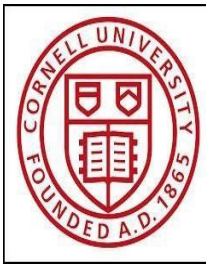
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Constitutionality in Making and Changing Constitutions

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In his 2010 State of the Union Address,[1] President Barack Obama called on Congress to pass a law reversing the effect of *Citizens United*, a controversial 5-4 Supreme Court judgment authorizing corporations to make unlimited independent expenditures in federal elections.[2] He later went farther, urging Congress to pass a constitutional amendment overturning the Court's ruling.[3] Today, many years since, *Citizens United* remains good law, despite what seems to be supermajority popular support for an amendment that would reform campaign finance rules.[4] There is a reason why *Citizens United* has not yet been overruled even though most Americans appear to want just that: amending the Constitution requires congressional approval—or at least congressional acquiescence in the case of an Article V amendment by constitutional convention—and Congress has so far continued to block all efforts to give the people what they clearly support. Faced with this split between Congress and the people, what could President Obama have done?

A Word of Thanks

I am grateful to the *Cornell International Law Journal* for organizing this symposium featuring responses from seven outstanding scholars to my Article on *Four Unconstitutional Constitutions and their Democratic Foundations*.[5] Their comments are challenging, useful and provocative. Reading them has for me been enriching and enjoyable—enriching because their insightful responses have taught me a great deal more than I knew before

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1. Barack Obama, "The 2010 State of the Union Address", *The Obama White House Archives* (Jan 27, 2010), https://obamawhitehouse.archives.gov/photos-and-video/video/2010-state-union-address#transcript [.

2. *Citizens United v. Fed Election Comm'n*, 558 U.S. 2010 (2010).

3. *See* Fredreka Schouten, *President Obama Wants to Reverse Citizens United*, USA TODAY (Feb. 9, 2015), https://www.usatoday.com/story/news/politics/onpolitics/2015/02/09/president-obama-wants-to-reverse-citizens-united/81582308 [https://perma.cc/C3RR-CLCZ].

4. Nicholas Confessore & Megan Thee-Brenan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), https://www.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?_r=0 [https://perma.cc/5YTF-FVV2].

5. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169 (2017).

about the subject of this colloquy, and enjoyable because engaging with each of them in this forum is a special privilege I do not take lightly. In this reply, I continue the conversation they have so generously begun, and I do so knowing that I have the good fortune of a lifetime of learning from them and their ideas.

Sources of Authority

Constitutionality is a measure of conformity with an authoritative standard. To evaluate the constitutionality of an action, for example, we require a benchmark and an arbiter to assess some given conduct. Whether a constitution can be unconstitutional need not necessarily be judged as a doctrinal matter but it certainly can be, as we know from the South African Constitutional Court's declaration that the 1996 draft constitution was unconstitutional.[6] Dennis Baker points to Canada as another jurisdiction where we might make a doctrinal case against the constitutionality of a Constitution.[7] The argument—which is in my view quite compelling—is that the Supreme Court in the *Patriation Reference* credited the wrong quantum of agreement as amounting to a conventional requirement for major constitutional changes in Canada: the Court should have recognized the existence of a convention of unanimous provincial consent rather than the lower and amorphous threshold of substantial provincial consent.[8] More controversially, Baker challenges us to consider whether unanimous consent was the correct amendment practice to credit as conventional in light of Quebec's special role as a founding partner in Confederation.[9]

As Baker reminds us, Quebec later challenged the Court's advisory ruling in the *Patriation Reference* when the province argued, shockingly to some but correctly to others, that Patriation was unconstitutional.[10] The Canadian Supreme Court predictably rejected Quebec's argument.[11] What other ruling could have been expected from a federalist institution that, if critics are right, had been complicit in aiding the federal government and the

6. *Certification of the Constitution of the Republic of South Africa, 1996*, Case CCT 23/96 (6 September 1996). The Interim Constitution had authorized the Constitutional Court to assess the conformity of the new draft constitution with a series of constitutional principles. *See* S. AFR. (INTERIM) CONST., act. 200, ch. V, s. 71(2)-(3) (1994). The constitution-making process subsequently unfolded as anticipated, the Constitutional Court exercising its extraordinary power to review the draft constitution consistent with the expectations of the parties. One can only imagine how this extraordinary allocation of power could have been distorted had events taken an unexpected turn, as they did in Chile when the predicate for the creation of a Constitutional Tribunal proved false. *See* Sergio Verdugo, *Birth and Decay of the Chilean Constitutional Tribunal (1970–1973): The Irony of a Wrong Electoral Prediction*, 15 INT'L J. CONST. L. 469 (2017).

