earlier draft of this chapter presented at that event.

¹ BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* (2019).

² *Id.*, chap. 1.

Philippine (1986), the Romanian (1989), and the Tunisian (2011). It then argues that this subtype of revolutionary constitutionalism typically faces a different legitimacy crisis and at a much earlier stage in its history: during the initial founding of the new regime and constitution that replaces the ousted one.³ Lacking the initial source of legitimacy that comes from having a Nehru, Mandela, Walesa, De Gaulle, Ben Gurion or Ayatollah Khomeini at the head of the revolutionary movement-party that (more than nominally) represents "the people" and then the new regime, uncharismatic revolutionary constitutionalism must find an alternative source from the outset.

One such source of legitimacy, as the different outcomes of the Tunisian and Egyptian revolutions of 2011 suggest, is the constitution-making process itself. While in Tunisia, this involved engagement and investment on the part of many differing and competing groups, both religious and secular, in Egypt the process of drafting the new constitution was dominated by the Muslim Brotherhood, the partisan beneficiary of "organizational asymmetries"⁴ among rival political groupings, resulting in alienation and ultimately a sense of delegitimation on the part of other factions.⁵ This failure to fill the initial legitimacy vacuum enabled the eventual military coup. A second source of such founding legitimacy where there is no movement party that singly or in cooperation with others has a plausible claim to represent the people as a whole may be the military victory of one faction over another, bringing about long-sought for peace and relative stability ("the war of the victors" in Mexico).⁶ A third may be the cross-cutting support for a newly emerged, post-revolutionary leader reflected in a broad and sweeping electoral

³ This part of my essay develops a theme in an earlier article of mine. See Stephen Gardbaum, *Revolutionary Constitutionalism*, 15 INT'L J. CONST. L. 173 (2017).

⁴ David Landau, *Constitution-Making Gone Wrong*, 64 AL. L. REV. 923, 975 (2013)

⁵ See *infra* text accompanying notes 52-3.

⁶ See *infra* text accompanying note 17.

victory, as perhaps in Romania.⁷ In short, Ackerman's volume masterfully analyzes an important type of revolutionary constitutionalism, but not the entire phenomenon per se.

In addition to this point that not all revolutionary constitutionalism is charismatic, movement-party led, Ackerman's account derives so much of its heft from the implications of charisma that it is useful to remind ourselves of the converse: not all charismatic revolutionary regimes are constitutionalist. By focusing on the problem that is distinctive to them, Ackerman's account arguably turns more on the charismatic, rather than the constitutionalist, nature of the revolutionary movement -- a feature common to other movement-led political revolutions of the twentieth century.⁸ In other words, succession crises are a distinct legitimacy problem of charismatic revolutionary regimes of all stripes, including totalizing ones, with "constitutionalism" doing little independent work. Recent/current examples are the post-Chavez and post-Castro succession and legitimacy issues in Venezuela and Cuba respectively.

A final consequence of the partial nature of Ackerman's account is a slightly myopic approach to judicial supremacy that arguably both overstates its importance to revolutionary constitutionalism as a whole and understates its role in non-revolutionary pathways to constitutionalism. For if judicial supremacy is a common response to the problem of fading revolutionary charisma, as Ackerman argues, it seems to follow that it would be less important or likely in the case of uncharismatic revolutions. And indeed, this is what we find. None of the successful leaderless revolutions discussed below has obviously consolidated its power by ceding to the courts supremacy as the distinctive guardians of the revolution. On the other hand, Ackerman's account appears to overlook the more general reasons that judicial supremacy might be appealing to constitutionalist regimes *of all types*, revolutionary or otherwise, and that help to

⁷ See *infra* text accompanying notes 37-8.

⁸ See *infra* text accompanying notes 58-9.

explain the overall trend in this direction. It also overlooks the more general political circumstances that make judicial supremacy more or less practically likely.⁹ These are less the fading of revolutionary charisma than the existence and longevity of a dominant political party within *all* pathways to constitutionalism.

These three related critiques are set out in the three parts of this chapter. Part I identifies the uncharismatic, non-movement party led variety as a second major, but overlooked, type of revolutionary constitutionalism with its own characteristic and different legitimacy crisis. Part II calls into question Ackerman's distinction between totalizing revolutions and revolutions on a human scale, as well as the role that "constitutionalism" plays in his analysis, insofar as the succession crisis he posits as a characteristic of revolutionary constitutionalism appears to be a common feature of charismatic revolutionary regimes of all stripes, including those of Lenin and Mao, and not generally of uncharismatic constitutionalist revolutions. Part III addresses Ackerman's treatment of judicial supremacy.

I. Two Types of Revolutionary Constitutionalism

The common theme behind all of Ackerman's case studies is the revolutionary movement-party and leader whose legitimacy, forged during the long period of struggle and sacrifice on behalf of the people (Time One), is unquestioned and extends seamlessly to the new regime it founds at the moment of victory (Time Two). This "constitutionalization of charisma"¹⁰ that defines the revolutionary hero's task at this point delays the characteristic legitimation problem until the "succession crisis" at Time Three, usually decades later, when the revolutionary leader and generation have passed from the scene. Now a more ordinary,

⁹ See Stephen Gardbaum, *What Makes for More or less Powerful Constitutional Courts?*, 29 DUKE J. INT'L & COMP. L. 1 (2018), and *infra* text accompanying notes 63-5.

¹⁰ See ACKERMAN, *supra* note 1, at 8.

routinized, or "normalized" political leadership faces an increasingly emboldened judiciary that claims legitimacy for itself as the distinctive guardian of the framers' revolutionary constitution. Frequently, this claim is successful as the regime re-consolidates its popular legitimacy at Time Four in the form of judicial supremacy.¹¹

As successful and persuasive as Ackerman's induction of the general pattern from the individual histories undoubtedly is, it remains a partial account of the developmental stages and legitimacy problems faced by revolutionary constitutionalism because it does not consider an equally prominent sub-type of the species: the spontaneous or leaderless revolution. Here, without the guidance, preparation, and organization of the revolutionary movement-party, the vacuum in legitimate authority that is both cause and consequence of the fall of the old regime at Time Two is not immediately and seamlessly filled by the "constitutionalization of charisma" and the rise to power of its leader. Rather, the direction and political leadership of the revolution are deeply contested and any successful claim to legitimacy must be earned in the here and now, it has not already accrued or vested. Accordingly, the acquiring of legitimacy in the first place, *during* the revolutionary turmoil, rather than potentially losing it a generation hence, is the characteristic problem of spontaneous, leaderless revolutions, and the key factor in their success or failure. This would not matter, or would matter far less, if such episodes of revolutionary constitutionalism were either rare or almost always unsuccessful by comparison with the movement-party led, charismatic ones on which Ackerman focuses. But this does not seem to be the case.¹² Indeed, the two types arguably go all the way back to the late eighteenth century and the birth of modern revolutions: the American (at least partly charismatic, via George

¹¹ Ackerman, *supra* note 1, chaps 1-2.

