

# Article

## Constitutional Amendment and Dismemberment

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#### INTRODUCTION—AMENDMENT AND DISEMPOWERMENT

How should constitutional designers structure the rules of constitutional change? Much has been written about constitutional design in general, but relatively little exists on the architecture of constitutional amendment.<sup>1</sup> My purpose in this Article is to introduce a new idea to the literature on constitutional amendment—the idea of constitutional *dismemberment*—to challenge us to better understand the uses and functions of the rules of change in codified, uncoded, and partially codified constitutions.

Constitutional dismemberment is at once a phenomenon, a concept, a doctrine, and a theory: it is occurring around the world; it fills a conceptual void in the literature on constitutional change; courts can operationalize it when they evaluate the constitutionality of amendments; and it forms the core of a larger theory of how constitutions do and should change. The prescriptions associated with constitutional dismemberment are intended for new, not existing, constitutions—both because amending constitutional amendment rules is difficult if not paradoxical<sup>2</sup> and, more importantly, because the idea of constitutional dismemberment requires us to reimagine constitutionalism.

The impetus behind the theory of constitutional dismemberment is that some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution

1. See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 918-28 (2014).

2. See PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE 11-14 (1990).

and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. These constitutional changes entail substantial consequences for the whole of law and society. Political actors must modify their behavior in conformity with new popular expectations, and courts must reinterpret the constitution in conformity with the change, overruling inconsistent precedent and developing new lines of jurisprudence. This reconstructed constitution becomes virtually unrecognizable to the pre-change generation, for whom the constitution now seems entirely new, not merely amended. And yet—here is the problem—we identify transformative changes like these as constitutional amendments no different from others.<sup>3</sup>

Constitutional amendments come in two types: they can either be corrective or elaborative. Properly defined, a constitutional *amendment* is a correction made to better achieve the purpose of the existing constitution. The Twelfth Amendment to the United States Constitution, for example, is properly identified as an amendment.<sup>4</sup> The founding Constitution required each presidential elector to cast two votes for president; the candidate with the most votes would become president and the runner-up, vice president.<sup>5</sup> The election of 1800 exposed the design flaw in this arrangement when two candidates earned the same number of electoral votes.<sup>6</sup> It took nearly three dozen ballots of voting by state delegations for the House of Representatives to ultimately break the tie and select Thomas Jefferson as president.<sup>7</sup> The Twelfth Amendment was designed to reduce the possibility of a tie by requiring electors to differentiate their selections for president and vice-president.<sup>8</sup> It corrected a technical flaw in the original Constitution.

A constitutional amendment can also be elaborative. An elaboration is a larger change than an amendment insofar as it does more than simply repair a fault or correct an error in the constitution. Like a correction, an elaboration continues the constitution-making project in line with the current design of the constitution. Instead of repairing an error in the constitution, however, an elaboration advances the meaning of the constitution as it is presently understood. For example, the Nineteenth Amendment is best understood as an elaborative amendment: it advances the meaning of the Fourteenth<sup>9</sup> and

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3. Gary Jacobsohn has described changes like these as “constitutional revolutions.” See Gary Jeffrey Jacobsohn, *Theorizing the Constitutional Revolution*, 2 J.L. & CTS. 1 (2014). But as with other efforts to account for these changes by describing them as “new constitutions,” this formulation has difficulty reconciling form with function: as a matter of form, these changes are ordinarily identified as amendments in a codified constitution yet, functionally, they do more than simply repair or adjust the constitution. I suggest in this Article that we need a new way to understand these changes—a new understanding that is attentive to both form and function. See *infra* Section I.A.

4. U.S. CONST. amend. XII (1804).

5. U.S. CONST. art. II, § 3.

6. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 55 (2005).

7. EDWARD J. LARSON, *A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800*, at 241-70 (2007).

8. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 617-20 (1999).

9. U.S. CONST. amend. XIV (1868) (entrenching the Equal Protection Clause, the Due Process Clause, and the Privileges or Immunities Clause).

Fifteenth Amendments,<sup>10</sup> making good on the promise of equality in these two Reconstruction Amendments, though here that promise was extended to a new class of voters not intended for that protection at the time of the proposal and ratification of the revolutionary equality amendments. The Nineteenth Amendment prohibits gender discrimination in voting,<sup>11</sup> an expansion of the franchise that was not corrective in the sense of fixing a design flaw in the Constitution but was nonetheless consistent with a plain reading of equality rights as well as the existing framework of the Constitution. In this Article, I use the term *amendment* to refer to both corrective and elaborative amendments.

A constitutional *dismemberment*, in contrast, is incompatible with the existing framework of a constitution because it seeks to achieve a conflicting purpose. It seeks deliberately to disassemble one or more of a constitution's elemental parts. A constitutional dismemberment alters a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution. It is a constitutional change understood by political actors and the people to be inconsistent with the constitution at the time the change is made. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution. I also suggest in this Article that constitutional dismemberment can occur by judicial interpretation, but I focus primarily on dismemberment outside of courts.

Constitutional dismemberment is a descriptive concept, not a normative one. A constitutional dismemberment can either improve or weaken liberal democratic procedures and outcomes. For example, the Civil War Amendments to the U.S. Constitution are better understood as dismemberments. The Thirteenth,<sup>12</sup> Fourteenth,<sup>13</sup> and Fifteenth Amendments<sup>14</sup> consolidated the Union victory over the Confederate States and collectively wrote into the Constitution a ringing declaration of the equality of all persons, if only as an aspiration.<sup>15</sup> Their most important function, however, was to demolish the infrastructure of slavery in the original Constitution.<sup>16</sup> They tore down the major pillars of America's original sin: the Three-Fifths Clause,<sup>17</sup> the Fugitive Slave Clause,<sup>18</sup> the Migration or Importation Clause,<sup>19</sup> and the Proportionate Tax Clause.<sup>20</sup>

10. U.S. CONST. amend. XV (1870) (protecting the right to vote against discriminatory denial or abridgement on account of race or color).

11. U.S. CONST. amend. XIX (1920) (protecting the right to vote against discriminatory denial or abridgement on account of gender).

12. U.S. CONST. amend. XIII (1865) (abolishing slavery and involuntary servitude, except as punishment for a crime).

13. U.S. CONST. amend. XIV.

14. U.S. CONST. amend. XV.

15. Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMPLE L. REV. 539, 596 (2002).

16. See Jamal Greene, *Originalism's Race Problem*, 88 DENVER U. L. REV. 517, 519 (2011).

17. U.S. CONST. art. I, § 2, cl. 3.

18. *Id.* art. IV, § 2, cl. 3.

19. *Id.* art. I, § 9, cl. 1. This clause was made temporarily unamendable until the year 1808. See *id.* art. V.

20. *Id.* art. I, § 9, cl. 4. This clause was likewise made temporarily unamendable until the year 1808. See *id.* art. V.

Scholars have suggested that the Civil War Amendments created a new constitution,<sup>21</sup> a new constitutional order,<sup>22</sup> or a new regime.<sup>23</sup> We can of course conceptualize these three amendments as constituting a new regime, a new order, or a new constitution. But as a matter of constitutional form, the U.S. Constitution identifies each of them as an amendment, entrenched serially in the Founders' constitutional text alongside other amendments ratified before and since, many of them mundane by comparison. Constitutional form and function therefore lead us down different paths in our effort to make sense of the Civil War Amendments: formally, we are compelled to identify these three constitutional alterations as mere amendments, but functionally we know they amount to something more. Yet they are neither mere amendments nor do they amount to promulgating a new constitution, a new order, or a new regime. They are best understood as constitutional dismemberments that occupy the space between an amendment and a new constitution; they aim to unmake a constitution without breaking legal continuity.

One of the key pillars of constitutional dismemberment is the principle of variable difficulty in constitutional change. The basic point of variable difficulty is a prescription for constitutional design: political actors should be directed by the rules of constitutional change to satisfy different thresholds for amendment than for dismemberment. Amendments should be subject to a lower threshold of direct or mediated popular consent than dismemberments, which should be authorized only by a higher degree of agreement. The reason why follows from the important difference between an amendment and a dismemberment: an amendment continues the constitution-making project in line with the current design of the constitution, while a dismemberment is incompatible with the existing framework of the constitution and instead seeks to unmake one of its constituent parts—its rights, structure, or identity. Where the rules of change do not state a distinguishable procedure for dismemberments—for example, where the constitution entrenches only one procedure for formal constitutional change—the theory of constitutional dismemberment suggests a default procedure to legitimate a dismemberment. Here, when the constitution is silent on the distinction between amendment and dismemberment, the deep constitutional transformation that dismemberment entails can be legitimated, with few exceptions, only by at least the same or similar configuration of constitution-making bodies that made the commitment that dismemberment later seeks to undo. This is ordinarily the original ratification procedure that authorized the constitution at its creation.

