

## Unconstitutional Constitution as a Redeeming Oxymoron

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### I. The Unconstitutional Constitution and the Paradox of Constitutionalism

There is no constitutional lawyer who would not feel tempted to explore such a concept as an unconstitutional constitution. Paradoxical as it is, the simple idea that a constitution can be unconstitutional challenges some of the core beliefs normally associated with constitutionalism, from the obedience to formal rules for constitution-making to more abstract—and, naturally, disputed—ideas like constituent power, revolution and democracy. Not without reason has Richard Albert, in his fascinating *Four Unconstitutional Constitutions and Their Democratic Foundations*, introduced his main argument by raising the question of what an unconstitutional constitution means,<sup>1</sup> and right after suggesting that it might bear some resemblance to the currently well-known phenomenon of unconstitutional constitutional amendments. After all, the very possibility of deciding against the constitutionality of a constitutional amendment, especially when not based on a breach of procedural rules, is itself already controversial.<sup>2</sup> Still, an unconstitutional constitution brings entirely new questions as to whether there exists such a possibility of defining unconstitutionality where, first, no criterion can be presumably traced back to any previous or superior legal document unless the very concept of constitution is itself downgraded, and, second, even the so-called implicit limitations on constitutional change<sup>3</sup> need to be challenged in a much more radical way than, for instance, when applied

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1. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 170 (2017).

2. For an excellent analysis of the phenomenon of unconstitutional constitutional amendments, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (2017).

3. Yaniv Roznai examines the implicit limitations on amendment power focusing on what he calls foundational structuralism, which is anchored in some principles, such as “the constitutional amendment power cannot be used in order to destroy the constitution.” *Id.* at 141; “the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution” and “amending power, like any governmental institution, must act in bona fides.” *Id.* at 142–43.

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to the amendment power.

This is the central debate Richard Albert so astutely provides by concentrating on four distinct constitutional experiences—The United States, Canada, South Africa and Mexico—and on four, as he calls it, “competing and complimentary axes of constitutional *formality*, constitutional *values*, constitutional *democracy*, and constitutional *legitimacy*.”<sup>4</sup> These distinct, rich constitutional realities have long lived with some sort of unconstitutionality despite “[tracing] its roots to democratic foundations.”<sup>5</sup> In all four examples, the argument lies in connecting their experiences with the complexities of typical core concepts of constitutional democracy. This is his most impressive line of reasoning: by presenting how such core concepts intertwine with the very reality of those constitutional democracies, he delves into the puzzle that comes out from the so-called paradox of constitutionalism,<sup>6</sup> while showing that this paradox must be grasped in experiences of social life and in all vulnerabilities that routinely challenge constitutionalism itself. Albert thus follows the premise that the “constitution is . . . to be treated not simply as a ‘segment of being’ but a ‘process of becoming.’”<sup>7</sup> The founding moment naturally plays a role, the idea that the people are the ones legitimizing the “authorizing moment”<sup>8</sup> of constitution-making is still central, but it is how constitutionalism evolves that places an inflection point in what is deemed constitutional or not. No better conclusion could be reached to understand such an intriguing concept of unconstitutional constitution: only by accepting that constitutionalism continuously betrays its founding moment or its “core meaning”<sup>9</sup> can one infer that a constitution, while *real*, can be *conceptually* unconstitutional.

The selection of the cases for his central thesis—“a constitution may be unconstitutional in different senses”<sup>10</sup>—plays a great deal for making Albert’s paper even more compelling. Through different means, he delves into fascinating nuances of the limits of constitutionalism. In the United States, he shows how a violation of the Articles of Confederation was defeated by the pace of a founding moment still in progress and whose outcome—the U.S. Constitution—would determine the future through an *ex post* popular

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4. Albert, *supra* note 1, at 171.

5. *Id.*

6. The paradox of constitutionalism is normally depicted as the insurmountable co-originality between constitutionalism and democracy. As Lasse Thomassen argues: Constitutionalism and democracy must already be co-original and mutually mediated; they cannot become so. If democracy is not already constitutional (and vice versa), it will not be able to properly mediate constitutionalism, which will then not be able to properly mediate democracy, and so on and so forth. Constitutionalism is precisely not only an enabling but also a necessary condition of democracy (and vice versa).