¹² Identifying the frequency of spontaneous, unorganized, leaderless revolutions, Hannah Arendt nonetheless attributes to "professional revolutionists" (of which Lenin and his party are the prototype) a typically major role in how they turn out after their initial outbreak. Although this first part is accurate with respect to the modern revolutions on which I focus, the second is less so. HANNAH ARENDT, *ON REVOLUTION*, 259-261 (1963).

Washington) and the French (leaderless). Famous (full or partial) failures of uncharismatic constitutionalism include such paradigms as the latter and both the 1905 and February 1917 Russian revolutions. But alongside these, if somewhat less well-known and studied, are the numerous successful examples of the phenomenon, right up to the present: exactly one hundred years separate the outbreaks of the Mexican and Tunisian revolutions, with several others in between.

A. The Mexican Revolution

The Mexican Revolution, usually dated from 1910 to 1920, which replaced the autocratic regime of Porfirio Díaz, the Porfiriato, with the new revolutionary constitutionalist one after several years of civil war, is a clear instance of a successful spontaneous, movement-party-less revolution lacking charismatic political leadership.¹³ As one of the leading historians of the revolution puts it, "the revolutionary creed was cobbled together over time and *ex post facto*."¹⁴ Indeed, an official revolutionary party, the Partido Nacional Revolucionario (PNR), was not created until 1929, so that it was very much a "product not progenitor"¹⁵ of the revolution. The revolution was spurred not by one or more movement-parties, but by a large and growing number of opposition factions reflecting and representing a host of different "outsider" interests and positions excluded from the Díaz regime: wealthy northern landowners; landless central and southern peasants; middle class urban professionals and intellectuals; working class trade unionists.¹⁶ Among these disparate groups divided by geography, ethnicity, and class, there was

¹³ To be sure, the charismatic regional guerilla leaders Francisco ("Pancho") Villa and Emiliano Zapata played important roles in the armed revolution, but they were never interested in being, or deemed qualified to become, national political leaders of the revolution.

¹⁴ ALAN KNIGHT, *THE MEXICAN REVOLUTION: A VERY SHORT INTRODUCTION* 62 (2016).

¹⁵ *Id.* at 76.

¹⁶ The historical material and description here draws on Knight, *supra* note 8; ALAN KNIGHT, *THE MEXICAN REVOLUTION* (1986); John Womack, *The Mexican Revolution, 1910-1920*, in LESLIE BETHELL, ED., *MEXICO SINCE*

no single opposition platform, party, or leader. The first post-Díaz president, the liberal, landowning, bookish, and ill-fated Francisco Madero, was really only the nominal leader of the revolution¹⁷ and, following the revolutionaries' defeat of the Huerta military dictatorship in 1914 and intra-faction civil war, he was succeeded by a series of more worldly and ruthless, but no more charismatic, revolutionary presidents in Venustiano Carranza (1917-1920), Alvaro Obregón (1920-1924), and Plutarco Elías Calles (1924-28). Nonetheless, following the period of civil war among the various revolutionary factions ("the war of the victors"), in terms of growing power, stability and legitimacy, the new revolutionary regime was undoubtedly successful. From its creation by Calles in 1929, the PNR became the overwhelmingly dominant party in Mexico's democracy until its successor party lost the presidency for the first time in 2000.

Does Ackerman's four-step developmental stage apply? What we see, I believe, is that Mexico's spontaneous, leaderless revolution followed a path that is similar in some respects, but different in others, to that of his movement-party revolutions. In particular, although mobilized insurgency (Time One), constitutional founding (Time Two), and revolutionary consolidation (Time Four) are each present, albeit in a different variation from his cases, crucially there is no Time Three of faded charisma and inter-generational succession crises representing the characteristic and existential legitimacy problem. This is emphatically not to say that succession was always smooth and easy, it was not, but rather that the key legitimacy problem is a different one and arises far earlier, during Time Two.

In Mexico, Time One plays out between 1900 and 1911 in the shape of the crisis in, and growing opposition to, the Porfiriato, leading to Díaz's resignation from office and exile in May 1911. Resulting from a combination of economic depression and crisis starting in 1907 -- which

INDEPENDENCE (1991); ANITA BRENNER, *THE WIND THAT SWEPT MEXICO: THE HISTORY OF THE MEXICAN REVOLUTION OF 1910-1942* (1943).

¹⁷ KNIGHT, *supra* 14, at 30.

wiped out many established middle class entrepreneurs, triggered the rise of strong working class opposition, created frustration among the young, educated middle class, and threw many peasants off the land -- and a near-inexplicable loosening of political repression that enabled the growth of several liberal opposition parties (such as Madero's Anti-Reelectionist Party) for the first time,¹⁸ Díaz's fraudulent reelection in June 1910 was the immediate spark for revolution. To the surprise not only of Díaz but also Madero, whose call for armed revolt in response had gone largely unheeded in his home state of Coahuila, a serious uprising broke out in the mountains of western Chihuahua, led by popular regional guerilla leaders Pascual Orozco and Pancho Villa.¹⁹ Returning from the United States, where he had fled, to assume the leadership of the Chihuahuan revolutionaries, Madero saw local revolts spread across Mexico so that most of the countryside was in the hands of revolutionaries by April 1911, at which point Díaz agreed to Madero's Treaty of Ciudad Juarez, left office, and ceded power to a provisional government. Under the terms of the agreement, the provisional government, with Madero's increasingly active support, attempted to disband the various revolutionary armies and guerilla bands. When Madero was elected president in October after the freest and fairest election in the country's history, as far as he was concerned the revolution, having achieved its goal, was essentially over.²⁰

Time Two, from revolution to constitution, occupies the years from 1911 to 1920. It is characterized by (1) Madero's increasing isolation as a moderate liberal caught in between the two rising forces of counterrevolution and a broader, more popular revolution centered on land reform, ending in a military coup and his assassination in February 1913; (2) two additional periods of civil war -- the war of the revolutionary "Constitutionalists" together with the Villa

¹⁸ The standard explanation derives from a 1908 interview that Díaz gave to the American journalist James Creelman, meant presumably for the American public, in which he claimed that he would welcome real opposition in the 1910 presidential election. See, e.g., BRENNER, *supra* note 16, at 19-20.

¹⁹ See Womack, *supra* note 16, at 131-2.

