Four Unconstitutional Constitutions and their Democratic Foundations

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The present fascination with the global phenomenon of an unconstitutional constitutional amendment has left open the question whether a constitution can be unconstitutional. To declare an entire constitution unconstitutional seems different in both kind and degree from invalidating a single amendment for violating the architectural core of a constitution, itself undoubtedly an extraordinary action. In this Article, I illustrate and evaluate four different conceptions of an unconstitutional constitution. Each conception draws from a different constitution currently in force around the world, specifically the Constitutions of Canada, Mexico, South Africa and the United States. Despite their unconstitutionality in different senses of the concept, each constitution is nonetheless rooted in democratic foundations. The strength of these foundations, however, varies as to each.

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I. An Unconstitutional Constitution?

The most fascinating cluster of questions in comparative public law today is whether, on what grounds, and by whom a constitutional amendment may be declared unconstitutional.[1] In some countries, for instance India, Supreme or Constitutional Courts have developed the "basic structure" doctrine to invalidate, on substantive grounds, a constitutional amendment that has nonetheless met all of the textually-entrenched procedural requirements for formal constitutional change.[2] In other countries, most notably Turkey, high courts are constrained by the constitutional text to review the constitutionality of amendments on procedural grounds alone.[3] Elsewhere, namely in France, the prevailing culture of popular sovereignty validates all formal amendments that have satisfied the procedural strictures in the constitution and therefore does not recognize the possibility of an unconstitutional constitutional amendment.[4]

Lost in our focus on the constitutionality of an amendment has been the equally fascinating cluster of similar but distinguishable questions whether, on what grounds, and by whom an entire constitution may be declared unconstitutional.[5] The two sets of questions are related insofar as

1. For recent accounts of this puzzle, *see* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017); Richard Albert, *Amendment and Revision in the Unmaking of Constitutions*, *in* EDWARD ELGAR HANDBOOK ON COMPARATIVE CONSTITUTION-MAKING (David Landau & Hanna Lerner, eds., forthcoming 2017); Richard Albert, *The Unamendable Core of the United States Constitution*, *in* COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION (András Koltay, ed., 2015); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015); Yaniv Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557 (2013); Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013); Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182 (2012); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011).

2. *See Minerva Mills Ltd. v. Union of India*, (1981) 1 SCR 206; *Kesavananda Bharati Sripadagalvaru v. Kerala*, (1973) 4 SCC 225 (India); *Golaknath v. State of Punjab*, (1967) 2 SCR 762.

3. TURKEY CONST., pt. IV, tit. I, art. 178(1)-(2) (1982).

4. Conseil constitutionnel [CC] [Constitutional Court] decision No. 92-312DC, Sept. 2, 1992, Rec. 76 (Fr.). The same is true in the United States with respect to the federal constitution. *See* Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J. L. & JURIS. 5, 32–38 (2009) (though not necessarily with respect to the constitutions of the subnational states). *See* Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217 (2016).

5. The most important exception is Gary Jacobsohn's field-shaping paper about unconstitutionality in India and Ireland, though he addresses more squarely the idea of an unconstitutional constitutional amendment than an unconstitutional constitution. *See* Gary Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460 (2006).

both must overcome the same first-order objection that denies there can ever be any democratically legitimate foundation for declaring an amendment unconstitutional.[6] Yet these two sets of questions are nevertheless different both in degree and kind because the possibility of declaring an entire constitution unconstitutional strikes more squarely at the core meaning of constitutional democracy and at what democracy requires in order to legitimate the creation of a new constitution. While there may exist reasonable arguments for invalidating certain constitutional amendments on substantive, procedural, or hybrid grounds,[7] there is a much less well-defined roadmap for declaring an entire constitution unconstitutional.

The question whether a constitution can be unconstitutional risks being misunderstood as implausible, sacrilegious or subversive. A strict formalist might question how a constitution can be unconstitutional if it has already been properly ratified. From the perspective of constitutional veneration, the claim of sacrilege is rooted in disbelief that *our* constitution could ever be unconstitutional. A foundationalist view, on the other hand, presupposes the constitutionality of the constitution because all other laws derive from it; without a valid constitution there is no generative source of authoritative law, and this simply cannot be. None of these three responses on its own nor collectively is a satisfactory answer to the question whether an amendment can be unconstitutional, if only because as a matter of descriptive reality courts commonly invalidate amendments.[8] It was once an extraordinary action to invalidate a single amendment for violating the architectural core of the constitution but its increasing frequency has today made it a relatively ordinary fact of constitutional life.

Of course, a sham constitution is unconstitutional in the liberal democratic sense,[9] a pathology that calls to mind the familiar problem of entrenching a constitution without rooting the text in a culture of constitutionalism.[10] But I am interested here only in democratic constitutions. Our point of departure is the multiplicity of meanings of unconstitutionality, a concept that runs along at once competing and complimentary axes of constitutional *formality*, constitutional *values*, constitutional *democracy*, and constitutional *legitimacy*. In this Article, I develop these distinguishable meanings of unconstitutionality to illustrate four conceptions of an

6. But for one of the strongest doctrinal and theoretical justifications for declaring a constitutional amendment unconstitutional in the specific context of the Indian Constitution, *see* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE 164–229 (2009).

7. Elsewhere, I develop these three grounds for invalidating a constitutional amendment. *See* Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 QUEEN'S L.J. 153, 182–203 (2015).

8. *See* Yaniv Roznai, *Unconstitutional Constitutional Amendments - The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 670–710 (2013).

9. *See* David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 880 (2013).

10. *See* Richard Albert, *The Cult of Constitutionalism*, 39 FLA. ST. U. L. REV. 373, 382–83 (2012); *see also* Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT'L J. CONST. L. 950 (2010) (exploring this phenomenon with respect to China).

unconstitutional constitution. Each conception draws from the lived experience of four constitutional traditions each with a codified constitution today: the Constitutions of Canada, Mexico, South Africa and the United States. The takeaway is not that these constitutions should be declared unconstitutional in law or legitimacy, but rather that we can mine these constitutional traditions for insights into what it might mean to describe a constitution as unconstitutional. *Despite their unconstitutionality in different senses of the concept, each constitution is nonetheless rooted in democratic foundations. The strength of these foundations, however, varies as to each.*

I begin in Part II by revisiting the illegality of the United States Constitution, the national constitution that replaced the Articles of Confederation, America's first constitution. The process of proposing and adopting the Constitution violated the rules of change in the Articles of Confederation but its subsequent popular ratification legitimated the break with the rules in the Articles. In Part III, I turn to the South African Constitution, whose previous iteration had been declared unconstitutional by the Constitutional Court in a peculiar two-step certification procedure. Part IV focuses on the Constitution of Canada, perhaps the world's most resistant to major formal amendment, and as a result the one most problematic from the perspective of participatory democracy. Next, in Part V, I explore a curious rule in the Mexican Constitution that seeks to make the Constitution irreplaceable by denying the validity of any new constitution that rebels might adopt. Throughout each Part, I discuss the possible democratic justifications for the constitution's unconstitutionality. I show that each instantiation of an unconstitutional constitution traces its roots to democratic foundations, albeit of variable strength. My purpose in this Article is to complicate our understanding of an unconstitutional constitutional amendment with the idea of an unconstitutional constitution, an understudied but fascinating possibility.

II. The United States Constitution and Constitutional Formality

There have been two master-text national constitutions in the United States.[11] The first was the Articles of Confederation, adopted by the Continental Congress in 1777 shortly after the Declaration of Independence. The Articles were ratified by all thirteen states in 1781 and remained in force until 1789, when the new United States Constitution became effective upon its own ratification, this time by only nine states.[12] The ratification of Constitution was valid when judged on its own terms, but it was not when judged against the rules of change in the Articles.

11. *See* Donald S. Lutz, *The Articles of Confederation as the Background to the Federal Republic*, 20 PUBLIUS 55, 57 (1990) (describing the Articles as the "first national constitution of the United States").

12. *See* U.S. CONST., art. VII (1787) ("The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.").

A. America's Second Founding

The Articles of Confederation entrenched an onerous formal amendment rule requiring the unanimous support of all states to alter their text. There were three operating principles to the amendment rule: inviolability, perpetuity, and unanimity. The Articles bound the states to adhere "inviolably" to them, an admonition that mirrored similar obligations in some of the state constitutions at the time.[13] The Articles also envisioned their own "perpetuity," though of course no constitution can ensure its own survival in the face of popular will to the contrary.[14] The final element was the high amendment threshold; the Articles required the consent of "the legislatures of every State" for any change. The provision in full reflects each of these three elements:

> And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.[15]

Amending the Articles under this unanimity threshold was thought to be virtually impossible,[16] and indeed in reality it was, no constitutional amendment having ever been adopted.[17] The lack of even a single amendment to the Articles was not for lack of trying. As early as July 1781—within five months of the ratification of the Articles—the Continental Congress instructed a committee "to prepare an exposition of the Confederation, a plan for its complete execution, and supplemental articles."[18] Although the committee submitted its report shortly thereafter in August—and recommended several changes to the Articles—no amendments were made.[19] The same outcome followed for all other amendment proposals.[20]

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13. *See, e.g.*, MD. CONST., art. XXXVIII (1776); S.C. CONST., art. XLIII (1778).

14. *See* Jeffrey Goldsworthy, Parliamentary Sovereignty 70 (2010).

15. ARTICLES OF CONFEDERATION OF 1781, art. XIII (1781).

16. *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 299–300 n.159 (1997).

17. Benjamin Fletcher Wright, *Consensus and Continuity–1776–1878*, 38 B.U. L. REV. 1, 19 (1958).

18. 20 JOURNALS OF THE CONTINENTAL CONGRESS 773 (July 20, 1781) (Gaillard Hunt ed., 1912).

19. 21 JOURNALS OF THE CONTINENTAL CONGRESS 894–96 (Aug. 22, 1781) (Gaillard Hunt ed., 1912).

20. *See* 19 JOURNALS OF THE CONTINENTAL CONGRESS 112–13, 124–25 (Feb. 3, 1781) (Gaillard Hunt ed., 1912) (proposing congressional power to collect import duties); 20 JOURNALS OF THE CONTINENTAL CONGRESS 469–71 (Mar. 12, 1781) (Gaillard Hunt ed., 1912) (proposing congressional power over states); 20 JOURNALS OF THE CONTINENTAL CONGRESS 257–59 (Apr. 18, 1783) (Gaillard Hunt ed., 1912) (proposing temporary grant to congressional power to collect import duties and requesting supplementary funds from states); 24 JOURNALS OF THE CONTINENTAL CONGRESS 260 (Apr. 18, 1783) (Gaillard Hunt ed., 1922) (proposing expense-sharing for common defense or general welfare according to population); 26 JOURNALS OF THE CONTINENTAL CONGRESS 317–22 (Apr. 30, 1784) (Gaillard Hunt ed., 1928) (proposing temporary grant of congressional power for fifteen years to regulate commerce with the states, and requiring the assent of only nine states); 28 JOURNALS OF THE CONTINENTAL CONGRESS 201–05 (Mar. 28, 1785) (John C.

The veto that each state could exercise under the Articles ultimately provoked the convening of an extraordinary assembly to find a way to fix the Articles.[21]

The Continental Congress prepared precise instructions for the state delegates who would gather in Convention in Philadelphia to repair the Articles.[22] Delegates were to gather for one purpose alone: "revising" the Articles in order to preserve the Union. The resolution instructing Convention delegates on their authorized function does not appear to leave open the *constitutional* possibility of adopting an altogether new constitution because it stresses that delegates have one "sole and express purpose":

> *Resolved* that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of Government and the preservation of the Union.[23]

Note here the insistence that the Convention must report its recommendations for revising the Articles to both Congress and the states. Note also that its recommended "alterations and provisions therein" must be approved by both Congress and the states in order to become effective, just as was required under the unanimity provision to formally amend the Articles.

These instructions from the Continental Congress suggest one perspective in the debate between Bruce Ackerman and Akhil Amar on whether the second founding was illegal. Ackerman understands the Convention as a formally illegal construction that nonetheless enhanced rather than undermined its authority, given its origins in the legally defective parliament that had presided over the Glorious Revolution of 1688.[24] For Amar, however, America's second founding was legal because there was no constitution to violate: in his view, the Articles were a treaty among thirteen states and any state could legally exercise its power to rescind the confederal compact.[25] As a matter of self-perception, however, the declared view of the Congress appears in the text of its instructions to dele-

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Fitzpatrick ed., 1933) (proposing to give Congress permanent and broader powers of the regulation of commerce); 31 JOURNALS OF THE CONTINENTAL CONGRESS 494–98 (Aug. 7, 1786) (John C. Fitzpatrick ed., 1934) (proposing seven additional Articles to the Articles of Confederation).

21. *See* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443, 2448–49 (1990).

22. George D. Harmon, *The Proposed Amendments to the Articles of Confederation*, 24 S. ATLANTIC Q. 298, 435 (1925).

23. 32 JOURNALS OF THE CONTINENTAL CONGRESS 74 (Feb. 21, 1787) (Roscoe R. Hill ed., 1936).

24. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 174–75 (1991).

25. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465–66 (1994).

gates. The Articles did not constitute a treaty but rather a constitution—the Congress spoke of their "federal Constitution," whose text the Convention would propose to revise with a view to the "preservation of the Union."

The answer to whether the Articles were a constitution suggests why it is possible to state that the United States Constitution was unconstitutional. From the perspective of the Articles in force at the time of the Philadelphia Convention, the process that generated the second founding did not conform to the rules of change entrenched in the existing constitution. Those rules in the Articles of Confederation required that, in order to be valid, any proposed change to the Articles—the revisions that the Continental Congress had authorized the Philadelphia Convention to propose—first be approved by the Continental Congress itself and subsequently by each of the state legislatures. Yet the Continental Congress neither approved nor disapproved the draft constitution that the Convention later sent to it.[26] The decision was made simply to convey to each of the states a copy of the report of the Convention along with its accompanying resolutions.[27] Nor did the states ultimately approve the new constitution by unanimous agreement; the new constitution became effective when, as indicated in the text of the proposed constitution, nine out of the thirteen states approved it.[28] On at least these two counts, then, the adoption of the second constitution violated the formal terms of the first. There is a further point to note in the debate on whether the new constitution was illegal: the proposed constitution violated the constitutions of many states. Some of the state constitutions prohibited the gathering of a convention outside of very strict time intervals—none of which corresponded to the Philadelphia Convention's call for a series of state conventions in 1787.[29] And yet the conventions were held.

B. The Legitimating Ratification

But constitutionality in this formal sense operates on a different plane from legitimacy. The state conventions that ratified the proposed constitution served a dual purpose, the second just as important as the first. The first purpose was rooted in ratificatory legality. Legality here was evaluated from the perspective of the proposed constitution, not from the perspective of the Articles, since the ratification of the new constitution was not in conformity with the legal requirements of change entrenched in the Articles. The ratification threshold entrenched in the proposed constitution required a supermajority of states to approve the change, a difficult threshold but quite considerably lower than the unanimity threshold the

26. *See* 1 JAMES SCHOULER, HISTORY OF THE UNITED STATES OF AMERICA UNDER THE CONSTITUTION 54 (1882).

27. 23 JOURNALS OF THE CONTINENTAL CONGRESS, 544 (Sept. 27, 1787) (Gaillard Hunt ed., 1914).

28. U.S. CONST., art. VII.

29. 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 36–38 (1998).

Articles required for its own amendment.[30] The state conventions ultimately satisfied these conditions to replace the Articles with the Constitution. The state of New Hampshire became the ninth to ratify in June 1788, and the Constitution came into force in March 4, 1789.[31] The state conventions therefore served, in the first instance, the functional purpose of ratification.

The second purpose of the state conventions was legitimation. The draft constitution, were it to be adopted, had to be founded on the people themselves and not on their state governments, both because the states could not agree among themselves and also because the people's consent would give the document a higher authority.[32] Legitimacy would come from the process of ratification, endowing the ratified constitution with a thick popular or sociological legitimacy rather than a thin legal legitimacy, the latter of which had been forfeited when the Continental Congress transmitted the proposed constitution to the states for their deliberations in defiance of the formal rule of change in the Articles. As Jack Rakove explains, "Madison understood that a constitution adopted through some process of popular ratification could be said to have attained a superior authority" than the state legislative approval that had sanctioned the Articles and the state constitutions.[33]

This superior authority derived from the popular consent expressed in the extraordinary forum of a constitutional convention, a form of revolutionary deliberation and decision-making whose product is validated by the very process of convention. With ratification eventually achieved, "the result was that the Constitution was regarded as the product of a process in which the ultimate source of legitimacy, the sovereignty of the people, was expressed as fully and as clearly as the accepted political beliefs and institutions of the time allowed."[34] The successful ratification of the Constitution suggests that the consent of the governed is a necessary and sufficient condition for its legitimacy.[35] But the Constitution took a unique path to its legitimacy: it won popular authority not in a normal election but rather over the course of a long and complex dialogue among federal and state institutions, as well as political elites and ordinary citizens.[36]

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30. U.S. CONST., art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").

31. There is, however, some doubt about when the Constitution became effective as law. *See* Gary Lawson & Guy Seidman, *When Did the Constitution Became Law?*, 77 NOTRE DAME L. REV. 1 (2001).

32. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 532 (2d ed. 1998).

33. Jack N. Rakove, *Constitutional Problematics, circa 1787*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 41, 65 (John Ferejohn et al. eds., 2001).

34. Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMMENT. 57, 75 (1987).

35. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1805 (2005).

36. ACKERMAN, *supra* note 29, at 85.

The ratifying convention was a peculiarly American institution, reimagined from what had historically been an unrepresentative and spontaneous body into the democratic and institutionalized one it became when it was created to write state constitutions and later to ratify the United States Constitution.[37] This institution was rooted in the exercise of what Bruce Ackerman and Neal Katyal have called "quasi-direct democracy."[38] The convention did not ask voters to express themselves in quite the same way as they would in a popular referendum nor was the convention itself a purely representative body. Instead, voters were to cast ballots for delegates who would gather in the convention with a mandate from the people, some delegates having campaigned for or against ratification, and others having been publicly uncommitted.[39] Ackerman and Katyal explain that the objective had been to organize a "deliberative plebiscite":

> The convention mode, in short, represented a distinctive mix of popular will and elite deliberation. On the one hand, debate and decisions in the electoral campaign pushed the convention in a definite direction. On the other, the delegates still had leeway to debate and refine the nature of the "mandate" that their success at the polls represented. The Federalists were trying for the best of two worlds—combining the popular involvement of "direct democracy" with the enhanced deliberation of "representative democracy." The aim, in short, was for a *deliberative plebiscite*.[40]

The opportunity for popular deliberation would be critical because of what the Federal Convention was asking of the states: to violate the formal rules of constitutional amendment in the Articles. By inviting the people to deliberate on the draft constitution, the question was transformed from a narrow inquiry about the legality of breaking with the Articles into a larger reflection on what would best serve the people and the republic. The outcome was not fated to be what it ultimately became, however, because "if the citizenry found the illegality really troubling, they would simply elect so many Antifederalist delegates to the convention that the Constitution would be doomed."[41] As Madison wrote, given that the new constitution "was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it for ever; its approbation blot out all antecedent errors and irregularities."[42] These state constitutional conventions for deliberation and debate on ratifying the draft constitution allowed supporters to "go on the offensive and deny that the Antifederalists' legalistic objections could be appropriately invoked to prevent a convention of the People from deliberating its fate."[43] In the end, the ratification of the constitution made its formal unconstitutionality inconsequential.

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37. *See* ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS AND LIMITATIONS 1-11 (1987).

38. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 562 (1995).

39. *Id.* at 563.

40. *Id.*

41. *Id.* at 562.

42. The Federalist No. 40, at 265-66 (James Madison) (Jacob E. Cooke ed., 1961).

43. Ackerman & Katyal, *supra* note 38, at 562.

III. The South African Constitution and Constitutional Values

The year 2016 marked the twentieth anniversary of the revolutionary constitution of South Africa, a document rooted in the aspiration to transform the state from apartheid to democracy. Described as the "world's leading example of a transformative constitution,"[44] the Constitution entrenches a commitment to founding values like "non-racialism" and "non-sexism," as well as "human dignity, the achievement of equality and the advancement of human rights and freedoms."[45] The Bill of Rights enumerates several protected classes, including "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."[46] As Bruce Ackerman has written, this historic Constitution promised a "new political beginning."[47] The South African Constitutional Court has helped make good on this promise with its principled and strategic judgments.[48] But the new South African Constitution did not have the most auspicious beginnings.