Mutuality is the operational rule of constitutional dismemberment. Subject to a narrow class of exceptions that I describe more fully below, the

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21. See, e.g., Eric Foner, *Blacks and the Constitution 1789-1989*, 183 *NEW LEFT REV.* 63, 68 (1990); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 *VAND. L. REV.* 1337, 1340 (1987); Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 *CARDOZO L. REV.* 2115, 2116 (1996).

22. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 *VA. L. REV.* 1045, 1097 (2001).

23. See 1 *BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS* 46, 58-80 (1991).

rule of mutuality authorizes a constitution's dismemberment using only at least the same procedure that was used to ratify it. What underlies the rule of mutuality is a principle of symmetry: removing something fundamental from a constitution should be permissible using only the same procedure that was used to put it in or something more onerous. Incorporating the rule of mutuality into the larger rules of constitutional change would result in at least two tracks of procedures: one for those changes that are consistent with the existing constitution and, accordingly, require no special measure of popular approval—changes that we can identify as constitutional *amendments*, both corrective and elaborative. This lower track should impose more demanding thresholds for elaborative amendments than for corrective amendments. The second track of procedures would entrench a more onerous procedure to be used specifically for constitutional *dismemberments*—that is, for those changes that do not cohere with the existing constitution because they transform its rights, structure, or identity. Entrenching these procedures in a constitution allows all manner of changes to be made without breaking legal continuity and importantly without inviting the instability that constitution-making entails.<sup>24</sup>

The rule of mutuality has two major purposes: one oriented to courts, and the other to a void in the central concept in the study of constitutional change. For decades now, courts around the world have exercised the extraordinary power to invalidate a constitutional change that judges believe violate the constitution.<sup>25</sup> On their view, political actors are not authorized to make transformative changes to the constitution without breaking legal continuity; they must instead write a new constitution in order to validly introduce changes of that magnitude. Judges have invoked the theory of constituent power—the core concept in the study of constitutional change—as the justificatory basis for their extraordinary decision to invalidate a constitutional amendment.

Stated most simply, constituent power theory proposes a rigid division of labor between the people and their representatives in government: only the people may found an altogether new constitution while their representatives in government are authorized to act in their name to do no more than change a constitution in harmony with the constitution's own terms. Yet constituent power theory refers to the people as an amorphous whole, with neither quantification nor qualification of who the people are, how they exercise their power, and when we know their actions are valid. Where the constitution does not entrench two tracks of rules of change, the rule of mutuality gives shape to constituent power theory by establishing a rebuttable presumption that the people exercise their constituent power when they speak in the same way they did when they wrote the constitution to begin with. Unlike the conventional approach to constitutional change which disallows transformative changes on

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24. Importantly, creating two separate tracks would not preclude entrenching multiple degrees of rigidity within each of the two tracks—a design of constitutional change that I have elsewhere described as an escalating structure of constitutional amendment. See Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 247-57 (2013).

25. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 179-225 (2017).

the theory that they create a new constitution, the theory of constitutional dismemberment and its accompanying rule of mutuality instead seek to maintain legal continuity and to discourage the extraordinary action of invalidating a constitutional change. Therefore, the two instrumental purposes of the rule of mutuality are to save a constitutional change from invalidation where a court concludes that the change is inconsistent with the existing constitution and, more broadly, to redeem the theory of constituent power.

Recognizing the distinction between amendment and dismemberment suggests answers to pressing questions and controversies in constitutional law today. How should constitutional designers structure the rules of constitutional change? How may political actors legally and legitimately formalize transformative changes to the constitution? How should scholars evaluate constitutional changes believed to violate the constitution's rights, structure, or identity? Should courts review the constitutionality of constitutional alterations?

In this Article, I identify, define, and theorize the idea of constitutional dismemberment and explain how the concept can explain many of the extraordinary constitutional transformations we see around the world today. I begin in Part I by highlighting three contemporary challenges in the study of constitutional change. I focus here on current challenges in constitutional design, the controversial though increasingly frequent use of judicial power to invalidate a constitutional amendment, and the ubiquitous though insufficiently precise theory of constituent power.

In Part II, I illustrate the phenomenon of dismemberment by showing its breadth of application to both codified and uncoded constitutions in connection with constitutional rights or structure, and its relevance to changes that improve or deteriorate the democratic values of liberal constitutionalism. I draw from different types of constitutions around the world, including the codified Constitutions of Brazil, Ireland, Jamaica, Japan, Saint Lucia, and the United States; the uncoded Constitutions of New Zealand and the United Kingdom; and the partially codified Constitution of Canada.

Next in Part III, I examine some of the implications of dismemberment for contemporary problems in constitutional change, including the problem of liberal democratic degeneration around the world, the problem of juristocracy, and the problem of legal discontinuity. I give special attention in this Part to how we might apply the idea of constitutional dismemberment to imposed constitutions, colonial constitutions, and the concept of constitutional resilience. I conclude with thoughts on the implications of constitutional dismemberment, both for the study of constitutional change and for the way in which constitutions are, and should be, altered in practice.

#### I. THE CHALLENGES OF CONSTITUTIONAL CHANGE

The distinction between amendment and dismemberment can help resolve three of the major challenges facing constitutional designers and scholars of constitutional change today. The first major challenge in the field is how to

distinguish the multiplicity of changes that constitutions undergo. The idea of dismemberment prescribes different procedures for altering constitutions—procedures that vary according to the degree of change. The second major challenge in the field confronts the questions whether and how courts should evaluate the constitutionality of constitutional changes. Courts around the world have invalidated constitutional amendments for exceeding the power of amending actors. Constitutional dismemberment resists the doctrine of unconstitutional constitutional amendment and instead suggests a catalytic, not obstructive, posture for courts when reviewing the constitutionality of constitutional changes. The third major challenge concerns the actual design of the textually-entrenched rules of constitutional change. Constitutional designers have struggled to create formal rules of change that do what these rules are intended to do: create a transparent, predictable, and rational process for altering the constitution. Constitutional dismemberment suggests a two-track model of constitutional design, as well as an accompanying default rule that political actors should respect where a constitutional text does not entrench any relevant rule at all. On each of these three fronts, the theory of constitutional dismemberment can bring greater clarity than we currently have.

#### *A. The Dividing Line in Constitutional Alteration*

Existing theories of constitutional change correctly recognize that some changes are more significant than others, but they have not yet specified what classifies a change as one type or another. Even those theories of constitutional change that identify criteria for what counts as an amendment arrive at a solution by classifying a constitutional change only by the outcome it produces, rather than by connecting the outcome to the process by which it is achieved. These conventional approaches generate an unhelpful binary classification: either a constitutional alteration properly amends a constitution or it so radically transforms a constitution that conceptually it yields a new constitution, even though no new constitution has been promulgated. As I will explain later, my solution creates gradients of change ranging from amendment to dismemberment to new constitution, with the possibility of amendment and dismemberment along different scales of magnitude. The result is a continuum of constitutional change rather than a binary classification.<sup>26</sup>

##### *1. Four Propositions*

Consider an example from John Rawls in reference to the United States Constitution: Would a constitutional change repealing the First Amendment's guarantee against a State religion be a valid use of the formal amendment procedure in Article V?<sup>27</sup> For Rawls, the answer is no: "[A]n amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the

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26. See *infra* Sections I.C, II.C.