²⁰ KNIGHT, *supra* note 14, at 32.

and Zapata armies against Huerta's military dictatorship (1913-1914), followed by "the war of the victors" among the rival revolutionary forces (1914-1915); and (3) the establishment of the revolutionary constitution by the winner, Carranza, in 1917. This period constitutes the legitimacy crisis of the revolution, as each faction -- Madero, Carranza, Villa, and others -- struggled to establish their revolutionary legitimacy in the absence of a movement-party and leader that had previously earned the mantle. The crisis was not one of subsequent succession but of initial and immediate possession. It was mostly resolved by success on the battlefield, as last faction standing, but was supplemented by the revolutionary constitution of February 1917 that also helped to legitimize the administration of Carranza and the "Sonoran dynasty" which he founded. Drafted and approved after long and heated debate by an all-Carrancista constituent assembly, albeit one split between "conservatives" and "radicals," the latter mostly prevailed despite Carranza's support of a more modest replacement of the 1857 "liberal" constitution.²¹ The new revolutionary constitution that emerged after Carranza's first draft was rejected barred the church from politics and primary education,²² contained several social and economic rights in Article 123,²³ and declared the social function of property permitting the state to regulate foreign investment and pursue land reform.²⁴ Under this first modern revolutionary charter, Carranza was soon afterwards elected constitutional president.

Time Three, the period of regime consolidation and institutionalization under the Sonoran dynasty, begins after the last violent change of government in 1920. This occurred when Carranza's lieutenant and tactical mastermind of the 1914-1915 civil war against the Villaistas,

²¹ See generally, E.V. NIEMEYER, *REVOLUTION AT QUERÉTARO: THE MEXICAN CONSTITUTIONAL CONVENTION OF 1916-1917* (1974).

²² MEXICAN CONSTITUTION 1917, Arts. 3, 130.

²³ Including the right of workers to an eight-hour day, to strike, to one day of rest a week, and against unjust termination.

²⁴ MEXICAN CONSTITUTION 1917, art. 27.

Alvaro Obregón, was elected president after Carranza himself fled and was killed as a result of attempting to impose his chosen but unpopular civilian successor over widespread military opposition within his Sonoran faction.²⁵ Under Obregón and his successor as president, Calles, who dominated politics until 1934, political stability gradually returned after a decade, although not easily or smoothly. Through a combination of thinning out the revolutionary military to prevent a repeat of the 1920 revolt, populist politics and land reform to retain popular support, and the 1920's economic boom, the revolutionary regime not only survived but consolidated its power. When president-elect Obregón was assassinated by a Catholic militant in 1928, Calles was legally prohibited from extending his own term but mostly retained power for the next six years by governing through a series of hand-picked nonentities, known as the *Maximato*.²⁶ In 1929, Calles established an official revolutionary party, the PNR, for the first time, which began by absorbing the multiple small, pro-regime parties as an umbrella organization but gradually became the hegemonic political force in Mexico under its various incarnations.²⁷ The consolidation and popularity of the regime reached its height under Lázaro Cárdenas, president from 1934 to 1940, with his unique combination of nationalism, corporatism, folksy populism, anti-fascism, and social reform.²⁸ Despite growing corruption and cronyism in the decades following Cárdenas, the PNR, from 1946 the Partido Revolucionario Institucional (PRI), remained in power continuously until 2000 and returned in 2012, although whether, following the political liberalization of the 1990s, the revolutionary regime can be said to have survived is perhaps a more difficult question.²⁹

²⁵ Womack, *supra* note 16, at 192-95.

²⁶ See Jean Meyer, *Revolution and Reconstruction in the 1920s*, in BETHELL, *supra* note 16, at 215-8.

²⁷ KNIGHT, *supra* note 14, at 76.

²⁸ When Cárdenas nationalized the foreign-owned oil companies during the Depression, millions of ordinary Mexicans brought in their jewelry to government offices to help pay off the debt incurred by the compensation paid.

²⁹ Arguably made a little easier by the PRI's candidate finishing a poor third, with only 16 percent of the vote, in the presidential election of 2018.

B. The People Power Revolution in the Philippines

The successful non-violent revolution through mass popular uprising and protests that ousted dictator Ferdinand Marcos in February 1986 served as the model for many in Central and Eastern Europe three years later. It was also, in many ways, quite similar to the first stage of the Mexican Revolution that resulted in Madero's presidency, apart from the armed versus peaceful uprising. In both cases, electoral fraud by the incumbent dictator that procured their "victory" in the presidential election over the opposition candidate was the immediate spark for the revolution, leading to the dictator leaving office and fleeing abroad, and the succession of the "defeated" candidate as the new president at the head of a revolutionary government. Both Madero and Corazon Aquino, the widow of assassinated senator Ninoy Aquino, emerged as the symbolic or nominal leaders of broad and diverse political opposition to the old regime, but neither was the charismatic head of a movement-party that, singly or in combination with others, earned the right to represent "the people" after long years of mobilization, struggle, and sacrifice. Neither had much political experience at the time they were catapulted into power by the popular uprising. Both were from wealthy, upper-class backgrounds, which arguably played a role in their resistance to the more radical demands for land reform coming from below and limited the trust in which they were held by the masses.

In the Filipino case, the revolution that ousted the dictator was brought about, not through armed revolt by local guerilla leaders (as in the Mexican), but significantly by calls for mass popular demonstrations soon after the disputed election on the part of high-up defectors from the armed forces (notably defense minister Juan Ponce Enrile and General Fidel V. Ramos) and the Catholic Church hierarchy, in particular Cardinal Sin, the Archbishop of Manila.³⁰ Responding

³⁰ This section draws on Amado Mendoza, *"People Power" in the Philippines, 1983-1986*, in ADAM ROBERTS AND TIMOTHY GARTON ASH, EDS., *CIVIL RESISTANCE AND POWER POLITICS: THE EXPERIENCE OF NON-VIOLENT ACTION*

to these calls, despite the threat of violence from the initially still mostly loyal military, up to two million ordinary citizens filled Epifanio de los Santos Avenue (EDSA) in protest against Marcos over the four days from February 22-25, culminating in his fleeing to exile in Hawaii and the installation of Aquino as president.

Although, unlike Madero, Aquino did not face or win a new presidential election after the revolution, her revolutionary government was able to acquire the more-or-less uncontested legitimacy that eluded Madero in Time Two. Despite both some disappointment and sense of betrayal on the left due to the moderate nature of her land reform policies and a series of attempted coups and counter-revolutions on the right, Aquino survived and never found herself on a rapidly disappearing middle ground, in the way that befell Madero. The decision of the newly reorganized and independent Supreme Court in October 1986 that the Aquino government was "in fact and law a de jure government,"³¹ was highly influential, as was the swift and near-universal international recognition of the new government as legitimate. Finally, the urgency that Aquino brought to having a new constitution drafted to replace Marcos' 1973 instrument, along with its content matching the revolutionary demands for reestablishing democracy, civil liberties, and social justice, and its overwhelming approval by referendum in February 1987, all helped to cement the popular legitimacy of the regime. This was manifested by the absence of a succession crisis when Aquino made the decision not to seek re-election in 1992, in order to set an example to the people and politicians,³² even though she could have pushed the argument that the one-term rule under the 1987 constitution did not apply to her as not being in effect in 1986.