A. The Certification Decision

On September 6, 1996, the Constitutional Court declared the new draft constitution unconstitutional.[49] The Court declared nine of its provisions invalid.[50] One provision violated the right to collective bargaining,[51] two gave too broad a protection from judicial review to an ordinary statute,[52] another failed to adequately entrench rights and to provide special procedures for amendment,[53] and another gave insufficient protection for the independence and impartiality of two important democracy-enhancing bodies, the Public Protector and the Auditor-General.[54] The Court judged the Constitution deficient also because one provision had failed to protect the independence and impartiality of the national Public Service Commission and had also failed to recognize and promote provincial autonomy.[55] The Court invalidated two other provisions for not properly creating or limiting the powers of local government,[56] and it also determined that the Constitution did not properly balance the distribution of powers between

44. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 224 (2002).
45. S. AFR. CONST., ch. 1, § 1 (1996).
46. *Id.* at ch. 2, § 9(3).
47. Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 783 (1997).
48. *See* THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005 143-90 (2013).
49. *Certification of the Constitution of the Republic of South Africa, 1996*, Case CCT 23/96 (Sept. 6, 1996).
50. *Id.* at para. 482.
51. *Id.* at para. 69.
52. *Id.* at paras. 149-50.
53. *Id.* at paras. 152-59.
54. *Id.* at paras. 161-65.
55. *Id.* at paras. 170-77, 274-78, 381-90
56. *Id.* at paras. 299-380.

the national and provincial governments.[57] The Court's decision to rule the constitution unconstitutional was seen at the time as "a unique jurisprudential and political event in the world."[58]

The Court exercised its extraordinary power of judicial review consistent with a constitutional grant of authority in the Interim Constitution of South Africa. Recognizing that this was an exceptional arrangement, the Court described the mandate it had been given by the Interim Constitution as a legal duty not a political one.[59] Its own function, the Court wrote, was not "to express an opinion on any gaps in the [new constitution], whether perceived by an objector or real."[60] The Court understood its function to have been "clearly spelt out in [the Interim Constitution]: to certify whether all the provisions of the [new constitution] comply with the [constitutional principles]."[61] Therefore, for the Court, the task of evaluating the constitutionality of the Constitution was well within its judicial capacity. As it undertook its analysis, the Court stressed that it would approach this role with little deference to the Constitution because the text had no special claim to correctness or constitutionality:

> Compiled as it was by the un-mandated negotiating parties, [the new constitution] has no claim to lasting legitimacy or exemplary status. The [Constitutional Assembly], composed of the duly mandated representatives of the electorate, was entrusted with the onerous duty of devising a new constitution for the country, unfettered by the provisions of the [Interim Constitution] other than those contained in the [constitutional principles].[62]

In the final analysis, much of the new Constitution survived the Court's review. The Court acknowledged that "constitution making is a difficult task,"[63] and although it did find some parts of the Constitution unconstitutional, the Court urged a "focus on the wood, not the trees," recognized the "monumental achievement" of the Constitutional Assembly in writing the new constitution, and otherwise insisted that "in general and in respect of the overwhelming majority of its provisions" the new constitution was sound.[64] The Court evidently sought somewhat to downplay the effect of its judgment, but the outcome of its exercise of judicial review was inescapable: as then-Justice Albie Sachs wrote, "this Court of which I'm proud to be a member, declared the Constitution of South Africa to be unconstitutional."[65]

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57. *Id.* at paras. 471–81.

58. Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y.L. SCH. L. REV. 669, 669 (1997).

59. *Certification of the Constitution of the Republic of South Africa, 1996*, *supra* note 49, at para. 27.

60. *Id.* at para. 30.

61. *Id.*

62. *Id.* at para. 29.

63. *Id.* at para. 31.

64. *Id.*

65. Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1257 (1997).

B. The Certification Process

The conventional theory of constitution-making would resist a court declaring a constitution unconstitutional. And perhaps with good reason, since a constitution is often the product of deliberative procedures that in various ways both directly and indirectly engage the people whom the text will govern in dialogue and consultation.[66] This relationship between the governed and governors is hierarchical: the governed are the principals, and they provisionally authorize their agent governors to govern until the governed assert their democratic right to replace them as governors or invoke their sovereign right to rewrite the constitution. It is therefore inconsistent with the idea of the people as sovereign for a court to declare a constitution unconstitutional, the constitution being a product of the people's sovereign choice and deliberation, whether delegated or direct. But the analysis is different where the people have either directly or indirectly authorized the court to exercise this extraordinary power.

Despite appearances, the declaration of the unconstitutionality of the South African Constitution is more consistent than not with the conventional theory of constitution-making. It is true that the Constitutional Court's eventual ruling was rooted, as Gary Jacobsohn has put it, in the delegation of a judicial power "as extraordinary as it was unprecedented: to legitimate (or not) a governing code by which a people commit to the structuring of a constitutional way of life."[67] This was literally an unprecedented moment because never before had a court been given the power to certify the constitutionality of a new constitution.[68] One might well question, as Ran Hirschl has done in his account of constitutional revolutions, why political actors did not contest the idea of the certification process, a decidedly unconventional part of the South African constitutional transition.[69] But although the Court's ruling may have been unconventional, it was not undemocratic. The Interim Constitution itself—written in 1993 and effective as of 1994 pending the adoption of the final constitution—authorized the Certification process, and the extraordinary role of the Court within it:

> The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles [agreed to by the Constitutional Assembly].
>
> A decision of the Constitutional Court [ ] certifying that the provisions of the new constitutional text comply with the Constitutional Principles, shall

66. *See* Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 208 (2009).

67. GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY 118–19 (2010).

68. *Id.* There was, however, one related precedent in Namibia, whose Constitution was written under the constraint of principles established in a resolution of the Security Council of the United Nations. *See* Matthew Chaskalson & Dennis Davis, *Constitutionalism, the Rule of Law, and the First Certification Judgment: Ex Parte Chairperson of the Constitutional Assembly in Re: Certification of the Constitution of the Republic of South Africa 1996, 1996(4) SA 744 (CC)*, 13 S. AFR. J. ON HUM. RTS. 430, 430–31 (1997).

69. RAN HIRSCHL, TOWARDS JURISTOCRACY 186 (2004).

> be final and binding, and no court of law shall have jurisdiction to enquire into or pronounce upon the validity of such text or any provision thereof.[70]

The Interim Constitution listed thirty-four items identified as "constitutional principles," though most of them read more like rules than principles.[71] For example, one principle insisted that "amendments to the Constitution shall require special procedures involving special majorities."[72] Another provided that "formal legislative procedures shall be adhered to by legislative organs at all levels of government."[73] The thirty-third item stipulated that "the Constitution shall provide that, unless Parliament is dissolved on account of its passing of a vote of no-confidence in the Cabinet, no national election shall be held before 30 April 1999."[74] Each was written as a rule or as a set of instructions to the Constitutional Assembly charged with writing the new constitution. Writing them as rules—rules designed to protect principles like the separation of powers, judicial independence and non-discrimination—thereafter allowed the Court to review the proposed text against the expectations that the Interim Constitution had set for the new constitution.

The choice to give the Constitutional Court the power to judge the constitutionality of the new constitution was the result of a compromise reinforced by political agreement. The National Party believed in the need for legal continuity and minority guarantees,[75] hence its endorsement of a process that put the responsibility on the Court to guarantee that the new constitution entrenched and protected fundamental rights, not the least of which were property rights;[76] and the African National Congress secured the democratic constitutional assembly it had hoped would write the new constitution, though the body would be constrained by the agreed-upon constitutional principles.[77] The entire process unfolded in two stages: first, there would be an Interim Constitution along with democratic elections to form a new government and a new legislature that would double as a constitutional assembly; second, the assembly would write the final constitution, whose conformity with the constitutional principles in the Interim Constitution would be judged by the Court.[78] The product of this innovative process illustrates Tom Ginsburg's insurance theory of judicial review. Conferring upon the Court the power to review the new constitution, and thereafter to be its authoritative interpreter, helped resolve a deadlock between the incumbent and ascendant parties. The Court's role assured the party in decline that there would be an impartial forum where

70. S. Afr. (Interim) Const., ch. 5, § 71(2)-(3) (1994).
71. *Id.* at Schedule Four.
72. *Id.* at Schedule Four, art. XV.
73. *Id.* at Schedule Four, art. X.
74. *Id.* at Schedule Four, art. XXXIII.
75. Heinz Klug, Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction 109 (2000).
76. *Id.*
77. *See id.* at 109-10.
78. *See* Heinz Klug, The Constitution of South Africa: A Contextual Analysis 223 (2010).

it could raise its future grievances with recourse to an entrenched bill of rights.[79]

This two-stage process is the key to the democratic legitimacy of the Court's ruling that the new constitution was unconstitutional. The Interim Constitution had become law as the final act of the pre-democracy parliament.[80] But this transitional constitution—and its grant of power to the Court—was the culmination of a negotiated agreement between the major parties,[81] a "solemn pact" to quote the words of the Interim Constitution itself.[82] The constitutional principles, too, had been settled by the negotiating parties, not chosen by the pre-democracy parliament.[83] The new constitution was later written by the first democratically elected parliament in its role as Constitutional Assembly, and it is this body that would be constrained to write the Constitution consistent with the principles in the Interim Constitution.[84] When the Court ultimately ruled on the draft, it was acting at the instruction and with the authorization of political parties, as representatives of the people, and the Court enforced the principles that had been chosen by these same political parties with the support of their constituencies. The connection between the Court's ruling and the people themselves is therefore closer than one might think when confronted by the thought of a court declaring a constitution unconstitutional.

Afterward, under the terms of the Interim Constitution, the Constitutional Assembly was required to revise the draft constitution into compliance with the Court's ruling. The Assembly rewrote the text and again sent it to the Court for its certification. This time, in December 1996, the Court held the new constitution constitutional,[85] and it was soon afterwards signed into law, bringing the formal process of constitution-making in South Africa to a close.[86]

IV. The Canadian Constitution and Constitutional Democracy

Virtually all of the world's codified constitutions entrench formal amendment procedures that authorize alterations to their text.[87] It is not uncommon for them to also entrench limits to formal amendments, making certain rules formally unamendable, even where large supermajorities

79. *See* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 55–56 (2003).

80. IAN SHAPIRO, DEMOCRACY'S PLACE 184 (1996).

81. *See* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 32–35 (2009).

82. S. AFR. (INTERIM) CONST., prmbl. (1993).

83. *See* Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. Rev. 809, 813–14 (2001).

84. *Id.*

85. *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, Case CCT 37/96 (4 Dec. 4, 1996).

86. For a useful review of the drafting of the Constitution, see Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 67–77 (1999).

87. *See* Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003).

may wish to amend them.[88] For example, the French Constitution makes republicanism and territorial integrity unamendable,[89] the Brazilian Constitution makes federalism unamendable,[90] and the German Basic Law famously makes human dignity unamendable.[91] Formal unamendability has grown from a feature common to fewer than twenty percent of the world's constitutions from 1789 to 1944, to roughly one quarter of constitutions from 1945 and 1988, to over half of all new constitutions since 1989.[92] The Constitution of Canada is something of an outlier for not entrenching any formally unamendable constitutional provision.[93] But the Canadian Constitution does, however, entrench an unusual form of unamendability that I have elsewhere described as "constructive unamendability."[94]

A. Constructive Unamendability

A constitution is constructively unamendable where the present political climate makes it practically unimaginable for constitutional actors to assemble the required supermajorities to pass a constitutional amendment. Unamendability on these terms therefore derives neither from formal constitutional design as in the case of Brazil, France, or Germany described above, nor does it derive from constitutional interpretation, as in India, where the Supreme Court has interpreted the "basic structure" of the constitution to be unamendable despite there being no mention of unamendability in the constitutional text.[95] Constructive unamendability is instead the product of constitutional politics requiring constitutional actors to perform impossible heroics to successfully amend the constitution. An example is the Equal Suffrage Clause in the United States Constitution, which guarantees that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[96] The Clause authorizes a change to a state's representation in the Senate only if that state grants its consent—but no state would consent to a change that resulted in the direct or relative diminution of its power in American federalism.[97] Constructive

88. *See* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 950–52 (2014).

89. FRANCE CONST., tit. XVI, art. 89 (1958).

90. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] artigo 60 (Braz.). http://www.law.nyu.edu/sites/default/files/upload_documents/Final_GFILC_pdf.pdf [https://perma.cc/8QH4-L6V5].

91. GERMAN BASIC LAW, tit. VII, art. 79(3) (1949).

92. *See* ROZNAI, *supra* note 1, at 20–21.

93. *See* Albert, *supra* note 7.

94. Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. (2d) 181 (2014).

95. *See* text accompanying *supra* note 1.

96. U.S. CONST., art. V.

97. *See* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1042–45 (2014). Sandford Levinson argues, correctly in my view, that one could read the Equal Suffrage Clause as requiring the unanimous consent of all states, not only of that state whose representation is diminished. *See* Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENT. 107, 122 n.32 (1996).

unamendability, then, is not a legal fact but rather a political reality that prevents formal change.

The Constitution of Canada is today constructively unamendable on all matters of national importance that touch upon federal-provincial relations. These are what Peter Russell understands as the kinds of changes that are achievable only through "mega constitutional politics," a term he uses to refer to major formal amendments that "address the very nature of the political community on which the constitution is based," that have a "tendency to touch citizens' sense of identity and self-worth," and that are "concerned with reaching agreement on the identity and fundamental principles of the body politic."[98] Even with this definition of the term, it is difficult to identify precisely which amendable matters require the popular mobilization that mega constitutional politics entail. Fortunately, the escalating structure of constitutional amendment in the Canadian Constitution identifies many of the amendable matters that require constitutional actors to engage in mega constitutional politics. This structure is *escalating* because the text creates multiple procedures to formally amend the constitution, each procedure expressly designated for amending only specific categories of provisions or principles, each imposing a higher threshold for an amendment, and each in comparison to the other's degree of entrenchment reflecting the relative importance of the amendable matter.[99]

There are five formal amendment procedures in Canada,[100] though only two authorize the kind of major amendment that is currently impossible. The three amendment procedures that are readily useable are the unilateral provincial procedure, the unilateral federal procedure and the multilateral regional procedure. Under the unilateral provincial procedure, "the legislature of each province may exclusively make laws amending the constitution of the province."[101] The federal unilateral procedure authorizes the Parliament of Canada to formally amend the Constitution "in relation to the executive government of Canada or the Senate and House of Commons."[102] This procedure is available for a narrow class of matters involving Parliament's internal constitution, for instance subjects like parliamentary privilege, legislative procedure, and the number of Members of Parliament.[103] The multilateral regional procedure applies to amendments that affect "one or more, but not all, provinces" for instance an amendment to boundaries between provinces or the use of English or French within a

98. *See* PETER RUSSELL, CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE 75 (1992).

99. *See* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 247–48 (2013).

100. Procedure for Amending Constitution of Canada, ss. 38–49, Part V of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K), 1982, c. 11 (hereinafter "*Constitution Act, 1982*").

101. *Constitution Act, 1982*., pt. V, s. 45.

102. *Id.* at s. 44.

103. Ian Greene, *Constitutional Amendment in Canada and the United States*, *in* CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES 249, 251 (Stephen L. Newman ed., 2004).

province.[104] Under this procedure, approval resolutions are required from both the House of Commons and the Senate, as well as the provincial legislature or legislatures affected by the amendment.[105]

Modern history has proven the other two amendment procedures unusable, making the matters assigned to each procedure today constructively unamendable. The first—the multilateral default procedure—must be used to amend all parts of the Constitution not otherwise assigned to another procedure.[106] This default procedure requires approval from both houses of Parliament and from the provincial assemblies of at least seven of Canada's ten provinces,[107] with the qualification that the population of the ratifying provinces must amount to at least half of the total provincial population.[108] Although it serves as the default procedure for amending the Constitution of Canada, this procedure is also designated as the exclusive amendment procedure for specific items, including proportional provincial representation in the House of Commons, Senate powers and provincial representation, Senator selection and eligibility, certain features of the Supreme Court of Canada, and the creation of new provinces.[109] The second amendment procedure that modern history has proven unusable—the unanimity procedure—requires approval from both the House of Commons and the Senate as well as from each of the provincial assemblies.[110] Constitutional actors must use this procedure for amendments to the structure and institutions of Canada's constitutional monarchy, namely the office of the Queen, Governor General, and Lieutenant Governor; the use of English or French subject to the amendments possible through the multilateral regional procedure; the composition of the Supreme Court of Canada subject to the amendments made possible through the multilateral default procedure; a specific ratio of provincial representation in the House of Commons to provincial representation in the Senate; and the entire structure of the amendment rules themselves.[111]

Both procedures collectively have been successfully used only once since their entrenchment in 1982, and that single use occurred in 1983,[112] arguably on the strength of the momentum generated by the patriation of the Constitution the year before. Since then, Canada has lived two spectacular failures to make large-scale amendments to the Constitution, first in 1990 with the Meech Lake Accord and then in 1992 with the Charlot-

104. *Constitution Act, 1982*., pt. V, s. 43.
105. *Id.*
106. *Id.*
107. *Id.* at s. 38(1).
108. *Id.*
109. *Id.* at s. 42(1).
110. *Id.* at s. 41.
111. *Id.*
112. *See Constitutional Amendment Proclamation, 1983*, SI/84-102, (1984) Can. Gaz. II, 2984. The unilateral federal and multilateral regional amendment procedures have been used a total of ten times. *See* PETER W HOGG, CONSTITUTIONAL LAW OF CANADA, vol. 1, ch. 1 at 1–7 n. 32 (5th ed. 2007) (loose-leaf updated 2014, release 1).

tetown Accord.[113] These two amendment packages proposed major reforms to the most important matters in federal-provincial relations. Their failures suggest that the Constitution of Canada may be the most difficult democratic constitution to amend on major items, harder even than the United States Constitution.[114] Recent decisions from the Supreme Court of Canada have further complicated formal amendment in relation to secession,[115] the Senate,[116] and to the Supreme Court itself.[117]

The constructive unamendability of the Constitution for major reforms is functionally, though not formally, the same as formal unamendability. The constitutional text of course makes nothing unamendable—everything is at least theoretically amendable using any of the five rules of formal amendment. But as a matter of functional reality, I have suggested that two of the five amendment procedures—those serving as gatekeepers to major constitutional reforms—are today simply not successfully deployable. The consequence is that those matters that are theoretically formally amendable using those two procedures might as well be formally unamendable because constitutional actors cannot hope to assemble the supermajorities required to amend them, at least not today.

B. Constitution and Reconstitution

Unamendability is deeply problematic for democratic constitutionalism. By definition, unamendability denies those governed by a constitution the power to amend it. Even where the unamendable provisions are worth protecting from the vagaries of constitutional politics—for instance, all civil and political rights, as in the Constitution of Bosnia and Herzegovina[118]—there is a greater cost to democracy in denying the people their power of amendment than there is to the principle that could otherwise be violated were it not unamendable. This trade-off is difficult if not impossible to quantify. Yet there is a case against unamendability, and it derives from understanding constitutionalism as rooted in participatory democracy.[119]

Historically, the codification of modern constitutions and the power of constitutional amendment have rested on the theory of popular sovereignty, whose fundamental teaching is that the ultimate source of constitutional legitimacy is the consent of the governed.[120] This poses a difficult

113. *See* Richard Albert, *The Conventions of Constitutional Amendment in Canada*, 53 OSGOODE HALL L.J. 399, 405–09 (2016).

114. Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85, 93 (2015).

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

116. *See Reference re: Senate Reform*, [2014] 1 S.C.R. 704.

117. *See Reference re: Supreme Court Act, ss. 5 and 6*, [2014] 1 SCR 433.

118. BOSNIA & HERZEGOVINA CONST., art. X, § 2 (1995).

119. I have developed this case elsewhere. *See* Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 676–77 (2010); Richard Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J. 1, 4–5, 37 (2008).