27. JOHN RAWLS, POLITICAL LIBERALISM 238 (1993).

world.”<sup>28</sup> Rawls recognizes that neither the constitutional text nor any constitutional theory can prevent political actors from deploying the rules of Article V to make a change for which they have the required support, but he would define the repeal of the First Amendment as a “constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution.”<sup>29</sup> In Rawls’ understanding of how constitutions should change, the use of Article V to repeal the First Amendment would create a new U.S. Constitution, even though the resulting amendment would be formally entrenched in the “old” constitution as a mere amendment, and despite there being no new codification promulgated as a new constitution. This Rawlsian view reflects the conventional understanding in the field of constitutional change: either a constitution is amended consistently with the constitution, or the alteration is so transformative that we cannot call it an amendment and we must instead recognize that conceptually it creates a new constitution.<sup>30</sup>

In the late nineteenth century, Thomas Cooley likewise insisted that an alteration inconsistent with an existing constitution should not be called an amendment. He wrote that an amendment “must be in harmony with the thing amended, so far at least as concerns its general spirit and purpose,” adding that “[i]t must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it.”<sup>31</sup> And yet we have seen many examples of constitutional changes formalized using the rules of constitutional amendment that were, in Cooley’s own words, “entirely incongruous” with the existing constitution. For Cooley, it is plainly incorrect in constitutional theory to define such changes as constitutional amendments:

[A]ny step in the direction of establishing a government which is entirely out of harmony with that which has been created under the constitution, . . . though it may be taken in the most formal and deliberate manner, and in precise conformity to the method of amendment established by the constitution, is inoperative in the very nature of things. . . . The framers of the constitution must very well have understood that this was the case, and must have acted upon this understanding; and they abstained from forbidding such changes because they would be illegitimate as amendments, and for that reason impossible under the term they were making use of.<sup>32</sup>

Cooley outlines in this passage the key elements in the conventional theory of constitutional change, all complementary to and derivative of the position taken by Rawls. The Rawlsian view holds to the legal fiction that an amendment refers only to an alteration that is consistent with the existing constitution and that any alteration inconsistent with it must be interpreted as creating a new constitution, even if the old constitution is not formally replaced with a new

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28. *Id.* at 239.

29. *Id.*

30. See Richard Albert, *The Unamendable Core of the United States Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* 13, 19-23 (András Koltay ed., 2015).

31. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 117 (1893).

32. *Id.* at 119.

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Cooley makes explicit three points that are implicit in the conventional theory of constitutional change. First, that the test for distinguishing a constitutional amendment from a new constitution is not whether the change is achieved through the process of constitutional amendment entrenched in the constitution. As Cooley writes, even if a constitutional alteration is “in precise conformity to the method of amendment established by the constitution,” the change is “inoperative” as an amendment if it is “entirely out of harmony with that which has been created under the constitution.”<sup>33</sup> Second, that a constitutional alteration inconsistent with the existing constitution is “illegitimate.” Finally, that a constitution implicitly entrenches the distinction between an alteration that qualifies as an amendment and one that creates, though only conceptually, a new constitution. Cooley explained that the framers “must have acted upon this understanding” and that they “abstained from forbidding” the kinds of changes that would yield a new constitution, because the very nature of amendment is to keep an amended constitution in harmony with an old one.<sup>34</sup>

Reading Cooley alongside Rawls allows us to isolate the four propositions that constitute the conventional theory of constitutional change. First, the binary proposition: a constitutional alteration results either in an amendment or in a conceptually new constitution. Second, the substantive proposition: a constitutional alteration formalized using the rules of amendment does not always result in a proper amendment. Third, the illegitimacy proposition: a constitutional alteration that results in something other than an amendment is illegitimate under the existing constitution. Fourth, the implicit limitations proposition: even where a constitutional text does not identify which kinds of constitutional alterations would qualify as a constitutional amendment versus a new constitution, this distinction is implicit in the nature of an amendment.

These four propositions recur in the modern scholarship on constitutional change. For instance, Walter Murphy argues that “valid amendments can operate only within the existing political system; they cannot deconstitute, reconstitute, or replace the polity.”<sup>35</sup> The suggestion here is that the use of the amendment power to deconstitute, reconstitute, or replace the polity is not an amendment at all, but rather the creation of what we can identify conceptually as a new constitution. More recently in his study of Article V in the United States, Jason Mazzone makes the case that an amendment only “fine-tunes what is already in place—or, in a metaphor eighteenth-century Americans used, puts the ship back on its original course.”<sup>36</sup> These views draw from the core of Carl Schmitt’s influential theory of constitutional change. Schmitt argues that

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33. *Id.*

34. *Id.*

35. Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 177 (Sanford Levinson ed., 1995).

36. Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1754 (2005).

the authority of political actors to amend a constitution is limited by a constitution itself. Political actors, he writes, may amend a constitution “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”<sup>37</sup> He specifies that “the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself.”<sup>38</sup> Any amendment that exceeds this authority effectively creates a new constitution—a constitution-making power that ordinary amending actors are not authorized to exercise, according not only to Schmitt, but also to the dominant and largely unchallenged view in the field.<sup>39</sup>

## 2. *The Foundations of the Conventional Views*

These conventional views of constitutional change are rooted in the theory of constituent power. Stated simply, the theory proposes a rigid division of labor between the people and their representatives in government: only the people may found an altogether new constitution, while the people’s representatives are authorized to act in the people’s name to do no more than change a constitution in harmony with the constitution’s own terms. Despite its great influence in law, constituent power theory is remarkably imprecise as to how the people are to exercise this power.<sup>40</sup>

The two core concepts in the theory are the *pouvoir constituant* and the *pouvoir constitué*.<sup>41</sup> These two concepts refer to two different groups of persons, each linked to the other through the constitution in a hierarchical relationship of the distribution and exercise of power such that one group is

37. CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer transl. ed., 2008).

38. *Id.*

39. See, e.g., David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 866-67 (2015) (discussing the dominant view in the field); Douglas Linder, *What in the Constitution Cannot be Amended?*, 23 ARIZ. L. REV. 717, 728-33 (1981) (suggesting that the Corwin Amendment would have created a new United States Constitution); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754-57 (1980) (arguing that an amendment can be unconstitutional); Ulrich K. Preuss, *The Implications of Eternity Clauses: The German Experience*, 44 ISR. L. REV. 429, 435-45 (2011) (tracing the history of unconstitutional constitutional amendment in Germany); Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 23, 24-37 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., 2017) (arguing that the amendment power is limited); Md. Ariful Islam Siddiquee, *Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments’ Amending Power*, 33 J.L. POL’Y & GLOBALIZATION 64, 70 (2015) (defending the theory and doctrine of unconstitutional constitutional amendment); George D. Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213, 221 (1920) (arguing that Article V is limited). There are some noteworthy exceptions to the conventional view that the amendment power is limited. See, e.g., Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010) (rejecting the use of unamendability in constitutional design and proposing a functionally similar alternative); John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373 (1985) (arguing that there are no implicit limitations on the use of Article V).

40. The theory has its origins in Emmanuel Joseph Sieyès’ French Revolutionary pamphlet. See EMMANUEL JOSEPH SIEYÈS, *QU’EST-CE QUE LE TIERS ÉTAT?* (2002) (originally published in 1789). Sieyès set out to construct a notional justification for the idea that the right to self-determination belongs to the people alone.

41. *Id.* at 53.

subordinate to the other. The superior group is the *pouvoir constituant*, which in translation is the *constituent power*, a term used to refer to the body of people in whom supreme power resides.<sup>42</sup> The inferior group is the *pouvoir constitué*, meaning the *constituted power*, a term used to refer to the institutions a constitution creates to carry out the duties and discretionary authority delegated by the people in that constitution. The major premise of the theory is that no constitution can properly be formed by a constituted power; instead, the constitution must be understood to have been created by the exercise of constituent power, which is to say by the people themselves.<sup>43</sup> The corollary premise of the theory is that the authority of the constituted power is limited to only changing the constitution in ways that remain true to the constitution created by the constituent power.

Constituent power theory is embedded in the legal fiction that the people actually authorize constitutions either in their writing or ratification, or both. The people sometimes participate directly in the constitution-making process in referenda to ratify a new constitution, as was the case for recent constitutions in Egypt (2014),<sup>44</sup> Zimbabwe (2013),<sup>45</sup> Kenya (2010),<sup>46</sup> Bolivia (2009),<sup>47</sup> and Iraq (2005).<sup>48</sup> But many important constitutions were not adopted with direct popular ratification. This list includes constitutions or constitutional acts in Canada (1982),<sup>49</sup> Germany (1949),<sup>50</sup> India (1950),<sup>51</sup> South Africa (1996),<sup>52</sup> and the United States (1787).<sup>53</sup>

It is hard to know why the legal fiction persists. The idea of “the people” as it is currently understood is too amorphous, too under-determined, and too romanticized to have significant purchase in explaining how constitutions are written or ratified. As Claude Klein and András Sajó have observed, “[t]he ‘people’ is not sufficiently structured to develop a constitution” nor can we say that actual individuals are “very welcome by the actual constitution-making

42. *Id.*

43. *Id.*

44. See Reza Sayah & Mohammed Tawfeeq, *Egypt Passes a New Constitution*, CNN (Jan. 18, 2014), <http://www.cnn.com/2014/01/18/world/africa/egypt-constitution/index.html>.