FROM GANDHI TO THE PRESENT (2008); BRIAN JOHNSON, THE FOUR DAYS OF COURAGE: THE UNTOLD STORY OF THE PEOPLE WHO BROUGHT MARCOS DOWN (1987); Kurt Schock, *People Power Unleashed: South Africa and the Philippines*, in UNARMED INSURRECTIONS: PEOPLE POWER MOVEMENTS IN NONDEMOCRACIES (2005).

³¹ In re: Saturnino v. Bermudez, G.R. No. 76180 October 24, 1986.

³² See KeriLynn Engel, *Corazon Aquino, revolutionary leader of the Philippines*, December 29, 2011, at: <http://www.amazingwomeninhistory.com/corazon-aquino-revolutionary-president-philippines/>

Instead, she supported General Ramos as her party's candidate, who narrowly defeated populist candidate Miriam Defensor Santiago of the People's Reform Party.³³

C. The Romanian Revolution

The Romanian Revolution of December 16-22, 1989, the last of that tumultuous year's successful anti-communist revolutions in Central and Eastern Europe, was unlike the others in two respects. It was the only bloody revolution, ending with approximately a thousand dead and an executed dictator, and it was the only wholly spontaneous, unorganized and leaderless one.³⁴ There were no roundtable talks between government and opposition as in Hungary, nor the Romanian equivalent of a Lech Walesa or Vaclav Havel. Instead, mass demonstrations started in Timisoara, spread to Bucharest, and were met with violent suppression ordered by Ceaușescu and carried out initially by the most repressive secret police force in the Soviet bloc before the scale of operations required the military.³⁵ After many of the latter switched sides and Ceaușescu was ousted, a newly formed political entity, the National Salvation Front (NSF), led by a triumvirate of former Communist Party insiders who had broken with Ceaușescu, rapidly emerged and took over power as the provisional national unity government.³⁶

The extent to which the NSF, its leading figure Ion Iliescu, or the new regime that it headed, had or acquired revolutionary legitimacy in the several years following the revolution is unclear. Although institutionally, the Romanian Communist Party essentially disappeared and did not transform itself into a post-revolutionary democratic opposition party challenging the

³³ *Ramos is Declared New President 6 Weeks After Philippine Election*, N. Y. TIMES, June 23, 1992, at: <https://www.nytimes.com/1992/06/23/world/ramos-is-declared-new-president-6-weeks-after-philippine-election.html>

³⁴ See generally, GEORGE GALLOWAY & BOB WYLIE, DOWNFALL: THE CEAUSESCUS AND THE ROMANIAN REVOLUTION (1991); STEPHEN D. ROPER, ROMANIA: THE UNFINISHED REVOLUTION (2000).

³⁵ See GALLOWAY & WYLIE, *id.*, at 10-15.

³⁶ *Id.*, at 21-24.

pace or principle of market reforms as elsewhere in the region, Romania is unique in the extent to which, as individuals, former Communist Party officials dominated the new regime.³⁷ Moreover, they also employed some of the tried-and-tested party tactics. For example, first as acting, and then as elected provisional, president, Iliescu on several occasions called in the miners to violently break up anti-communist and anti-NSF demonstrations (the so-called Mineriads) and permitted only a brief period of public discussion before the referendum on the new constitution, drafted by a committee of legislators and constitutional lawyers appointed by the NSF-dominated parliament, was held in December 1991.³⁸ Parliamentary and presidential elections called by provisional government decree in May 1990, and then under the new constitution in September 1992, were marred by a degree of intimidation and violence that was noted at the time.³⁹ And more broadly, many of the servants of the Communist-era "deep state" appeared to have survived in the military, bureaucracy, and police.

On the other hand, in these first two sets of elections, Iliescu and his party (initially the NSF until he and many others split from it in April 1992 to form what would become the current Social Democratic Party) easily won what were still contested elections, and 77.3% of voters approved the new constitution in the referendum.⁴⁰ When Emil Constantinescu, a former academic, running with the support of the center-right Romanian Democratic Convention, defeated Iliescu in the presidential run-off in 1996 for the first peaceful transfer of power after the revolution, there was a general sense that democratic forces had prevailed. And yet, Iliescu

³⁷ See Emma Graham-Harrison, *Twenty-five years after Nicolae Ceausescu was executed, Romanians seek a 'revolution reborn'*, THE GUARDIAN, December 6, 2014, at: <https://www.theguardian.com/world/2014/dec/07/romanians-seek-a-reborn-revolution-25-years-after-ceausescu>

³⁸ GALLOWAY & WYLIE, *supra* note 34, at 85-87.

³⁹ See International Republican Institute and the National Democratic Institute for International Affairs, *Report on Romania's Democratic Transition*, available at <http://www.iri.org/sites/default/files/Romania%27s%201992%20Presidential%20and%20Parliamentary%20Elections.pdf>

⁴⁰ See DIETER NOHLEN & PHILIP STOVER, *ELECTIONS IN EUROPE: A DATA HANDBOOK 1598-91* (2010).

returned to power in 2000 and his party, sometimes in coalition with its Liberal-Democratic Party rival (which also had its origins in the NSF), has mostly governed ever since.

D. The Tunisian Revolution

The Tunisian revolution, sometimes referred to as the Jasmine revolution (only) in the West, was the first domino to fall and the spark for other revolutions of the so-called Arab Spring of 2011, as well as thus far the only successful one.⁴¹ It was also, like the others in the region that followed, a leaderless, spontaneous uprising of the people against an authoritarian dictatorship, unorganized by any revolutionary movement-party. Once Ben Ali resigned and fled to Saudi Arabia in mid-January 2011, a month after vegetable seller Mohamed Bouazizi's self-immolation and three weeks after the nation-wide mass demonstrations began, the initial continuance in power of his prime minister Mahomed Ghannouchi as head of the first provisional national unity government was deemed illegitimate and he was replaced after six weeks.⁴² But, in the absence of a clear movement-party and charismatic leader that had fought for decades to bring about the revolution, the broader legitimacy of the new regime very much depended on the contingences of the arrangements for its establishment and the transition to democracy, including the constitution. Once again, this legitimacy had to be earned in the moment, it was not something that had already been allocated or acquired. Following the election of the constituent assembly in October 2011, the approval of the new constitution in January 2014, and elections for the new legislature and president under its provisions in October and November 2014, for reasons that will be briefly explored, the new democratic regime

⁴¹ See Said Arjomand, *Revolution and Constitution in the Arab World, 2011-12*, in MEHRAN KAMRAVA ED., BEYOND THE ARAB SPRING: THE EVOLVING RULING BARGAIN IN THE MIDDLE EAST (2014); NOURI GANA ED., THE MAKING OF THE TUNISIAN REVOLUTION: CONTEXTS, ARCHITECTS, PROSPECTS (2013), Laryssa Chomiak, *The Making of a Revolution in Tunisia*, 3 MIDDLE EAST L. & GOVERNANCE 68 (2011).

