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Amendment Codification in Switzerland

Codifying an Evolving Culture of Constitutional Pragmatism

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I. Introduction

Swiss citizens regularly vote on proposed amendments to the Swiss Constitution. The constitutional text is generally open to change, and the authority on textual change is the totality of Swiss citizens with the qualification that a majority of the cantons must assent to any amendment.[1] This chapter addresses the following questions: (1) how and where does the constitutional text indicate change?; (2) where does this put the Swiss Constitution in a comparative typology of amendment codification models around the world?; and (3) why was the model chosen? More generally, this chapter interprets the Swiss model in its relationship with temporalities of constitutional creation.

Article 67a of the Swiss Constitution stipulates in its first paragraph that 'the Confederation and Cantons shall encourage musical education, in particular that of children and young people'. Footnote 37 indicates that Article 67a was adopted by a popular vote on 23 September 2012. The third paragraph of Article 72 on 'Church and State' stipulates that 'the construction of minarets is prohibited'. Footnote 38 indicates that this constitutional norm was adopted by a popular vote on 29 November 2009.[2] While all articles of the Constitution must be adopted by the majority of Swiss citizens and the majority of cantons according to Swiss constitutional law, these two popular votes share an extraordinary point of origin: unlike other articles, they were initiated by citizens collecting signatures rather than by elected politicians serving in the Federal Assembly, the Federal Council or cantonal political offices.

[1] Swiss Federal Constitution 1999, art 140.
[2] ibid arts 67a and 72.

However, their special point of origin cannot be discerned from the footnotes. Footnotes merely indicate that there has been an amendment adopted by popular vote at a specific date. Moreover, the footnotes only trace the amendments back to the last total constitutional revision of 1999, the second since Switzerland became the first federal state in Europe in 1848. In the general consciousness, the moment of 1848 is remembered as a major event of Swiss history and the foundation of the modern state; however, the original text is forgotten.

Richard Albert has conceptualised four models of codifying constitutional amendments from the study of constitutions across the world. This chapter attempts to situate the Swiss model within this theoretical framework. The four models are extracted from distinct codification arrangements in the US Constitution, the Indian Constitution, the Irish Constitution and the British Constitution. Drawing from their rules of codification, Albert categorises these models under the four labels *appendative*, *integrative*, *invisible* and *disaggregative*. He argues that the decision about which model a constitution follows is not just a legal formality, but a choice about how a people remembers its past.[3]

This idea could be extended even further: it is not only a choice about constitutional memory, but also a choice about construing a temporal bridge between constitutional foundation and the as-yet unknown demand for constitutional principles which the future might bring. Consequently, not only do modern constitutions institutionalise and channel citizen agency, set up legitimate powers and create cyclical rhythms of political life, but they also place constitutional creation in the arc of political time. The choice of amendment rules and codification models reveals assumptions and reflections of constitutional creators about the place in time they envisage for their Constitution.

The chapter analyses Albert's typology of codification models with regard to temporalities of political legitimacy and situates the Swiss codification model within it. It argues that the Swiss case is a form of the integrative model and reflects an evolving culture of constitutional pragmatism. It also traces the historical development of this culture and the emergence of a form of citizen constitutionalism.

II. Codification Models and Temporalities of Political Legitimacy

The moment of constitutional creation raises two possibilities: it may repudiate pre-existing arrangements and replace them with something radically novel, or it may attempt to reform these arrangements. The line is not sharp: even when pre-existing arrangements are repudiated, novelty is only partial. Some practices and

[3] Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford, Oxford University Press, 2019) 230.

normative interpretations will be carried over into the new constitutional time. While objective factors such as the amount and depth of new principles certainly influence the categorisation as a new beginning or reform, so do the demands of the political moment: do historical actors seek continuity with or distance from the past? These interpretations may already be contested in their time. In addition, future generations may change the interpretative emphasis of past events again. The choice of a model of constitutional codification is a revealing historical source for the interpretation of decisive constitutional moments in the history of polities.