Lasse Thomassen, *A Bizarre, Even Opaque Practice’: Habermas on Constitutionalism and Democracy*, in *THE DERRIDA-HABERMAS READER* 176, 179 (Lasse Thomassen ed., 2011).

7. Martin Loughlin & Neil Walker, Introduction, in *THE PARADOX OF CONSTITUTIONALISM* 3–4 (Martin Loughlin & Neil Walker eds., 2007).

8. *Id.* at 3.

9. *Id.* at 2.

10. Albert, *supra* note 1, at 196.

ratification. In this intriguing constitutional moment, the insurmountable tension between the Constitution and the sovereignty of people—and also the intricacies surrounding the act of representation or, as it took place, a “deliberative plebiscite”<sup>11</sup> increases. His analysis clearly reveals how the paradox of constitutionalism leads to a vicious circularity because constitutionalism and democracy cannot be “fully in place.”<sup>12</sup> After all, in the American experience, there appeared to be a victory of the people over the rules of the game,<sup>13</sup> now reinvented through the Constitution to make this very people sovereign only under its new conditions.<sup>14</sup>

In South Africa, an *ex ante* unconstitutionality of a draft Constitution, as such determined by the unconventional review of the Supreme Court in the process of constitution-making, radicalized even further the paradox of constitutionalism by placing a new actor—a Court—as a final authoritative and vigilant voice to “certify” the validity of the Constitution and guarantee a peaceful political transition among the political actors.<sup>15</sup>

In Canada, the extremely rigid mechanism in two of the five procedures for constitutional amendment—which Albert calls “constructive unamendability”<sup>16</sup>—also stresses the paradox of constitutionalism as far as it places a severe burden on the ability of people to change the Constitution. This practical impossibility of formal change, which is the one better “rooted in predictability, transparency and accountability,”<sup>17</sup> seems to point out to a sort of unconstitutionality,<sup>18</sup> but it also may signal, as Albert puts it, “stronger democratic foundations”<sup>19</sup> based on a pluralistic disharmony that ultimately “protects the Constitution.”<sup>20</sup>

Finally, in Mexico, the “Constitution’s prohibition of a new constitution”<sup>21</sup> expresses a radical contradiction to the dynamic essence of the paradox of constitutionalism, which inevitably places text and reality in unsettling circumstances leading to change. It also challenges the very idea of constituent power and revolution, which exceeds by far the constitutional

11. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 563 (1995).

12. As Thomassen says, “insofar as one of the two components—constitutionalism or democracy—is not fully in place, we are dealing with a vicious circularity.” Thomassen, *supra* note 6, at 179.

13. See Loughlin & Walker, *supra* note 7, at 4 (contending that “. . . established constitutional forms are, ‘in the name of the people,’ also challenged and resisted, marginalized, and undermined, and even surpassed and overcome.”).

14. “The highest power within the community is thus sovereign only under condition that it is not; because under condition that its actions are valid, because imputed to the Constitution that establishes the conditions under which the popular will can be expressed as sovereign.” Emiliós A. Christodoulidis, *The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse*, 12 KING’S C.L.J. 111, 132 (2001).

15. Albert, *supra* note 1 at 178–79.

16. *Id.* at 18384.

17. *Id.* at 187.

18. *Id.*

19. *Id.* at 188.

20. *Id.*

21. *Id.* at 189.

text and is at least normatively structured on the premise of popular participation.<sup>22</sup> The expected “indefinite validity”<sup>23</sup> of the 1917 Constitution based on being the outcome of a popularly legitimizing revolutionary moment, nonetheless, creates a fiction of stability where history—full of instances of rebellions—had already proven otherwise.