45. See *Zimbabwe Approves New Constitution*, BBC NEWS (Mar. 19, 2013), <http://www.bbc.co.uk/news/world-africa-21845444>.

46. *Kenya's Back Change to Constitution in Referendum*, BBC NEWS (Aug. 5, 2010), <http://www.bbc.com/news/world-africa-10876635>.

47. See Simon Romero, *Bolivians Ratify New Constitution*, N.Y. TIMES, (Jan. 25, 2009), <http://www.nytimes.com/2009/01/26/world/americas/26bolivia.html>.

48. See *Iraqi Constitution Passes, Officials Say*, CNN (Oct. 25, 2005), <http://www.cnn.com/2005/WORLD/meast/10/25/iraq.constitution>.

49. The *Constitution Act, 1982* is a statute of the Parliament of the United Kingdom. See *Constitution Act, 1982, being Schedule B to the Canada Act, 1982 c. 11* (U.K.).

50. The Basic Law was adopted by the Parliamentary Council and ratified by Germany's subnational units. See GRUNDGESETZ [GG] [BASIC LAW], art. 144, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html).

51. The Indian Constitution was adopted and enacted by a Constituent Assembly. See INDIA CONST. pmbl.

52. The South African Constitution was enacted by a Constitutional Assembly. See *In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1997 (1) BCLR 1 (CC).

53. The U.S. Constitution was ratified in state conventions. See U.S. CONST. art. VII.

elite.”<sup>54</sup> The people are more often than not represented by executives who negotiate constitutions as elite bargains, by legislators who vote on a package of proposals, by Constituent Assembly members who deliberate on and debate the content of constitutions, and sometimes by one or more of these groups of representatives in some special sequence or combination.<sup>55</sup>

Constituent power theory is therefore not a descriptive account of how constitutions are made and changed, but rather a normative aspiration for how some scholars believe they *should* be made and changed. Scholars persuaded by the theory seem to elide these distinctions when they invoke constituent power to defend limitations on the amendment power or to justify an invalidation of a constitutional amendment. But even the aspiration itself is unclear. It may be for new constitutions to be written or authorized directly by the people, an eventuality that becomes a real possibility as the peoples of the countries of the world continue to get swept into the trend of popular consultation that political actors appear gradually to be embracing. The aspiration may alternatively be more conservative: it may be both to constrain how political actors change constitutions and also to equip scholars and jurists with a vocabulary to oppose changes they might resist for any number of reasons. There may be a third aspiration: to foster constitutional stability and endurance. One important effect of constituent power theory is to make it difficult to change the fundamental core of a constitution unless the people, whoever they are, manifest their will to allow such a change. The result of constituent power theory is therefore to privilege the status quo, which may in turn create a more stable constitutional order and help the constitution endure. Whether these normative ambitions are positive goods is a different question from whether constituent power theory reflects the realities of constitutional change.

### 3. *The Missing Concept*

The conventional theory of constitutional change can explain what an amendment is: it is a change that is consistent with the framework of a constitution. The conventional theory can also explain the constitution-making moment when a new constitution is created and entrenched against ordinary repeal. But conventional theory requires a theoretical leap to accept that a constitutional change passed as an ordinary amendment amounts to a new constitution even where no new text has been promulgated. Important changes like the Civil War Amendments are, of course, more than mere adjustments, yet to say that they create a new constitution requires us to ignore that the thing we identify as *the* constitution remains unchanged in form, except to the extent

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54. Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419, 424 (Michel Rosenfeld & András Sajó eds., 2012).

55. See Tom Ginsburg, Zachary Elkins & Justin Blount, *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 205 (2009) (reporting that referenda were involved in the ratification of less than twenty-five percent of constitutions in a study sample of constitutions adopted from 1789 to 2005).

of the alteration.

We therefore need a new concept to fill the void that exists in the conventional theory of constitutional change between an amendment and a new, actual constitution. The middle ground should serve as a bridge between these two constitutional changes. On one end, an amendment is a constitutional alteration that continues to develop the constitution in the constitution-making path that began at its founding moments. On the other, it is an alteration that yields a new constitution, at least in form and also, though not always, in significance, as scholars argue was the case in the United States with Reconstruction. There is room in the middle of these two forms of constitutional alteration for a concept that is more than an amendment but less than a new constitution.

We can conceptualize this middle ground as the unmaking of a constitution without breaking legal continuity. This is the phenomenon I identify as a constitutional dismemberment. A dismemberment is a self-conscious effort perceived as the unmaking of the constitution with recourse to the rules of constitutional alteration. A dismemberment introduces a change that is incompatible with the constitution's existing framework and purpose. A dismemberment introduces a transformative change to the constitution, but it does not produce a new constitution because, as a matter of form, the constitution remains what it was prior to the change, except to the extent of the change itself. The theory of constitutional dismemberment accordingly does not recognize a new constitution until a new constitution is in fact self-consciously adopted by the relevant political actors choosing to launch and successfully complete the formal constitution-making process for that purpose.

### *B. Enforcing the Boundaries of Constitutional Change*

Courts have enforced these four propositions in the course of reviewing the constitutionality of constitutional changes. They have done so consistently with the conventional theory of constituent power, enforcing the boundaries of constitutional change by drawing a line between those constitutional alterations that they believe are consistent with the constitution and those they believe are not. Courts around the world have in fact been applying something like the concept of dismemberment in the course of reviewing the constitutionality of constitutional amendments without recognizing it as such. Yet they have taken the wrong jurisprudential lesson from the distinction between a constitutional amendment and a constitutional dismemberment.

#### *1. Three Unconstitutional Constitutional Amendments*

Imagine a constitutional challenge to the Eighteenth or Nineteenth Amendments at the time of their passing for violating the federalist foundations of the U.S. Constitution. Although it is the keystone of the architecture of the Constitution, federalism as a structure and allocation of vertical powers is not made formally unamendable in the text. Could the Supreme Court of the United States have held that either amendment was unconstitutional—and in

turn annulled it—on the theory that the amendment violates the unwritten federalist foundations of the Constitution?<sup>56</sup> This is a close analogue to the question confronting many courts around the world when an amendment is challenged as unconstitutional, the main difference being that the U.S. Constitution makes nothing formally unamendable.

Today it is not uncommon for supreme or constitutional courts to annul a procedurally-perfect constitutional amendment on the theory that the amendment is unconstitutional. The doctrine of unconstitutional constitutional amendment has traveled the globe, from its political foundations in France and the United States, to its doctrinal origins in Germany, to its practical application in constitutional States in nearly every region of the world, including Argentina, Austria, Greece, Hungary, Portugal, South Africa, South Korea, Switzerland, and Tanzania, to name but a few.<sup>57</sup> However, its increasing frequency does not make it any less extraordinary nor any more reasonable.

Consider three high court rulings—one each from Colombia, Taiwan, and India—where judges have invalidated an amendment for exceeding what they view as the implicitly limited amendment power that amending actors are presumed to hold under the conventional theory of constituent power. The four propositions are central to the outcome in each case. But note that the idea of dismemberment rests deep within the rulings, although the courts do not seem to recognize it.

Begin with Colombia. The Constitutional Court of Colombia has created the “substitution of the constitution” doctrine, which authorizes Congress only to amend the Constitution but not to replace it, on the theory that the power of constitutional replacement “is reserved for the people in their authority as primary constituent power.”<sup>58</sup> As Carlos Bernal has explained, the core of the doctrine is that “the power to amend the constitution comprises the power to introduce changes to any article of the constitution text” on the condition that “these changes can neither imply a derogation of the constitution nor its replacement by a different one.”<sup>59</sup> In the Court’s first judgment establishing the doctrine, it stressed implicit limitations on the amendment power:

The derivative constituent power, then, lacks the power to destroy the Constitution. The constituent act establishes the legal order and, because of that, any power of reform is limited only to carrying out a revision. The power of reform, which is constituted power, is not, therefore, authorized to annul or substitute the

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56. The United States Supreme Court considered constitutional challenges to both the Eighteenth and Nineteenth Amendments after they were passed. In each case, the Court rejected claims that the amendments violated federalism. See *Leser v. Garnett*, 258 U.S. 130, 136 (1922); *Rhode Island v. Palmer*, 253 U.S. 350, 386 (1920).