The *appendative model* is motivated by the idea of keeping the original text untouched as it affords its words a foundational status bound up with the existence of the polity itself. This means that the text structures time into a pre-eminent beginning and restricts change to extra chapters added to it, which I will call 'constitutional foundationalism'. It enshrines an authoritative founding moment which cannot be entirely repudiated (although inspire repetition) without endangering the continuity of the republic. The choice of the model creates an interpretative framework that is consequential not only for constitutional law, but also for a culture of political memory and legitimacy. Amendments necessarily refer to the foundational moment to which they add something in taking up the language of foundational authority. However, unintentionally, this model also leads to open acknowledgement of breaks and renewal in the amendments.

The *disaggregative model* does not aggregate all norms of constitutional significance in a single text. The decisive aspect is the absence of a separate source of authority for constitutional norms: constitutional norms are enacted through the exact same procedure as ordinary law and are not weaved together into one text. Accordingly, constitutional change occurs through the creation or change of single legislative acts. This model of codification reflects the absence of a marked-out moment of foundation. Constitutional beginnings fade out into the mists of time. Evolving practice and commitments rather than explicit foundational authority serve as a source of legitimacy. I will call this form of political legitimacy in time constitutional historicism. In this model, no single act of foundation may outshine the prudent continuity of an old evolving history. Legal texts of very different historical moments may assume enduring fundamental constitutional significance without being integrated into one text.

Both the *appendative model* and the *disaggregative model* place interpretative obstacles in the way of non-jurists who would like to understand the valid constitutional law of the moment. The *invisible model* is clearer: the past is deleted out of the text without indication. This reflects an attitude to political legitimacy in time that may be described as constitutional presentism. There is an important foundational moment and a distinct source of constitutional authority. However, textual codification does not emphasise temporal markers, but rather continuity. It presents a fluid text: parts of the past are invisibly in the present and are integrated into the present.

Just like the *invisible model*, the *integrative model* integrates amendments into a living text. It differs in that the text includes markers that indicate the place and

moment of textual change. There is a founding moment in which a coherent original text is produced. There is a distinct source of constitutional authority that may amend the text. Yet the act of integration is made visible and the text demonstrates its character as a dynamic and temporal document. Parts of the relatively short constitutional present are integrated into the extended constitutional past from which the stability of the whole derives. This attitude to political legitimacy in time may be called constitutional pragmatism as it is focused on the action of textual integration of past and present. The text introduces its potential amenders to its history since its adoption and may be read like an encouragement to make new suggestions rather than to shy away from touching the Constitution short of activism for foundational new principles.

III. The Place of the Swiss Constitution

The Swiss Constitution creates two procedures of partial revision: partial revision may be proposed by 100,000 Swiss citizens, or it may be decreed by the Federal Assembly (both chambers of the Parliament). Both procedures trigger a mandatory vote of the people and the cantons.[4] Amendments are integrated into the original text and the moments of the popular votes are indicated by footnotes. However, the indication of integrated amendments only extends back to the last total revision – currently the Swiss Federal Constitution of 1999. Older amendments have become invisible. Yet constitutional life has already produced a rich array of new amendments. The totally revised Federal Constitution of 1999 now contains added articles such as Article 139b and it also contains article numbers without any corresponding text such as Article 139a.[5] Footnotes indicate when these articles have been introduced, altered, replaced or repealed by popular vote, but they do not say anything about the previous version of the text.

Two features differentiate the Swiss model from the type of integrative model that Albert has identified in the Indian Constitution: the absence of old text and the fact that indications do not extend beyond the last total constitutional revision, although the latter may simply be the result of the fact that the Indian Constitution has never undergone a complete revision. Notwithstanding these differences, the Swiss case may be regarded as a moderate form of the integrative model of codification. Swiss citizens may always attempt to amend the Constitution, but are challenged to integrate their present demands with the text that history has bequeathed them through the action of placing their amendment in it. In the event that their proposal finds popular and cantonal approval, their agency on the text leaves a footnote for the future.

Constitutional pragmatism of the Swiss type is not only marked by the visible integration of constitutional past and present in an ever-unfinished text; it also

[4] Swiss Federal Constitution 1999, arts 140, 192 and 194.
[5] ibid arts 139a and 139b.

stands for an ongoing practice rather than a theory of citizen sovereignty as the source of constitutional principle. Constitutional amendment became not an act of rare meaning, but a relatively frequent occurrence of political life.