7. Dennis Baker, *The Origins and Implications of Canada's "Constructive Unamendability": A Comment on Richard Albert's* Four Unconstitutional Constitutions and their Democratic Foundations, 5 CORNELL INT'L L.J. ONLINE 29, 30–31 (2017).

8. *Reference re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ["*Patriation Reference*"].

9. Baker, *supra* note 7, at 3032.

10. *Id.* at 30–33.

11. *Reference re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 ["*Quebec Veto Reference*"].

signatory provinces impose Patriation on Quebec? Sixteen years later, the Court later took a more sensitive if Solomonic approach in the *Secession Reference*, when it declared that political actors are bound by a duty to consult in the event of a clear expression of the will of the people of Quebec to leave Confederation.[12] Yet the *Patriation* and *Secession References* share an important feature in common: they both demonstrate how closely the Court is attuned to political reality. In the *Patriation Reference*, the Court quite deliberately averted a constitutional crisis when it chose the least constraining convention in order to ensure as best it could the successful patriation of the Constitution. In the *Secession Reference*, the Court was similarly deliberate when it confirmed that a constitutional amendment was necessary to formalize a provincial secession from the country yet stopped well short of identifying which of Canada's five amendment procedures the Constitution required political actors to use. Appealing to the Constitution as a source of authority would have been inappropriate as a resolution to a dispute that concerned the legality and legitimacy of the Constitution itself.[13]

In these Canadian and South African cases, the sources of authority were domestic. But sources of authority can also be supranational, as Silvia Suteu explains in connection with the Venice Commission, more formally known as the Council of Europe's European Commission for Democracy through Law.[14] The Venice Commission does not exercise the same role as the Canadian Supreme Court in the *Patriation Reference* or the South African Constitutional Court in the constitutionalized certification process. It is more accurate to describe the Commission's function as evaluating whether draft constitutions comply with the standards of the Council of Europe.[15] Suteu asks provocatively and indeed importantly whether "the increasing role played by such supranational actors in constitution-making eventually amount to a finding akin to one of unconstitutionality of a constitution?"[16] The strengthening forces of European integration lead me to believe the answer is unfortunately yes, to the extent that the finding of compliance-as-constitutionality is anchored in an expectation of conformity with regional norms of constitutionalism. I have argued elsewhere that this is a lamentable outcome because it coerces states into constitutional harmonization and spells doom for autochthony in constitution-making.[17] We should nonetheless heed

12. *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 ["*Secession Reference*"].

13. As Baker has argued elsewhere, one could justify the Court's holdings here and elsewhere as "protecting an inclusive form of federalism." *See* Dennis Baker & Mark D. Jarvis, *The End of Informal Constitutional Change in Canada?*, *in* CONSTITUTIONAL AMENDMENT IN CANADA 185, 200 (Emmett Macfarlane ed., 2016). Yet Baker is ultimately right that, at its best, constitutional democracy requires a form of coordinate constitutionalism. *See* DENNIS BAKER, NOT QUITE SUPREME: THE COURTS AND COORDINATE CONSTITUTIONAL INTERPRETATION (2010).

14. Silvia Suteu, *Unconstitutional Constitutions? New Approaches to an Old Problem—A Response to Richard Albert*, 5 CORNELL INT'L L.J. ONLINE 47, 53 (2017).

15. *Id*.

16. *Id*. at 53–54.

17. *See* Richard Albert, *Constitutions Imposed with Consent?*, *in* IMPOSED CONSTITUTIONS: THEORY, FORMS & APPLICATIONS (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., forthcoming 2018).

