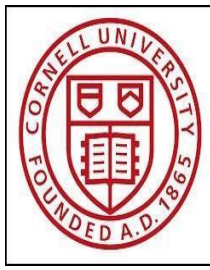
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Comments on Richard Albert's Theory of Unconstitutional Constitutions

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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

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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.

that take seriously the normative side of the debate on whether a constitution 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 Uunconstitutionality

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

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.

"people" is the source or legitimacy.[10] Under this approach, the people can 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

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 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.*

unconstitutional, even though it violated the Articles of Confederation.[15]

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

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.

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).

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 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

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

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.

conflict between two norms that claim to have the authority of the constituent power.[28] On the contrary, the unconstitutional amendment requires a dispute 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

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 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).

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 "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

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

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.

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

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