IV. From Treaty to Constitutional Federalism: The Foundation of a New Power

The Swiss Confederation adopted its Federal Constitution in 1848, the year of revolutionary upheavals across Europe. Unlike the other revolutionary movements which rose up against old established monarchies, Swiss liberals and radicals did not have to stage a revolution against a power to assert the democratic nation. Switzerland had not participated in the development towards enlightened absolutism in the early modern period: no standing army, no centralised tax collection and no rational bureaucracy. The short attempt to modernise and centralise Switzerland during the unitary Helvetic Republic that lasted from 1798 to 1803 introduced wide-ranging equalising changes in the relationship between the cantons, but it failed to establish a lasting central power. Cooperation of instructed delegates remained the way of communal political life. The radicals did not want to replace an old sovereignty around which a state had been built up, but to erect a new national sovereignty with its own state by political voluntarism building on the experience of a common history.

The fact that the Constitution had not been the result of resistance against governmental authority shaped its text: it was not a list of liberties and rights won against a defeated power, but rather a textual statement of a political project to be realised through a new power. This power was democratically bound to the new collectivity of equal Swiss citizens. One way to create a new power rather than to reorganise one would have been to elect a foundationalist national constitutional convention. This would have bypassed the existing institutional forms. Instead, the old Swiss confederate assembly managed to stay on top of radical demands by establishing a commission, the Revisionskommission, out of the existing confederate assembly with representatives of most cantons to draft a liberal constitution corresponding to the spirit which fuelled 1848. It was an extraordinary fusion of popular sovereigntist radicalism with its discourse of supra-positive natural rights to constitute national self-government and a legalist moderate liberalism with its insistence on positivist legal means to achieve the shared goal of national integration. The international political moment contributed decisively to this alliance.[6]

How did liberals and radicals gain their position to become constitutional legislators for a new form of political union? In the early 1830s, 11 cantons

[6] Historian Oliver Zimmer argues that without this temporary ideological convergence of moderate liberalism and democratic radicalism, the nation-state of 1848 would hardly have come about: Oliver Zimmer, *A Contested Nation: History, Memory and Nationalism in Switzerland, 1761–1891* (Cambridge, Cambridge University Press, 2003) 132.

had undergone substantial constitutional change – in some places universal male suffrage was introduced, often as a result of popular pressure. However, attempts to integrate the Swiss cantons into a national state rather than mere military collaboration and a common foreign policy failed.[7] The goal was fiercely contested: conservative governments were opposed to national integration, which was synonymous with secular modernisation (particularly state education) and liberal rights. In the 1840s, these governments formed a separate military alliance to protect themselves from attacks by liberal revolutionaries. By 1847, liberals and radicals had achieved power in a narrow majority of cantonal governments. They used this majority to engage the Confederate Assembly in a new project of constitutional revision and soon decided to start the Sonderbundskrieg, a short war to dissolve the separate military alliance that was deemed an illegal breach of the Federal Treaty of 1815.[8]

The crushed resistance paved the way for the Federal Constitution. The Revisionskommission, which had already been formed before the war, was now complemented with liberal representatives from the defeated cantons. The constitutional project envisioned a dynamic federal state with a liberal economic union with a common coin, a mobile society with freedom of movement and settlement, powers to establish federal public works, a postal service, a better coordinated military defence structure and new national universities. Moreover, the Constitution set up an institutional arrangement of public powers as the main political actors: a national citizenry with constitutional agency and electoral power, a bicameral Federal Assembly, an executive Federal Council elected by the Federal Assembly and a Federal Court.[9]

V. Legitimating the Constitution: A Hidden Revolution?

A popular referendum was the radical path to legitimate the new Constitution. It was not the first referendum held on a nationwide basis; during the unitary Helvetic Republic, there had been a very first constitutional referendum in 1802. However, it was this one that definitively impressed on the public mind the idea of a sovereign national citizenry ultimately responsible for federal constitutional matters. The referendum was conducted by the cantons. The cantons asked all male Swiss citizens – a legal status created by the new Constitution – whether they consented to the adoption of the new Constitution. This inaugurated the principle of political

[7] Andreas Kley, *Verfassungsgeschichte der Neuzeit: Grossbritannien, die USA, Frankreich und die Schweiz* (Bern, Stämpfli Verlag, 2020) 239.