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

58. Mario Cajas Sarria, *The Unconstitutional Constitutional Amendment Doctrine and the Reform of the Judiciary in Colombia*, INT’L J. CONST. L. BLOG (Sept. 1, 2016), <http://www.iconnectblog.com/2016/09/the-unconstitutional-constitutional-amendment-doctrine-and-the-reform-of-the-judiciary-in-colombia>.

59. 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, 341 (2013).

Constitution from which its competence is derived. The constituted power cannot . . . grant itself functions that belong to the constituent power and, therefore, cannot carry out a substitution of the Constitution not only because it would then become an original constituent power, but also because it would undermine the bases of its own competence. . . . The power of reform, a constituted power, has material limits, because the power to reform the Constitution does not include the possibility of derogating it, subverting it or substituting it in its integrity.<sup>60</sup>

The Court stressed that the amendment power in Colombia is limited, even though the constitutional text imposes no explicit limitations on it.<sup>61</sup> The reason why, wrote the Court, is that the amending power is a constituted power, a lesser and bounded power in comparison to constituent power, the latter being a power that is “absolute, unlimited, permanent, without limits or jurisdictional controls, because its acts are political and foundational and not juridical, [and] whose validity derives from the political will of the society.”<sup>62</sup> The Court therefore saw its role as protecting the Constitution from its replacement—what the Court described as its “eliminat[ion]” or “substitut[ion]”—by anything less than a procedure legitimated by constituent power.<sup>63</sup> The Court has often relied on this substitution doctrine since its first appearance in 2003.<sup>64</sup>

Turn next to Taiwan. The Taiwanese Constitution authorizes no formal limitations on constitutional amendment, provided amending actors can successfully assemble the required majorities and meet the required thresholds.<sup>65</sup> Yet the absence of a formally unamendable rule has not stopped the Taiwanese Constitutional Court from striking down a series of constitutional amendments. In one case, the National Assembly adopted a set of amendments in 1999 that the Court subsequently invalidated on both procedural and substantive grounds.<sup>66</sup>

The constitutional challenge began when members of the Legislative Yuan filed a petition arguing that the amendment passed by the National Assembly—where votes had been cast in anonymous ballots in the second and

60. Corte Constitucional [C.C.] [Constitutional Court], julio 9, 2003, Sentencia C-551/03, paras. 37, 39 (Colom.), translated in COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 341 (Manuel José Cepeda Espinosa & David Landau eds., 2017).

61. Joel Colón-Ríos, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America*, 44 VICTORIA U. WELLINGTON L. REV. 521, 531 (2013).

62. Sentencia C-551/03, para. 29 (quoting Corte Constitucional [C.C.] [Constitutional Court, octubre 1, 1992, Sentencia C-544/02, para. 10 (internal quotation marks omitted)), translated in Colón-Ríos, *supra* note 61, at 530-31.

63. Colón-Ríos, *supra* note 61, at 531 (quoting Sentencia 551/03, para. 34).

64. See, e.g., Bernal, *supra* note 59, at 343-46; Vicente F. Benítez R. & Germán A. González H., *The Role of Courts Sustaining Democracy: An Approach from Transitional Regimes*, 36 REVISTA DERECHO DEL ESTADO 41, 48-50 (2016); David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069, 1107-08 (2016); Gonzalo Andres Ramirez-Cleves, *The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy*, in DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM 213-20 (Thomas Bustamante & Bernardo Gonçalves Fernandes eds., 2016).

65. See MINGUO XIANFA [CONSTITUTION], ch. XIV (1947) (Taiwan).

66. See Judicial Yuan Interpretation No. 499, Mar. 24, 2000 (Taiwan Const. Ct. Interp.), [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=499](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499).

third readings—violated the Constitution’s amendment rules.<sup>67</sup> They also argued that there were irregularities in the vote because some of the amendment proposals had been defeated in the second reading but were still voted on again in the third. The amendment, moreover, required the National Assembly to be constituted according to a proportional allocation given to political parties on the basis of votes they had received in the latest election of the Legislative Yuan, a separate constitutional organ. The challengers claimed that this change would make all of those persons unaffiliated with a political party ineligible for selection to the National Assembly. The challengers raised other concerns, including that the amendment improperly extended term limits and also sowed confusion about their duration.<sup>68</sup>

The Court held the amendment unconstitutional. Anonymous balloting, the Court explained, violated the principles of “openness and transparency” in the legislative process.<sup>69</sup> As for the voting irregularities, the Court held that they “contradict the fundamental nature of governing norms and order that form the very basis and existence of the Constitution, and are prohibited by the norms of constitutional democracy.”<sup>70</sup> The rule of proportional representation in the National Assembly based on political party votes received in Legislative Yuan elections violated the principles of “democracy and constitutional rule of law.”<sup>71</sup> The extension of term limits likewise violated the principle of “democratic state of constitutional rule of law.”<sup>72</sup> The Court also explained in general terms how it reached the conclusion that these amendments were unconstitutional:

Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution’s very existence destroys the integrity and fabric of the Constitution itself. . . . The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.<sup>73</sup>

As in other cases around the world where courts have rejected an amendment, here the Taiwanese Constitutional Court set the Constitution itself as the limiting reagent for lawful constitutional change. It held that constitutional changes inconsistent with the Constitution would destroy the Constitution as it is presently understood.<sup>74</sup> There are echoes in this judgment of the Colombian

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (alteration in original).

74. The Taiwanese Constitutional Court has since dialed back its activism in constitutional politics, and it may in fact be on the path downward to constitutional irrelevance. See Ming-Sung Kuo, *Moving Towards a Nominal Constitutional Court? Critical Reflections on the Shift from Judicial Activism to Constitutional Irrelevance in Taiwan’s Constitutional Politics*, 25 WASH. INT’L L.J. 597 (2016).

Constitutional Court's self-given duty to protect the Constitution from its "eliminat[ion]."<sup>75</sup>

Courts in Colombia, Taiwan, and elsewhere in the world have not built this approach from scratch. Their judgments derive from ideas developed in a set of Indian Supreme Court rulings that have migrated to courts in constitutional democracies in both the Global North and South, in the East and West, and in civil and common law regimes. Inspired by German theory and doctrine, the Indian Supreme Court has created a vague but judicially self-entrenching "basic structure doctrine" to justify its power to review constitutional amendments for their constitutionality.<sup>76</sup>

The impetus for the Indian doctrine was the national legislature's virtually unfettered power of formal constitutional alteration. With the exception of certain classes of change that require state ratification, the legislature may alter the Indian Constitution with a simple majority vote in each house of the legislature as long as a two-thirds quorum of all members is present.<sup>77</sup> By comparison to other constitutional democracies, this is a very low threshold for formal alteration.<sup>78</sup> It is so low that it raises the risk that legislators will treat the Constitution like a statute, making it as easily changeable and indistinguishable from one.<sup>79</sup> The legislature's power is even greater in light of the absence of any formally unamendable rule in the Constitution. It is therefore possible, perhaps even likely, that the legislature would be tempted to exploit its textually unlimited power of formal alteration to make constitution-level changes with a simple legislative majority vote. The "basic structure doctrine" was thus created to justify limiting the legislature's constitutional amendment power to only those changes that cohere with the Constitution.<sup>80</sup>

The Indian Supreme Court has come a long way on whether it has the power to review an amendment. It first declared in 1951 that the amendment

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75. See Judicial Yuan Interpretation No. 499, *supra* note 66; *supra* note 63 and accompanying text.

76. See A.G. Noorani, *On India's Debt to a German Jurist, Professor Dietrich Conrad*, FRONTLINE (Apr.-May 2001), <http://www.frontline.in/static/html/fl1809/18090950.htm>; see also Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 325 n.22 (2011) (noting the probable link between the basic structure doctrine and German scholarship). There is an important historical connection between the idea of an unconstitutional constitutional amendment and the German doctrine of constitutional identity. See Monika Polzin, *Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law*, 14 INT'L J. CONST. L. 411 (2016).

77. INDIA CONST. art. 368, § 2.

78. See DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006) (ranking the Indian Constitution as one of the easiest to amend in his study sample).

79. See ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 39-40 (1999); Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT 20, 22-23 (1995).