Suteu's call for new research into supranational sources of authority in constitution-making, a field of study to which she has contributed important scholarship.[18]

But the possibility of an unconstitutional constitution is not a new phenomenon. Sergio Verdugo reminds us that constitutions have in the past been adopted in violation of the rules of change entrenched in the old constitution.[19] He highlights Chile, Colombia, Germany and Venezuela as jurisdictions where we can find examples of this procedural unconstitutionality.[20] More importantly, Verdugo also complicates in a productive way the question of authority—who has the authority to declare or enforce the unconstitutionality of a constitution? While it would be unusual for a Court to deny the constitutionality of an action of the unbounded constituent power, there is nothing odd about a Court holding unconstitutional an act of a constituted power. Verdugo observes that the creation of the draft South African Constitution and the final Constitution that was ultimately approved by the Court were acts of a constituent power. These derivative constitutions had been authorized by the Interim Constitution, whose creation was an act of the constituent power. This distinction has implications for what we ought to regard as ordinary and truly extraordinary. Verdugo's clarification suggests that the South African case is not as extraordinary as we might think since the Court did not undo the work of the constituent power but only of a constituted power that derived its limited authority from the Interim Constitution. The Interim Constitution remained intact from the very beginning. I agree with Verdugo that the truly extraordinary act would have been invalidating it—a creation of the constituent power.

An Amendment-by-Referendum to Overturn Citizens United?

Return to the stasis in the United States on reversing *Citizens United*. Seeing no likelihood that Congress would initiate the Article V process to send an amendment proposal to the states for their ratification, could the president have gone over the heads of congresspersons to hold a nation-wide amendment referendum on whether to overturn the holding in *Citizens United*? The United States Constitution does not by its text authorize such a move but it is not clear that it is prohibited. This unconventional path could well be one of the "new horizons" to which Juliano Zaiden Benvindo alludes when he speaks of the defiance of the rigid rules of formal amendment: "constitutional democracy is marked by [an] ever-present threat of betrayal, which, nonetheless, may open it up to new horizons and, indeed, serve as a

18. *See, e.g.*, Silvia Suteu, *Women and Participatory Constitution-Making*, *in* CONSTITUTIONS AND GENDER 19 (Helen Irving ed., 2017); Silvia Suteu, *Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits*, 6 GLOBAL CONST. 63 (2017); Silvia Suteu, *Developing Democracy Through Citizen Engagement: The Advent of Popular Participation in the United Kingdom's Constitution-Making*, 4 CAM. J. INT'L & COMP. L. 405 (2015).

19. Sergio Verdugo, *Comments on Richard Albert's Theory of Unconstitutional Constitutions*, 5 CORNELL INT'L L.J. ONLINE 39, 43–45 (2017).

20. *Id*. at 40 n.7.

nudge for new constitutional moments and constitutional changes, either formal or informal."[21] In the case of the presidential amendment-by-referendum, what amounts as a matter of law to constitutional disobedience may in fact reflect as a matter of constitutional politics a strategic choice to break from the textual strictures that make it otherwise impossible for the constitution to withstand extreme conditions of exception or emergency. In his earlier work, Zaiden has suggested that constitutional disobedience, even if unconstitutional, has redeeming virtues that go to the core of creating and sustaining a constitutional community.[22]

Nor is it an entirely hypothetical question to ask whether the president could have held a nation-wide amendment referendum to change the Constitution even where amendment referendums are not authorized.[23] Then-President Charles de Gaulle took a similar path to amending the French Constitution when, in 1962, he held a referendum on whether to abolish the electoral college for presidential selection in favor of presidential election by direct popular vote. At the time, Parliament was resistant to de Gaulle's plan and ultimately refused to initiate the formal amendment procedure to make this change. Undaunted, De Gaulle went directly to the people, asking them whether they approved the amendment—even though there was no constitutional authorization for him to use a referendum in this way to amend the Constitution. A strong majority of French voters cast their ballots in favor of De Gaulle's amendment to create direct presidential elections.[24] He declared the Constitution amended, and the Conseil Constitutionnel recognized the validity of the amendment on grounds that the court had to give effect to the will of the people.[25]

The rules of formal amendment in the United States Constitution likewise do not authorize referenda or any kind of direct appeal to the people. Nor, however, does the Constitution prohibit them. The Constitution may be fairly characterized as silent on this matter, though one could argue that the specificity of the rules of Article V precludes the possibility of other paths to formal amendment. Scholars have accordingly described Article V as the

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21. Juliano Zaiden Benvindo, *Unconstitutional Constitution as a Conceptual Oxymoron of Practical Relevance*, 5 CORNELL INT'L L.J. ONLINE 1, 4 (2017).