⁴² Chomiak, *id.*, at 70-1.

acquired sufficient political legitimacy for it (thus far) to withstand a very difficult set of economic challenges. Yet the success of the revolution continues to be balanced on a knife edge in the face of these challenges, which pose a serious threat to its perceived economic legitimacy. Survival rather than consolidation remains the urgent priority.

Here, Time One is constituted not by the decades and accreted layers of sacrifice by the movement-party leadership on behalf of the people, but by the decades and accreted layers of sacrifice by the people themselves -- in terms of poverty, unemployment, and political repression -- under the authoritarian rule of Presidents Bourguiba (1959-1987) and Ben Ali (1987-2011), and their corrupt one-party state regime. The already bad situation worsened after the global financial crisis, with unemployment, and particularly youth unemployment, increasing still further and the state reducing its subsidization of many goods and services, thereby increasing the cost of living.⁴³ Publication by major newspapers around the world in November 2010 of leaked documents detailing corruption and repression by the regime also contributed to the context in which the desperate act of protest by the beaten and humiliated vegetable seller on December 17 took place.⁴⁴ Local demonstrations in Sidi Bouzid, the scene of the self-immolation, were met with harsh responses by the police, and the protests against high unemployment and cost of living, as well as in support of Bouazizi, quickly spread across the country, some of which were hurriedly organized by trade unions, students, and lawyers.⁴⁵ The government called in the military to quell the protests, which resulted in a downward spiral of violence and increasingly repressive measures, but no end to the crowds, culminating in Ben Ali's fleeing the country for Saudi Arabia on January 14. A state of emergency was declared, the Army Commander pledged to "protect the revolution," Prime Minister Ghannouchi briefly

⁴³ Gana, *supra* note 41, at 20.

⁴⁴ Chomiak, *supra* note 41, at 72.

⁴⁵ *Id.*

assumed the interim presidency before the head of the Ben Ali- created Constitutional Council confirmed the speaker of the legislature as the lawful successor, who in turn announced the formation of a temporary national unity government.⁴⁶

Time Two, from the 2010-11 revolution to the 2014 constitution, is where not only the shape and survival, but also the legitimacy, of the revolutionary process and resulting regime was crucially at stake. Unlike in Mexico, where the creation of the constitution in 1917 in a sense partially institutionalized the victory and supplemented, but did not create, the revolutionary legitimacy of the winning faction, in Tunisia the legitimacy of the new regime very substantially turned on the constitution-making process and result.⁴⁷ All the hopes of the revolution were focused on the work of the constituent assembly.

Crucially, the national unity government that formed the day following Ben Ali's departure was under civilian control, with the armed forces not driving events but taking orders. After Ghannouchi's resignation as prime minister at the end of February, the former pre-Ben Ali prime minister Beji Caid Essebsi took over until the constituent assembly election in October. At that election, the moderate Islamist and pro-democracy party Ennahda, led by returned exile Rached Ghannouchi (no relation) and which had been largely non-existent inside the country before the revolution, won 37 percent of the votes and 89 of the 217 seats under the party-list PR system.⁴⁸ The constituent assembly overwhelmingly elected human rights activist and physician Moncef Marzouki as interim president, who in turn appointed Ennahda politician Hamadi Jebali as prime minister of the provisional government in coalition with the-then two leading (although far smaller in terms of seats, at 55 combined) secular centrist parties. Having adopted a

⁴⁶ Gana, *supra* note 41, at 25-6.

⁴⁷ See Gardbaum, *supra* note 3.

⁴⁸ *Tunisia's Islamist party claims electoral victory*, DAILY TELEGRAPH, October 25, 2011, at: <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/tunisia/8847315/Tunisias-Islamist-party-claims-election-victory.html>

provisional constitution in December, the assembly, which doubled as interim legislature and to which the government was politically accountable, set to work on drafting the permanent new constitution, although it wasn't given a specific deadline. The Ennhada-led "troika" eventually disbanded in January 2014 in favor a technocratic government.

Accordingly, the balance of party politics (absent a dominant revolutionary movement) and political sentiment in Tunisia -- the absence of a clear Islamist majority party and ineradicable cross-party suspicion and hostility, itself partly a result of the experience of power sharing during the interim regime and constitution-making process -- created an experience of relatively inclusive government and fierce debates, but ultimately not a winner-take-all approach towards the process of drafting the constitution on the part of the leading parties. The eventual result, after a little more than two years, was the approval of a document that reasonably accommodated, and compromised between, all pro-revolutionary sides and factions. The role of Islam and Sharia in the new Tunisia was expressed in deliberately ambiguous terms in Article 1,⁴⁹ an artfully drawn semi-presidential form of government was designed to avoid the twin pitfalls on an overly strong executive and the instability of a parliamentary system with relatively weakly institutionalized parties lacking experience in government,⁵⁰ and a fairly extensive set of civil, political and economic rights, certainly by regional standards.⁵¹ The outcome of a constitution-making process that was widely perceived as fair and inclusive and resulted in a constitution that most could bring themselves to support was the gradual bestowing of

⁴⁹ "Tunisia is a free, independent, sovereign state; its religion is Islam, its language Arabic, and its system is republican. This Article might not be amended." CONST. OF TUNISIA, art. 1.

⁵⁰ See Sujit Choudhry and Richard Stacey, *Semi-Presidentialism as a Form of Government: Lessons for Tunisia* (2013).

⁵¹ *Tunisia signs new constitution*, THE GUARDIAN, January 27, 2014, at: <https://www.theguardian.com/world/2014/jan/27/tunisia-signs-new-constitution-progressive>

revolutionary legitimacy on the new regime during Time Two. It could be, and was, plausibly understood as what the revolution had been fought for.