80. The court-created "basic structure doctrine" was not a necessary outcome. Conventions of unamendability could have emerged from the political process in order to constrain the legislature's exercise of its textually-unlimited amendment power. See Gert Jan Geertjes & Jerfi Uzman, *Conventions of Unamendability: Covert Constitutional Unamendability in (Two) Politically Enforced Constitutions*, in AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES (Richard Albert & Bertil Oder eds., forthcoming 2018).

power is unlimited.<sup>81</sup> Sixteen years later, the Court indicated a turn in the opposite direction: the Court in 1967 laid the foundation for invalidating an amendment at some point in the future, holding that the amendment power could not be used to abolish or violate fundamental constitutional rights.<sup>82</sup> The Court's new position on implicit limits on amending powers was rather controversial, which perhaps explains why the Court held that it would apply this power only prospectively, not retrospectively.

The Court held a few years later that the amendment power could be used only as long as it did not do violence to the Constitution's basic structure.<sup>83</sup> The organizing logic of this "basic structure," according to the Chief Justice, was that "every provision of the Constitution can be amended, provided in the result the basic foundation and structure of the Constitution remains the same."<sup>84</sup> The basic structure consists of various principles, including constitutional supremacy, the republican and democratic forms of government, the secular character of the State, the separation of powers, and federalism.<sup>85</sup> These elements of the basic structure doctrine are not spelled out in the Constitution's text. Nor are they the result of a popular consent-driven constitutional design that entrenches a hierarchy of importance allowing the people to distinguish among different values. These and other elements of the basic structure doctrine identified since then have emerged from the Court's interpretation of the Constitution, just like the basic structure doctrine itself.

The Court took the next step nearly one decade later when it invoked the basic structure doctrine to invalidate actual constitutional amendments to the Constitution's formal amendment rules.<sup>86</sup> The amendments had proposed to prevent the Court from evaluating the constitutionality of any amendment at all. They established the rule that "no amendment of this Constitution . . . shall be called in question in any court on any ground"<sup>87</sup> and that "for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."<sup>88</sup> When the Chief Justice held these amendments unconstitutional, he relied on the vocabulary of destruction, the same language we read in the rulings of the Colombian and Taiwanese Constitutional Courts. The Chief Justice wrote that although "Parliament is given the power to amend the Constitution," it is clear that this "power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure."<sup>89</sup> Protecting the constitution from its destruction is the key idea behind the basic structure doctrine. It also informs the substitution of the constitution doctrine and the rulings of most, if

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81. See *Sri Sankari Prasad Singh Deo v. Union of India*, (1952) SCR 89 (India).

82. *Golaknath v. State of Punjab*, (1967) 2 SCR 762 (India).

83. *Kesavananda Bharati Sripadagalvaru v. Kerala*, (1973) 4 SCC 225 (India).

84. *Id.*

85. *Id.* para. 316.

86. *Minerva Mills Ltd. v. Union of India* (1981) 1 SCR 206 (India).

87. The Constitution (Forty-second Amendment) Act, 1976, sec. 55 (India).

88. *Id.*

89. *Minerva Mills Ltd.*, (1981) 1 SCR 206.

not all, other courts that make the extraordinary decision to invalidate an amendment on substantive grounds.

## 2. *The Conventional Rule and the Remedy*

Many high courts around the world have given themselves the task of guarding the constitution from changes they believe would destroy its original design. The language of destruction recurs with frequency in other cases. A recent judgment of the Belizean Supreme Court is illustrative:

There is though a limitation on the power of amendment by implication by the words of the Preamble and therefore every provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. . . . I therefore rule that even though provisions of the Constitution can be amended, the National Assembly is not legally authorized to make any amendment to the Constitution that would remove or destroy any of the basic structures of the Constitution of Belize.<sup>90</sup>

This imagery of destruction is familiar in scholarship on constitutional change, so old that it was not new when William Marbury wrote in a 1919 paper published in the *Harvard Law Review* that “it may be safely premised that the power to ‘amend’ the Constitution was not intended to include the power to *destroy* it.”<sup>91</sup> He, too, adhered to the conventional theory of constitutional change I have described as rooted in four propositions.

Invalidation is the ordinary judicial remedy for passing an amendment the Court believes exceeds the scope of the amendment power. The court annuls the amendment on the theory that it is a new constitution masquerading as an amendment. The conventional rule is therefore that a constitutional change amounting to a new constitution can be valid only if the change is made by a constituent power and not by an inferior constituted power. However, what remains inadequately answered is why invalidation must be the court’s response to a transformative constitutional change.

Constituent power is a sociological concept, neither a legal nor a moral one. In the eyes of constituent power—setting aside for now how we actually identify it—the formal trappings of law are less important than political effectiveness and societal acceptance. Where the political class recognizes the validity of a constitutional change and the people approve or acquiesce to it, that change has a claim to legitimacy though not necessarily to legality: a constitution can therefore be simultaneously illegal yet democratically legitimate.<sup>92</sup> This is one of the implications of Bruce Ackerman’s theory of “constitutional moments.”<sup>93</sup> Although Ackerman does not present

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90. *British Caribbean Bank Ltd. v. Att’y Gen. of Belize*, Claim No. 597 of 2011, para. 45 (2012), [http://www.belizejudiciary.org/web/supreme\\_court/judgements/legal2012/eighth%20amendment.pdf](http://www.belizejudiciary.org/web/supreme_court/judgements/legal2012/eighth%20amendment.pdf).

91. William L. Marbury, *The Limitations Upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919) (italics in original).

92. See Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 CORNELL INT’L L.J. 169, 175-77 (2017).

93. See ACKERMAN, *supra* note 23 (introducing the theory of “constitutional moments”); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (theorizing the Reconstruction and the

“constitutional moments” in these terms, his theory is an account of how constituent power has been exercised in U.S. history.

The range of valid exercises of constituent power is boundless in cases of legally discontinuous changes. There are no rules of process to legitimate the outcome; the very fact of a popular outcome marking a new beginning is its own source of legitimation. But for a legally continuous change that keeps the constitution in force, the question becomes how to identify the exercise of constituent power where its exercise does not follow the rules of a constitutional text. The answer will differ across jurisdictions because the rules for recognizing the exercise of constituent power are jurisdiction-specific. Constituent power in France, for example, will not mobilize in the same way as constituent power in Germany, which have two different constitutional traditions.

Recognizing the exercise of constituent power is governed by local rules. These rules track the constitutional history of the people in the jurisdiction, how the people interact with and speak through their representatives and institutions, and whether the people and elites will recognize a purported exercise of constituent power as valid. In the case of the United States, history and modern politics suggest that there are three basic rules for recognizing the valid exercise of constituent power. First, the rule of extraordinariness: the transformative constitutional change must occur either through extraordinary institutions, like conventions, or with recourse to some extraordinary procedure, as in the Reconstruction. Second, the rule of consent: the change must be supported by significant popular consent manifested either directly or indirectly. Third, the rule of federalism: the change must be validated in both federal- and state-level institutions.<sup>94</sup>

### 3. *Constitutionalizing Constituent Power*

Courts that have annulled constitutional amendments for exceeding the scope of the amendment power must believe either that they can accurately identify an exercise of constituent power or, more likely, that they can recognize when a constitutional change has been supported by something less than constituent power. The body we call “the people” is not necessarily the same across jurisdictions. Its configuration changes according to local norms and indeed it may also change across time. Ackerman recognized as much when he argued that the major path to constitutional change in the United States since the New Deal is no longer formal amendment via the federalist

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New Deal as constitutional moments); 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (making the case that the Civil Rights movement created a constitutional moment).

94. On this point, I depart from Akhil Amar’s theory of majoritarian constitutional amendment, which aggregates popular will across the nation without regard to state distribution of popular support. See Akhil Reed Amar, *The Consent of the Governed*, 94 COLUM. L. REV. 457 (1994). The rule of federalism points to the principal reason why Ackerman’s theory of the “constitutional moments” in the New Deal and the Civil Rights Movement stand on less firm ground today than the Founding and Reconstruction: the victories of the first pair remain contested in court unlike the victories of the second pair because the first pair was consolidated only at the level of national law without the same depth and intensity of acceptance at the state level.

structures of Article V, but rather transformative judicial appointments through national institutions—namely, the Senate, the Presidency, and the Supreme Court.<sup>95</sup>

Whether in the United States or elsewhere, constituent power cannot be cabined by the rules entrenched in a constitutional text. The nature of constituent power is such that it cannot be constitutionalized as a matter of enforceable constitutional law. But the text can certainly attempt to direct how constituent power can be validly exercised. One way to direct its exercise, though never successfully to constrain it, is to entrench the procedures that the constituent power uses to constitute the constitutional order at its point of origin.