120. LESTER BERNHARDT ORFIELD, THE AMENDING OF THE FEDERAL CONSTITUTION 1 (1942).

problem for a constitution that is, or is thought to be, unamendable: If the people have no power to update their constitution to entrench their contemporary values in it, can we call their constitution a constitution? One can view a constitution as both a verb and noun. It is of course a document—a thing that outlines the structures of government, defines the powers of public institutions and entrenches rights. But it is also an action—a continuing process of self-definition and redefinition, one that invites the people who are to be governed by the text to both shape the rules that bind them and to reshape them as time, experience, and evolving values might require. The idea of a constitution as an action derives from the Lockean consent theory of legitimacy, which rests on the people's acts of express and tacit consent to validate their government.[121]

Understanding a constitution as a continual doing has implications for how we prioritize the relative importance of the various forms of constitutional change.[122] Formal amendment is of course not the only way the people may express their consent to a change in constitutional meaning. But this act of constitutional alteration is rooted in predictability, transparency and accountability—three democratic and participatory values of the rule of law.[123] In contrast to most of the many forms of informal amendment—for example judicial interpretation, statutory enactment, executive action, implication and convention[124]—formal amendment telegraphs when and how constitutional change occurs, and it usually generates widely agreed-upon textual alterations to which the people and political actors can point as a referent for debate or action.[125] An informal amendment, however, can happen without public notice that it is occurring at all, or indeed that it has occurred in the past, thereby undermining the connection between the people and their constitution in its codified and also uncodified forms.[126]

On this account of a constitution as an action, an unamendable constitution is not only a paradox but it is also 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. While it is not quite in the same family of intuition that has given rise to calls to take the constitution away from the courts[127] or those in favor of weak-form judicial review[128] (or functioning parliamentary bills of rights[129] or

121. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT, Book II, Ch. VIII, § 122 (Whitmore & Fenn, 1821).

122. *See* Albert, *supra* note 4, at 38–43.

123. *See* Richard Albert, *Constitutional Amendment by Stealth*, 60 MCGILL L.J. 673, 716 (2015).

124. *See* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1062–71 (2014).

125. *See* Albert, *supra* note 123, at 716–17.

126. *See* Richard Albert, *Constitutional Amendment by Constitutional Desuetude*, 62 AM. J. COMP. L. 641, 680–84 (2014).

127. *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

128. *See generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).

the Commonwealth model of constitutionalism[130]), both approaches to constitutionalism seek to privilege more popular forms of decision-making.

Of course legitimacy need not be rooted in popular will; it may instead derive from a less procedural and a more substantive theory of democratic constitutionalism, one that elevates a moral reading of constitutional commitments over its participatory dimensions.[131] The tension between process and content is apparent in the case of a formally unamendable constitutional rule: the text privileges the content of the entrenched provision over the capacity of the people to change it, even if a supermajority of constitutional actors and the people wish to abolish, rewrite or refine its text. This tension exists just as well for constitutions, like Canada's, that are constructively unamendable because the consequence is the same: the text is unchangeable.

But the difference between a formally unamendable constitution and a constructively unamendable one is that the latter rests on stronger democratic foundations.[132] The cause of the Constitution of Canada's unchangeability for all but its most important parts is the political climate that prevents the formation of the political consensus required to make an amendment. As a federal state that must negotiate the differences among multiple communities and identities, and indeed among multiple nations,[133] Canada has been said to stand "at a crossroads" that will prevent the population as a whole from constituting itself as one nation unless a "certain national consciousness" emerges to bind together individuals with dissimilar ethnic, linguistic, regional, and other identities.[134] These divisions are what led to the failure of both recent wholesale amendment efforts in the Meech and Charlottetown Accords.[135]

It is in the disharmony of Canadian constitutionalism that we can locate its democratic foundations. The difficulty of political agreement is what protects the Constitution. No simple majority can transform the terms of the federal bargain, nor even may a supermajority. Bargain-transforming changes are instead possible only with the approval and legitimation of a particular configuration of political consensus that cuts across the many nations that constitute Canada. Major constitutional changes require agreement not only among parliamentarians in Ottawa but also among a

129. *See* JANET L. HIEBERT & JAMES B. KELLY, PARLIAMENTARY BILLS OF RIGHTS (2015).

130. *See* STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM 21–46 (2013).

131. *See* James Allan, *Thin Beats Fat Yet Again—Conceptions of Democracy*, 25 L. & PHIL. 533, 535 (2006); Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 401–11 (1998).

132. Although I am not persuaded, there is a case to be made that the formal unamendability of a constitutional provision likewise rests on democratic foundations. *See* Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT (Richard Albert et al., forthcoming 2017).

133. *See* JEREMY WEBBER, REIMAGINING CANADA 40–74 (1994).

134. *See* Michel Seymour, *Quebec and Canada at the Crossroads: A Nation Within a Nation*, 6 NATIONS & NATIONALISM 227, 237 (2000).

135. I have explored these failures elsewhere. *See* Albert, *supra* note 113.

substantial number of legislators in provincial assemblies across the regions of the country.

Yet there is more than this factor—the difficulty of assembling the required parliamentary and provincial agreement—that has produced the constructive unamendability of the Canadian Constitution.[136] There also exist other amendment rules outside the constitutional text. Some provincial laws now require legislators to consult the people in a provincial referendum before ratifying an amendment proposal.[137] Canada's territories arguably must also be consulted in these amendments as well, further expanding the relevant communities in constitutional change.[138] Political actors must also contend with new expectations of popular participation that confer upon previously excluded segments of the population an important voice in any future process of constitutional renewal.[139] We could characterize these factors as restrictions on the power of constitutional amendment, and indeed this has been their effect. But in a much deeper way, these and other factors that render the Constitution of Canada constructively unamendable could be said to have the salutary consequence of protecting the Constitution from changes without the assurance that all of Canada's voices have been heard.

V. The Mexican Constitution and Constitutional Legitimacy

In the Mexican tradition, revolution and constitution are distinguishable but inseparable, both as a matter of political morality and in constitutional design. The success of the country's modern revolution in the 1910s gave deep meaning to the 1917 Constitution. And in turn by its entrenchment, the Constitution validated the revolution itself. The Constitution sought to "institutionalize"[140] the revolution. Its text celebrates those who helped the cause of the Revolution, conferring upon them "and their sons, daughters, and widows" a special "preference in the acquisition of parcels of land" and "the right to the discounts specified by law."[141] But none of these is the strongest expression of the Constitution's revolutionary roots. Its revolutionary origins are best reflected in the Constitution's prohibition of a new constitution.

A. Rebellion and Constitution

Like most constitutions,[142] the Mexican Constitution authorizes political actors to make formal constitutional amendments. Two-thirds of the

136. *See* Albert, *supra* note 7.
137. *Id.* at 177–78.
138. *Id.* at 176.
139. *Id.* at 178–79.
140. *See* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 Mich. L. Rev. 2677, 2677 (2003).
141. Mexico Const., trans. art. 12. (1917).
142. *See* Bjørn Eric Rasch & Roger D. Congleton, *Amendment Procedures and Constitutional Stability*, *in* Democratic Constitutional Design and Public Policy 319, 325 (Roger D. Congleton & Birgitta Swedenbord eds., 2006).

national Congress must agree to propose an amendment, which becomes valid when approved by a majority of the state legislatures.[143] Mexico's formal amendment rules interestingly distinguish additions from amendments, the former meaning a new writing that is added to the constitutional text and the latter referring to alterations to the existing text.[144] This is an uncommon distinction in constitutional design. What is even more noteworthy, though, is a related section of the Mexican Constitution, entitled the "inviolability of the Constitution," a section that we can interpret as an effort to create an irreplaceable Constitution. The full text of this fascinating provision follows below:

> 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.[145]

This declaration of constitutional inviolability predates the 1917 Constitution: it was entrenched, word for word, in the 1857 Constitution of Mexico.[146] A similar provision appears in a few other Latin American constitutions.[147] Yet constitutional inviolability is much less prevalent around the world than even its uncommon counterpart, the entrenchment of the right to revolution.[148]

There are at least three elements of note about the Mexican Constitution's inviolability: the Constitution's indefinite validity, its special popular justification, and its resistance to rebellion. First, the Constitution presents itself as valid indefinitely, losing neither its "force" nor "effect" even if "a government whose principles are contrary to those that are sanctioned herein" one day takes power and writes a new constitution. This peculiar provision on the Constitution's "inviolability" suggests that a new constitution would be invalid because there can be only one constitution, and it is the 1917 text. This highlights a second point of note: that the Constitution is thought to be anchored in a special popular justification that explains and perhaps also requires its indefinite validity. The Constitution creates a presumption against a new constitution. It intimates that a new constitution could arise only where popular will has been suppressed. As its text states, "as soon as the people recover their liberty" the Constitution "shall be reestablished," presupposing that the people could not

143. MEXICO CONST., tit. VIII, art. 135 (1917).
144. *Id.*
145. *Id.* at tit. IX, art. 136.
146. MEXICO CONST., tit. VIII, art. 128 (1857) (superseded).
147. *See, e.g.*, HONDURAS CONST., tit. VII, ch. II, art. 375; PARAGUAY CONST., pt. II, tit. I, ch. I, art. 137; VENEZUELA CONST., tit. VII, ch. I, art. 333.
148. *See* Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184, 1217–18 (2013) (finding that twenty percent of the world's constitutions entrench the right to resist).

choose to be governed by a text other than the 1917 Constitution. Finally, this Constitution is made resistant to rebellion: "even if its observation is interrupted by rebellion" it will remain in force throughout the rebellion and, once order is restored "those who had taken part in the government emanating from the rebellion, as well as those who cooperated with such persons, shall be judged" under the 1917 Constitution.

These are high ambitions for a constitutional text. One cannot help but think in this context of James Madison's cautionary words in the debates surrounding the ratification of the proposed United States Constitution. For him, a codified constitution was but a collection of words, "parchment barriers" as he called them, boundaries written however clearly and definitively on paper that could never withstand "the encroaching spirit of power."[149] A state governed by a codified constitutional text is of little use in a liberal democracy without an underlying culture of constitutionalism and respect for the rule of law.[150] As Walter Murphy has quite rightly observed, "to think that words can constrain power seems foolish."[151]

The asserted "inviolability" of the Mexican Constitution could be a mere parchment barrier, or it could have some deeper meaning that in fact exerts some constraint on those who would seek to establish a government contrary to the Constitution. I will return to this question further below. But first we must answer the definitional question left open in the provision purporting to make the Mexican Constitution inviolable: what do we mean by a rebellion?

A rebellion targets a government seen as illegitimate.[152] The rebellion can be both successful and not, and it is generally understood to be a "violent power struggle, occurring within an autonomous political system, in which the overthrow of the regime is threatened by means that include violence, and in which the participants are largely from the masses."[153] As Roger Bowen explains in his account of "rebellion":

> [R]ebellion signifies much more than simple violence or "peasant discontent"; rebellion represents a perhaps fatal questioning of the legitimacy of the established order; it means that the rebels are claiming that something is wrong with conditions as they presently exist; it means (though not always) that the traditional grounds of obedience upon which the state rests are

149. The Federalist No. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

150. For the leading account of this paradox as it manifests itself in Africa, see H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65-84 (Douglas Greenberg et al., eds., 1993).

151. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3,7 (Douglas Greenberg et al., eds., 1993).

152. TED ROBERT GURR, POLITICAL REBELLION: CAUSES, OUTCOMES AND ALTERNATIVES 247 (2015).

153. D.E.H. RUSSELL, REBELLION, REVOLUTION AND ARMED FORCE: A COMPARATIVE STUDY OF FIFTEEN COUNTRIES WITH SPECIAL EMPHASIS ON CUBA AND SOUTH AFRICA 62 (1974).

being challenged.[154]

Mexico has a long history of rebellion, dating to the eighteenth century,[155] commonly occurring largely in its rural regions.[156] Social movements of many kinds were particularly frequent from the 1810s to the 1850s.[157] Against this backdrop, we can understand the purpose of constitutionalizing the prohibition against a constitution born of rebellion: the 1857 Constitution, which first entrenched the provision on constitutional inviolability and later appeared in the 1917 text, "was the product of a generation of liberals committed to the creation of a modern republic that would halt the flood of rebellions and dictatorships that characterized the history of this country since Independence."[158] Rebellion is therefore an historical problem that Mexican political actors sought to address in constitutional design in order to foster stable constitutionalism, whether or not they believed the constitution's text could in fact deter rebels from trying to overthrow the regime. A constitutional text quite clearly cannot prevent a future rebellion by making ineffective a constitution borne of rebellion, as the Constitution tries to do here. Nonetheless, entrenching this prohibition on rebellion in the constitutional text is a statement of how strongly the state would oppose rebellion and defend the exiting Constitution.

One possible reading of the Constitution's declaration of its own inviolability is that it makes all new constitutions unconstitutional. On this view, declaring the 1917 Constitution inviolable—by insisting that any new constitution borne of rebellion would be ineffective—denies the constitutionality of a constitution that a successful rebellion might create. The argument against the validity of that new constitution would stress that the nature of a national constitution that structures all legitimate authority is that there can be only one effective national constitution at any given time. This would not prevent the articulation of competing claims of authority, as we saw in the Civil War era when the United States Constitution and the Constitution of the Confederate States made competing claims to legitimacy.[159] The point would be that only one constitution can be the true constitution at any single period in time, and only power and effectiveness can determine which one rules. This view would insist on two further points. First, that the 1917 Mexican Constitution is designed to preempt

154. ROGER W. BOWEN, REBELLION AND DEMOCRACY IN MEIJI JAPAN: A STUDY OF COMMONERS IN THE POPULAR RIGHTS MOVEMENT 5 (1984).

155. *See generally* MICHAEL T. DUCEY, A NATION OF VILLAGES: RIOT AND REBELLION IN THE MEXICAN HUASTECA, 1750-1850 (2004) (discussing the history of rebellion in the country).

156. *See generally* Riot, Rebellion, and Revolution: Rural Social Conflict in Mexico (Friedrich Katz ed., 1988) (examining rebellion in the rural regions of Mexico).

157. *See* Brian Hamnet, *The Comonfort Presidency, 1855-1857*, 15 BULL. LATIN AM. RES. 81, 81-82 (1996).

158. Gabriel L. Negretto & José Antonio Aguilar Rivera, *Rethinking the Legacy of the Liberal State in Latin America: The Cases of Argentina (1853-1916) and Mexico (1857-1910)*, 32 J. LATIN AM. STUD. 361, 373 2000).

159. Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate Constitution*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 274 (Sanford Levinson ed. 2016).

the contest between competing constitutions by proclaiming itself the true constitution. And that, by implication, the 1917 Mexican Constitution establishes that any other constitution with a competing claim of authority is invalid and must be treated as unconstitutional.

B. Revolution and Constitution

But perhaps there is a better reading of the Constitution's declaration of its inviolability. No constitution can control how the constituent power exercises its authority. Nor can a constitution prevent the constituent power from writing a new constitution. Any act of the constituent power recognized by political actors and the people as an act of the constituent power is by definition valid; it is what authorizes the creation of a constitutional order, what sustains it and also what legitimates it. This is the core of the reason why the United States Constitution was unconstitutional but not illegitimate: the constituent power validated the violation of the Articles in an extraordinary expression of its consent to the new constitution. Howsoever the constituent power manifests its will, whether on a new or revised constitution, neither the expressed will of the constituent power nor the form that its expression takes can be illegitimate because the valid exercise of the constituent power is the ultimate source of legitimacy for the choices that a people makes.[160]

The 1917 Mexican Constitution therefore could conceivably purport to deny the legitimacy of any new constitution that replaces it but it could not in fact deny that new constitution its actual legitimacy. Whatever the constitutional text authorizes or prohibits, the people may, if they so choose, exercise their constituent power to create a "government whose principles are contrary to those that are sanctioned [in the 1917 Constitution]." The choice is theirs, and indeed the 1917 Constitution recognizes elsewhere in its text that the people may exercise their constituent power to claim their "inalienable right" to freely create a new government:

> The national sovereignty resides essentially and originally in the people. All public power emanates from the people and is instituted for their benefit. The people have, at all times, the inalienable right to alter or modify the form of their government.[161]

This is not a grant of authority. It is a recognition of a sociological fact of how power is exercised and how it legitimates the law. We might even consider this provision redundant insofar as it is a first principle that should everywhere be presupposed to be descriptively true.

Let us then posit that the 1917 Constitution does not intend to deny the legitimacy of a new constitution. The Constitution's declaration of its inviolability could instead mean one of two things. First, it could mean simply what it says: that any rebellion that temporarily suspends the con-

160. Elsewhere, I have critiqued the theory of constituent power as insufficiently developed to explain how constitutions actually do change. *See* Richard Albert, *Constitutional Dismemberment*, 43 YALE J. INT'L L. (forthcoming 2018).

161. MEXICO CONST., tit. II, ch. I, art. 39 (1917).

stitution and whose leaders then govern under another constitution, whether codified or not, will be prosecuted once order is restored by those whom the rebellion has overthrown. It could alternatively mean that any new constitution that is promulgated by rebels claiming to speak for the people, but without actually having their support, shall be invalid until the people successfully assert their power either to restore the old constitution or to write a new one.

Either of these alternative readings seems consistent with the 1917 Constitution, which warns would-be rebels elsewhere in the constitutional text that:

> Those who have taken part in the government that emanated from the rebellion against the legitimate Government of the Republic or those who cooperated with it, afterwards taking up arms or holding office or employment with the factions that attacked the Constitutionalist Government, shall be tried under the laws in force unless pardoned by such Government."[162]

This provision of course would not apply where the rebellion that had created a new constitution ultimately became accepted as an exercise of the constituent power and recognized by the people as their authoritative constitution. But then it would be more appropriate to speak here of revolution rather than rebellion. Rebellion as we understand it does not lead to a new constitution. When it does, we recognize retrospectively that the rebellion was mislabeled or that the rebellion had transformed into something qualitatively different that we prefer to call a revolution. Like a rebellion, a revolution may begin as a violent struggle for change in the regime, and it may well be supported by a mass mobilization. The difference is in both process and outcome. Rebellion is destructive whereas revolution is constructive; the object of the former is overthrow while in the latter it is to found a new beginning supported by a discernible popular will that is often though not always reflected in a new constitution.[163]

The logic of the 1917 Constitution's declaration of its inviolability is that the right of revolution cannot as a matter of positive law be established in a constitutional text *a priori*, but rather that it may be established only *a posteriori* when the people acknowledge that they have validly exercised it.[164] This interpretation appears in one of the leading studies of the Mexican Constitution, in which the author explains in reference to this entrenched prohibition that:

> A right to revolution cannot be positively recognized because it implies disowning the law. A constitution recognizing a right for its own breach could not be, strictly speaking, a constitution. For this reason, the constitution of 1917, originated from the disowning of the constitution of 1857, prohibited revolution just as the previous.

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162. *Id.* at trans art. 10.

163. *See* HANNAH ARENDT, ON REVOLUTION 140 (1990).

164. *See* FELIPE TENA RAMÍREZ, DERECHO CONSTITUCIONAL MEXICANO 66-74 (Mariana Velasco Rivera trans., 28th ed. 1994).

> The right to revolution cannot be positive established *a priori* but only *a posteriori*. The *law of revolution* only becomes positive law when it is, explicitly or implicitly, acknowledged by the people.[165]

On one hand, this interpretation is inconsistent with the actual design of modern constitutions, some of which entrench the right to revolution[166] and others that contemplate political actors violating the constitution in a period of declared emergency.[167] On the other, these models might be internally incoherent despite the best efforts of their designers. Where does this leave us?

"In a time of revolution," Walter Bagehot wrote, "there are but two powers, the sword and the people."[168] The incumbents wield the sword to defend the regime while the people seek a new beginning for themselves and their state. In their challenge to the regime, the people exercise their natural right to revolution,[169] whether or not it is entrenched in or prohibited by the constitutional text. No constitution can as a matter of effective constraint or compulsion authorize revolution, nor can it prohibit revolution. A constitutional text could of course recognize the right of revolution, as some currently do, but the people would possess this right independent of the text. And a constitutional text could purport to prohibit revolution, but this would not, nor could it, prevent the people from exercising their right. The very nature of the revolutionary right is that it recognizes no bounds, constitutional or not, codified or not, on when and how it begins and unfolds nor on what it seeks to achieve. Revolution is limited only by the organizational capacity and collective strength of the movement that builds behind it.