## II. Unconstitutional Constitutions and the Radical Constitutionalism

Albert’s analysis of those distinct examples is notable, and the way he explores the paradox of constitutionalism through those experiences and histories is brilliant. What is particularly striking in all these experiences, as he so remarkably explores them, is that they disclose how constitutional democracy is marked by this ever-present threat of betrayal, which, nonetheless, may open it up to new horizons. Indeed, it may serve as nudge for new constitutional moments<sup>24</sup> and constitutional changes, either formal or informal. This could lead to a radical debate over the very limits of constitutional democracy, and indeed present, as Christodoulidis puts it, “the inevitable contradiction at the heart of constitutionalism, the incommensurability to which it gives expression, the constructive misreadings it accommodates.”<sup>25</sup> Albert’s central argument suggests somehow this path, but his focus seems to go in a distinct direction. He concludes his paper by affirming that “a constitution need not be constitutional to be legitimate,”<sup>26</sup> a sentence that appears to stress a more traditional viewpoint of what constitutionality means with respect to democracy and which seems to resolve the paradox of constitutionalism, or, in less radical terms, this “inevitable contradiction at the heart of constitutionalism.”

On the one hand, he resorts to H.L.A. Hart internal and external perspectives<sup>27</sup> in order to conclude that, depending on who the observer is, those constitutions could be deemed unconstitutional.<sup>28</sup> On the other hand, he highlights popular participation as a remedy to transform an unconstitutional constitution into a valid and, thereby, legitimate constitution. As he says: “the question whether a constitution can be simultaneously

22. See Andreas Kalyvas, *Popular Sovereignty, Democracy, and the Constituent Power*, 12 CONSTELLATIONS 223–44, 238 (2005) (arguing that “the normative content of constituent sovereign is one of participation. This constituent power demands that those who are subject to a constitutional order co-institute it.”).

23. Albert, *supra* note 1, at 190.

24. See BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1* (1993). See also Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 364–426 (2015).

25. Christodoulidis, *supra* note 14, at 127.

26. Albert, *supra* note 1, at 196.

27. “When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kind of assertion: for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’” H.L.A. HART, *THE CONCEPT OF LAW* 89 (1994).

28. See Albert, *supra* note 1, at 194.

unconstitutional yet rooted in democratic foundations may be answered only with reference to the people as the ultimate source of legitimation.”<sup>29</sup> Or, more directly, “the people possess an extraordinary power of absolutism that can transform a formally unconstitutional constitution into a legitimate one anchored in democratic values.”<sup>30</sup>

Although he seriously challenges core concepts of constitutionalism and proves, in practice, they are more ambiguous than promised, he ends up sustaining that constitutions are ontologically a product of a people, who has the power to legitimate it in various forms. This is a compelling argument, but, naturally, it does not come without some intriguing questions. First, in such a context, would it still be considered constitutionalism when “constitutional reason forms a particularly powerful template that imposes an order of intelligibility on the exercise of sovereignty?”<sup>31</sup> Second, wouldn’t Albert be trying to solve the insurmountable paradox of constitutionalism by placing the people as the final call for this puzzle? And, third, more radically, who are these people?<sup>32</sup>

It is important to notice, in any case, that Albert’s conclusions—and the questions they raise—are coherent with some premises he had already announced right at the beginning of his paper. Albert implied that he would adopt some premises without exploring them much further, when he said, for instance, that “declaring an entire constitution unconstitutional strikes more squarely at the core meaning of constitutional democracy and what democracy requires in order to legitimate the creation of a new constitution.”<sup>33</sup> In this case, there appears to be an indication that constitutional democracy has a promise, a normative assumption (the “core”), as a parameter for assessing whether a constitution is constitutional or not. Still, as those aforementioned questions, this statement also raises a fourth one: what is this promise that seems to represent Albert’s “core meaning of constitutional democracy” and, as such, the central criterion to determine whether a constitution is constitutional or not?

His main arguments do not explore this debate in a way that would deviate from his main purpose of “[complicating] our understanding of an unconstitutional constitutional amendment with the idea of an unconstitutional constitution.”<sup>34</sup> He does not, for this reason, enter into the intricate and infinite philosophical debate over what makes a constitution constitutional, where the seat of sovereignty lies, who the people are, what “the core meaning of constitutional democracy” is or what it should entail, although he opens up possible avenues for such a research. He adopts instead a more pragmatic avenue, and his four axes—“constitutional *formality*,

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29. *Id.* at 196.