[8] Historisches Lexikon der Schweiz, René Roca, 'Sonderbundskrieg' (2012), https://hls-dhs-dss.ch/de/articles/017241/2012-12-20.

[9] Federal Constitution 1848.

nationality, though the historically evolved principle of sovereign cantonal particularity remained tangible in the stipulation of a consenting cantonal majority.

The Sonderbundskrieg which preceded the Constitution had not been legitimated in revolutionary language, but had drawn on a historically and legally legitimated discourse of military unity and common purpose to justify military intervention. The gradualist historical rhetoric allowed the impression of a legal and smooth transition to a new federation. The language of continuity and the considerable autonomy that remained with the cantons made the new arrangements more palatable. This links the Swiss case to constitutional historicism: there was reluctance to regard the Constitution as a foundationalist text since the idea was not to liberate the political project from the past for a new beginning, but to build on the past and renew it, while adapting to the needs of the time.

Yet while revolutionary rhetoric was largely absent from the centre of constitutional action, in legal substance it was a proper revolution: it created the first federal state on the European continent, it institutionalised the national citizenry as the new sovereign with a right to constitutional revision at any time, it carved out new areas of common policy and it proclaimed a list of liberal rights to protect certain activities from state interference. The right to constitutional revision at popular request resulted from a democratic theory of constitutionalism that differed from universalist liberal constitutionalism.[10] This radical conception of constitutionalism regarded the Constitution as the direct expression of the wishes and concerns of the citizens. According to this theory, the Constitution was not conceptualised as a binding contract rooted in enlightened reason guaranteeing a set of universally rational and just principles, but rather as state purposes, rights and limits to power legitimated by practical citizen mobilisation.

The Swiss fusion of elements of constitutional historicism and elements of constitutional foundationalism was the easiest solution to bridge the habitual local liberty and the desire for modernisation and national representation. Constitutional historicism emphasised a homegrown tradition of political liberty and consensus in the absence of a strong power and the ways in which the Constitution left these traditions in place. Constitutional foundationalism emphasised that it did not draw its inspiration from the French revolutionary constitutions with their rationalist centralism, but from American federalism.[11] Notwithstanding the strong tendency to downplay foundationalism in a historicist language, in essence the outcome was a foundationalist constitutional text which set up a new democratic republic on the European continent.

[10] Zimmer (n 6) 119.

[11] An influential example is the treatise by the Swiss philosopher Ignaz Troxler on Swiss constitutional reform: Ignaz Paul Troxler, *Die Verfassung der Vereinigten Staaten Nordamerikas als Musterbild der Schweizerischen Bundesreform* (Basel, Verlag der Brodtmann'schen Buchhandlung, 1848) 9.

VI. Debating Revision and Codification in 1848

How did the Revisionskommission debate the possibility of revision and the form of codification of such revisions? The question of revision was an important topic on the agenda. The participants had the previous Federal Treaty of 1815 as a comparison on their minds – a treaty that did not regulate revision at all. In particular, the radical President of the commission, Ulrich Ochsenbein, spoke out in favour of providing a clear channel to constitutional revision at any time in line with his position of democratic constitutionalism. Moreover, such a provision was seen as a means to avoid revolutions by providing a legal channel for change. The commission followed him on this matter. It also decided that regular revision would happen in the same way as ordinary federal laws.[12] This had effects on the codification model: the form of codification was to be analogous to ordinary law. An *appendative model* of codification was out of the question.

This decision stayed true to the practice of using historical continuity to legitimate novelty. The Revisionskommission was itself a product of this practice that was now also adapted for future revision: no constitutional convention had to be elected to do so, the initiative could simply be taken by any member of the Federal Assembly and had to be ratified by the majority of citizens and cantons. The Federal Assembly and the national citizenry – both of which had come into existence simultaneously in 1848 – were perceived as closely related political actors. The Federal Assembly played the leading part, while the citizenry (and the cantons) followed with the sovereign right to refuse undesired steps.

However, the question whether the right of initiative for revision was to be restricted to Members of Parliament or opened up to citizens was the subject of intense debate. Ultimately, the stipulation that 50,000 citizens could demand a revision and request a popular vote on this question was accepted. If the majority of the Swiss citizens and cantons voted for such a revision, a general re-election of the members of the two chambers was to follow to proceed with the task. The report written in the name of the Revisionskommission to the confederate assembly stated that it was a consequence of popular sovereignty that the people could revise its Constitution at any time and that most revolutions in history had happened in circumstances in which constitutional amendment had been made too difficult to achieve.[13] The result was a mix produced by three forces: a desire for historical continuity, a project of substantial foundationalism and pragmatic thinking about policy areas suited for centralisation.