In purporting to prohibit a new constitution emerging out of *rebellion*, the Mexican Constitution should not be misunderstood as prohibiting a constitution emerging out of *revolution*, the difference being that the former is not approved, reinforced or acquiesced to by the people but the latter is. Nor should we understand the prohibition on a new constitution born of rebellion as authorizing revolution, because it plainly does not speak of revolution, nor of when, whether or how the people are to mount their revolution. Still, the Constitution's declaration of its inviolability is at its core nonetheless about revolution. We should understand the Constitution's prohibition on a new constitution born of rebellion as the Constitution's recognition of the people's right of revolution. Where a rebellion takes control of the government and entrenches a new but illegitimate constitutional order, the Constitution urges the people to restore it by all necessary means, with recourse to arms if necessary. The prohibition then lays out the sequence of restoration: the people shall reclaim power, the Consti-

165. *Id.* at 74.

166. Ginsburg et al., *supra* note 148.

167. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] artigo 136 (Braz.); FINLAND CONST., ch. 2, sec. 23 (1999); PHILIPPINES CONST., art. VII, sec. 18 (1987); PORTUGAL CONST., pt. I, tit. I, art. 191 (1976); ST. KITTS AND NEVIS CONST., ch. II, sec. 19 (1983).

168. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 78 (Paul Smith ed., 2008).

169. THE DECLARATION OF INDEPENDENCE (U.S. 1776); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Book II, ch. XVII (Whitmore & Fenn, 1821).

tution shall then ultimately be restored, and those responsible for having subverted the order will be held responsible for their wrongdoing under the Constitution's rules. This reading of the Constitution's declaration of its inviolability allows us to reconcile the plain text of the prohibition with the natural right to revolution, while also integrating into our interpretation of the Constitution the nation's lived history with revolution and rebellion.

VI. Unconstitutionality and Democracy

Our case studies from the United States, South Africa, Canada and Mexico reveal how a constitution may be unconstitutional in different senses. Each unconstitutional constitution is nonetheless rooted in democratic foundations of different strengths. The American case reflects a revolutionary tradition that legitimates the considered judgment of the people. The Mexican case also emerges from a revolutionary tradition, but one that is oriented to the threat of rebellion, a common occurrence in the country's lived history. The South African Constitution, in contrast, does not have the same classical revolutionary beginnings but it does have unconventional revolutionary beginnings: the transition from apartheid to democracy was a democratic revolution that proceeded over a long period, with mass mobilization yet without the violence that characterized the paradigmatic American, French and Russian Revolutions.[170] That the final outcome in South Africa was negotiated peacefully rather than prosecuted by conventional revolutionary means does not undermine the revolutionary character of its outcome. For its part, the Canadian case emerges from a decidedly non-revolutionary tradition and reflects the idea of unconstitutionality from a different direction: that a constitution, in order to be a constitution, requires that it be susceptible to formal change when circumstances warrant. Each of these four constitutional traditions suggest that a constitution need not be constitutional to be legitimate.

There are three themes worth exploring by way of conclusion: perspective, participation and the people. The first concerns the perspective from which we are to evaluate the constitutionality of a constitution. H.L.A. Hart famously distinguished between the internal and external points of view, the former held by political actors within the legal system and the latter held by outsiders to it.[171] From an internal perspective, the United States Constitution and the draft South African Constitution were both unconstitutional, the first as a formal matter insofar as it violated the rules of change in the Articles of Confederation and the second also as a formal matter because the Court held that it violated the constitutional principles against which it was to be judged. Without denying the possibility that political actors could view the Canadian Constitution as unconstitutional,

170. *See* Richard Albert, Democratic Revolutions (June 1, 2011) (unpublished BCL dissertation, University of Oxford) (on file with author).

171. H.L.A. HART, THE CONCEPT OF LAW 89 (3d ed. 2012) ("[I]t 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'.").

it is more an external perspective that gives rise to the claim suggested here that the Canadian Constitution is unconstitutional because it is virtually formally unamendable in its most basic elements. The Mexican Constitution, however, may be judged unconstitutional on both internal and external perspectives. The overthrown incumbents would decry the unconstitutionality of a new constitution while the ascendant challengers would not, the former believing that any new constitution contrary to the old would be invalid and illegitimate while the latter would point to their effective control as both the source of legitimacy for the new constitution as well as the reason for its adoption. From an outsider perspective, we can interpret a new Mexican Constitution as both constitutional and not, depending on whether we view the new governors as representing a new, valid and stable popular consensus.

The second important theme is participation. In each case, the legal defect of unconstitutionality can be remedied by popular validation. We see this perhaps most clearly in the case of the United States. Procedurally unconstitutional, the new constitution shed all taint of illegitimacy when the people later ratified it in extraordinary constitutional conventions. Popular participation can also occur *ex ante*, as in the case of South Africa, where the people participated via their representatives in the multi-party drafting of the interim constitution. The list of principles against which the Constitutional Court was to evaluate the new constitution was therefore imbued with the popular legitimacy generated by the drafting process for the interim constitution. The Mexican case similarly highlights popular participation: the unconstitutionality of a new Mexican constitution turns on the extent to which the people accept as legitimate what is presented to them as a new beginning. The closer the cause of the constitutional replacement is to a popular revolution, the less likely the new constitution is to be viewed as unconstitutional from the internal perspective, and indeed from the external one as well. In Canada, it is the barriers to successful ratification, but not to participation itself, that makes the Constitution constructively unamendable. But in erecting such high barriers to ratification, the Constitution requires a massive mobilization and coordination of popular participation to change the basic bargain the Constitution protects.

Both perspective and participation point our attention to a third theme: the people. The question whether a constitution can be simultaneously unconstitutional yet rooted in democratic foundations may be answered only with reference to the people as the ultimate source of legitimation. Though the people are not always clearly identifiable, it is the people who by their direct or indirect approval can validate an unconstitutional constitution. They may defend constitutional principles in revolution, they may approve a constitution directly by referendum, they may grant their consent by acquiescence, and they may delegate their power to write or approve a constitution to officials tasked with representing their interests. Under these forms of popular consent, the people possess an extraordinary

power of absolution that can transform a formally unconstitutional constitution into a legitimate one anchored in democratic values.

The question that motivated this inquiry to begin with is whether a constitutional amendment can be unconstitutional. The answer is of course yes. But whether an entire constitution can be unconstitutional raises both similar and different questions. The questions are similar because they invite us to break free from our formalist presuppositions that respecting the constitutional text is sufficient for constitutionality. They are different because the stakes are likely to be higher in the unconstitutionality of a constitution as opposed to a single amendment. Yet the various ways that a constitution can be unconstitutional—as a matter of form or substance, and from the perspective of participatory democracy or popular legitimacy—invite us to consider alternative grounds upon which to declare a constitutional amendment unconstitutional, over and above the ones that constitutional courts commonly invoke today around the world. In light of the increasing attacks on liberal constitutionalism in states as varied as Colombia, Ecuador, Grenada, Honduras, Hungary, Japan, Trinidad & Tobago, Turkey, Venezuela, and elsewhere,[172] constitutional actors may well require a new toolkit of reasons to invalidate constitutional changes in order to protect the foundations of constitutional democracy. Considering how a constitution can be unconstitutional may help reverse engineer justifications for declaring an amendment unconstitutional. I leave for another day, however, the task of formulating these derivative justifications—and also of defending them—and repeat for now only that a constitution may at once be unconstitutional yet nonetheless democratic.

172. *See* Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 658-59 (2015).

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Unconstitutional Constitution as a Redeeming Oxymoron

Juliano Zaiden Benvindo†

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,[1] 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.[2] 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[3] 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.

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.*"[4] These distinct, rich constitutional realities have long lived with some sort of unconstitutionality despite "[tracing] its roots to democratic foundations."[5] 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,[6] 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.'"[7] The founding moment naturally plays a role, the idea that the people are the ones legitimizing the "authorizing moment"[8] 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"[9] 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"[10]—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"[11] increases. His analysis clearly reveals how the paradox of constitutionalism leads to a vicious circularity because constitutionalism and democracy cannot be "fully in place."[12] After all, in the American experience, there appeared to be a victory of the people over the rules of the game,[13] now reinvented through the Constitution to make this very people sovereign only under its new conditions.[14]

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.[15]

In Canada, the extremely rigid mechanism in two of the five procedures for constitutional amendment—which Albert calls "constructive unamendability"[16]—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,"[17] seems to point out to a sort of unconstitutionality,[18] but it also may signal, as Albert puts it, "stronger democratic foundations"[19] based on a pluralistic disharmony that ultimately "protects the Constitution."[20]

Finally, in Mexico, the "Constitution's prohibition of a new constitution"[21] 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

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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." Emilios 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.[22] The expected "indefinite validity"[23] 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[24] 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."[25] 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,"[26] 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[27] in order to conclude that, depending on who the observer is, those constitutions could be deemed unconstitutional.[28] 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

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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."[29] Or, more directly, "the people possess an extraordinary power of absolution that can transform a formally unconstitutional constitution into a legitimate one anchored in democratic values."[30]

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?"[31] 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?[32]

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."[33] 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 mains 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."[34] 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."[35] 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"[36] are nothing other than expressions of this make-believe[37] 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"*[38]), the great lesson of Albert's paper lies in stirring up a distinct look into this subject: despite those fascinating circumstances and unconstitutionalities, what might really matter is whether those constitutions,

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.

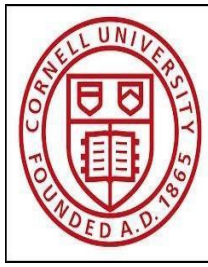
in one way or another, have served as an effective parchment for political commitment[39] and become a legitimate force towards their peoples. This is the reason why he ends his paper by suggesting that such a concept might be a relevant tool to fend off the "increasing attacks on liberal constitutionalism."[40]

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."[41] 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.

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.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The End of Binarism in Constitutional Thinking?

Francisca Pou Giménez†

The core of Albert's article is a suggestive invitation to think—freely and courageously. Remember the days, he says, when the idea of an "unconstitutional constitutional amendment" sounded like nonsense upon stilts. And contrast it with the current scenario, in which review and invalidation of amendments is an ordinary incidence of legal life in many countries, analyzed by an entirely new field of scholarly work. Would there be a similar path towards the normalization of the idea of "unconstitutional constitution"? Can we think of cases where this expression is meaningful? Are the two ideas the same kind of idea? Can we learn something about unconstitutional amendments by looking into the broader, heavier idea of an "unconstitutional constitution"? What can we learn, more generally, from musing around such an idea?

Albert contends his analysis explores different meanings of unconstitutionality, running along "at once competing and complementary axes of constitutional formality, constitutional values, constitutional democracy, and constitutional legitimacy."[1] Yet, though he certainly presupposes those different meanings in the analysis of the four constitutions—US, South Africa, Canada and Mexico—his piece does not deepen in conceptual decantation. He distinguishes, for instance, between intra-systemic and extra-systemic dimensions of unconstitutionality,[2] but he does not push hard the analytical carving out, to the benefit of the narrative fluidity he pursues to more effectively trigger reflection.[3]

I believe more conceptual work along those preliminary lines can be illuminating, and that Albert's description of the four cases provides, precisely, the basis to advance it. In my view, an exercise in reflective equilibrium between the concept of constitutionality (and unconstitutionality) and the four instances of use he presents delivers a scenario in which this notion is best viewed as a question of degree, of points along a continuum. This is hardly captured by a terminology that invokes a rigid binary opposition: constitutionality/unconstitutionality. And while one could think

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

2. *See id.* at 19697.

3. *Id.*

this opposition retains a strong grip on our legal imagination, I will suggest that we have actually abandoned binarism in constitutional thinking more deeply and definitely than we might wish to admit. If in some domains discarding binarism still seems hard to swallow, it is because of certain legal and political functions the Constitution fulfills. How to square proper attention to these functions with our unmistakably expanded conceptual usages is something that Albert's piece prompts us to work on.

I. Dimensions of Unconstitutionality

Since Walter Bryce Gallie wrote his hyper-cited article on "essentially contested concepts" we know there are instances where people deeply and permanently disagree not only about the reach or the implications of certain words, but about the very way the description of their meaning should be attempted, and about how the definitional properties of the concept behind them should be appraised.[4] "Constitution" and the corresponding adjectives—"constitutional" and "unconstitutional"—probably qualify as members of the category. But Albert's exploration of the four cases in which it is in some way meaningful to speak of an "unconstitutional constitution" rather suggests that our usage of the notion should not be pictured as a complete chaos, but as a basket filled with a limited assortment of different kinds of goods. We do not have a single understanding of constitutionality (and unconstitutionality), but neither an infinite number of them. People will not cease to discuss what conception of the constitution should be adopted for one or another purpose, but there are four or five understandings that have sort of "stuck" collectively: we, as a legal community, recognize and operate with them on an ordinary basis.

The first one equates "constitutionality" with *respect for the rules of recognition and change*. From this perspective—of unmistakable Kelsenian and Hartian overtones—the constitution contains the criteria which determine what counts as law (and what counts as the constitution) whenever certain steps are followed. The US Constitution and the Mexican 1917 Constitution can be said to be unconstitutional in this sense, because they did not fully respect the rules of change established by the preceding Constitution—if we sidestep for the sake of the analysis the scholarly debate that Albert recounts in his piece and assume the Articles of Confederation were one. The South African Constitution and the Canadian one, by contrast, did not break the rules of recognition and change—South Africa simply exemplifies a case where the rules of change crafted a two-step process that included judicial review bent on checking whether the principles set down in the founding, politically negotiated document had been respected by the Interim Constitution.

The second one equates "constitutionality" with *respect for certain*

4. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 165, 197–98 (1956). For an interesting analysis of Gallie's argument and its many repercussions in social science debates, *see* David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, *Essentially Contested Concepts: Debates and Applications,* 11 J. POL. IDEOLOGIES 211, 211–12 (2006).

substantive contents or institutional arrangements—for instance, fundamental rights and the division of powers. This conception is uninteresting for Albert because he explicitly contends that he focuses only on liberal democratic constitutions, and so the four constitutions are obviously constitutional under this understanding. But it is truly central in new areas of constitutional analysis, and therefore very relevant for the point about conceptual usage I am trying to make. In the dynamic domain of "global constitutionalism," for instance, the constitutionality element in the transnational sphere is tracked down through resort to certain basic principles of justification. The "constitutional frame of reference," according to the editors of the leading journal in the field, typically includes what Kumm calls "the trinitarian mantra of constitutional faith": human rights, democracy, and the rule of law.[5] There are weaker versions of the substantive component, of course—for instance, those that associate constitutionality to the presence of certain structures and parameters, even if they do not match those definitional of democracy and the rule of law).

The third one equates "constitutionality" with the idea of *prospective collective self-rule*. The Constitution must be a framework providing for continued, evolving collective political agency. Present generations must feel the Constitution makes space for them to rule themselves according to their wishes and circumstances, often different from those in the past. This is the sense in which the Canadian constitution seems, as Albert remarks, problematic. A Constitution that explicitly forbids change, or sets an institutional frame that, in interaction with the political and social system, effectively petrifies a text, could not be really said to be a Constitution.

Finally, the fourth matches "constitutionality" with the idea of *popular authorship,* understood in the strongest sense: basic norms that are the product of the *demos*, the will of the People. This is the reason why the Constitutions of the US, Canada and South Africa are said to be "constitutions" after all, and this is the reason why the constitution of the rebels imagined by Article 136 of the Mexican Constitution would not be recognized as such. The extraordinary weight of this element in contemporary constitutional thought is duly underlined throughout Albert's article.

The four properties target different temporal moments—some sources of unconstitutionality arise when the constitution is born, others only when it is operating—and exhibit two prominent features: they are conceptually distinct from one another, and they present themselves in real cases in different manners and degrees. The concepts of constitutionality/unconstitutionality experience both "combinatory vagueness" and "reference vagueness." The notion of combinatory vagueness, embedded in the tradition of "family resemblances" and "cluster concepts," obtains in cases where concepts are

5. Mathias Kumm, *An Integrative Theory of Global Public Law: Cosmopolitan, Pluralist, Public Reason Oriented* (2011) https://www.researchgate.net/publication/265437302_AN_INTEGRATIVE_THEORY_OF_GLOBAL_PUBLIC_LAW_COSMOPOLITAN_PLURALIST_PUBLIC_REASON_ORIENTED; Mathias Kumm, Anthony F. Lang, James Tully & Antje Wiener, *How large is the world of global constitutionalism?,* 3 GLOBAL CONSTITUTIONALISM 1, 1–8 (2014).

associated to a weighted set of criteria, no single one of them being either necessary or sufficient for its proper application.[6] The notion of reference vagueness draws attention to the fact the properties associated to the concept are present in different measures or degrees in reality; disagreements may therefore arise not about what the property means, but about whether a situation of the world can be considered an instantiation of the property. As Moreso contends in an article that inspires next section's title, far more concepts are subject to incommensurate multidimensionality and reference vagueness than we might think.[7]

II. Constitutionalize Me a Little: Non-Binary Conceptual Backdrops

The combinatory feature both confirms and qualifies Albert's contentions. It is true that in the four cases it is meaningful to speak of a "constitutional constitution" because of its democratic foundations. But under prevailing usages, I contend, we would be prepared to do the same as soon as a sufficient number of dimensions obtain. The constitution of the US does not respect the rules of change, but derives from an extraordinary exercise of popular engagement and its contents match the constitutional trinity—more than enough. The South African Interim Constitution infringed certain substantive principles set down in the political negotiations advanced in the name of the people, but endured the Court's review and the corresponding modifications. The 1996 text is therefore constitutional because of its origins, because of its contents, and because it ultimately respected the rules of change—more than enough. The Canadian Constitution frustrates prospective collective self-rule, but preserves the political power of the founding nations (the pluralistic Canadian "people"), its contents are kosher, and it did not came into being by breaking the rules—more than enough. In short: as soon there are enough goodies in the basket, no matter which exact goodies they are, constitutionality obtains. The overall conceptual performance is one in whose context it is meaningful to speak of *strong* or *weak constitutionality*, and of different *qualities* of constitutionality, more generally.

Non-binarism is sort of reinforced by the second feature: the vagueness of the concept's reference. Consider respect for the pre-established rules of change in the US or the Mexican cases. While the Querétaro Convention gathered to amend the 1857 constitution, the process did not follow the

6. FREDERICK SCHAUER, THE FORCE OF LAW, 38–39 (2015); *see also* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (2009) (discussing family resemblances); MAX BLACK, PROBLEMS OF ANALYSIS: PHILOSOPHICAL ESSAYS (1954); and JOHN SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969) (discussing cluster concepts).

7. José Juan Moreso, *Marry Me a Little. How Much Precision is Enough in Law?,* DROIT ET PHILOSOPHIE, https://www.academia.edu/23375579/Marry_me_a_little._How_much_Precision_is_enough_in_Law. See the original distinction between degree (or soritical) vagueness and combinatory vagueness in William Alston, *Vagueness*, THE ENCYCLOPAEDIA OF PHILOSOPHY (1967).

established amendment rules and delivered a qualitatively different product.[8] The US story, on its part, is spelled out in detail by Albert. Cases of procedural perfection or utterly new beginnings are rare. What we found most often are intermediate, gray-zone cases, where the constitution is a product of a formalized process disciplined by law, though not exactly the one pre-designed by the rules of change.