22. *See* Juliano Zaiden Benvindo, *The Forgotten People in Brazilian Constitutionalism: Revisiting Behavior Strategic Analyses of Regime Transitions*, 15 INT'L J. CONST. L. 332 (2017); Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 364 (2015).

23. *See* Richard Albert, *Discretionary Referenda in Constitutional Amendment*, Conference Paper for Symposium on "The Limits and Legitimacy of Referendums," University of Toronto Faculty of Law, September 22–23, 2017, Boston College Law School Legal Studies Research Paper No. 460, *available at*: https://ssrn.com/abstract=3025772 [https://perma.cc/4NQM-YYDL].

24. For a discussion of this episode, *see* Jean-Philippe Derosier, *The French People's Role in Amending the Constitution*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 315–26 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017).

25. Décision no. 62-20 DC, Nov. 6, 1962, *available at*: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1962/62-20-dc/decision-n-62-20-dc-du-6-novembre-1962.6398.html [https://perma.cc/QLV7-28TE].

exclusive mode of textual alteration although there are prominent scholars who have taken the contrary position: that Article V is not the only legally valid method the Constitution authorizes for constitutional amendment.[26]

But would there be a material difference between successfully overturning *Citizens United* with recourse, on the one hand, to the amendment procedures in Article V and, on the other, to a national referendum that yielded a decisive majority on the same question? The result of the former would derive its legitimacy from two sources: first from the legal-positivist authorization of the process outlined in the codified master-text of the Constitution and second from the approval of the change by political actors in a complicated two-part vote to propose and subsequently to ratify the amendment across multiple institutional actors in the United States. The result of the latter would derive its legitimacy from another source altogether: from the direct popular approval of the change that was at worst a violation of and at best a supplement to the formal rules of change.

From Binary to Graduated

Whether the difference is material turns on how we evaluate the legitimacy of legal-positivist authorization for constitutional change versus a more popular form of authorization. A jurisdiction that places primacy on popular sovereignty might well prioritize the referendal mode of change precisely because of its rejection of the constraints placed on the people by onerous legal forms. And even if the legal form had been legitimated at the founding moment of the jurisdiction in an extraordinary process of popular constitution-making, the more current will of the people expressed in the referendum *could* amount to a more compelling expression of popular sovereignty. Whether one or the other is more compelling is precisely the inquiry that Joel Colón-Ríos invites us to undertake in order to evaluate differential degrees of democratic legitimacy.[27] Colón-Ríos and I agree that "the validity of a constitution is to be solely judged by the people to which it applies,"[28] but this is only a point of departure. As Colón-Ríos demonstrates, democratic legitimacy is not binary. It is instead graduated along a scale.

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26. *Compare* BRUCE ACKERMAN, WE THE PEOPLE—VOLUME 1: FOUNDATIONS 46, 58–80 (1991) (introducing theory of "constitutional moments"), *and* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (arguing that the Constitution may be amended by national referendum), *with* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) (arguing that Article V is the only way to formally amend the Constitution), *and* John R. Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms*, 21 CUMB. L. REV. 271 (1991) (rejecting the view that the Constitution can be formally amended outside of Article V).

27. Joel Colón-Ríos, *On Albert's Unconstitutional Constitutions*, 5 CORNELL INT'L L.J. ONLINE 17, 19 (2017).

28. *Id*. at 20. In many of his other works, Colón-Ríos has advanced the similar view that the will of people should be the controlling factor in making, changing and interpreting constitutions. *See, e.g.*, JOEL COLÓN-RÍOS, WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER (2012); Joel Colón-Ríos, *The Counter-Majoritarian Difficulty and the Road Not Taken: Democratizing Amendment Rules*, 25 CAN. J. L. & JURIS. 53 (2012); Joel Colón-Ríos, *De-constitutionalizing Democracy*, 47 CALIF. W.L. REV. 41 (2010).