Although Article V of the U.S. Constitution seeks to constitutionalize constituent power, it does so while conceding its inability to impose enforceable rules on its exercise. Under Article V, there are four ways to formally change the Constitution. The first pair of procedures authorizes two-thirds of both Houses of Congress to propose an amendment that becomes valid when three-quarters of the states ratify it through either the legislature or a convention, the choice being up to Congress. The second pair authorizes two-thirds of the states to petition Congress to call a convention to propose a constitutional change that becomes valid when three-quarters of the states ratify it either in a legislature or a convention, again the choice left to Congress.<sup>96</sup> Each procedure may be used to alter anything in the Constitution; nothing today is formally unamendable.<sup>97</sup>

Here are the four separate formal procedures that authorize a textual alteration to the Constitution: (1) Congress proposes, by two-thirds supermajority, a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *legislative votes*; (2) Congress proposes a change by two-thirds supermajority, and the change becomes valid when it is ratified by three-quarters of the states in *conventions*; (3) two-thirds of the states petition Congress to call a constitutional convention to propose a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *legislative votes*; and (4) two-thirds of the states petition Congress to call a constitutional convention to propose a constitutional change, and the change becomes valid when it is ratified by three-quarters of the states in *conventions*.

But one of these four methods of formal change is unlike the others. The fourth is similar to the one that was used to ratify the U.S. Constitution. The 1787 Philadelphia Convention approved the Constitution for the states to ratify according to the following rule: “The ratification of the conventions of nine

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95. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1171-73 (1988).

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

97. The slave trade and related taxation provisions were formally unamendable until 1808 but these have, of course, since expired. *See id.* For an important study on constitutional sunset provisions like these, see SOFIA RANCHORDÁS, *CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE* (2014).

states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”<sup>98</sup> Note that the ratification of the Constitution was made subject to the approval of state *conventions*. This ratification procedure for the Constitution therefore reminds us of the fourth Article V amendment procedure requiring two-thirds agreement in a convention to propose constitutional changes that later become valid where three-quarters of states ratify those changes in conventions. But there is an important difference: the three-quarters threshold for ratifying a constitutional amendment amounts to ten of the original thirteen states present at the Founding. This ten-state amendment ratification threshold therefore creates a higher ratification threshold for amending the Constitution than the nine-state total that was required to ratify the Constitution to begin with—evidence of how strongly the drafters and ratifiers wished to preserve the content of the Founding Constitution.

How should we interpret the choice to entrench in Article V a ratification threshold for constitutional amendments that is similar to the one used to ratify the entire Constitution? And why would the authors of the Constitution create three other rules for constitutional change—rules that were not used to ratify the Constitution? The answers to these questions help us understand constituent power in the United States.

Article V entrenches both powers of amendment and dismemberment, as well as the power of formal constitutional creation, all without stating so in those terms. The four procedures in Article V give political actors the tools to exercise the full scope of powers to change the Constitution, both within the existing constitutional order, so as to retain legal continuity, and also from outside the constitutional order, in order to found a new constitution that leads to legally discontinuous constitutional change. The first two Congress-initiated procedures authorize amendment consistent with the Constitution. The fourth procedure has the widest range.<sup>99</sup> It authorizes both amendment and dismemberment, and it also contemplates the creation of a new constitution. This procedure is substantially the same one used in 1787 to step outside of the Articles of Confederation in order to propose and thereafter ratify an altogether new constitution, except that it requires one more state to approve the change for a successful ratification.

The third procedure—a convention to propose amendments that become valid if ratified by three-quarters of the state *legislatures*—does not constitutionalize constituent power, but the constituent power may nonetheless choose to make a new constitution using this process. It would thereafter be up

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98. U.S. CONST. art. VII.

99. It has never successfully been used since the adoption of the Constitution, nor has the third. See William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMP. L. 485, 490 (2006). Scholars have explored its present viability as a method to formally amend the Constitution. Compare Michael B. Rapport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1512 (2010) (arguing that the process as currently understood “does not work”), with Gerard N. Magliocca, *State Calls for an Article Five Convention: Mobilization and Interpretation*, 2009 CARDOZO L. REV. DE NOVO 74, 75 (challenging the view that the process is “not a practical device” for constitutional change).

to political elites and the people to recognize the validity or not of that purported exercise of constituent power. Whether to follow the directions outlined in the constitutional text is the choice of the constituent power alone. That is the lesson of the violation of the Articles of Confederation in 1787. The choice to break from the unanimity rule for constitutional amendment and in turn to adopt a new ratification standard was illegal when judged against the legal standard set by the Articles of Confederation, but it was thereafter legitimated by the popularly-supported ratification of the Constitution according to the new rule of ratification.

There has been only one successful use of the fourth procedure in the history of the United States—and that was the Founding itself. This does not mean that the Founding period is the only instance of the exercise of constituent power in the United States. As Ackerman suggests, constituent power has been exercised many times in U.S. history. The point is not that the fourth procedure is the only way to exercise constituent power; it is instead that the fourth procedure is the only way the Constitution expresses the form that constituent power might take. It may, of course, take others. But this was the only form then known to the Constitution's authors when they suggested exercising constituent power to ratify the Constitution. The authors of the Constitution knew from their own experience that the codified text is no barrier to constitutional change when the people manifest their will to unmake the constitution and make a new one.

### *C. Constitutional Design for Formal Alteration*

The rules of change in the U.S. Constitution place it in a small group of constitutions that distinguish between amendment and dismemberment. These constitutions authorize dismemberment using constitution-making procedures—and they do so without breaking legal continuity in the regime. These constitutions of course do not use the twin terms amendment and dismemberment, but the idea is evident in their design. The Swiss Constitution, for example, distinguishes in its text between “total” and “partial” revision.<sup>100</sup> Partial revision is understood to refer to amendments—changes that cohere with the Constitution—while total revision entails substantially bigger changes that transform the Constitution into something it is presently not.<sup>101</sup> We see a similar division of powers between constitution-changing and constitution-making in a few other constitutions of the world,<sup>102</sup> namely in Austria,<sup>103</sup> Costa Rica,<sup>104</sup> and Spain.<sup>105</sup> This framework for formal alteration properly attends to both the content and process of constitutional change.

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100. CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 192 (Switz.).

101. *Id.* arts. 193-94.

102. See Albert, *supra* note 1, at 930-32.

103. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl I No. 62/2016, art. 44 (Austria).

104. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, Nov. 7, 1949, arts. 195-96.

105. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978, § 168 (Spain).

However, the standard design of the rules of formal alteration in the world's constitutions today generally does not entrench the differences between constitution-changing and constitution-making powers. As a result, most constitutions do not recognize the important differences between the thresholds for formal alteration and constitutional ratification, and they therefore miss the design possibilities for legally continuous transformative constitutional change. What follows from the standard design of the rules of formal alteration is free rein for courts to distinguish as they deem proper between the constitution-changing and constitution-making powers, and therefore to invalidate formal alterations that in the view of judges amount to transformative constitutional changes—even when those changes are supported overwhelmingly by political actors and the people they represent.

### 1. *The Standard Design of Formal Rules of Change*

The standard design of the formal rules of constitutional change features only one unified track for constitutional changes. The standard design therefore does not distinguish between alterations that simply repair or elaborate the constitution and those that remake or replace it. In other words, the overwhelming majority of constitutions define formal alteration exclusively with regard to amendment. This means that the entrenched rules to alter the constitution are not identified in connection with the constitution's formal ratification procedure. The unified procedure in most constitutions therefore is only rarely entrenched in relation to the procedure recognized by the legal elite and the people as the valid and legitimate way to exercise the power to unmake the constitution.

For example, the German Basic Law recognizes only one way to make alterations to it. Amendments are permitted “only by a law expressly amending or supplementing its text,” and “[a]ny such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.”<sup>106</sup> The same is true of the French Constitution, which requires the national legislature to approve an amendment proposal before it is ratified in a national referendum, though the president has the power to unilaterally bypass the referendum requirement for proposals made by the government.<sup>107</sup> The procedure to alter the Italian Constitution is more complicated, but the general approach remains the same: the constitutional alteration procedure does not distinguish between the power to change or to unmake or replace the Constitution.<sup>108</sup> In order to become valid, the national legislature must approve a proposal in each House over two consecutive votes held within three months.<sup>109</sup> If the proposal secures two-thirds approval, it becomes valid, but if it fails, one-fifth of one of the two Houses, 500,000 voters, or five autonomous Regional Councils may request that the proposal be ratified in a national

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106. GRUNDGESETZ [GG] [BASIC LAW] art. 79 (Ger.).