Consider Colombia. Under the 1886 Constitution, constitutional changes could only come from a special law, adopted after several turns by consecutive legislatures; but students successfully distributed a slip asking for a constitutional assembly, which many people included in the next ballot. The president then agreed to include an official slip in the presidential election and, after the option gained majority support, he set the constitutional process in motion in an emergency decree. And the Supreme Court, on review, declared the decree valid —except for the limits it tried to impose to the constitution-making body.[9] Or consider the 1853 Constitution of Argentina, which set in the original version of its Article 30 a ten-year amendment moratorium. Yet the text was reformed in 1860, and most people now speak of "the 1853/60 Constitution," while debate remains on the extent to which the rules of change were violated —without such a debate putting in question, in any case, the undisputable constitutional character of the resulting document.[10]

The same occurs with the degree of popular authorship, the degree of dynamic collective self-rule, the degree of procedural correction, and the degree of respect for substantive principles and institutions. There will be central cases of constitutionality and unconstitutionality and many peripheral ones where we will not be certain as to whether and to what extent the conditions for the concept to apply obtain. Note, however, that if reference vagueness were the only problem, there would be no reason to abandon binarism. Reference vagueness is extremely common, and it may perfectly accompany concepts whose defining properties we can identify crystal clear. If there were only reference vagueness under way, we would not feel we the need for an intermediate concept. We do feel this need here because of the combinatory element, and also —and importantly— because each of the properties that combines or alternates ("prospective self-rule," "rule of law") is often hard to grasp or profoundly contested.

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8. IGNACIO MARVÁN, CÓMO HICIERON LA CONSTITUCIÓN DE 1917 60–67 (2017).

9. I follow here Juan F. González Bertomeu's account of the Colombian events. *See* Juan F. González Bertomeu, *Relying on the Vibe of the Thing: The Colombian Constitutional Court's Doctrine on the Substitution of the Constitution*, 2–3 (working paper on file with author).

10. The 1860 constitutional reform was done when the province of Buenos Aires, which had remained outside the 1853 constitutional pact, finally joined the rest of the country. Some authors contend that 1860 represents a breaking of the rules set in 1853, while others argue that the 1853 constitutional process was not actually completed until 1860 (for this reason, they call the Constitution "the 1853/60 Constitution"). For references of views on each side of the debate, see Juan F. González Bertomeu, *The Constitution of Argentina* in CONRADO HÜBNER MENDES AND ROBERTO GARGARELLA, THE OXFORD HANDBOOK OF LATIN AMERICAN CONSTITUTIONAL LAW (forthcoming, 2018). The ten-year moratorium provision was eliminated from Article 30 in 1860.

III. Is Gradualness in Constitutional Thinking a Problem?

Constitutionality and unconstitutionality no longer evoke, in sum, a binary scenario. Albert's exploration of the different ways in which speaking of an unconstitutional constitution is meaningful suggests the time might have come to imagine the notion as continuum. The process strikes me as analogous to the one other important notions have undergone. Briefly reviewing these other processes may help better visualize what is going on here.

Take democracy and its associated adjectives—also classic *personages* in talk about essentially contested concepts. While the debate among different conceptions of democracy will never fade away, and scholars will continue to stipulate their preferred definitions, there is a multidimensional image of the concept that has definitely stuck up in the collective and prompts conversation about levels and degrees. Consider "democratic decay" as an emerging field in constitutional theory and politics,[11] or the prominence of "quality of democracy" studies in political science. For Diamond and Morlino, for instance, there are eight dimensions to democratic quality: five procedural (rule of law, political participation, electoral competition, and vertical, and horizontal accountability), two substantive (respect for civil and political freedoms, and the progressive implementation of greater political equality), and one (responsiveness) that focuses on results.[12] As these authors remark, "[t]he multidimensional nature of our framework . . . . implies a pluralist notion of democratic quality . . . . [T]here are not only dense linkages but also trade-offs and tensions among the various dimensions of democratic quality, and democracies will differ in the normative weights they place on these various dimensions . . . . There is no objective way of deriving a single framework of democratic quality, right and true for all societies."[13]

Or take, well, the notion of "unconstitutional constitutional amendment." The booming of scholarly work in the area has increased our sensitivity for the shadows of grey. Although we recognize as *prima facie* sound the distinction between procedural and substantive flaws in amendment-making, for instance, we know that the decision as to how deep we will scan procedural correction is, inescapably, a substantive one, and we face hypothesis hard to classify. What does it mean, to take something as "discussed and approved by a legislature"? What sort of procedural

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11. *See* Tom Gerald Daly, Time to View Democratic Decay as a Unified Research Field?, INT'L J. CONST. L. BLOG (Sept. 30, 2016) http://www.iconnectblog.com/2016/09/time-to-view-democratic-decay-as-a-unified-research-field/ [https://perma.cc/C2XW-HZPW]; Tom Gerald Daly, Democratic Decay in 'Keystone' Democracies: The Real Threat to Global Constitutionalism? INT'L J. CONST. L. BLOG, (May 10, 2017) [https://perma.cc/CW8L-XZ47]; and Tom Gerald Daly, *Public Law and the Puzzle of Democratic Decay in Brazil*, Panel on Law and Policy in Latin America (Jun. 20–23, 2017) [https://perma.cc/7YWF-HYXN].

12. Larry Diamond & Leonardo Morlino, *The Quality of Democracy: An Overview*, J. DEMOCRACY 15 (5), Oct. 2014, 22. *See also* GUILLERMO O'DONNELL, JORGE VARGAS CULLELL & OSWALDO M. IAZZETTA (eds.), THE QUALITY OF DEMOCRACY: THEORY AND APPLICATIONS (2004); DANIEL BRINKS, MARCELO LEIRAS & SCOTT MAINWARING (eds.) REFLECTIONS ON UNEVEN DEMOCRACIES: THE LEGACY OF GUILLERMO O'DONNELL (2014).

13. *See* Diamond & Morlino, *supra* note 12.

infirmities should amount to a procedural infraction? Is the famous "substitution" doctrine of the Colombian Constitutional Court procedural or substantive? In the context of this doctrine, procedural regularity includes both respect for the rules of competence and for the rules of procedure —not only the latter— and inquiry into competence leads to inquiry into which authorities have jurisdiction to "amend" the Constitution and which ones to "substitute" it, something the Court operationalizes through a "substitution test" whose substantive components are unmistakable. Against a background marked by the binarism that opposes formal and substantive flaws, the substitution doctrine makes a *tertium genus* suddenly imaginable. Amendment irregularities can be now imagined as organized along a first continuum that calibers the relative seriousness of the irregularity, in combination with a second one marking the transit from procedure to substance. Consider, finally, the concept of constitutional "dismemberment," as different from both "amendment" and "new constitution," coined precisely by Richard Albert in view of the shortcomings of trying to describe contemporary realities with the traditional terminology, which therefore emerges as a truly paradigmatic third, in-between concept.[14]

In my view, burying binarism and embracing the idea that constitutions may be strongly or weakly constitutional is promising. It may help, for instance, sharpen our sensitivity for things that are already salient in contemporary constitutional practice, and trigger new strands of analysis around them. Take for instance what David Landau calls instances of "abusive constitutionalism," defined as situations where democratically elected actors use legitimate constitutional tools—notably amendment and replacement of constitutions— to erode democracy.[15] Or think about the sort of phenomena behind recent warnings against "de-constitutionalization" in Turkey.[16] Or think of poor Mexican constitution, which in Article 136 identifies the enemies of the past—attacks by rebels, by extra-systemic agents—but fails to protect itself from intra-systemic attacks like the one implied in a pattern of hyper-reformism—700 amendments and counting—which seriously compromises the legal and political functions of the Constitution.[17] An additional advantage of conquering the middle terrain is that we gain tools not to give the constitutional "pass" so easily: "constitutional" is an adjective with high positive emotive charge and a badge

14. Richard Albert, *Constitutional Amendment and Dismemberment*, 42 YALE J. INT'L L. 4 (forthcoming 2018, available at papers.ssrn.com). For Albert, an "amendment" is "an adjustment made to better achieve the purpose of the existing constitution. An amendment continues the constitution-making project." A "dismemberment" by contrast "is incompatible with the existing framework of the Constitution because it seeks to achieve a conflicting purpose . . . . [It] alters the identity, the fundamental values or the architecture of the Constitution."

15. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013).

16. Ali Acar, *De-constitutionalism in Turkey?*, INT'L J. CONST. L. BLOG (May 19, 2016), http://www.iconnectblog.com/2016/05/deconstitutionalism-in-turkey/ [https://perma.cc/9JXV-HCHA].

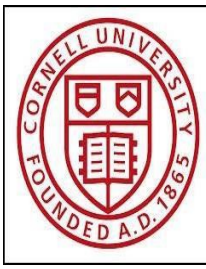
17. Francisca Pou Giménez & Andrea Pozas-Loyo, *The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition while Blocking Democratic Consolidation*.

of legitimacy, and it should be administered with care. Other advantages are those that naturally accompany our struggling with vague words: we deliberate and think! As has been remarked, "incommensurate multidimensionality" and operating with soft-boundary law is often valuable, since it triggers (and guides) practical deliberation, and helps us apply the law with flexibility and adaptability.[18]

For sure, binarism has played an absolutely crucial function in the legal system: identifying what is (valid) law and what is not. And this may be a source of difficulties. But contemporary debates on legal pluralism —in both its infra- and its supra-national manifestations—the increasing futility of efforts at signaling a single institution as holding the "final word" in adjudication, and the associated concepts of pluralist or "multilevel constitutionalism,[19] are all developments that erode binarism even at that level. At any rate, the dilemma for constitutional lawyers is probably the option between sticking to a uni-dimensional concept of constitutionality, associating it with respect for the rules of recognition and change, but foregoing participation in a number of wider discussions that are of profound relevance to contemporary constitutionalism, or rather entering these discussions at the prize of dealing with multidimensional complexity. The research agenda that Richard Albert's piece helps us catch sight of is, therefore, truly complex and far-reaching. It is, however, a complexity that must be addressed, not ignored.

18. *See* Moreso, *supra* note 7.

19. Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutionalism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM, 53–90 (2012); Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter American Court of Human Rights: A Rejoinder to Paolo Carozza and Pablo González Domínguez*, 15 INT'L J. CONST. L. 443–46 (2017).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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]

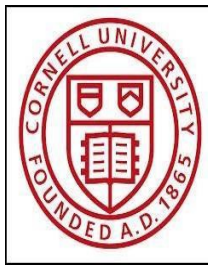
What at first sight might look as a highly democratic constitution-making process (as in the Constituent Assembly example mentioned above), could

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.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Comment on Constitutions and their Democratic Foundations—Richard Albert

Mariana Velasco Rivera†

Richard Albert's piece on *Four Unconstitutional Constitutions and their Democratic Foundations* makes us take the fascinating question of unconstitutional constitutional amendments to a whole new level. Is it possible for a constitution to be unconstitutional? And if so, could that constitution still be legitimate? Albert presents four case studies to develop four conceptions of unconstitutionality: the second founding of the United States, the South African constitution-making process of the early 90's, the constructive unamendability of the Canadian constitution, and the inviolability of the Mexican constitution. Clearly saying his takeaway is not that these constitutions should be declared unconstitutional, Professor Albert invites us to think about what it might mean to describe a constitution as unconstitutional.[1] In this context, Albert raises different arguments to consider the unconstitutionality of each constitution to then offer reasons why despite their unconstitutionality the four constitutions trace their roots to democratic foundations and therefore are legitimate.

The unconstitutionality of these four constitutions derives from different circumstances. First, the U.S. Constitution of 1789 is unconstitutional from its origin in that the process that generated it was not in observance of the onerous amendment rule established in the Articles of Confederation, but it is still legitimate because the process of popular ratification let the American people express their consent and give the document a higher authority.[2] Second, the unconstitutionality of the South African constitution derives from the intervention of the Supreme Court in certifying the constitutionality of the new draft constitution in that said intervention is inconsistent with the idea of the people as sovereign and its right to self-determination. Nevertheless, the

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1. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 171 (2016).

2. *Id.* at 17576.

constitution is legitimate in that the intervention of the Supreme Court was part of the political agreement for the transition to democracy and therefore can be understood as grounded in the democratic roots of popular sovereignty. In other words, although the court's intervention was unconstitutional, the Constitution is legitimate because while evaluating the constitutionality of the new constitution, the South African court was acting under the instruction and with the authorization of the political parties and ultimately of the people.[3] Third, the unconstitutionality of the Canadian constitution derives from its constructive unamendability, which is "not a legal fact but rather a political reality that prevents formal change"[4]; and, its legitimacy derives from that same political climate preventing constitutional amendments in the sense that it is protecting the constitution from changes that have not previously taken into account all Canada's voices.[5] Finally, the conception of unconstitutionality in the Mexican case is originated from the constitutional prohibition of a new constitution born of rebellion, established in article 136. According to this article, Albert argues, a new constitution would be unconstitutional but still could be legitimate if we interpret the provisions in light of the alternative reading he offers. In his view, although Article 136 denies the sovereign right of the people to revolution and self-determination, the prohibition of a new constitution born of rebellion should be understood as the recognition of the people's right to resist an illegitimate constitution and the urge to restore the legitimate order by all necessary means, including the use of arms.[6]

Although Professor Albert states his takeaway is not that these constitutions should be declared unconstitutional, his method of analysis and focus on the legitimacy of the different constitutions are revealing regarding the implications of describing a constitution as unconstitutional. Had any of these constitutions not been legitimate, would that mean they would have to be declared unconstitutional? As we know, the unconstitutionality of norms has significant implications in positive law. The concept of an unconstitutional but legitimate constitution could serve as grounds to declare the constitutionality of a constitution. But for this to work, it is crucial to have clarity on when we would face an unconstitutional constitution. In this commentary, I would like to focus on that question.

Based on the four examples offered by Professor Albert, the U.S. and South African cases would be clear cases in which a constitution is, in fact, unconstitutional albeit legitimate. The U.S. illustrates a case in which the unconstitutional violation of formal amendment rules is surmounted by the expression of popular consent. And, the South African case shows one in which the unconstitutional intervention of the Court in certifying the constitutionality of the Constitution is overcome by the fact that said intervention was ultimately authorized by the people. Yet, the unconstitutionality and legitimacy conceptions in the Canadian and Mexican

3. *Id.* at 17980.
4. *Id.* at 184.
5. *Id.* at 186.
6. *Id.* at 195.

cases are less clear.

Canada

As mentioned before, according to Professor Albert, the unconstitutionality of the Canadian constitution stems from its constructive unamendability—which is a functional rather than a formal unconstitutionality derived from the political climate that prevents amending the constitution. The question, in this context, is if the political climate can make the constitution unconstitutional.

Although I agree with the problems formal and constructive unamendability entail for democratic constitutionalism, I am not entirely persuaded about the qualification of the Canadian constitution as unconstitutional due to its constructive unamendability. Even though the effects of formal and constructive unamendability can be regarded as the same, its cause it is not. The former is the result of an explicit constitutional provision that forbids amendment while the latter is the product of a political environment that could change at any moment. Distinguishing between these forms of unamendability and its causes is crucial in determining whether a constitutional provision or a constitution itself can be regarded as unconstitutional. Whereas formal unamendability is clearly against principles of democratic constitutionalism, constructive unamendability is not. In fact, the Canadian constructive unamendability could be read in line with democratic principles.

The Canadian constitution does not prohibit constitutional amendments. Quite the contrary, it establishes various procedures to amend different categories of provisions "and each imposing a higher threshold for an amendment where the degree of entrenchment reflects the importance of the amendable matter".[7] That is, in broad terms, the aim of the Canadian constitutional amendment system is to make certain parts of the constitution harder to amend than others.[8] In this context, failed attempts to amend the parts of the constitution with heightened protection could also be understood as the successful functioning of the provisions that are supposed to protect precisely those parts of the constitution. Accordingly, constructive unamendability could very well be understood as the successful functioning of the Canadian constitutional amendment system, where those sections with heightened protection would only be possible to amend in extraordinary circumstances that have not yet been met. Therefore, one could argue, the Canadian Constitution is being protected not by circumstantial factors of the current political climate but by the effectiveness of the constitutional design chosen by the constitutional drafters.

Alternatively, one could argue the thresholds required to guarantee a heightened protection of the constitution are so high that it is virtually

7. *Id.* at 184.

8. For a general overview of the function of amendment rules see generally Donald Lutz, *Toward a Theory of Constitutional Amendment*, *in* RESPONDING TO IMPERFECTION—THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63–87 (Sanford Levinson ed., 1995*)*; *see also* Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, MCGILL L.J. 225 (2013).

impossible to meet them and therefore impossible to amend the constitution. But in this case, we would be arguing a defect on the design of the amendment rules, not a political reality that prevents formal change. In other words, in such a case we would be closer to formal unamendability rather than constructive unamendability. Additionally, note that in this case, we would only be arguing the unconstitutionality of a single provision and not the constitution as a whole.

In sum, none of these readings of the Canadian constructive unamendability would allow saying that the Canadian constitution is unconstitutional. Constructive unamendability could be understood as the success of the entrenchment rules. Even if we argue that the constitutional design of the amendment rules is unconstitutional, that would not make the whole constitution unconstitutional.

Mexico

Regarding the Mexican case, Professor Albert develops the fourth conception of an unconstitutional constitution based on Article 136 of the Mexican Constitution, which prohibits a new constitution born of rebellion as follows:

> This Constitution shall not lose force and effect, even if its observance is interrupted by a rebellion. In the event that a government, whose principles are contrary to those that are sanctioned herein, is established through any public disturbance, as soon as the people recover their liberty, its observance shall be reestablished, and those who have taken part in the government emanating from the rebellion, as well as those who have cooperated with such persons, shall be judged in accordance with this Constitution and the laws derived from it.[9]

In Professor Albert's view, this provision is problematic vis-à-vis a hypothetical new constitution because it creates a presumption against the latter. In short, the constitutional provision denies the right to revolution and self-determination. Still, in light of this provision, a new constitution would be unconstitutional but legitimate based on an alternative reading of Article 136. In Albert's words:

> [w]e should understand the Constitution's prohibition on a new constitution born of rebellion as the Constitution's recognition of the people's right of revolution. Where a rebellion takes control of the government and entrenches a new but illegitimate constitutional order, the Constitution urges the people to restore it by all necessary means, with recourse to arms if necessary.[10]

Unlike the other three cases, this case deals with a constitutional provision that is currently in force. It is neither a formal violation of the amendment rules of a constitution that has been replaced, nor the intervention of a court certifying the constitutionality of a constitution or the political state of affairs preventing the formal amendment of a constitution. The peculiar Mexican provision on the *inviolability of the constitution* poses at least two possibilities of unconstitutionality: the unconstitutionality of a potential new constitution; and, most importantly, the unconstitutionality of the provision

9. MEXICO CONST., tit. IX, art. 136 (1917).
10. *See* Albert, *supra* note 1, at 195.

establishing the prohibition of a new constitution. While the former possibility, in the end, is a matter of fact, the latter is a legal one. To develop the fourth concept of unconstitutionality, Professor Albert mainly focus on the unconstitutionality of a hypothetical new constitution and redeems its legitimacy by offering a reading of Article 136 that reconciles the text of the prohibition of a new constitution with the natural right to revolution.[11] However, in my view, Article 136 cannot be understood as the recognition of the right to revolution and self-determination.

Although we would agree in that a new constitution would be legitimate, it is not for the same reasons. I disagree in that the potential new constitution would be unconstitutional because, in my view, article 136 is unconstitutional. Should my reading be correct, the Mexican case would not fit in Albert's concept of an unconstitutional constitution because the unconstitutionality of Article 136 would neither make the Constitution of 1917 unconstitutional nor the potential new constitution born of rebellion.

The question here is if we can actually interpret Article 136 of the Mexican Constitution is at its core about the right of revolution and, most importantly, about the right to self-determination if the only legitimate outcome is the restoration of the threatened regime. Can we indeed talk about a revolution if the only legitimate aim is the preservation of the status quo? I think the answer is no. In fact, we have reasons to believe this article enshrines the exact opposite aim. This provision illustrates a way in which political actors were trying to preserve the power constellation of that moment in time and deter any form of resistance to the new regime.

As Professor Albert correctly asserts, "rebellion is . . . an historical problem that Mexican political actors sought to address in constitutional design in order to foster stable constitutionalism."[12] The prohibition of a new constitution born of rebellion established in Article 136 reflects Mexico's long-standing constitutional history of political instability due to continuous rebellions. In fact, it seems that Venustiano Carranza, one of the most powerful actors during the revolution, understood this well when deciding to frame the revolutionary movement as one to restore the constitution of 1857 and present the constitution project of 1917 as a set of amendments to the former.[13] Perhaps more importantly, the reason to maintain the prohibition of a new constitution in the constitution of 1917 was the everlasting tension between the different revolutionary factions, which was certainly not going to dissipate with the enactment of the constitution of 1917. For example, the establishment of the constitutional framework for the distribution of land property in Article 27 was a clear victory of the *Zapatista* faction vis-à-vis the interests of the *Carrancistas*;[14] yet, its implementation still remained to

11. *Id.*

12. *Id.* at 192.