[12] Rolf Holenstein, *Stunde Null: Die Neuerfindung der Schweiz im Jahr 1848, Die Privatprotokolle und Geheimberichte der Erfinder* (Zurich, Echtzeitverlag, 2018) 818.

[13] H Druey and JC Kern, 'Bericht über den Entwurf einer Bundesverfassung' (8 April 1848) 76, https://www.e-rara.ch/zut/content/titleinfo/7530617.

VII. The Journey from a Foundationalism of Principles to Constitutional Pragmatism

The difference between partial revision and complete revision, which was to play an important role in Swiss constitutional history, was not yet clearly conceptualised in 1848. In practice, the codified rules meant that the power of partial revision was restricted to the Federal Assembly, while a popularly accepted citizen initiative against its will would effectively subject the whole Constitution to an examination for revision by a re-elected Parliament. Hence, the citizens' vote on constitutional change was essentially a sovereign's right to veto. The Constitution was considered a foundationalist document to be amended only for acts of rare significance for which a popular vote was considered necessary. The citizen right to initiate revision against the will of the Parliament was not an invitation to do so, but an emergency provision where an alienated citizenry had lost confidence that elected politicians would take their wishes and concerns seriously.

For 18 years the Constitution produced by the alliance of 1848 had remained untouched, but in January 1866, the sovereign citizenry gained the first chance to use its right to veto constitutional change and it did so. Out of nine proposed constitutional amendments, eight were rejected. This weakened the assumption that the discourses and decisions of the Federal Assembly reflected the wishes and concerns of the citizenry. It was the beginning of a decoupling process between citizen confidence in politicians and citizen expression on constitutional matters. Over time, the citizens came to consider it their practical task to shape the Constitution and separated this task intellectually from electing suited politicians.

The first attempt at constitutional amendment from above necessitated a concrete suggestion of codification within the text. As was to be expected from the decision to treat constitutional law technically like ordinary law, a form of textual integration was proposed. New articles would be integrated by adding a letter to the number of the existing article next to which the new article was to be placed (for example, Article 54a).

During the 1860s, several Swiss cantons experienced strong democratic movements that demanded more popular participation in legislation and these demands produced several new cantonal constitutions. In response to the Federal Council's proposal for the first constitutional revision, these demands were also voiced in the Federal Assembly. One parliamentary motion demanded the introduction of a popular referendum on ordinary laws at citizens' request.[14] One line of argument was that private material interests had proven very influential on federal policies and that it was important not to forget to think about developing citizens'

[14] Alfred Kölz, *Neuere Schweizerische Verfassungsgeschichte II: Ihre Grundlinien in Bund und Kantonen seit 1848* (Bern Stämpfli Verlag, 2004) 504.

participatory possibilities when amending the Constitution for the first time. Yet the prominent entrepreneur and politician Alfred Escher was finally able to rally support against this proposal by insisting that a referendum on laws would destroy the highest constitutional principle of the Swiss Federation, namely 'representative democracy'.[15] Supporters of this position added that such a right would be used to obstruct progress and that the citizens would lack the necessary education. The motion was subsequently rejected, and the constitutional revision was put to the vote without any proposition to expand the possibilities of popular participation.

For some citizens, the reaction to the vote on the revision without any chance to decide on new forms of popular participation to compensate for more centralisation was to start to organise for a complete constitutional revision. While many accepted more centralisation, a proclaimed goal was to gain more participative power so that centralisation would not make the federally constituted powers too powerful.[16] In these years, the democratic movement for more popular participation on the cantonal level peaked in Zurich. A new Constitution was adopted with overwhelming majorities which turned the leadership between representatives and citizens on its head: it stated that the people would exercise the right of legislation with the collaboration of the (legislative) Cantonal Council.[17]

During these years, direct democracy gained support in popular consciousness. As the democrats and radicals also won more seats in the National Council, they started to push for a constitutional revision. They charged the Federal Council with the task to examine which parts of the Constitution should be revised to bring it into concordance with the requirements of the times, 20 years after its first adoption. Soon after its proposal, demands created by the military situation around 1870 made clear that a total rather than just a partial revision would be necessary.[18] Subsequently, the two chambers elected separate Revisionskommissionen. There, many politicians supported the introduction of new elements for popular participation in legislation and lively discussions on different possibilities took place.