A comparison with the failed revolution in neighboring Egypt is instructive.⁵² There, following the ouster of Mubarak, the army seized firm control of the revolution. In large part to escape this domination at the earliest opportunity, pro-revolutionary groups and factions agreed to regular presidential and parliamentary elections before drafting a new constitution. Given the unequal condition of the various political groupings in terms of institutionalization and preparedness, and the electoral returns that almost inevitably followed from them, this enabled the Muslim Brotherhood, which had played almost no role in the revolution, to take advantage of "organizational asymmetries" to gain full, undivided control of it and levers of power before, during, and after the constitution-making process. The non-competitiveness of the multiple small and divided liberal-secular parties compared to the two Islamist ones in the legislative elections of November 2011-January 2012, compounded by the mixed majoritarian and PR electoral system in place, meant that despite the narrowest of presidential election victories, as head of a unified or consolidated majority government of the Muslim Brotherhood, President Morsi was not required to -- and did not -- engage in any form of power sharing. This premature "winner-take-all" system was responsible for the perceived partisanship and failure to reach out to opponents that rapidly detracted from any cross-party sense of engagement in a common enterprise. The constitution that emerged from the government-appointed and Brotherhood-dominated constituent assembly was tainted with claims of self-dealing from the outset and lost all claims to general legitimacy after the secular opposition walked out in protest. In addition, the inherent inflexibility of the permanent presidential office meant that Morsi was legally and

⁵² This section draws on Sahar Aziz, *Bringing Down an Uprising: Egypt's Stillborn Revolution*, 30 CONN. J. INT'L. L. 1 (2014); Mohammed Fadel, *What Killed Egyptian Democracy?*, BOSTON REV., January 24, 2014; Gardbaum, *supra* note 3, at 197-99.

politically unchallengeable for the full four-year term despite mounting opposition and dwindling popularity, which increased the likelihood of the ultimate military coup.

In Tunisia, Time Three's attempt to stabilize and consolidate the democratic regime began with the first parliamentary and presidential elections under the new constitution in October and November 2014 respectively. The newly formed main secular party bloc Nidaa Tounes ("Call of Tunisia") won eighty-six of the two hundred and seventeen seats to become the leading party, with Ennahda second with sixty-nine.⁵³ This resulted in the formation of a new unity government but one that involved a significant inter-party transfer compared to the first provisional one. Nidaa Tounes's candidate, Essebsi, then won the subsequent presidential election with a 55/45 run-off victory against incumbent interim president Marzouki, with Ennahda declining to run a candidate. Since then, the democratic regime that emerged from the revolution has been faced with a series of major economic and security challenges. The already deeply troubled economic situation was significantly worsened by several ISIS-organized terrorist attacks on tourists, deliberately designed to cripple the country's leading industry. The dire employment outlook, especially for the young, and still rising cost of living means that the ongoing success of the revolution, the only one in the region, hangs by a thread, as demonstrators have returned to the streets. The continued political legitimacy of the revolution likely depends on the economic.

II. Charisma and Constitutionalism

The previous section argued that, contrary at least to the strong impression created by Ackerman's account, the characteristic and distinctive legitimacy problem of revolutionary

⁵³ *Tunisia election results: Nida Tunis wins most seats, sidelining Islamists*, THE GUARDIAN, October 30, 2014, at: <https://www.theguardian.com/world/2014/oct/30/tunisia-election-results-nida-tunis-wins-most-seats-sidelining-islamists>

constitutionalism is not always or necessarily the succession crisis at Time Three. This is because not all episodes of revolutionary constitutionalism involve the type of charismatic leadership and role of the movement-party that is the common feature of Ackerman's case studies. In the face of numerous key counter-examples of leaderless revolutions that faced a different and earlier legitimacy crisis, his thesis turns out to address an important sub-type of revolutionary constitutionalism, but not the whole phenomenon. That is, not all revolutionary constitutionalism is of the charismatic variety. In this brief section, I will additionally argue that not all charismatic revolutionary movements are constitutionalist, and that charisma rather than constitutionalism may be doing most of the work in generating the characteristic legitimacy problem that Ackerman identifies and analyzes. Many successful non-or anti-constitutionalist ("totalizing") revolutionary movement-parties with charismatic leaders faced the same or similar characteristic succession crises that threatened the legitimacy of the regimes they had forged. In other words, among successful revolutionary parties, succession crises may be more a consequence of charisma than constitutionalism.

Take the two paradigmatic totalizing revolutions of the twentieth century, the Bolshevik of October 1917 and the Chinese of 1949. Each was, of course, engineered by the respective communist revolutionary movement-parties and by as charismatic a leader as you could conceive in Lenin and Mao. In both cases, Ackerman's general four stage developmental history seems a good fit: (1) organized mobilization against the existing regime and huge sacrifice on behalf of "the people," leading eventually to revolutionary overthrow; (2) the founding of the new regime; (3) succession/legitimacy crisis, and (4) consolidation after the passing of the charismatic leader. Lenin's series of strokes from 1922 and death in 1924, while earlier in relation to Time Two than in Ackerman's case studies, created a regime succession crisis for several years until the wholly

uncharismatic party insider Stalin had eliminated all of his rivals,⁵⁴ and a legitimacy crisis that arguably lasted until Hitler's invasion of the Motherland in April 1941. Following Mao's death in 1976, the PRC regime also suffered both a succession and legitimacy crisis, as the "cult of personality" that had sustained Mao died with him. The eventual new leader, Deng Xio Ping, was forced to abandon Chinese Communist Party shibboleths and instigate radical economic reform by the depth of public hostility towards communism as it had been put in practice by the party, especially during the Cultural Revolution.⁵⁵

Currently, two totalizing revolutions are experiencing major legitimacy crises as a result of the passing of the charismatic leader and/or revolutionary generation. In Cuba, the end of the Castro brothers' combined 59 years in power have raised serious legitimization questions for the regime. Fearing to appoint another, next-generation family member to succeed him, Raúl Castro's choice of the distinctly uncharismatic Miguel Díaz-Canel, born one year after the revolution, has provoked serious questions about whether his leadership will be accepted by the rest of the party and, more importantly, the citizens of Cuba.⁵⁶ In Venezuela, the "Bolivarian revolution" of the charismatic Hugo Chavez has been in legitimacy crisis ever since his death in 2013 and succession by the uninspiring Nicholas Maduro,⁵⁷ even before the dive in world oil prices and Maduro's increasingly desperate and unambiguously authoritarian steps to remain in power appear to have made the regime's eventual fall a matter of when not if.

In short, the legitimacy crisis posed by the passing of a charismatic leader and/or revolutionary generation appears to be a general problem faced by charismatic revolutionary

⁵⁴ See, e.g., STEFAN T. POSSONY, *LENIN: THE COMPULSIVE REVOLUTIONARY* (1964).