30. *Id.*

31. Christodoulidis, *supra* note 14, at 133.

32. “The concept of people always already contains within itself the fundamental biopolitical fracture. It is what cannot be included in the whole of which it is a part as well as what cannot belong to the whole in which it is always already included.” GIORGIO AGAMBEN, *MEANS WITHOUT END* 31 (2000).

33. Albert, *supra* note 1, at 196.

34. *Id.* at 4.

constitutional *values*, constitutional *democracy*, and constitutional *legitimacy*—although characterized by seriously complex concepts, are as such explored in their very limits and ambiguities when confronted with the four distinct selected “constitutional traditions.”<sup>35</sup> Though it leaves the reader wanting more, it might have been an intelligent move for prompting a debate that is deeply complex, dense, and endless. Rather than bringing forward a set of inherently controversial parameters for conceptually determining the “core meaning of constitutional democracy” and all the other aforementioned concepts, and thereby what constitutionalism entails in abstract, he stresses that it is the constitutional living that will justify the very value of unconstitutionality. In doing so, he brought a fascinating conclusion in what, through other means, would prove extremely challenging: that unconstitutionality itself may be less dramatic than it first sounds, and, indeed, nothing other than a typical symptom of how constitutionalism is ontologically rooted in some sort of unconstitutionality.

### **Conclusion: Unconstitutional Constitution as a Redeeming Oxymoron**

This is the acumen of Albert’s rationale. In the end, by showing how life and text struggle with each other in those four fascinating experiences, he reveals that unconstitutional constitutions, rather than leading to insurmountable disagreements on the “core” of constitutionalism, should be treated as a redeeming oxymoron. After all, every constitution is, one way or another, unconstitutional. Yet, though unconstitutionality may be a fact of every constitution in various forms, to declare a constitution unconstitutional sounds disturbing and plays a great deal in how we interpret its legitimizing force over time. This is the reason why the dilemma lies in understanding that despite the ontological unconstitutionality of constitutions, constitutions need to bear a resemblance of constitutionality, which is a paradox in itself. Those normative assumptions—“the core meaning of constitutional democracy,” “the seat of sovereignty,” “the people,” “the foundations of constitutional democracy”<sup>36</sup> are nothing other than expressions of this make-believe<sup>37</sup> that is at the core of constitutionalism, but which not rarely fails in reality. For this reason, more than searching for the parameter for assessing the constitutionality of a constitution (although he explores them through the “competing and complimentary axes of constitutional *formality*, constitutional *values*, constitutional *democracy*, and constitutional *legitimacy*”<sup>38</sup>), the great lesson of Albert’s paper lies in stirring up a distinct look into this subject: despite those fascinating circumstances and unconstitutionality, what might really matter is whether those constitutions,

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35. *Id.* at 4.

36. *Id.*

37. “The political world of make-believe mingles with the real world in strange ways, for the make-believe world may often mold the real one. In order to be viable, in order to serve its purpose, whatever that purpose may be, a fiction must bear some resemblance to fact.” EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 12 (1989).

38. Albert, *supra* note 1, at 171.

in one way or another, have served as an effective parchment for political commitment<sup>39</sup> and become a legitimate force towards their peoples. This is the reason why he ends his paper by suggesting that such a concept might be a relevant tool to fend off the “increasing attacks on liberal constitutionalism.”<sup>40</sup>

Albert’s paper calls for a new approach to an endless conceptual problem whose practical implications are immediate. Through experiences of social life, he reveals the troublesome and fragile grounds of constitutionalism, but also how constitutionalism has a self-empowerment and self-learning effect that can overcome some of its original or acquired sins. He shows that “the time of ‘foundation’ does not of course confine itself to the time of revolution but spreads over continuous time.”<sup>41</sup> Yet he also reveals how constitutionalism, in these distinct times, has to cope with its inexorable sins by redeeming itself through rich and inspiring experiences of our social life. This is a fascinating paper, which sets in a new perspective some of the dilemmas constitutionalism has so deeply dealt with, but mostly proves that, in every constitutional reality, there is always a “perhaps” reconfiguring our assurances over how this “make-believe” presents itself in distinct constitutional events and moments.

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39. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2010) (examining how constitutions and institutions can constrain politics through distinct mechanism).

40. Albert, *supra* note 1, at 198.

41. Christodoulidis, *supra* note 14, at 132.