While a first attempt at legitimating a revised Constitution at the polls failed to secure both a popular and a cantonal majority in 1872, the citizens and cantons accepted a second proposition for revision with less centralisation and more anticlericalism in 1874. Unlike the draft of 1872, it did not include a right for citizens to initiate legislation or challenge legislation after a prescribed time limit to do so has passed by. Yet it did include a new possibility for citizens to challenge federal legislation after the law had passed the Parliament and to demand a popular referendum. This weakened the theory that the Constitution was a foundationalist text of fundamental principles to be amended only in extraordinary moments of citizen mobilisation.

[15] ibid 505.
[16] ibid 508.
[17] Zurich Cantonal Constitution 1869, art 28.
[18] Kley (n 7) 270.

VIII. Voting on Laws

The expansion of popular participation in legislation of the 1874 Constitution changed the relationship between constitutional law and ordinary legislation. The original arrangements had expressed a clear difference between the sovereign of the Constitution, the citizenry and the cantons, and the ultimate source of authority on ordinary federal laws, the two chambers of the Parliament. The new set-up diluted this clear distinction in the source of legitimacy and made it possible to regard the Constitution less as a supreme law of utmost significance and more as an important channel of citizen expression among others. Parliamentary concretisation could take a pragmatic and reconciliatory approach rather than a strictly principled form sustained by an external institution. After all, the citizenry could intervene again with referenda if it did not approve of the parliamentary decisions.

As a consequence of the revision of 1874, the Constitution was no longer the only channel of direct popular political expression other than the election of persons. The frequent votes on both constitutional law and ordinary law engraved a strong sense of political participation on the public mind that turned on the perceived importance of the issue rather than the juristic categorisation as constitutional or legislative. This helped to bring about a pragmatic rather than a symbolically charged attitude to the Constitution. Winning a campaign for a constitutional norm meant to exert a significant effect on political attention and resources: the Constitution became a contested text that assumed a different role than simply setting up fundamental principles for the polity which were to be defended against the politics of the day.

The possibility of referenda on laws left the option open to mobilise the citizenry whenever opposed groups believed that they stood a significant chance to win against the Parliament. Thus, rather than becoming more removed from access by daily politics and subjected to elaborate juristic dogmatisation, the text of the Constitution became more involved in daily politics – contemporaneously with the expansion of the powers of the citizenry. Frequent citizen voting practice on both fundamental constitutional norms and regular laws complemented the written principles of the Constitution and its professional interpreters, and came to act as a main source of legitimate power. The citizens had become the guardians of the living Constitution by reserving the right to block anything they regarded as stepping beyond the legitimate power of the Parliament, which they had accepted in the Constitution.

IX. Constitutional Text Written by Citizens

The referendum on ordinary laws was important for shaping a new public attitude towards the Constitution. It was not decisive for establishing constitutional codification, which had already been set on its path in practice with the first propositions

for constitutional revision in 1866. The integrative model was suited to the exclusive access of Members of Parliament to constitutional text. The Parliament was an institution where educated lawyers usually played a significant role, and they would attempt to integrate new amendments well into the text.

Yet the development of participatory rights for the national citizenry did not stop with the referendum on federal laws introduced in 1874. In 1879, one Member of Parliament failed to gain support for a motion to centralise the right to issue banknotes at the federal level. In response, he started to collect signatures to demonstrate popular support for his idea. During the public discussion, dissatisfaction with the restriction of popular initiative to total constitutional revision came to the fore and a subsequent petition by the 'society of the people' demanded that the Constitution should be complemented with an article on banknotes, but should also be amended to allow popular initiatives for partial revision. Yet the Federal Council turned this into the simple question: 'Should there be a revision of the Federal Constitution?', which was negated by the citizenry.[19]