Two or more actors or bodies may be said to possess democratic legitimacy, though one may be shown, as Colón-Ríos demonstrates, to be more or less democratically legitimate than the other. The federalist design of the intricate forms of amendment under Article V—the very paths that today block the reversal of *Citizens United*—would yield a democratically legitimate amendment but a referendal amendment would possess some democratic legitimacy. We would need the tools and vocabulary to evaluate their relative bona fides if we wished to identify the more democratically legitimate of the two.

Democratic legitimacy is not the only concept that can be—nor indeed perhaps should be—plotted along a graduated scale, as we learn from Francisca Pou Giménez.[29] To describe a constitution in stark terms as either wholly constitutional or wholly unconstitutional ignores the rich complexity in our lived experiences of constitutionalism. We can better advance our learning about constitutions, their forms and their mutations by imagining constitutionality as a continuum, from "strongly" to "weakly" constitutional.[30] Pou therefore pushes us to bury binarism as an evaluative approach used to assess the constitutionality of constitutions according to the degree to which political actors show "respect for the rules of recognition and change," how closely they operationalize "prospective collective self-rule," whether they reflect the democratic vision of "popular authorship," and the extent to which they conform to "certain substantive contents or institutional arrangements."[31] This last of four dimensions of constitutionality holds promise particular in our day of attacks on liberal democracy around the world. Would any student of contemporary global constitutionalism argue that the Hungarian or Polish Constitutions of today are anything but unconstitutional when held up to the values of liberal constitutionalism? Or, more closely to Pou's own work, could anyone deny that the institutional deficiencies of the Mexican Supreme Court raise the question whether the Court enjoys the judicial independence we have come to expect in liberal democracy?[32] Or can we deny that the hundreds of amendments to the Mexican Constitution raise doubts about whether the Constitution is indeed a constitution or a mere statute?[33] Pou suggests fruitful and much needed lines of inquiry as she urges us look past the myopia of binarism on questions

29. Francisca Pou Giménez, *The End of Binarism in Constitutional Thinking?*, 5 CORNELL INT'L L.J. ONLINE 9 (2017).

30. *Id*. at 15.

31. *Id*. at 11.

32. *See* Francisca Pou Giménez, *Constitutional Change and the Supreme Court Institutional Architecture: Decisional Indeterminacy as an Obstacle to Legitimacy*, *in* JUDICIAL POLITICS IN MEXICO: THE SUPREME COURT AND THE TRANSITION TO DEMOCRACY 117 (Andrea Castagnola & Saúl López Noriego eds., 2017).

33. *See* Francisca Pou Giménez and Andrea Pozas-Loyo, *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation*, *in* CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA (Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo eds., forthcoming 2018); Mariana Velasco Rivera, *Mexico's Constitutional Entrenchment Mirage: The Political Sources of Constitutional Hyper-Reformism*, *in* CONSTITUTIONAL CHANGE AND TRANSFORMATION IN LATIN AMERICA (Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo eds., forthcoming 2018).

beyond the idea of constitutionality, namely the quality of democracy, the distinction between process and substance, and the forms of constitutional change.

Three Forms of Legitimacy

The question about materiality—whether there would be a material difference between successfully overturning *Citizens United* using Article V or a national referendum—would also turn on the extent to which we could observe a change in the Hartian rule of recognition.[34] Would political actors recognize the validity of this amendment-by-referendum as they had before recognized the validity of successful Article V changes? If the answer is yes, there would then be no material difference between overturning *Citizens United* using Article V and doing the same in an amendment-by-referendum. And there would be even less of a difference if the amendment-by-referendum were entrenched in the constitutional text alongside other amendments, further obviating the distinction between the two amendment procedures, even though one would be expressly authorized in the codified constitution and the other not even identified as a possibility. Here too, then, we could say that the constitutional amendment had been legitimate despite claims of illegality for departing from the strict codified rules of formal amendment.

