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### Four Unconstitutional Constitutions and their Democratic Foundations

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#### Recommended Citation

Richard Albert. "Four Unconstitutional Constitutions and their Democratic Foundations." *Cornell International Law Journal* 50, no.2 (2017): 169-198.

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# Four Unconstitutional Constitutions and their Democratic Foundations

Richard Albert†

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.<sup>1</sup> 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.<sup>2</sup> In other countries, most notably Turkey, high courts are constrained by the constitutional text to review the constitutionality of amendments on procedural grounds alone.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> 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,<sup>7</sup> 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.<sup>8</sup> 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,<sup>9</sup> a pathology that calls to mind the familiar problem of entrenching a constitution without rooting the text in a culture of constitutionalism.<sup>10</sup> 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

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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.<sup>11</sup> 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.<sup>12</sup> 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.

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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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

Amending the Articles under this unanimity threshold was thought to be virtually impossible,<sup>16</sup> and indeed in reality it was, no constitutional amendment having ever been adopted.<sup>17</sup> 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.”<sup>18</sup> Although the committee submitted its report shortly thereafter in August—and recommended several changes to the Articles—no amendments were made.<sup>19</sup> The same outcome followed for all other amendment proposals.<sup>20</sup>

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.<sup>21</sup>

The Continental Congress prepared precise instructions for the state delegates who would gather in Convention in Philadelphia to repair the Articles.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> And yet the conventions were held.

## B. The Legitimizing 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

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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.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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."<sup>34</sup> The successful ratification of the Constitution suggests that the consent of the governed is a necessary and sufficient condition for its legitimacy.<sup>35</sup> 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.<sup>36</sup>

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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 Become 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.<sup>37</sup> This institution was rooted in the exercise of what Bruce Ackerman and Neal Katyal have called “quasi-direct democracy.”<sup>38</sup> 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.<sup>39</sup> 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*.<sup>40</sup>

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.”<sup>41</sup> 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.”<sup>42</sup> 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.”<sup>43</sup> 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,”<sup>44</sup> 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.”<sup>45</sup> 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.”<sup>46</sup> As Bruce Ackerman has written, this historic Constitution promised a “new political beginning.”<sup>47</sup> The South African Constitutional Court has helped make good on this promise with its principled and strategic judgments.<sup>48</sup> 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.<sup>49</sup> The Court declared nine of its provisions invalid.<sup>50</sup> One provision violated the right to collective bargaining,<sup>51</sup> two gave too broad a protection from judicial review to an ordinary statute,<sup>52</sup> another failed to adequately entrench rights and to provide special procedures for amendment,<sup>53</sup> and another gave insufficient protection for the independence and impartiality of two important democracy-enhancing bodies, the Public Protector and the Auditor-General.<sup>54</sup> 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.<sup>55</sup> The Court invalidated two other provisions for not properly creating or limiting the powers of local government,<sup>56</sup> and it also determined that the Constitution did not properly balance the distribution of powers between

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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.<sup>57</sup> The Court's decision to rule the constitution unconstitutional was seen at the time as "a unique jurisprudential and political event in the world."<sup>58</sup>

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.<sup>59</sup> 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."<sup>60</sup> 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]."<sup>61</sup> 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].<sup>62</sup>

In the final analysis, much of the new Constitution survived the Court's review. The Court acknowledged that "constitution making is a difficult task,"<sup>63</sup> 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.<sup>64</sup> 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."<sup>65</sup>

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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.<sup>66</sup> 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."<sup>67</sup> This was literally an unprecedented moment because never before had a court been given the power to certify the constitutionality of a new constitution.<sup>68</sup> 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.<sup>69</sup> 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

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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. JACOBSON, 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.<sup>70</sup>

The Interim Constitution listed thirty-four items identified as “constitutional principles,” though most of them read more like rules than principles.<sup>71</sup> For example, one principle insisted that “amendments to the Constitution shall require special procedures involving special majorities.”<sup>72</sup> Another provided that “formal legislative procedures shall be adhered to by legislative organs at all levels of government.”<sup>73</sup> 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.”<sup>74</sup> 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,<sup>75</sup> 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;<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> But this transitional constitution—and its grant of power to the Court—was the culmination of a negotiated agreement between the major parties,<sup>81</sup> a “solemn pact” to quote the words of the Interim Constitution itself.<sup>82</sup> The constitutional principles, too, had been settled by the negotiating parties, not chosen by the pre-democracy parliament.<sup>83</sup> 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.<sup>84</sup> 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,<sup>85</sup> and it was soon afterwards signed into law, bringing the formal process of constitution-making in South Africa to a close.<sup>86</sup>

