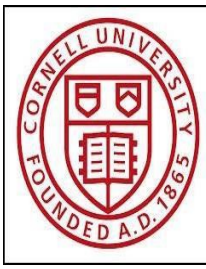
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On Albert's Unconstitutional Constitutions

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The doctrine of unconstitutional constitutional amendments rests on a kind of paradox. On the one hand, it is a profoundly conservative doctrine: it is about preserving the current constitutional rules and denying the legal validity of certain changes. On the other hand, it has a radical democratic potential: to the extent that it rests on the idea that fundamental constitutional change lies in the hands of the constituent people, it indirectly attributes legal validity to extra-legal, but participatory, constitution-making episodes. In *Four Unconstitutional Constitutions and their Democratic Foundations*,[1] Richard Albert takes this paradox to new heights: an entire constitution might be unconstitutional, and yet valid, given its democratic foundations. What could it mean for a constitution to be "unconstitutional"? The most straightforward answer would be that a constitution is unconstitutional if it is adopted in violation of the established rules of constitutional change. From this formal perspective, the Constitution of the United States, to the extent that it was adopted in violation to the rule of change contained in the Articles of Confederation, would be a clear example of an unconstitutional constitution. Albert maintains that the way out of an unconstitutional founding of this sort can take the form of a popular ratification process that, which as a result of its heightened democratic legitimacy, makes the formal unconstitutionality of the constitution simply "irrelevant."[2]

This discussion, in a certain way, puts into question the very concept of *unconstitutionality*. When we say that an ordinary law is "unconstitutional" we usually mean that its content is inconsistent with the substance of a constitution. That law would nevertheless remain valid (and as a matter of fact enforced), until it is declared unconstitutional by an institution with strike down powers. But when we think that a statute has been adopted in violation of the law-making procedures established in the constitution, we would not

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

2. *Id.* at 178.

normally say that it is "unconstitutional," we would say that it was never valid, that it never became law.[3] Something similar happens with respect to unconstitutional constitutional amendments. When a court determines that a particular constitutional amendment is "unconstitutional" it is normally indicating that it is contrary to the fundamental principles in which the constitution rests, not that it has been adopted in violation of the amendment rule.[4] If on the contrary, a legislature attempts to amend a constitution without following the formalities contained in the amendment rule, we would not usually say that the legislature has adopted an "unconstitutional constitutional amendment," but that it did not adopt an amendment at all. Interestingly, when Albert invites us to think about "unconstitutional constitutions," there is—I think—a strange switch in our conceptual framework: our attention suddenly moves away from the substance of the established constitution, to that of the procedures through which it can be legally altered.

However, there may be reasons to resist this impulse. As Albert shows through a discussion of the adoption of the current Constitution of South Africa, it is possible for a constitution to be unconstitutional as a result of its content: its coming into being may have been made conditional on compliance with certain pre-agreed principles contained in an interim constitution. In such a case, however, one may wonder whether it is unconstitutionality that is at issue, or at least unconstitutionality in the normal sense of the word. Article 71 of the Interim Constitution of South Africa (1993) established: "A new constitutional text shall— (a) comply with the Constitutional Principles contained in Schedule 4; and (b) be passed by the Constitutional Assembly in accordance with this Chapter." When the Constitutional Assembly failed to adopt a constitution entirely consistent with the relevant principles, it failed to act in accordance with the mandate contained in the Interim Constitution. That is to say, it failed to adopt a constitution at all: unlike the U.S. Constitution, which regardless of its formal unconstitutionality was treated as valid given the nature of its foundation, the document prepared by the Constitutional Assembly and reviewed by the Constitutional Court was always a "draft constitutional text." In that respect, it is more similar to a draft bill that for some reason never became a law, than to an existing law that is at some point declared unconstitutional by a court.

Albert suggests that the democratic legitimacy of the South African Constitutional Court's decision to refuse to certify the draft constitution rests in the fact that it was previously authorised to do so by the people "acting

3. Nevertheless, in some jurisdictions, courts will treat a holding of unconstitutionality as the invalidation of a 'law' that was ineffective from the moment it was adopted. For a discussion, see Richard S. Kay, *Retroactivity and Prospectivity of Judges in American Law*, 62 AM. J. COMP. L. 27 (2014).