And yet an important question remains open: what do we mean by legitimacy? Richard Fallon identifies three distinguishable forms.[35] He describes *legal legitimacy* in this way: "that which is lawful is also legitimate,"[36] noting that legality in this sense does not necessarily entail correctness.[37] In contrast, *sociological legitimacy* is a measure of popular approval for official conduct that can be said to exist where "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[38] Finally, *moral legitimacy* is oriented toward neither legal process nor popular ratification but rather a normative view of what ought to be. It is "a function of moral justifiability or respect-worthiness,"[39] such that "even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified."[40]

When confronted with these three options, my inclination would be to suggest that what gives rise to the possibility of an unconstitutional yet democratic constitution is the concept of sociological legitimacy. I would suggest that it is not enough for a constitution to be adopted through legal forms to recognize it as legitimate in a democratic sense, nor can we claim with any predictive success that a particular view of the moral good offers a

34. H.L.A. HART, THE CONCEPT OF LAW 94–95 (2d ed. 1994).

35. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794–1801 (2005).

36. *Id.* at 1794.

37. *Id.*

38. *Id*. at 1795.

39. *Id.* at 1796.

40. *Id.*

roadmap in order to legitimate a democratic constitution. The former would allow autocratic rulers to claim that their legal forms have generated a democratic constitution and the latter is simply too tangled in normativity to yield a reliable test for measuring the democratic quality of a constitution. Of the three, then, I would suggest that only sociological legitimacy offers a meaningful test for evaluating the degree of a constitution's legitimacy. And moreover that, of the three, only sociological legitimacy offers a measurable standard to evaluate what amounts to an intolerable misuse of official power.

But Mariana Velasco Rivera suggests a different reading altogether, one that gives us a way to read sociological and moral legitimacy as complementary paths to democratic validation.[41] She argues that Article 136 in the Mexican Constitution—the provision purporting to deny the authority of a new constitution that springs from rebellion[42]—is unconstitutional. On her reading, the unconstitutionality of Article 136 derives from two sources. First, she raises the possibility that Article 136 is incompatible with the twin natural rights to revolution and self-determination.[43] Second, she states that any new constitution should therefore not be evaluated according to Article 136 but rather on its own merits, which for Velasco must accord with the "constitutional right of the people to choose their form of government,"[44] a right the Mexican Constitution protects in Article 39. Velasco therefore appears to be suggesting that there is moral legitimacy to the revolutionary right to create a new constitution. Of course, where the natural right of revolution yields a new constitution, we can fairly describe that new constitution as sociologically legitimate. By casting the right of revolution in moral terms, Velasco may have productively collapsed Fallon's distinction between moral and sociological legitimacy in cases where the controlling moral value derives from popular participation in the construction of the state and its rules.

New Questions in Constitution-Making and Constitution-Changing

The challenging, productive and truly valuable comments from Baker, Colón-Ríos, Pou, Suteu, Velasco, Verdugo and Zaiden leave no doubt that many fascinating questions remain unanswered. They have each pointed the way to a cluster of new questions in the study of constitution-making and constitution-changing. These questions invite analysis not only from a comparative perspective but also from doctrinal, empirical, historical and

41. Mariana Velasco Rivera, *Comment on "Four Unconstitutional Constitutions and their Democratic Foundations,"* 5 CORNELL INT'L L.J. ONLINE 21 (2017).

42. Mexico Const., tit. VIII, art. 136 (1917):

> This Constitution shall not lose its force and effect even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein should become established as a result of a public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who had taken part in the government emanating from the rebellion, as well as those who cooperated with such persons, shall be judged in accordance with this Constitution and the laws that have been enacted by virtue thereof.

43. Velasco Rivera, *supra* note 40, at 24–25.

44. *Id*. at 26.

theoretical perspectives that hold promise for enriching our understanding of how constitutions are made and how they are changed. Just as importantly, their comments raise a pair of questions that have no globalizable answers but that we should seek to answer at a national level for specific countries in light of their own traditions and aspirations: how should a constitution be made and how should it be changed? There is much more to learn about whether and how a constitution can be unconstitutional. These seven comments from great scholars and dear colleagues offer us an exciting agenda for future research.