13. *See* ULISES SCHMILL, EL SISTEMA DE LA CONSTITUCIÓN MEXICANA (1st ed. 1971).

14. For an in-depth analysis on the origin of this and other provisions of the constitutions of 1917 see Pastor Rouaix, *Génesis de los artículos 27 y 123 de la Constitución política de 1917*, Puebla, 1945; *Diario de los debates del congreso constituyente*, Imprenta de la Cámara de Diputados, 1917; and Emilio Kouri, La Promesa Agraria del Articulo 27, Revista Nexos (Feb. 1, 2017),

be seen. Naturally, social and political conflict was an ever-present threat. Therefore, it seems plausible to conclude the aim of article 136 was to deter any form of resistance against the regime. Enshrining the resistance to rebellion in Article 136 was preemptively delegitimizing any mobilization that could threaten the stability of the regime. Whether the provision was a mere parchment barrier or not would be a different question, but the point is that in such a context it is hard to imagine Article 136 was included to be read in light of the right of revolution and self-determination.

In short, in my view, rather than protecting the right to revolution, the intention of the constitutional drafters was to delegitimize and deter any potential resistance against the regime that was to be settled. In this context, the reading of Article 136 offered by Professor Albert is not plausible for two related reasons. First, because it is hard to sustain that the provision is about the right to revolution when the only legitimate aim is to preserve the status quo; and, second, because there are reasons to believe the intention of the drafters was to deter any form of popular resistance against the new regime.

Should my reading of Article 136 be correct, where would this leave us concerning the question of an unconstitutional constitution? The answer is twofold, one related to the constitution of 1917, and the other related to a potential new constitution out of rebellion.

First, we would necessarily have to conclude that article 136 is incompatible with the natural right to revolution and the right of self-determination established in Article 39 of the Mexican constitution.[15] This would not make the Mexican constitution unconstitutional, but only because of the explicit recognition of the right of self-determination in Article 39. Had this provision not been included in the constitutional text, one could argue the illegitimate and undemocratic character of the Mexican constitution of 1917 for the outright denial of the people's right to choose and change their form government and their right to resist. This denial would make the constitution not unamendable, but irreplaceable.

Second, given the incompatibility of article 136 with the right to revolution and self-determination, the constitutionality of a potential new constitution would not be affected by said provision. The constitutionality and legitimacy of a new constitution would not need to be justified in light of article 136 but rather in its own merits. And even if we wanted to insist in evaluating its constitutionality and legitimacy in light of the constitution of 1917, said evaluation should have to be done based on the right to self-determination recognized in article 39. In light of this Article, a new constitution could not be interpreted as anything else but the legitimate exercise of the constitutional right of the people to choose their form of government.

In conclusion, Professor Albert's analysis opens a fascinating conceptual

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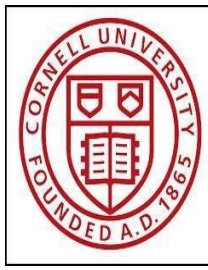
http://www.nexos.com.mx/?p=31269#ftnref4 [https://perma.cc/3Z2Z-ZALK].

15. Article 39 of the Mexican Constitution explicitly recognizes the right to self-determination as follows: "The national sovereignty is vested, originally and essentially, in the people. Public power comes from the people and it is institutionalized for the people's benefit. People, at all times, have the inalienable right to change or modify its form of government." *See* MEXICO CONST., tit. II, art. 39 (1917).

window on the unconstitutionality and legitimacy of constitutions. However, although I agree with this theoretical possibility, I think not all the cases presented in this piece illustrate it well. Specifically, I consider the Canadian and Mexican cases do not quite fit in the conceptual possibility of an unconstitutional constitution. On the one hand, the constructive unamendability of the Canadian constitution makes reference to a particular state of affairs that could change at any given moment. This, in my view, could be understood as the effectiveness of the institutional design chosen by the constitutional drafters rather than an unconstitutional state of affairs that can be extended to making the constitution unconstitutional. On the other hand, in the Mexican case, focused on arguing the legitimacy of a new constitution despite the explicit prohibition established in article 136, Professor Albert offers an alternative reading of the provision that saves its constitutionality. This, in my view, overlooks the possible unconstitutionality of Article 136, which would imply that a potential new constitution could not be unconstitutional.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The Origins and Implications of Canada's "Constructive Unamendabilty": A Comment on Richard Albert's *Four Unconstitutional Constitutions and Their Democratic Foundations*

Dennis Baker†

In his provocative article, Albert asks what might be the ultimate question of constitutional existentialism: can a constitution itself be unconstitutional? To do so, he builds on the literature discussing instances where a constitutional amendment is ruled unconstitutional—Gary Jeffrey Jacobsohn's extended discussion in *Constitutional Identity*[1] is the best account of that phenomena that I have come across—but Albert takes it further by exploring examples where an entire constitution might not be constitutional, in the sense that it did not conform to the existing legal framework. Albert's examples are compelling: America's "second founding" did not follow the procedures laid out for amendment by the Articles of Confederation; the South African Constitutional Court's 1996 decision that the new draft constitution was unconstitutional; and the fascinating provision in the Mexican Constitution that shields it from any new legal order that may arise from the "interruption" of a rebellion. Albert's analysis reminds us that constitutional enactments are not "big bangs" of creation but that what went before can be just as important as what emerges.

In this respect, I am puzzled by Albert's limited use of the Canadian experience, since the *Constitution Act, 1982* is a potentially "unconstitutional constitution" that itself might have been added to his case studies. Instead Albert uses—here and elsewhere[2]—Canada as the paradigmatic example of constructive amendability, which he describes as a condition where "the present political climate makes it practically unimaginable for constitutional actors to assemble the required supermajorities to pass a constitutional amendment." There is much to Albert's conceptualization and, as I will

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1. GARY J. JACOBSOHN, CONSTITUTIONAL IDENTITY (Harvard University Press, 2010).

2. Richard Albert, *Constructive Unamendability in Canada and the United States*, 67 SUP. CT. L. REV. 181 (2014).

discuss in Part II below, it is an accurate assessment of Canada's current constitutional stasis. A related question, and one that could further his discussion of political legitimacy and legal continuity, goes unasked: how did Canada arrive at this condition?[3] For the most part, Albert presents the Canadian case in a rather static, ahistorical manner, choosing instead to begin with the status quo emerging from the events of 1982. This is unfortunate because, as I describe in Part I below, the constitutional politics of 1981–82 show the relationship between political legitimacy and legal continuity under considerable stress.

I. How did Canada Get There? The Questionable Jurisprudence of the *Patriation* Sequence

The Supreme Court of Canada's 1981 decision in *Re: Resolution to amend the Constitution*[4] broke a half-century deadlock in Canadian constitutional negotiations. Since as early as 1931, Britain had been willing to "patriate" the Canadian Constitution by giving formal legal authority to domestic actors. This would reflect the informal understanding, already in place, that formal amendment of the Canadian constitution by the British Parliament would only be on the request of Canadians. For the remaining bit of formal authority to be transferred, however, Canadians would first have to agree to an amending formula for future changes. Such an agreement proved elusive, as negotiations between the Federal Government and the provinces failed repeatedly from 1931 to 1981. Prime Minister Pierre Trudeau, frustrated by his own "near-miss" failure to negotiate an agreement in 1971 and having promised a "renewed federalism" in the 1980 referendum on Quebec sovereignty, proposed that the Federal Government would simply make the request to Britain on its own. Several provinces objected and set in motion reference cases that ultimately arrived at the Supreme Court. As Peter Russell noted in the aftermath of the decision, it was one of those rare occasions "when the main stream of national political life flowed so relentlessly up to a Supreme Court decision," but wryly suggests that "[p]erhaps the *Dred Scott* case is a parallel."[5]

With the benefit of more recent comparators, the *Patriation Reference* looks more like Canada's *Bush v. Gore*: a results-oriented decision based on indefensible reasoning. Russell was slightly more charitable when he described the decision as "bold statescraft, questionable jurisprudence." The statescraft, as Rainer Knopff describes, can be attributed to a judicial preference for a constitutional process somewhere between the short-circuit

3. Albert takes a more historical approach in *The Conventions of Constitutional Amendment in Canada*, but this is in the context of arguing whether a referendum is now conventionally required for amendment. *See* Richard Albert, *The Conventions of Constitutional Amendment in Canada*, 53 OSGOODE HALL L.J. 399 (2016). My view is that the unconstitutionality questions here could also benefit from such treatment.

4. Reference re Resolution to Amend the Constitution (Patriation Reference) [1981] 1 S.C.R. 753.

5. Peter Russell, *Bold Statescraft, Questionable Jurisprudence in* AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 210 (Methuen Publications, 1983).

unilateralism favored by the Federal Government and the (apparently) unachievable unanimity favored by some of the provinces.[6] While the Court ruled that the Federal Government could act alone as a matter of law, it also identified a constitutional convention[7] that required the provinces to agree to the request. Seizing upon a formulation advanced only in Saskatchewan's factum, the threshold for agreement was to be a "substantial degree of provincial consent." The clear objective was to bring the players back to the table to find a political settlement. In the subsequent negotiations, the "bold statescraft" led to a breakthrough and Canada's Constitution finally came under home rule in April of 1982.

Unfortunately, the deal was reached without the agreement of the Québec Government, an absence that opened a constitutional wound that remains unhealed. In response to being left out of the final agreement, the Québec Government decreed that "it has always been recognized that no change of this kind could be made without the consent of Québec."[8] To advance their claim, Québec launched a new reference case—commonly called the *Québec Veto Reference*[9]—asking of the *Constitution Act, 1982* the very same question Albert poses: is this an "unconstitutional constitution"?

As a matter of doctrine—if we were to take the earlier *Patriation Reference* seriously—Québec's case is very strong. The evidence in both cases before the Court of pre-1982 constitutional change consisted of five "positive precedents" of successful constitutional amendments agreed to by all provinces.[10] While these precedents point toward a *unanimity* rule, there was also evidence that the Federal Government saw unanimity for some of these amendments as desirable but not necessary. More telling, in this respect, were the "negative precedents" of unsuccessful constitutional amendments and constitutional conferences in 1951, 1960, 1964 and 1971, each of which failed because of the objections of one or more provinces.[11] In two instances, the historical record was perfectly clear that all political actors were operating under the assumption that a constitutional amendment could not move forward without the agreement of Québec: the successful 1964 amendment had the support of the other nine provinces as early as 1962, but Québec stood alone in delaying it until it "finally gave its consent" in 1964; in 1971, Prime Minister Pierre Trudeau thought he had achieved the agreement of all the provinces, but Québec Premier Bourassa withdrew Québec's consent a few weeks later, resulting in the abandonment of the

6. Rainer Knopff, *U2: Unanimity versus Unilateralism in Canada's Politics of Constitutional Amendment* in CONSTITUTIONAL AMENDMENT IN CANADA (Emmett Macfarlane, ed., Univ. Toronto Press, 2016).

7. The Court's decision to provide guidance on the content of a constitutional convention itself is controversial, given that conventions are expressly not legal. For more on the *Patriation Reference* see Carissima Mathen, *"The question calls for an answer, and I propose to answer it": The Patriation Reference as Constitutional Method*, 54 SUP. CT. L. REV. 143 (2011).

8. Decree No. 3214-81.

9. *Re: Objection to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793 [hereinafter *Québec Veto Reference*].

10. *Québec Veto Reference*, 803.

11. *Id.*

Victoria Charter. As Donald Smiley notes, "[a]fter the Québec Government had given notice of its dissent from those changes, there was no serious discussion to the effect that the Charter should [go forward]" and, moreover, "major political actors showed at least a tacit acceptance of the principle that Quebec's assent to amendments altering federal-provincial powers was by convention required."[12] As Smiley argues, "[o]ne is not required to accept a thorough-going two-nations view of Canada to believe that *some* considerable constitutional recognition of cultural duality is essential to the continuing stability, if not the existence of Confederation."[13] Peter Russell agrees and notes that "a stronger case would be based on the contention that the requirement of substantial provincial consent has not only a quantitative dimension but also a qualitative, dualistic dimension which requires the consent of the province in which most of Canada's French-speaking citizens reside."[14]

The Supreme Court chose the weaker case. A unanimous bench held that Quebec possessed no veto over constitutional change because there was an insufficient record of statements made by federal authorities "recognizing either explicitly or by necessary implication that Quebec had a constitutional power of veto"[15] (despite, the Court concedes, "an abundance of material, speeches made in the course of Parliamentary debates, reports of royal commissions, opinions of historians, political scientists, constitutional experts which endorse in one way or another the principle of duality . . . and there can be no doubt that many Canadian statesmen, politicians and experts favored this principle"[16]). Leaving aside the clear precedent of 1971 that establishes the "necessary implication" the Court sought, this high standard for recognizing the agreement of the actors would mean that the "substantial agreement" formulation in the earlier case would also fail as a convention. As a novel articulation found only in one party's factum in that case, the Court's own formulation in the *Patriation Reference* has even *less* of a pedigree than the case for a Québec Veto. It is hard to avoid the conclusion that the Court's opinion was torqued to arrive at a specific result: to avoid invalidating the freshly enacted *Constitution Act, 1982*. Once the Queen had arrived at the signing ceremony in April 1982, it would have been politically difficult for English Canada to accept a judicial unpatriation. One can also see, however, how unsatisfying—infuriating!—for Quebeckers to see its strong legal case, with its clear precedents and better logic, to be defeated by events.

Canada's *Patriation* saga informs Albert's argument in several important aspects. First, it illustrates that the question of political legitimacy is seldom binary and uniform: the *Constitution Act, 1982* was politically legitimate in most of the country, but its status in Quebec is controversial at

12. Donald Smiley, *A Dangerous Deed: The Constitution Act*, 1982, in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 77 (1983).

13. *Id.*

14. Peter Russell, *Bold Statescraft, Questionable Jurisprudence* in AND NO ONE CHEERED: FEDERALISM, DEMOCRACY & THE CONSTITUTION ACT 225–26 (1983).

15. *Québec Veto Reference*, 814.

16. *Id.*

best. (In addition, as largely an act of executive federalism—requiring simply the consent of the First Ministers—its democratic credentials might also be questioned.) Second, we see in this sequence how legal continuity and political legitimacy might influence each other. There is unquestionably legal continuity here—the Supreme Court made its decisions and they are legally binding on Québec, who are no less affected by the *Constitution Act, 1982* than any other province—but it is legal continuity of the shallowest variety and only possible because the jurisprudence was deformed to accommodate political reality. Combining these two points—the complexity of political legitimacy and its interrelation with legal continuity—yields a third: the relationship between political legitimacy and legal continuity is dynamic and it can be aggravated and mended over time, even if it is not completely severed. Albert notes that, with respect to the "unconstitutionality" of the US Constitution, "the new constitution shed all taint of illegitimacy when the people later ratified it in extraordinary constitutional conventions."[17] By contrast, Canada failed twice to remedy its constitutionally questionable exclusion of Quebec (with the Meech Lake and Charlottetown Accords), but, as François Cardinal, editor of *La Presse* notes, "the absence of Quebec's signature on the 1982 constitution [is] a major embarrassment that we don't even try to fix any more."[18] For some, the legal continuity, stretched over a long enough period of time (35 years in this case) may cure the defect; others will, of course, disagree.

Finally, the *Patriation* sequence contextualizes Canada's constructive unamendability. In truth, with respect to the parts of the constitution affecting all provinces, the Canadian constitution has been constructively unamendable since 1964. The only exception was the opening in 1982 (and a subsequent minor procedural amendment in 1983), made possible by this most questionable jurisprudence. When Albert praises the "democratic foundations" of constructive unamendability, where "the difficulty of political agreement" is "what protects the Constitution" and suggests that "[b]argain-transforming changes are instead possible only with the approval and legitimation of a particular configuration of political consensus that cuts across the many nations that constitute Canada,"[19] he is implicitly challenging the democratic credentials of the *Constitution Act, 1982*. Perhaps, then, he might have explicitly answered the question of whether it might be also considered an "unconstitutional constitution."

II. Constructive Unamendability in Post-1982 Canada

As Albert recognizes, "constructive unamendability" in Canada is very different from the *intentional* unamendability found in the French, Brazilian

17. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 197 (2017).

18. François Cardinal, *Dear Canada, we need to talk. Sincerely, Québec*, GLOBE & MAIL (June 15, 2017), https://beta.theglobeandmail.com/opinion/dear-canada-we-need-to-talk-sincerely-quebec/article35308545/?ref=http://www.theglobeandmail.com& [https://perma.cc/HE8X-VWUS].

19. Albert, *supra* note 17, at 188.

and German Constitutions. The Canadian variant, as Albert notes, is not by conscious design, but rather a fallout from the mega-constitutional events of the 1980s and early 1990s. With the "near death" result in the 1995 referendum on Quebec secession, Canadians welcomed a "pause" in the constitutional wrangling. While there have been minor constitutional amendments (in cases which effect only one province), this constitutional fatigue has apparently ossified for some into a refusal to ever return to negotiations. Albert's claim of constructive unamendability has been confirmed by recent events in Canada, particularly Québec's recent attempt to reengage the constitutional question. Pierre Couillard's provincial government produced a 177-page document on "Our Way of Being Canadian," which announced a new "policy on Québec Affirmation and Canadian Relations"[20] While clearly intended to be an opening for a renewed constitutional conversation, the invitation was quickly rebuffed by the Prime Minister (in a "curt and scornful manner," according to one commentator[21]) and even Couillard's Minister for Canadian Relations retreated by saying "We never asked for [opening the constitutional table]"[22] (but, in the document's forward, Minister Fournier announced its goal as "breaking down the taboo surrounding discussions about our future relations with Canada. . . including its constitutional aspects"). Given the negative reaction to even the prospect of discussing constitutional change, it is safe to say that Albert's assessment of Canadian constitutional stasis holds true.

An earlier incident was perhaps even more revealing. When the Commonwealth nations agreed to eliminate the gender bias in the succession of the Crown (in the face of the possibility that Prince William's first-born heir might have been female), some member nations did so by constitutional amendment or multi-level agreement. In Canada, the situation was more difficult since even this innocuous change—there were no Canadian defenders of male primogeniture!—could be the thin wedge to open a larger conversation about the constitutional role of the monarch or, more worryingly for the Federal Government, a beginning of the horse-trading negotiations that characterized Meech Lake and Charlottetown. On the other hand, the desired change would best be enacted with the unanimous agreement of the provinces (s.41 requires unanimity to change "The Office of the Queen").[23] This legally-necessary but politically-impossible change put the Government in a bind and demonstrated the unworkability of the post-1982 Canadian Constitution. If even uncontroversial, technical "housekeeping" amendments of this sort are avoided, then formal amendment of any sort is unlikely.

20. GOVERNMENT OF QUÉBEC, *Quebecers: Our Way of Being Canadian: Policy on Québec Affirmation and Canadian Relations* (June 2017), https://www.saic.gouv.qc.ca/documents/relations-canadiennes/politique-affirmation-en.pdf.

21. Cardinal, *supra* note 18.

22. Paul Wells, *What Québec wants: To be a little closer to Canada*, MACLEANS (June 7, 2017), http://www.macleans.ca/politics/ottawa/what-quebec-wants-to-be-a-little-closer-to-canada/ [https://perma.cc/8K9X-2RJT].

23. Philippe Lagassé & Patrick Baud, *The Crown and Constitutional Amendment after the Senate Reform and Supreme Court References* in CONSTITUTIONAL AMENDMENT IN CANADA, (Emmett Macfarlane, ed., 2016).