4. This is not necessarily true in the context of constitutions which contain tiered amendment rules; that is, rules according to which certain constitutional changes can only be brought into existence through one of various amendment procedures. In such cases, one could say that an amendment is "unconstitutional" because it was adopted using the incorrect procedure. The ultimate reason for the unconstitutionality of the amendment, however, would be its substance.

through their agents in government."[5] This may be true in the South African case, but more generally, it raises a question about what may be called "degrees of democratic legitimacy." For example, let us suppose that a democratically elected parliament adopts a new constitution with no form of direct popular intervention. The new constitution contains an amendment rule that authorizes its revision through a process that involves a referendum on whether a Constituent Assembly shall be elected to draft a new constitution, a special election in which the members of that body are selected, and a final referendum in which the draft constitution can be ratified or rejected. Both of these processes (the initial creation of a constitution by an elected legislature and an amendment rule involving two referendums and an elected Constituent Assembly) could be described as democratic, but most people would tend to view the second one as *more* democratic. Now, let us also suppose that this constitution contains an eternity clause which prohibits the adoption of a new constitution that does not establish a bicameral legislature. If that clause were to be judicially enforced to declare invalid a draft constitution adopted by a popularly elected Constituent Assembly and ratified in a referendum, would it be right to say that the court's decision would be democratically acceptable because it rests on "the people's" authorization as expressed through parliament?

Albert's discussion of the Canadian Constitution offers some clues as to the possible answer to that question. The Canadian Constitution, Albert maintains, is "constructively unamendable": it is practically impossible for political actors to assemble the supermajorities required to adopt certain major changes.[6] A constructively unamendable constitution (and naturally a formally unamendable constitution), for Albert, could be seen as unconstitutional: "Denying the people's power to constitute and reconstitute themselves makes the thing that is said to bind the people unlike what a constitution should be."[7] From this perspective, in the situation described above one could say that the court's decision would be problematic (both from a democratic and constitutional perspective), as it would be enforcing a provision that denies the people the right to alter the constitution to which they are bound. Nevertheless, Albert gives us some good reasons to think that the constructive unamendability of the Canadian Constitution would not be properly captured by my previous statement. The fact that the Canadian Constitution is constructively unamendable is a result of the different (cultural, linguistic, ethnic) divisions in the Canadian population: the currently insurmountable hurdles contained in its amendment rule guarantee that major changes only take place "with the approval and legitimation of a particular configuration of political consensus that cuts across the many nations that constitute Canada."[8]

What at first sight might look as a highly democratic constitution-making process (as in the Constituent Assembly example mentioned above), could

5. Albert, *supra* note 1 at 180.
6. *Id.* at 183.
7. *Id.* at 18788.
8. *Id.* at 188.

hide divisions that make a seemingly popular and majoritarian procedure unable to be understood as an act of "the people." And it may be that the level of political consensus that is required in order to amend certain parts of the Canadian Constitution, would be enough to provide a clear signal that the Canadian *demos* has decided to engage in fundamental constitutional change. One may then ask how, outside of the Canadian context, can we know that "the people" has decided to give itself a new set of constitutional rules? This problem is at the root of Albert's discussion of Article 136 of the Mexican Constitution of 1917, which declares that it "shall not lose its force and effect even if its observance is interrupted by rebellion."[9] Rebellion, in this context, is not synonymous with popular revolution: it seems to refer to the establishment of a government—by a faction of the people—in violation of the existing constitutional text. Any constitution established as a result of a rebellion, would be invalid from the perspective of the Mexican Constitution of 1917 (for the reasons discussed above, I wonder whether we could call such a constitution "unconstitutional," but I won't pursue that point further). However, as Albert argues, there may come a point in which what started as a rebellion is retroactively recognised as a popular revolution and as having given birth to a new constitution.[10]

It could be, for example, that a political movement that was once seen as perpetrating a *coup d'état*, triggers the election of a new Constituent Assembly, wins (fairly) the majority of the seats available in that entity, and produces a new constitutional text. The once rebels would then suddenly appear as having been acting on behalf of the people all along. In such a case, however, how do we now if that retroactive recognition of a rebellion as a popular revolution, as a genuine exercise of the people's constituent power, is not the result of a misunderstanding? How do we know that we are not confusing the group that controls the majority of the seats in an elected constitution-making body with "the people," and that the new constitution has not been designed to suppress other groups? It seems that here one arrives to the limits of modern constitutionalism. There is not much that we, as democratic citizens, can do but to continually reflect on the mechanisms that at a moment in time are seen as proper means for the expression of popular will. What in the eighteenth or nineteenth centuries would have been seen as an act of the people, may be interpreted today as an elitist constitution-making process. In the same way, the mechanisms that are now generally accepted as democratic constitution-making procedures could be seen by future generations as profoundly flawed, as not sufficiently inclusive and participatory. But, as Albert shows with respect to the process that led to the creation of the U.S. Constitution, that would not necessarily make our constitutions invalid or "unconstitutional." The validity of a constitution is to be solely judged by the people to which it applies.

9. MEXICO CONST., tit. IX, art. 136 (1917).
10. Albert, *supra* note 1, at 194–95.