Five years later, three conservative Members of Parliament drafted a parliamentary motion which included the request to make the constitutional text accessible to partial revision by popular initiative. The democrats supported the idea and five years later, the Federal Council supported a specific version of the request. It pushed the idea that popular initiatives should be introduced only in the form of suggestions. The final amendment of the constitutional text would remain in the hands of the Parliament and the citizenry would subsequently only be able to have a vote on that proposition. However, the Parliament changed the proposition and allowed the possibility that organised citizens could propose the precise textual reform themselves, but had to stick to one matter at a time. In 1891, the citizenry and the cantons accepted this new popular right, although the campaign was contested. The reform was pushed by conservative and democratic forces, while liberals and radicals were sceptical as it weakened the power of the Federal Parliament, which they considered to be a progressive force. Yet the Federal Council – and subsequently the Parliament with a rather narrow majority – ultimately supported the revision as it deemed the restriction of popular initiative to total constitutional revision an obstacle to the detection of actual popular will.[20]

The opening of the constitutional text to citizen initiative furthered the attitude of dynamic constitutionalism. While some parts of the Constitution remained stable and well accepted, the text had become a work in progress rather than a venerated reference text. The initiative proved to be a popular political device. However, in contrast to obstructive referenda that stood considerable chances of success, initiatives were insecure campaigns. They bypassed the parliamentary chambers not to block a law, but to introduce constitutional principle. It was a form of popular empowerment against the representatives, but was also open to use

[19] Kölz (n 14) 638.
[20] ibid 643.

by parliamentary minority forces to pressure majorities by threatening a popular vote on a matter which they refused to discuss.

For these reasons, the idea of the initiative had originally been treated as necessitating a re-election of Parliament. The process of decoupling popular expression on constitutional matters from political elections only really came to an end with an introduction of the popular initiative on constitutional text. The integrative model required organising citizens to study the existing text and integrate their demand pragmatically with the Constitution arising out of history. Since 1891, the Swiss citizens have voted on 225 initiatives and accepted only 24. Of those 225 initiatives, 189 initiatives were voted on after 1950 and only 36 (of which seven were accepted) in the period between 1891 and 1950.[21] Nevertheless, initiatives have led to momentous constitutional revisions, such as the introduction of a system of proportional election of the National Council (1918) and the decision to join the United Nations (2002).

X. Conclusion

Switzerland has opted for a form of the integrative model of codification. This model has not developed as the outcome of a contested debate, but was adapted from the codification models of ordinary laws. It reflects a constitutional culture of pragmatism. Three elements are decisive in terms of understanding this constitutional culture. The first is the radical theory that the Constitution is to be understood as the practical expression of considered collective will of equal citizens; practice would habituate the citizens to consider themselves as the legitimate authority on constitutional matters. The text was not lauded as the creation of enlightened founders whose theories and intentions would become the object of extended interpretative disputes. Instead, it was considered as the creation of pragmatic men combining the widespread demands for democratic sovereignty on a national scale and the historically evolved political structures and habits in a federal structure. Although there was a downplayed foundationalist dimension to the original text of 1848, the political culture ended up not enshrining the moment of constitutional foundation and declared principles, but encouraging further pragmatism in constitutional development by normalising the idea of a frequently mobilised citizenry as the ultimate source of law.

This process took first place through the dissolution of clearly separate sources of legitimacy for constitutional as opposed to ordinary legislation. The distinction between extraordinary constitutional politics in rare moments of collective mobilisation about fundamental principles and regular ordinary politics largely disappeared. Although rare moments of breakthrough were not excluded, the

[21] Swiss Federal Chancellery, https://www.bk.admin.ch/ch/d/pore/vi/vis_2_2_5_9.html.

focus of constitutional development lay on incremental change resulting from the regular consultation of the wishes and concerns of the citizenry. The vote on concrete laws rather than simply on abstract constitutional principles contributed to this culture of pragmatism and permanent dialogue.

This evolving culture of participation on laws facilitated the introduction of the popular initiative to amend constitutional text. It was this shift that completed pragmatic constitutionalism and became an invitation for citizens to become co-authors of an evolving constitutional text. The integrative model of codification required that organised citizens had to study the text in considerable depth in order to place and make their proposed changes. Nevertheless, the political culture that evolved sacrificed constitutional purity and simplicity for a palimpsestic work in progress. Pragmatic integration of past and present became the hallmark of Swiss constitutional culture.