#### 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.<sup>87</sup> 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., prmb. (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.<sup>88</sup> For example, the French Constitution makes republicanism and territorial integrity unamendable,<sup>89</sup> the Brazilian Constitution makes federalism unamendable,<sup>90</sup> and the German Basic Law famously makes human dignity unamendable.<sup>91</sup> 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.<sup>92</sup> The Constitution of Canada is something of an outlier for not entrenching any formally unamendable constitutional provision.<sup>93</sup> But the Canadian Constitution does, however, entrench an unusual form of unamendability that I have elsewhere described as “constructive unamendability.”<sup>94</sup>

#### 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.<sup>95</sup> 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.”<sup>96</sup> 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.<sup>97</sup> 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](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). Sanford 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.”<sup>98</sup> 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.<sup>99</sup>

There are five formal amendment procedures in Canada,<sup>100</sup> 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.”<sup>101</sup> 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.”<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> This default procedure requires approval from both houses of Parliament and from the provincial assemblies of at least seven of Canada's ten provinces,<sup>107</sup> with the qualification that the population of the ratifying provinces must amount to at least half of the total provincial population.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> 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.<sup>111</sup>

Both procedures collectively have been successfully used only once since their entrenchment in 1982, and that single use occurred in 1983,<sup>112</sup> 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-

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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.<sup>113</sup> 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.<sup>114</sup> Recent decisions from the Supreme Court of Canada have further complicated formal amendment in relation to secession,<sup>115</sup> the Senate,<sup>116</sup> and to the Supreme Court itself.<sup>117</sup>

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<sup>118</sup>—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.<sup>119</sup>

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.<sup>120</sup> 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.<sup>121</sup>

Understanding a constitution as a continual doing has implications for how we prioritize the relative importance of the various forms of constitutional change.<sup>122</sup> 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.<sup>123</sup> In contrast to most of the many forms of informal amendment—for example judicial interpretation, statutory enactment, executive action, implication and convention<sup>124</sup>—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.<sup>125</sup> 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 uncoded forms.<sup>126</sup>

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<sup>127</sup> or those in favor of weak-form judicial review<sup>128</sup> (or functioning parliamentary bills of rights<sup>129</sup> or

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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<sup>130</sup>), 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.<sup>131</sup> 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.<sup>132</sup> 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,<sup>133</sup> 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.<sup>134</sup> These divisions are what led to the failure of both recent wholesale amendment efforts in the Meech and Charlottetown Accords.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup> Canada's territories arguably must also be consulted in these amendments as well, further expanding the relevant communities in constitutional change.<sup>138</sup> 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.<sup>139</sup> 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"<sup>140</sup> 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."<sup>141</sup> 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,<sup>142</sup> the Mexican Constitution authorizes political actors to make formal constitutional amendments. Two-thirds of the

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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 Swedenborg eds., 2006).

national Congress must agree to propose an amendment, which becomes valid when approved by a majority of the state legislatures.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup>

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

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

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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.”<sup>149</sup> 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.<sup>150</sup> As Walter Murphy has quite rightly observed, “to think that words can constrain power seems foolish.”<sup>151</sup>

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.<sup>152</sup> 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.”<sup>153</sup> 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.<sup>154</sup>

Mexico has a long history of rebellion, dating to the eighteenth century,<sup>155</sup> commonly occurring largely in its rural regions.<sup>156</sup> Social movements of many kinds were particularly frequent from the 1810s to the 1850s.<sup>157</sup> 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.”<sup>158</sup> 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 existing 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.<sup>159</sup> 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

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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 Hammet, *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.<sup>160</sup>

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.<sup>161</sup>

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-

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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.<sup>162</sup>

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.<sup>163</sup>

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.<sup>164</sup> 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.<sup>165</sup>

On one hand, this interpretation is inconsistent with the actual design of modern constitutions, some of which entrench the right to revolution<sup>166</sup> and others that contemplate political actors violating the constitution in a period of declared emergency.<sup>167</sup> 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.”<sup>168</sup> 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,<sup>169</sup> 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-

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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.<sup>170</sup> 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.<sup>171</sup> 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,

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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 absolutism 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,<sup>172</sup> 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.

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