Before Prince George arrived and made the issue moot, the Canadian Government responded with ordinary legislation (*The Succession to the Throne Act*[24]) that purported to effect the necessary change without amending the constitution. The constitutionality of that statute remains controversial despite a recent Quebec judgment affirming it.[25]

The *Succession to the Throne Act* suggests a potential way out of the "constructive unamemdability" trap. Mark D. Jarvis and I have identified several "informal" means of constitutional change in our chapter in Emmett Macfarlane's *Constitutional Amendment in Canada* (2016).[26] Albert argues against such informal measures and finds them inferior to formal amendment in the sense that the latter "telegraphs when and how constitutional change occurs, and it generates agreed-upon textual alterations to which the people and political actors can point as a referent for debate and action."[27] whereas informal amendment "can happen without public notice that it is occurring at all, or indeed that it has occurred in the past, thereby undermining the connection between the people and their constitution in its codified and also uncodified forms."[28] While these deficiencies might apply to more subtle forms of informal change, I find them unconvincing when applied to statutory enactments that complement constitutional provisions. Surely the open legislative process and concrete specificity of a written statute answers some of Albert's concerns about public awareness.

A larger problem with the usage of ordinary statutes to modify the constitution is obvious: such "workarounds" can amount to "formula-shopping" where the lower threshold of a statutory enactment (a majority in the legislature) could deter a Government from ever seeking formal amendment.[29] In what sense would a constitution be permanent—or a "higher law"—if it could be altered by mere statutory enactment? For this reason, statutes in direct conflict with the constitutional text are rightly unconstitutional. If we approach this only in the strictest sense, there is still some considerable latitude for amendments-by-statute. While it is true that a statutory amendment that said "not x" when the constitution says "x" would be out-of-bounds, what about a statutory amendment that says "y", perhaps complementing or contextualizing the constitutionally entrenched "x"? A Canadian example of such legislation is the *Regional Veto Act*.[30]

Enacted in 1996 by the Chrétien Government, the *Regional Veto Act* was an attempt to reestablish Quebec's veto over constitutional change while

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24. *Succession to the Throne Act, 2013* (S.C. 2013, c.6).

25. *Motard & Tallon v. Canada (Attorney General)* (Quebec Superior Court, Bochard J., 2016).

26. Dennis Baker & Mark D. Jarvis, *The End of Informal Constitutional Change in Canada?* in CONSTITUTIONAL AMENDMENT IN CANADA, (Emmett Macfarlane, ed., 2016); We also suggest that some of the Supreme Court's most recent jurisprudence (in *Reference re: Supreme Court Act* and *Senate Reference*) may signal a rejection of such informal amendments.

27. Albert, *supra* note 17 at 187.

28. *Id*.

29. *See also*, Robert E. Hawkins, *Constitutional Workarounds*, 89 CANADIAN BAR REV. 513 (2010).

30. *An Act respecting Constitutional Amendments*, S.C. 1996, c.1.

making it more palatable to the rest of Canada by broadening it to include other regions. The *Act* specified that the Federal Government would not introduce a resolution to authorize a constitutional amendment without the consent of all five regions of Canada, with those regions being defined as Quebec, Ontario, B.C., two or more of the Atlantic provinces with 50% of that population, and two or more of the Prairie provinces with 50% of that population. In effect, the Federal Government would "loan" its veto to the regions, ensuring that future constitutional amendments would proceed not just with the "seven provinces representing 50% of the population" formulation found in s.38 of the 1982 *Act* but with something approaching near unanimity. It is a better version of the Court's "substantial consent of the provinces": smaller provinces would not be able to exert undue influence over negotiations, but a constitutional amendment unpopular in any of the five regions would be impossible.

Much of the commentary surrounding the *Regional Veto Act* argues that the enactment is unconstitutional because it attempts to supplant the textual provision for amendments in s. 38 of the *Constitution Act, 1982*.[31] I am not so sure. The *Act* leaves the formal provision clearly in place (note that the Government is only legally binding itself—and future Governments— to not *introducing* an amendment and its *enactment* would still meet the lower threshold required by s.38). Moreover, the *Act* simply codifies what has become political reality and provides explicit guidance for what would otherwise be a completely discretionary decision.[32] Even without the law, there is nothing to prevent a federal government from reserving their consent until there was unanimous agreement. Indeed, they might reserve their agreement for *any* reason and it could be made contingent on all sorts of mechanisms—a public opinion poll, the personal whim of the prime minister, or even a coin flip. Unlike a statutory enactment, these measures could be unpredictable, kept secret and might occur without public debate (in other words, the criticisms Albert holds against informal change generally). Conversely, legislation "telegraphs" to the public and political elites the actual framework for negotiations. As a statute, of course, it is subject to repeal whenever the Government chooses to do so, so long as it commands the confidence of the legislature (and, if it does not, it is probably not the time for constitutional negotiations). As simply a constraint on the Federal Government's own discretionary power, the *Regional Veto Act* offers clarity and certainty in a manner that complements the formal amendment power instead of offending it.

By committing to a higher standard for constitutional amendment, the *Regional Veto Act* supplies a legislative correction to the "questionable jurisprudence" of the *Québec Veto* case. In effect, the statutory enactment concedes the error made in 1981-82 and restores what should have *always*

31. Knopff, *supra* note 6.

32. There may be "separation of powers" concerns here, but legislation restricting executive discretion is fairly common in Canada. It would be difficult—but perhaps not impossible—to suggest that the *Act* runs afoul of section 9 of the *Constitution Act, 1867*, but, if so, a number of other enactments would be unconstitutional as well.

been one of the constitutional amendment rules for Canada: a formal constitutional change affecting all the provinces must not be enacted without the consent of the province of Québec. This threshold is difficult to achieve but it is the only one that makes sense considering Canada's foundation and history. If Albert is right about Canada's "constructive unamendabilty"—and I think he is—and Canadians need some mechanism for "updat[ing] their constitution to reflect their contemporary values in it," then two primary options are left: changes through judicial interpretation and changes via ordinary statutes. While the decisions of the Court may provide a "release valve" to relieve pressure for necessary constitutional change, informal amendments-by-statute provide not only another more democratic means of doing so, but also a potential check on judicial errors. The *Regional Veto Act* illustrates this potential for constitutional correction. Assuming the political realities of constructive unamendability remain fixed, the combination of a generous approach to informal statutory amendments with a unanimity rule for formal change might offer the only legitimate pathway of constitutional progress for Canada.

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The Value of the Concept of Unconstitutional Constitutions

Sergio Verdugo†

Introduction

Constitutional scholars have been highly interested by the question of whether a constitutional amendment can be unconstitutional, and (if yes) who can declare or enforce the unconstitutionality of the constitutional modification and how? Richard Albert's article moves beyond this literature and explores an even more provoking theme: whether a constitution can be unconstitutional. Albert identifies diverse conceptions of unconstitutional constitutions using four different examples: (1) the US Constitution, which was enacted following a constitution-making process that violated the Articles of Confederation,[1] (2) the South African Court's certification decision declaring the unconstitutionality of parts of the new Constitution,[2] (3) Canada's restrictions on amending its Constitution due to what Albert calls "constructive unamendability,"[3] and (4) the Mexican constitutional provision prohibiting constitutional replacement by rebellion.[4] After identifying the diverse conceptions, Albert argues that although those democratic foundations have "different strengths,"[5] each "traces its roots to democratic foundations."[6] By connecting the idea of democracy with the standard of constitutionality against which a constitution is confronted, Albert finds that unconstitutional constitutions could still be legitimate and, in the end, not unconstitutional.

Albert's article will probably become an important contribution to the field of comparative constitutional law because it is one of the first articles that take seriously the normative side of the debate on whether a constitution

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1. Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 17278 (2017).
2. *Id.* at 17882.
3. *Id.* at 182–89.
4. *Id.* at 18995.
5. *Id.* at 196.
6. *Id.* at 171.

can be unconstitutional. The reason why this theme is under-explored in the legal literature might be because there are not many cases (if any) of courts challenging an entire constitution. This is not to say that the phenomenon of an unconstitutional constitution is uncommon. A brief look at the constitution-making procedures of the world will quickly conclude that many constitutions have been enacted by violating procedural and substantive rules or principles of the prior constitution.[7] The interesting argument, then, is not to say that many countries have unconstitutional constitutions (this is a frequent phenomenon), but to explore the grounds on which those constitutions are unconstitutional from a theoretical point of view. This is precisely what Albert is offering to the field.

Albert's main purpose is to "complicate our understanding of an unconstitutional constitutional amendment with the idea of an unconstitutional constitution, an understudied and fascinating possibility."[8] In this comment, I argue that the problem of an unconstitutional constitution should be disconnected from the issue of an unconstitutional amendment in a drastic way, and I explain why both categories should be studied separately. The fact that the idea of democracy could be used as an argument for both phenomena does not mean that their nature is equivalent.

First, I detail Albert's idea of democratic legitimacy and constitutionality and show how, in his view, these two ideas are codependent. Then, I suggest that the difference between unconstitutional amendments and unconstitutional constitutions is one of *kind* and not one of *degree*. Albert thinks that the difference is both one of kind and one of degree, but he does not identify the reason why there is a difference of *kind,* and he does not explore the implications of this assessment. Third, I argue that one implication of separating the debates between unconstitutional amendments and unconstitutional constitutions is to understand better the nature of the *whom* question: who can declare that a constitution is unconstitutional?

I. Democratic Legitimacy and Unconstitutionality

Albert's conclusion regarding the fact that the four conceptions of unconstitutional constitutions are based on democratic foundations is predictable, since, as Albert says, he is only interested in democratic constitutions.[9] The question, then, is what makes *democratic* and what makes *constitutional* a constitution. Although Albert does not use an explicit definition of democracy, his argument and examples reveal that his idea of democracy is driven by popular participation and the recognition that the "people" is the source of legitimacy.[10] Under this approach, the people can

7. Among many examples, see: the Colombian 1991 Constitution (which did not follow the modification rules of the 1886 Constitution), the German Basic Law (which did not follow the procedure of the broken Weimar Constitution), the Venezuelan 1999 (its enactment did not follow the 1961 Constitution), the 1925 and 1980 Chilean Constitutions, the U.S. Constitution (discussed in Albert's paper), and so on.

8. Albert, *supra* note 1, at 172.

9. *Id.* at 171.

10. In this comment, I do not discuss Albert's elaboration regarding the "perspective" which that can be used in evaluating a constitution, which can be held by internal actors

validate a constitution directly or indirectly, implicitly or explicitly, before or after the new constitution is enacted. These ideas are based on a conception of democracy that differs from the ones used by other contemporary constitutional scholars exploring related issues, who prefer to connect their conceptions of democracy with political competition and electoral uncertainty,[11] among other possible rival understandings of democracy. This precision is important because it helps to understand the limits of Albert's argument.

According to one of Albert's examples, regarding his interpretation of the Mexican Constitution's clause forbidding constitutional replacement by rebellion, the prohibition of constitutional replacement only operates when the new constitutional order is illegitimate.[12] Albert's idea of democratic illegitimacy operates together with the notion of unconstitutionality. Because the new constitution is unconstitutional only if it is illegitimate, and vice versa, the idea of what is *constitutional* and the idea of what is *democratic* can become indistinguishable. If the new constitution is legitimate, then it replaces the old constitution and the new constitution cannot be understood as unconstitutional. If we understand the requirement of democracy as the people's political and social consent, then, the Mexican Constitution could be democratic. On the contrary, if we understand the requirement of democracy as political competition and electoral uncertainty, it would be hard to say that the 1917 Mexican Constitution was democratic, at least during its implementation by the hegemonic *Partido Revolucionario Institucional* (PRI) regime, which controlled the country for nearly seventy-one years. Political competitiveness is not, of course, the only normative criterion for defining democracy, but it must be, in my point of view, a necessary part of any definition of democracy.

In other of Albert's examples, the unconstitutionality of the US Constitution was "remedied by popular participation."[13] The lesson is that "the people possess an extraordinary power of absolution that can transform a formally unconstitutional constitution into a legitimate one anchored in democratic values."[14] According to Albert, because the US Constitution was accepted by popular participation, we cannot consider it to be unconstitutional, even though it violated the Articles of Confederation.[15]

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within the system or by external actors that operate outside the system. *Id.* at 19496.

11. Think, for instance, in the way Issacharoff uses the idea of a "successful democracy" considered as the one where the political losers can win future elections, in his argument about the way constitutional courts can contribute to the consolidation of such a democracy and prevent authoritarian turns; and the way Landau uses the idea of democracy as a spectrum focusing on competition between incumbents and political opponents, and individual and minority rights. *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES. CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); David Landau, *Abusive Constitutionalism*, 47 UC DAVIS L. REV. 189, 195–96 (2013).

12. Albert, *supra* note 1, at 19394.

13. *Id.* at 197.

14. *Id.*

15. Notice that in this example the idea of democratic legitimacy could arguably work with the conception of democracy that focuses on political competition and electoral uncertainty because of the way the US Constitution atomized political power and created competing institutions aimed to prevent a majoritarian faction to become hegemonic.

The question, then, is why is it useful to evaluate the *constitutionality* of a constitution? If the standard of constitutionality consists on the democratic credentials of the constitution, then why do we not just use the idea of democracy to evaluate the legitimacy of a constitution? One possibility could be that Albert wants to make a *legal* claim, adding a normative value (democracy) to the evaluative standard (constitution). However, because all the evaluative standards that interest Albert's research (recall that his analysis only applies for *democratic* constitutions) match the normative value, then all constitutions could be legitimate. The question of what makes a constitution *constitutional*, then, lacks an independent value.

If we want the *constitutionality* idea to have an independent value, we need to make this concept distinguishable from the notion of democracy. Since constitutions could have different degrees of democracy and authoritarianism and different conceptions of democracy are at stake when we talk about constitutionalism,[16] it could be useful to build categories inside a spectrum. After all, the literature distinguishes different kinds of constitutions, such as authoritarian ones,[17] other constitutions that establish competitive authoritarian regimes,[18] and so on.[19] Constitutions could also change: an authoritarian constitution can turn to be democratic,[20] and a democratically enacted constitution can convert into an authoritarian constitutional system. The idea of an unconstitutional constitution that focuses on the way an old constitution rivals with a new constitution, regardless of their origin and content, could be illuminating for the field.

II. Unconstitutional Amendments v. Unconstitutional Constitutions

As Albert notices, the difference between an unconstitutional amendment and an unconstitutional constitution is both an issue of kind and an issue of degree. However, and despite his words, Albert does not really identify why the difference is a matter of *kind*. For him, the unconstitutionality of a constitution "strikes more squarely at the core meaning of constitutional democracy and at what democracy requires in order to legitimate the creation of a new constitution."[21] For Albert, both issues are similar because "they invite us to break free from our formalist

16. The idea of liberal constitutionalism is in tension with majoritarian democracy, and political systems typically find different institutional arrangements to engage with that tension.

17. Mark Tushnet, *Authoritarian Constitutionalism. Some Conceptual Issues*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 36–49 (Tom Ginsburg & Alberto Simpser eds., 2014).; *see also*, ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION (2002).

18. STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM. HYBRID REGIMES AFTER THE COLD WAR (2010).

19. *See, e.g.,* Phoebe King, *Neo-Bolivarian Constitutional Design*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 366–97 (Denis J. Galligan & Mila Versteeg eds., 2013).

20. *See, e.g.,* the experience of the Chilean 1980 Constitution. Tom Ginsburg, *¿Fruto de la Parra Envenenada? Algunas Observaciones Comparadas sobre la Constitución Chilena*, 133 ESTUD. PÚBLICOS 1–36 (2014).

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

presuppositions that respecting the constitutional text is sufficient for constitutionality"[22] and they are "different because the stakes are likely to be higher in the unconstitutionality of a constitution as opposed to a single amendment."[23] Both ideas, for Albert, have a sort of derivative justification: "Considering how a constitution can be unconstitutional may help reverse engineer justifications for declaring a constitutional amendment unconstitutional."[24] All these considerations support the *degree* distinction and not the *kind* distinction.

The ideas of constitutional amendment and constitutional replacement are not new in constitutional scholarship. The classic distinction introduced by Sieyès in 1789, between constituent and constituted power,[25] or, in contemporary terms, between constituent originary power (*pouvoir constituant originaire*) and constituent derivative power (*pouvoir constituant dérivé*),[26] along with the conventional view that suggests that the constituent power is unlimited and unconstrained, could explain why the natures of the unconstitutional constitution and the unconstitutional amendment are different in kind. The unconstitutional constitution is enacted by the constituent power, which operates as an external and unconstrained actor. The constituent power does not need to use the pre-established constitutional reform procedure because it is an external actor, as it happened with the 1991 Colombian Constitution and the 1980 Chilean Constitution.[27] This is also the case of the US Constitution. The constituent power can be unconstitutional or not from a *legal* perspective, and it can implement its will regardless of that legal standpoint. The constituent power is a de facto power. On the contrary, the unconstitutional amendment is enacted by a constituted power (and not by an external actor) that recognizes the pre-established constitutional reform procedure. Therefore, the amendment power could be limited and constrained by a constitutional framework.

The unconstitutional constitution is different from the issue of unconstitutional amendment because the first one involves an irreconcilable conflict between two norms that claim to have the authority of the constituent power.[28] On the contrary, the unconstitutional amendment requires a dispute

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22. *Id.* at 198.

23. *Id.*

24. *Id.*

25. Emmanuel Joseph Sièyes, *What is the Third State, in* THE ESSENTIAL POLITICAL WRITINGS 43, 89 (Oliver W. Lembcke & Florian Weber eds., 2014).

26. Bernal attributes the authorship of this distinction to the French scholars Roger Bonnard and George Vedel Carlos Bernal. Roger Bonnard & George Vedel Carlos Bernal, *Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine*, 11 INT'L J. CONST. L. 339, 342 (2013).

27. Sometimes the constituent power can operate from *inside* the system and produce what Albert calls "dismemberment." *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. (forthcoming 2018). However, the constituent power does not *need* to operate from inside the system.

28. There are, of course, alternative ways to approach the issue of an unconstitutional constitution. For instance, someone could argue that a constitution is unconstitutional because it is incompatible with a natural law principle, with international law, with a superior common law principle or with a higher constitutional convention. Albert's

between the constituent power and a species of the constituted power. Consequently, the idea of an unconstitutional constitution requires two competing constitutions that exclude themselves because they both claim to be unconstrained and unlimited in power while organizing the "form and type of the political unity" (to use Schmitt's language).[29] Thus, one of them needs to defeat the other. The reason why the Articles of Confederation lost their value was due to the supremacy of the accepted US Constitution, which claimed to establish and control the federal polity. On the contrary, the idea of an unconstitutional amendment assumes that, by using the pre-established constitutional reform procedure, the constituted power recognizes the superiority of the existing constitutional framework. To modify that framework, the constituted power cannot but follow the corresponding decision-making procedure. For this reason, constituent and constituted power can coexist without excluding themselves, while two constituent powers are always mutually exclusive.

The previous consideration is important at least for two reasons. First, because of the way we use the democratic normative argument for claiming that the power to declare unconstitutional the will of a political majority is against democracy. In the case of constitutional amendments, this democratic argument is strong. Consequently, if we want to declare the unconstitutionality of a constitutional amendment supported by majorities,[30] we would need to find equally important democratic reasons to justify constraining the majorities.[31] The question of how the democratic argument works for the case of an unconstitutional constitution has yet to receive an answer, and that answer needs to consider the nature of the constituent power.

III. The "Whom" Question

The second reason to differentiate the nature of the unconstitutional constitution from the nature of the unconstitutional amendment is to better precise the "whom" question. Albert opens his paper by identifying three relevant questions: "whether, on what grounds, and by whom an entire constitution may be declared unconstitutional."[32] The question of the

examples assume the existence (or potential existence) of two written *legal* norms: a first written constitution that conflicts with a second written constitution that was enacted or could be enacted in the future.

29. CARL SCHMITT, CONSTITUTIONAL THEORY 75 (Jeffrey Seitzer trans., 2008).

30. Previously, I have argued that, in the Chilean constitutional regime context, the democratic argument defeats the argument that suggest that constitutional reform should be limited by doctrines such as natural law, international law or human rights. In that paper, I argued that the Chilean constitutional system should only have procedural limits on constitutional reform, and that the democratic debate on what reforms the Chilean constitution should have should remain open. Sergio Verdugo, *La objeción democrática a los límites materiales de la reforma constitucional*, 28 ACTUAL. JURÍD. 229 (2013).