⁵⁵ Gregory C. Chow, *Economic Reform and Growth in China*, 5 ANNALS OF ECONOMICS AND FINANCE 127, 128 (2004).

⁵⁶ See Azham Ahmed, Raúl Castro Prepares to Resign as Cuba's President, Closing a Dynasty, NYT (April 18, 2018), at <https://www.nytimes.com/2018/04/18/world/americas/raul-castro-resigns-cuba-president.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>.

⁵⁷ See, e.g., Susan Grainger, *Hugo Chavez and Venezuela confront his succession*, BBC, December 11, 2012, at <https://www.bbc.com/news/world-latin-america-20678634>

regimes of all stripes, and not only constitutionalist ones. The "constitutionalization of charisma" may be the distinctive task of the latter at Time Two, but it is far from clear that this plays much of a role in either the generation or solution of the particular problem at Time Three. The problem has been a common one for all revolutionary regimes whose legitimacy is significantly based on charismatic leadership, and the solution in almost all cases has been a combination of choice of successor by either the old leader alone or by the other members of the revolutionary party elite (India, South Africa, Soviet Union, China, Cuba) and acknowledgment/accommodation of enough of the contemporary policy concerns underlying the crisis to permit at least partial renewal of legitimacy. In India, judicial supremacy may be seen as the necessary accommodation of the concerns raised by and during the Emergency,⁵⁸ just as Deng Xiao Ping's market reforms in post-Mao China were aimed at blunting public hostility towards the party resulting from the excesses of the Cultural Revolution.⁵⁹

III. Judicial Supremacy?

In Ackerman's account, the succession crisis of revolutionary constitutionalism at Time Three is frequently (although not always or necessarily) resolved by consolidation of the regime at Time Four in the form of "judicial supremacy." India and Israel are prime examples, perhaps France and Italy too. The reason is that as the revolutionary charisma and legitimacy of the movement-party fades with the passing of the leadership that toppled the old, and established the new, regime, leading to the succession crisis, the claim of the judges to greater revolutionary legitimacy as a result of their task of interpreting and applying the founding document grows in comparison to the new generation of "normalized," uncharismatic party politicians. This greater

⁵⁸ See ACKERMAN, *supra* note 1, chap. 2; see also S. P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS (2002).

⁵⁹ See *supra* note 55.

connection to, and relationship with, the revolution comes to be viewed as a stronger source of legitimacy by Time Four.⁶⁰ Thus, for example, it is only after Nehru's death and the succession crises of the Congress Party that followed, during which its legitimacy drastically fades to the extent of losing an election and power for the first time in 1977, that the Supreme Court of India is emboldened to emerge as the leading constitutional actor it has since become.⁶¹ The Israeli "constitutional revolution" of 1992 is another example.

Putting to one side the question of what exactly Ackerman means by "judicial supremacy," which he never really defines,⁶² he may here be overlooking the extent to which judicial empowerment and supremacy is a *general* tendency within contemporary constitutionalism; i.e., within all three pathways and not only the revolutionary. In other words, the broad trend towards increased judicial power and supremacy may be explicable independently of the growing relative revolutionary legitimacy of courts at Time Four. The very general (even minimal) conception of constitutionalism that Ackerman identifies and uses to distinguish among types of modern revolutions, as involving legal constraints on the exercise of political power,⁶³ certainly suggests a potentially significant role for courts regardless of which of the three pathways to it is taken. Thus, the importance of the rule of law and, especially within contemporary constitutionalism, of institutional checks and balances on power rather than unchecked, majoritarian democracy, seem to account for the general transfer of power to courts that has corresponded with "the rise of world constitutionalism."⁶⁴ To be sure, some of the

⁶⁰ ACKERMAN, *supra* note 1, chap. 1.

⁶¹ *Id.*, chap. 2.

⁶² Or rather perhaps, which among the term's various meanings he is employing. See Stephen Gardbaum, *What is Judicial Supremacy?*, in GARY JACOBSON & MIGUEL SCHOR EDS., *COMPARATIVE CONSTITUTIONAL THEORY* (2017).

⁶³ ACKERMAN, *supra* note 1, at 5.

⁶⁴ Public choice explanations for the rise of constitutional courts and judicial power, such as Tom Ginsburg's "insurance" and Ran Hirschl's "hegemonic preservation" theses, also appear to cut across the various pathways to constitutionalism. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN*

"usual suspects" for most powerful constitutional court in the world stem from the revolutionary tradition -- India, the United States -- but so too do courts in countries that followed a non-revolutionary pathway, such as Germany and Colombia since 1992.⁶⁵ In short, it is far from clear that judicial supremacy is limited to, or especially connected with, the revolutionary strand of constitutionalism.

So, judicial supremacy may not be distinctive to revolutionary constitutionalism. At the same time, however, not all revolutionary constitutionalism results in the problem to which judicial supremacy is the frequent answer. Indeed, it is far from clear that that the route to, and rationale for, judicial supremacy applies to revolutionary constitutionalism as a whole, rather than the sub-part of it on which Ackerman focuses. Where a legitimacy vacuum is not caused by, or first encountered at, the fading of revolutionary charisma at Time Three, then the greater claim to legitimacy of the judges than the new generation of normalized party politicians may well not apply. In other words, successful leaderless revolutions -- i.e., ones that survive the earlier legitimacy crisis at Time Two -- may be less likely to consolidate under judicial supremacy.

This is certainly what we find in the case of Mexico. The increasingly hegemonic position of the PNR after its establishment in 1929 (from 1946 the Partido Revolucionario Institucional (PRI)), meant that although constitutional discourse and legal form were important components of the revolutionary regime from the outset and much time was spent debating judicial institutions at the constituent assembly,⁶⁶ consolidation occurred without anything remotely resembling judicial supremacy. The newly created Supreme Court of Justice of the

ASIAN CASES (2003); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

⁶⁵ See, e.g., Gardbaum, *supra* note 9, at 1-2.

⁶⁶ NIEMEYER, *supra* note 21.

Nation may have helped to bestow legitimacy on the revolutionary regime but from 1917 until the end of PRI dominance and the 1994 constitutional reforms, it was deeply subordinated to the executive branch. As one legal scholar puts it, "The Mexican Supreme Court has been characterized by its passive political role, and its submission to the will of the executive."⁶⁷ Granted from the outset only the limited scope of judicial review constituted by the *amparo* jurisdiction, which has no legally binding effect beyond the plaintiff unless confirmed by five similar judgments, the institutional independence of the court was reduced by one constitutional amendment switching from congressional appointment to presidential nomination in 1928 and another by replacing life tenure with six year terms in 1934.⁶⁸ But institutional details aside, the very success and longevity of the revolutionary regime and party as the dominant political force in Mexico rendered judicial supremacy an unlikely political outcome.

