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

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### Introduction

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

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

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

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

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

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

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

50 *CORNELL INT'L L.J.* 47 (2017)

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

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

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

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

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

8. Cheryl Saunders, *Constitution Making in the 21<sup>st</sup> Century*, 4 INT’L REV. L. 1 (2012).

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

10. Albert, *supra* note 6.

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

### I. What Role for Unconstitutional Constitutions?

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

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

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

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

13. *Id.*

14. *Id.* at 186.

constitution might be a better comparator).<sup>15</sup>

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

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

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

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

17. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

require constitution-makers to justify their departure.

## II. Where to for Thinking about Unconstitutional Constitutions?

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

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

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

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27. *Id.*

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

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

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

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

## Conclusion

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

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

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

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

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

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

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

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

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