31. Carlos Bernal, for example, justifies the Colombian Constitutional Court doctrine on "constitutional replacement" because of it specific function in preventing the Colombian hyper-presidential regime to undermine democracy. Bernal, *supra* note 26. More generally, see for example the book by YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

32. Albert, *supra* note 1, at 170.

"whom" is easier to answer in the case of an unconstitutional amendment. Since the constituted powers are *created* by the Constitution that is used as a standard to evaluate the amendment, the agents that hold those powers are *creatures* of the Constitution, and not of the amendment. Thus, the legal source of their power is that Constitution, and the "whom" question typically relies on those agents.

The answer to the question of the "whom" is less easy when we try to determine who will declare or enforce the unconstitutionality of a constitution. Because the unconstitutional constitution is the result of the constituent power, which is an unconstrained external actor typically in a time of constitutional instability, there is not always a pre-established institutional creature with the ability to defend it. The South African Court example suggested by Albert could be misleading. At the time of the certification decision, the Court was a *creature* of the interim Constitution and the principles that it was supposed to enforce against the newly enacted Constitution. For the South African Court, then, the constituent power was expressed in the interim Constitution, which controlled its jurisdiction. Therefore, it could be argued that South African Court case should not be an exception of a court declaring the unconstitutionality of a constitution since, for the South African Court, the new constitution was the result of a constrained and constituted actor.

Normally, courts that need to solve a constitutional challenge against a constitution are creatures of a first constitution that also serves as the source of the courts' own judicial authority. Thus, we cannot expect these courts to declare such unconstitutionality. Instead, they typically declare that the constitution is constitutional, or that they lack jurisdiction. This was the case, for instance, of Fujimori's 1993 Constitution, which was challenged by a petition to the Peruvian Constitutional Court signed by more than 5,000 individuals, who argued that the Constitution was unconstitutional.[33] Another example is the decision of the Venezuelan Supreme Court, which upheld the Chávez government's action in order to create a constitution violating the procedure of the 1961 Constitution.[34] Other examples are the decisions of the Chilean Constitutional Court declaring that the Court lacked jurisdiction to solve a claim challenging the legitimacy of the 1980 Constitution during the Pinochet dictatorship,[35] and to decide a conflict that involved questioning the legitimacy of specific provisions of the 1980 Constitution during the transition to democracy era.[36] Although these kinds of challenges typically fail, and courts normally reject them, these cases show that a recently enacted constitution can be contested during a period of instability. Courts tend to recognize the constituent power, sometimes even before the new constitution

33. TRIBUNAL CONSTITUCIONAL [T.C.] [CONSTITUTIONAL TRIBUNAL], 10 diciembre 2003, Exp: 014-2003-AI/TC.

34. Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia*, 18 CONSTELLATIONS 365, 369–72 (2011).

35. TRIBUNAL CONSTITUCIONAL [T.C.] [CONSTITUTIONAL TRIBUNAL], 21 diciembre 1987, Rol: 46.

36. TRIBUNAL CONSTITUCIONAL [T.C.] [CONSTITUTIONAL TRIBUNAL], 18 marzo 1998, Rol: 272.

is actually enacted. It is typically in this period of instability that the question of an unconstitutional constitution might become necessary.

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Unconstitutional Constitutions? New Approaches to an Old Problem—A Response to Richard Albert

Silvia Suteu†

Introduction

Richard Albert's work on both the theory and practice of constitutional amendments has been at the forefront of a burgeoning field of inquiry.[1] His impressive body of scholarship has covered (and often defined) issues as diverse as the various functions performed by constitutional amendment rules, ranging from the expressive to the transformative;[2] the correlation between the structure of such rules and the hierarchy of values within the polity;[3] or indeed the uneasy relationship between substantive limits on amendment and democracy.[4] The latter in particular has influenced a number of scholars' research on unamendability, calling as it did for both theoretical and doctrinal rigor when engaging with the conundrum of unconstitutional constitutional amendment doctrines.[5]

In his *Four Unconstitutional Constitutions and Their Democratic Foundations* article, Albert pushes our thinking in this area further still, inviting us to consider whether constitutions themselves can be

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1. *See generally*, MADS ANDENAS, THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS (2000);., HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro, eds., 2011); ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades, ed. 2012); THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT (Richard Albert, ed., 2017).

2. Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225 (2013).

3. Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014).

4. Richard Albert, *Nonconstitutional Amendments*, 22 CANADIAN J.L. & JURIS. 5 (2009) and Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010).

5. For the most recent take on unamendable provisions, *see* YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

unconstitutional.[6] In other words, having established empirically that amendments can and have been declared unconstitutional by constitutional courts in many countries and, more controversially, how this might be reconciled theoretically with commitments to constitutionalism and democracy, Albert now looks at the potential unconstitutionality of fundamental laws themselves. In so doing, he first seeks to classify the ways in which we might go about answering the question by looking at: whether the constitution was adopted according to the constitutional rules predating it; whether a constitution can be declared unconstitutional if it contradicts pre-agreed constitutional principles; whether its internal amendment rules are such as to render certain types of constitutional change virtually impossible and hence unconstitutional in the sense of "constructive unamendability"; and, finally, whether a constitution adopted following rebellion can be pre-invalidated by the current basic law. All these scenarios Albert traces to his four case studies, the United States, South Africa, Canada, and Mexico, respectively. Albert concludes that unconstitutional beginnings matter as a distinct object of study, and that they can coexist with democratic foundations.

In what follows, I propose to proceed along two main axes. First, I will seek to establish the added benefit—for comparative constitutional law and theory—of Albert's analysis. I therefore evaluate the explanatory value of his definition and classification of unconstitutional constitutions. Second, I entertain possible applications of Albert's framework beyond his present article. Taking his to be an initial foray into the question of the unconstitutionality of constitutions, I map out potential further directions one may wish to pursue in order to deepen the analysis of constitutional roots in this key.

My overall conclusion is that Albert's endeavour is one best understood in the context of increased interest in constitutional foundations more generally.[7] Thus, while constitutional scholarship may have only rarely dealt with the concept of unconstitutional foundations up to this point, there is a broader field of work addressing how constitutions *should* be adopted so as to comply with emerging norms of democratic self-government and legitimacy.[8] An example would be the increasingly central role attributed to participation in constitution-making, which some see as potentially giving rise to a right to democratic self-government.[9] (Albert himself briefly touches on this when discussing the Canadian case.[10]) Another example would be the

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

7. *See e.g.*, SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS (Denis J. Galligan & Mila Versteeg, eds., 2013).

8. Cheryl Saunders, *Constitution Making in the 21st Century*, 4 INT'L REV. L. 1 (2012).

9. Vivien Hart, *Democratic Constitution Making*, United States Institute of Peace Special Report 107, 1–12 (July 2003) http://www.usip.org/sites/default/files/resources/sr107.pdf [https://perma.cc/4AUA-UF7M].

10. Albert, *supra* note 6.

emergence of transnational rules for constitution-making, also tied to the increasingly complex web of supranational institutions to which states belong.[11] The overlap between this scholarship and Albert's article is evident: the increased regulation of how constitutions should come into being has as a corollary that processes not complying with these rules will be seen as illegitimate and, if the rules themselves are constitutionalised, as unconstitutional. This is also why it is so important for his definition of this unconstitutionality, and attendant classification, to be further-reaching and to draw on current constitution-making dynamics.

I. What Role for Unconstitutional Constitutions?

The first question to raise is what the explanatory value of introducing the new conceptual category of unconstitutional constitutions is. In other words, what function can this new way of assessing constitutional foundations play and how is it different from other ways of thinking of constitutional beginnings? If it is indeed "different both in degree and kind,"[12] we should be able to pinpoint the added value of thinking of constitutions as potentially unconstitutional in various ways.

An initial observation here is that some further refining of the distinctions drawn in Albert's piece would still be necessary if we are to clearly delineate each case as "an instantiation of an unconstitutional constitution."[13] For example, are constitutions adopted in a manner inconsistent with pre-existing rules, such as was the case of the United States, unconstitutional in the same way as a constitution which is nearly impossible to amend in some respects, as the Canadian one is? Or indeed, the same as a constitutional draft being declared unconstitutional following a constitutional review procedure stipulated by pre-agreed rules, as in the case of South Africa? Admittedly, Albert is aware of the difficulties with discussing these cases together and at least in some instances hints at the conceptual difference between them, such as when he explains Canada's "constructive unamendability" as "functionally, though not formally, the same as formal unamendability."[14] But even if we are to accept that "as a matter of functional reality" the Canadian case fits his typology, we run the risk of veering into a type of sociological unamendability which is difficult to assess (and for which, incidentally, the purported unamendability of the American

11. *See* e.g., Jean L. Cohen, *The Role of International Law in Post-Conflict Constitution-making: Towards a Jus Post Bellum for "Interim Occupations"*, 51 N.Y.L. SCH. L. REV. 497 (2006); Vicki Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, 2010); Lech Garlicki & Zofia A. Garlicka, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, 44 ISRAEL L. REV. 343 (2011); Christine Bell, *What We Talk About When We Talk About International Constitutional Law*, 5 TRANSNATIONAL LEGAL THEORY 241 (2014); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015).

12. Albert, *supra* note 6, at 171.

13. *Id.*

14. *Id.* at 186.

constitution might be a better comparator).[15]

Similarly, more conceptual clarity would be welcome when discussing the Mexican case, which hinges on there being a straightforward distinction between (illegitimate) rebellion and (legitimate) revolution.[16] Whether a displacement of the constitution has been "approved, reinforced or acquiesced to by the people"[17] will most likely not be an easy assessment to make, particularly in the midst of what might be a violent overthrow. Furthermore, even if the assessment was clear cut, who is to make the determination (likely constitutional courts) and what consequences flow from it (presumably the repeal of the new constitution) would be very tricky.[18] Given the Mexican constitution's distinctive "inviolability" clause, a more contextual and historical analysis of its origins would likely shed more light on what the framers intended and how the provision has worked in practice.

To return to the initial question raised above, what have we gained in understanding if we consider these constitutions as unconstitutional? If what matters is a constitution's overall legitimacy in society, its implementation, and endurance, then how that constitution has come into being may be all but irrelevant.[19] There are numerous examples of constitutions having foundations that are problematic from a formal point of view, for instance, but nevertheless enduring and gaining their polities' acceptance (and even veneration). One such example is of course discussed by Albert himself and is the United States Constitution. Others include examples of post-1989 constitution-making in Central and Eastern Europe, where rather than to follow the formal constitutional rules for adopting new basic laws, many former communist countries chose instead to begin anew, whether by way of constituent assemblies or round tables.[20] One might object that following rules prescribed by the newly delegitimized communist constitutions was hardly an option and that is true; it should nevertheless force us to consider a new dimension to the analysis of unconstitutional constitutions: what is the benchmark against which we assess that unconstitutionality? If the pre-

15. On unamendability in the US context, see Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717 (1981). Albert himself has addressed this issue in Richard Albert, *The Unamendable Core of the United States Constitution* in COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION (Andras Koltay, ed. 2015).

16. Albert, *supra* note 6, at 18990.

17. *Id.*

18. For a discussion of just such a proposal in the context of Nigeria, see Tunde I. Ogowewo, *Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy*, 44 J. AFRICAN L. 135 (2000).

19. On whether constitutional foundations matter, *see* John M. Carey, *Does It Matter How a Constitution Is Created?* in IS DEMOCRACY EXPORTABLE? 15577 (Zoltan Barany & Robert G. Moser, eds., 2009. On constitutional endurance, see Zachary Elkins *et al*., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009) (although the authors do believe processes of constitution-making matter, such as the inclusiveness of the process).

20. On different constitution-making processes in former communist countries post-1989, *see* Andrew Arato, *Conventions, Constituent Assemblies, and Round Tables: Models, Principles and Elements of Democratic Constitution-Making*, 1 GLOBAL CONSTITUTIONALISM 173 (2012); *see also* Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364 (1995).

existing rules were themselves undemocratic or otherwise illegitimate, does it still make sense to speak of unconstitutional foundations when constitution-makers choose to depart from their formal constraints? Another illustrative case here is the German reunification of 1991 which was achieved constitutionally not through the formal route prescribed by the Basic Law (Article 146) but through the formal accession of the eastern *Länder* to West Germany on the basis of the former Article 23.[21] Viewed through this pragmatic lens, what matters is constitutional efficacy, which may but need not be tied to constitutional foundations.[22]

All of this risks overstating the extent to which constitutional beginnings may be irrelevant. Constitutions are not purely legal documents but also serve as pacts to enshrine and sometimes create hard-fought political settlements.[23] This is especially true in post-conflict and post-authoritarian contexts, where the bargains which must be struck between the opposing parties are fragile and therefore often constitutionalised (including in the form of eternity clauses, perceived as the strongest guarantee of their survival).[24] There are also risks of delegitimizing the constitutional project if the process by which it comes about is viewed as not inclusive and not representative of a wide array of societal interests.[25]

However, what matters in all of these accounts of the significance of constitutional beginnings is constitutional legitimacy, tied to perceptions of democracy and inclusiveness, rather than either formal or constructive (un)constitutionality of the type Albert is addressing here. His discussion of participation as well as of the internal and external perspectives on the question of unconstitutionality inches towards addressing precisely this problem of the potential overlap between unconstitutionality and illegitimacy.[26] In fact, I would argue that unconstitutionality is significant not because it shows that constitutions can be adopted in processes which do away with pre-existing rules—this we long knew. It is, however, relevant to the extent that it can function as a proxy for, or indicator of, illegitimacy. In other words, if a constitution is replaced via a procedure in breach of existing rules (as was the case in the US and South Africa and might be the case in Mexico if its "inviolability" clause is breached), this can perform a signalling role: it can alert the polity to a transgression of the rules of the game and

21. On the constitutional path chosen for German reunification, see Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475 (1991).

22. For arguments that constitutional foundations do impact on whether and how constitutions are to be implemented, *see supra* note 7.

23. Christine Bell, *Introduction: Bargaining on constitutions—Political settlements and constitutional state-building*, 6 GLOBAL CONSTITUTIONALISM 13 (2017).

24. On constitution-making in post-conflict societies generally *see*, *inter alia*, Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making,* 6 CHI. J. INT'L L. 1 (2006); *see also* Jennifer Widner, *Constitution-Writing in Post-conflict Settings: An Overview*, 49 WM. & MARY L. REV. 1513 (2008). On unamendable provisions as entrenched political bargains in such settings, *see* Silvia Suteu, *Eternity Clauses in Post-conflict and Post-authoritarian Constitution-making*, 6 GLOBAL CONSTITUTIONALISM 63 (2017).

25. Saunders, *supra* note 8 at 5.

26. Albert, *supra* note 6, at 19495.

require constitution-makers to justify their departure.

II. Where to for Thinking about Unconstitutional Constitutions?

In his article, Albert links his account of unconstitutional constitutions to the doctrine of unconstitutional amendments, although he does not fully elaborate on how the former "complicates our understanding" of the latter.[27] Presumably, the point is that unconstitutional constitutional change can go beyond merely modifying individual provisions in basic laws and include an entirely new text being adopted unconstitutionally. If so, this again requires further conceptual sharpening, as the distinction between amendments and constitutions is a difficult one that may require an adjustment of our theoretical tools.[28]

I would argue that Albert's analysis is valuable in another sense as well, insofar as it links to notions of procedural and substantive limits on constitutional amendment. I would therefore contend that the greater added value of this work is in pushing forward our thinking on constitutional foundations and what formal or informal requirements exist in order for them to be considered legitimate. In saying this, I am aware that Albert distinctly does not address legitimacy but constitutionality, although as argued above, I think he finds it himself difficult to keep the two separate (see his discussion of Canada and to an extent Mexico). A purely formal account of constitutionality here—understood as compliance with pre-existing constitutional norms for the adoption of a new constitution (the internal perspective in Albert's account)—would not be the real story. It would simply acknowledge that constitution-makers can and do break the rules in forging new constitutions.

Moreover, any account of constitutional foundations must reflect how constitutions are actually adopted in the real world: oftentimes following revolutions or other forms of upheaval, neither of which can be regulated in advance by basic laws.[29] Constitutions are often elitist projects designed to reinforce a status quo, which severely privileges certain groups. To expect such constitutions to allow for their own replacement, or to do so easily, is therefore to misunderstand the nature of constitutions and struggles to replace them. Nevertheless, as already stated, formal constitutionality can reinforce the perceived legitimacy of a constitutional replacement process. The precondition for this is that the old constitution itself enjoying a high degree of legitimacy. Thus, abiding by pre-existing rules for constitutional change and replacement can reinforce the notion that constitutional rules are being adhered to and that the rule of law is respected.

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27. *Id.*

28. On the difficulties of distinguishing between constitutional amendment versus replacement in the Colombian context and theoretically, *see* Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. 339 (2013).

29. *See* Elster, *supra* note 20 (discussing constitution-making as involving making choices under (sometimes severe) constraints).

Related to my call for Albert to connect his analysis more squarely with current thinking on constitution-making, an example might be linking South Africa's example with what has come to be termed "post-sovereign constitution-making."[30] A more contextualised discussion of the South African case would reveal that the multi-step constitution-making process there—whereby constitutional principles were first negotiated by political parties, and an interim constitution adopted to govern the country until a permanent one could be adopted— has not remained a one-off occurrence.[31] What the role of constitutional courts, if present, should be in these situations, and whether they should function differently in fragile contexts is still something scholars struggle with.[32]

A final addition to this line of thinking might be to consider unconstitutionality by reason of non-compliance with international norms.[33] To give only one example, the Council of Europe's European Commission for Democracy through Law (better known as the Venice Commission) now regularly issues opinions evaluating constitutional drafts of its member states.[34] Its determinations concern whether the drafts comply with Council of Europe standards and not their unconstitutionality in Albert's sense. Nevertheless, might the increasing role played by such supranational actors in constitution-making eventually amount to a finding akin to one of unconstitutionality of a constitution? Can and should they play the role of guardians of the rules of the game in this area?[35]

Conclusion

My aim in this brief piece has been to explore in greater depth the theoretical underpinnings and consequences of Albert's analysis of unconstitutional constitutions. I have done so by, first, asking what the added

30. ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY (Oxford University Press, 2016).

31. On the increased recourse to interim constitutions during constitution-making processes, *see* International IDEA, *Interim Constitutions: Peacekeeping and Democracy-Building Tools*, Policy Paper, (Oct. 2015), http://www.idea.int/sites/default/files/publications/interim-constitutions-peacekeeping-and-democracy-building-tools.pdf [https://perma.cc/FME4-NJPY]; *see also* Charmaine Rodrigues, *Letting off Steam: Interim Constitutions as a Safety Valve to the Pressure-cooker of Transitions in Conflict-affected States?* 6 GLOBAL CONSTITUTIONALISM 33 (2017).

32. Samuel Issacharoff, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015).

33. On international legal norms in the field of constitution-making*, see generally, supra* note 11.

34. *See*, *e.g.*, Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 AM. J. COMP. L. 963 (2015); *see also* Paul Craig, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, 2 UC IRVINE J. INT'L, TRANSNAT'L, & COMP. L. 57 (2017).

35. For a discussion of whether the European Union and the European Court of Human Rights might similarly play roles of guardians against transgressions of the rule of law, *see* Armin von Bogdandy & Pal Sonnevend

CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA (Hart Publishing, 2015).

value of thinking of constitutions as potentially unconstitutional may yield and scrutinizing the classification Albert has put forth. My main observation in this respect has been that we need to clarify our conceptual tools and explain in what way we consider problematic constitutional foundations, in the sense of unconstitutionality as distinct from illegitimacy, significant. Secondly, I suggested several novel directions in which work on the unconstitutionality of constitutional beginnings might go. Chief among these have been the interplay with constitutional illegitimacy; the need to address new developments in constitution-making theory and practice, including democratic requirements of participation and multi-stage processes; and the impact of the rise of transnational actors and norms in the area of constitution-making. Investigating how constitutions come into being and what impact that has on constitutional design, implementation, and longevity is a hot topic in constitutional scholarship at the moment. Albert's article on unconstitutional constitutions is a welcome addition to that growing body of work.

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Constitutionality in Making and Changing Constitutions

Richard Albert†

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, *The Value of the Concept 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.