In Tunisia, of course, we are still only eight years into the revolution, if its fragile legitimacy survives perhaps at the very beginning of the consolidation phase. However, despite the constitution calling for the creation of an independent constitutional court for the first time in the country's history and the enactment of an organic statute for it in 2015, no judges have been appointed and the court has yet to be established.⁶⁹ Incumbent politicians are perhaps more reluctant to cede power to it than were the initial constitutional drafters. If the regime survives, there is no way to tell at this stage whether it will end up with judicial supremacy. As we have seen, by no means is this always the case with revolutionary constitutionalism as a whole. But if it does, this may well be the result of more general factors than a succession/legitimacy crisis.

⁶⁷ Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LAT. AM. ST. 705, 706 (2000).

⁶⁸ *Id.*, at 710-12.

⁶⁹ Sharan Grewal, *Tunisia needs a constitutional court*, BROOKINGS, November 20, 2018, at <https://www.brookings.edu/blog/order-from-chaos/2018/11/20/tunisia-needs-a-constitutional-court/>

Among these, judicial supremacy appears to be significantly a function of the existence or absence of a dominant political party in constitutionalist regimes *of all pedigrees* rather than either a distinctive feature of revolutionary constitutionalism in general or the result of fading revolutionary charisma and succession crises in particular.⁷⁰ Among revolutionary regimes, it seems to be the existence and longevity of the revolutionary party's political dominance that matters and not so much whether it is charismatic or the original bearer of revolutionary legitimacy. Thus, the major difference between the movement-led and charismatic revolutionary regime in India that consolidates under judicial supremacy and the non-charismatic one in Mexico that does not, is the ability of the PNR/PRI to maintain its political dominance for several more decades than the Congress Party. This is, of course, despite its non-charismatic origins as the inheritor rather than the creator of legitimacy.⁷¹ Only once this dominance is seriously challenged for the first time in the 1990s is there political space for a more robust and independent constitutional judiciary. The United States has never had a dominant political party or faction along the lines of these two.

Similarly, with respect to the elite pact pathway to constitutionalism, the Federal Republic of Germany is an example of such a non-revolutionary regime without (at least since 1969) a dominant political party that has a very powerful constitutional court as "guardian of the constitution."⁷² By contrast, Japan is an example of the elite pact pathway in which a single party, the Liberal Democratic Party (LDP), has long been dominant and the Supreme Court is universally perceived as one of the weakest among constitutionalist democracies.⁷³ And this is

⁷⁰ See Gardbaum, *supra* note 9, at 25-30.

⁷¹ See *supra* note 8.

⁷² See, e.g., Peter E. Quint, *The Most Extraordinarily Powerful Court of Law the World has Ever Known? -- Judicial Review in the United States and Germany*, 65 MD. L. REV. 152, 153 (2006) (arguing that the German Constitutional Court has surpassed the U.S. Supreme Court to become the most powerful in the world).

⁷³ See, e.g., David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, in PUBLIC LAW IN EAST ASIA (Albert H.Y. Chen & Tom Ginsburg eds., 2013); Shigenori Matsui, *Why is the Japanese Supreme Court So*

despite the twin facts that its formal powers were modeled on, and are largely similar to, those of the U.S. Supreme Court, and that, since the 1946 constitution has never been amended, it faces less threat of being overruled by constitutional amendment than the U.S., German, or Indian courts.⁷⁴

The South African constitutional court may appear to be a partial exception, as it has operated within a dominant party democracy. But despite its undoubted influence, judicial supremacy does not seem an accurate characterization of the regime as a whole during the period of ANC dominance, which may now be coming to an end.⁷⁵ Moreover, as Ackerman charts, its influence was built-in at the outset when the newly established constitutional court was given a highly unusual and unusually prominent role in the constitutional founding: of ruling on the consistency of the final constitution with the 34 "constitutional principles" contained in the interim one.⁷⁶

IV. Conclusion

As a pioneering volume identifying the existence and implications of three distinct pathways to constitutionalism, and developing an in-depth history of the revolutionary tradition in the twentieth century, Ackerman's *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law*, is an immensely ambitious and impressive work. Its global coverage and detailed case studies provide rigorous and persuasive support for his overarching thesis about the common developmental stages and challenges of the revolutionary pathway to constitutionalism.

Conservative?, 88 WASH. U. L. REV. 1375 (2011). See also Gardbaum, *supra* note 9, at 36-39 (explaining why the Japanese court is weak, including the role of the dominant LDP).

⁷⁴ See Gardbaum, *supra* note 9, at 37.

⁷⁵ In the 2016 municipal elections, the ANC lost control of three metropolitan municipalities, including the city of Johannesburg, to opposition parties for the first time.

⁷⁶ ACKERMAN, *supra* note 1, chap. 3.

And yet, as extensive as his case studies are, this chapter has argued that the volume provides a partial account of the phenomenon of revolutionary constitutionalism and not the whole. For it deals exclusively with only one of its two major subtypes: the constitutionalist revolution engineered and led by a charismatic hero and movement-party that has earned its legitimacy through long years of struggle and sacrifice on behalf of the people against the old regime. It overlooks what has been an equally common and globally dispersed type of revolutionary constitutionalism over the same time period, with a not-obviously dissimilar rate of success and failure: what I have referred to as the "uncharismatic" variety. This is the spontaneous, leaderless or movement-less constitutionalist revolution, exemplified by the Mexican, Filipino, Romanian, and Tunisian revolutions discussed.

The existence and history of this second common type of revolutionary constitutionalism problematizes much of Ackerman's analysis as inherent to, or characteristic of, this pathway to constitutionalism as a whole. For it has tended to face a quite different key legitimacy crisis and at a different time: an initial one during the revolutionary turmoil rather than a succession crisis a generation later. Indeed, such succession crises appear to be not distinctive to revolutionary constitutionalism per se, but rather to charismatic revolutionary regimes of all stripes, including the more notorious "totalizing" ones of the twentieth century. Similarly, experience of the uncharismatic strand strongly suggests that judicial supremacy is not, contrary to Ackerman, specially connected with revolutionary constitutionalism. None of the uncharismatic case studies has obviously resulted in judicial supremacy and several countries that took the non-revolutionary path to constitutionalism have. The key variable here is arguably the presence or absence of a dominant political party.

This chapter introduces an additional layer to the topic of revolutionary constitutionalism. The hope is that scholars will be inspired, rather than intimidated, by the scale and ambition of Ackerman's book to bring similar depth to bear on the uncharismatic strand (and any others that might be found to exist) and build on his outstanding foundation to further our understanding of the revolutionary mode tout court and its interconnections with the other pathways to constitutionalism.