107. 1958 LA CONSTITUTION art. 89 (Fr.).

108. Art. 138 Costituzione [Cost] (It.).

109. *Id.*

referendum.<sup>110</sup>

## 2. *The Limits of the Standard Design*

The scarcity of exceptions to the standard design reinforces the general point: the standard design cannot accommodate the distinction between amendment and dismemberment. The standard design of formal rules of change does not entrench the distinction between the power to merely amend the constitution and the power to make a change that transforms its rights, structure, or identity without breaking legal continuity. Under the standard design, making a change of the larger magnitude instead requires political actors and the people to invest time and resources—as well as to incur the non-trivial risk of failure—to make a new constitution and therefore to break the legal continuity that is valuable and perhaps necessary for stability in a constitutional order.

For courts, the relevant distinction is between constitution-changing and constitution-making. Courts enforce this distinction, although nowhere found in the standard design, by invalidating what is viewed as a transformative constitutional change brought about through the formal alteration procedures for constitutional amendment, when such change should have been brought about, in the view of the courts, through the relevant constitution-making procedures. However, there is plenty of evidence to suggest that courts do not enforce this distinction consistently or on replicable grounds.

## 3. *The Consequences of the Standard Design*

Consider a pair of cases from Turkey. They show how inconsistently courts can apply the constitution-changing/-making distinction. A preliminary point is important: the Turkish Constitution authorizes the Constitutional Court to invalidate constitutional alterations when they have been made in violation of the procedures of constitutional change; the Constitution does not authorize the Court to evaluate the content of amendments for coherence with the Constitution.<sup>111</sup>

In a 2008 judgment, the Constitutional Court struck down as unconstitutional a set of amendments on wearing headscarves in universities.<sup>112</sup> The basis of the Court's decision was not a violation of the Constitution's amendment procedure. It was instead rooted in what the Court saw as a violation of the constitution-changing/-making distinction—a distinction that the Court incorporated into the narrowly-worded authorization it is given to review constitutional amendments for procedural correctness alone. The Court

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110. *Id.*

111. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 148 (Turk.) (“[T]he verification of constitutional amendments shall be restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.”).

112. For a thorough discussion of the case, see Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision*, 10 INT'L J. CONST. L. 175 (2012).

imported this substantive restriction into the procedural test through Article 4 of the Constitution, which elevates several principles to the status of unamendable characteristics of the Turkish Republic.<sup>113</sup> The relevant unamendable principle in this case was secularism,<sup>114</sup> which the Court held had been violated by the constitutional amendment that allowed lifting the ban on wearing headscarves in university.

Before the Court could enforce this content-based restriction on constitutional change, it first had to find a way to incorporate substantive review into the narrow procedural review that the Constitution authorizes it to perform. In a twist that Andrew Arato believes is “very strong, even foolproof,” the Court defined the problem in terms of competence: the Court explained that it could not approve the correctness of the amendment if the amendment violated the substantive restriction on what could be amended—here, secularism—because such an amendment would be procedurally invalid in the sense of falling beyond the competence of the amending actors.<sup>115</sup> Far from being foolproof, however, this result undermines the textual prohibition on judicial review of amendments on anything but procedural grounds. Nonetheless, even in the face of the Constitution’s prohibition on substantive review, the Court struck down the amendment, invoking the conventional theory of constituent power as the primary reason and specifying that only constituent power can authorize a fundamental change to the Constitution.<sup>116</sup>

The Court’s defiance of the Constitution is problematic in its own right. But it takes on an additional dimension when we see how inconsistently the Court has applied its own precedent.

In a more recent 2016 judgment, the Turkish Constitutional Court held that it could not pierce the veil of procedure to review the substantive constitutionality of an amendment because doing so would render meaningless the Constitution’s ban on content-based review of constitutional amendments.<sup>117</sup> The dispute concerned the Constitution’s rule on parliamentary immunity, under which members of the National Assembly enjoy broad immunity for statements, views, and votes in connection with their parliamentary functions, meaning they cannot be arrested, interrogated, detained, or tried, and they are immune from criminal sentences during their term of elected service.<sup>118</sup> This rule, however, is subject to the important exception that the Assembly may, by law, choose to lift parliamentary immunity.<sup>119</sup>

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113. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 4 (Turk.).

114. *Id.* art. 2.

115. ANDREW ARATO, POST SOVEREIGN CONSTITUTION MAKING: LEARNING AND LEGITIMACY 242 (2016).

116. Roznai & Yolcu, *supra* note 112, at 184.

117. Anyasa Mahkemesi [Constitutional Court] June 3, 2016, E. 2016/54, K. 2016/117, Resmi Gazete [Official Gazette], June 9, 2016, No. 29737 (Turk.) (translation by Ali Acar on file with author) [hereinafter Parliamentary Immunity Case].

118. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] Nov. 7, 1982, art. 83 (Turk.).

119. *Id.* There is another constitutional rule to note: Article 85 gives members of the National Assembly the right to appeal their loss of parliamentary immunity by a law of the National Assembly

The dispute arose when the Turkish National Assembly adopted an amendment temporarily lifting the Constitution's grant of parliamentary immunity to legislators. The amendment made possible the prosecution of members of the National Assembly who were under investigation for criminal charges. Some members of the National Assembly filed a constitutional challenge to the amendment, arguing that they were authorized to seek redress from the Constitutional Court under Article 85, which gives members of the National Assembly the right to appeal their loss of parliamentary immunity. The Court rejected their request for judicial review, because although Article 85 would normally authorize the Court to review the lifting of immunity if it had been passed by an ordinary law, this temporary lifting of immunity was not done by ordinary law—it was a constitutional amendment passed using the Constitution's formal amendment rules. And since Article 148 limits the Court to reviewing an amendment only to the extent that it violates the procedures of constitutional amendment, the Court here could not venture beyond that restriction to evaluate the amendment under its authority conferred by Article 85 because that authority becomes disabled where a constitutional amendment is concerned. Here is the relevant passage in the Court decision:

A Law of Amendment adopted through this procedure cannot be at all the subject of judicial (constitutional) review in terms of its content; the procedural review is possible only within the framework specified by Art. 148. Pursuant to Art. 148, judicial review of constitutional amendments in terms of procedural requirements is restricted to whether the requisite (qualified) majority votes were obtained for the proposal and in the ballot, and whether the prohibition on debates under expedited procedure was observed.<sup>120</sup>

The Court therefore took an exceedingly narrow perspective on its own power of judicial review. It held that the Court is authorized to review an amendment only for procedural correctness, and that this excludes any procedure—like the one in Article 85—that does not relate to the adoption of an amendment.<sup>121</sup> The Court added that reading Article 148 any other way would hollow it and deny it of its intended effect, which was to circumscribe the Court's authority to review constitutional amendments. The Court affirmed that the challengers could refile their claim under Article 148 but they had no recourse in law under Article 85.<sup>122</sup>

The Court's ruling in this Parliamentary Immunity Case takes the position dictated by a plain reading of the Constitution, but it is not consistent with the reading that the Court gave to the same text in the Headscarf Ban Case. This inconsistency is troubling in and of itself. It does not assuage matters to know that the Court has now returned to the correct reading of the Constitution. These two contrary judgments introduce uncertainty in the jurisprudence of the Court on how it will in the future evaluate claims that an amendment is

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directly to the Constitutional Court, which can annul their loss of immunity if it is not done in accordance with the Constitution. *Id.* art. 85.

120. Parliamentary Immunity Case, *supra* note 117, para. 11.

121. *Id.* para. 13.

122. *Id.* paras. 14-15.

unconstitutional. These two judgments moreover raise the question whether one or both were driven by constitutional politics instead of constitutional law. In either case, it should not come as a surprise that constitutional politics may offer a better explanation for how a court resolves a claim that an amendment is unconstitutional; the idea of constituent power may be exploited equally by courts and amending actors.

The larger point on the rules of formal alteration is that the standard design does little where it is needed most. First, the standard design invites instability. At a minimum, the rules of formal alteration should prescribe a transparent, predictable, and rational process for altering the constitution. But the rules of change in the standard design fail to distinguish between constitution-changing and constitution-making procedures, the result being that the only lawful way to transform the constitution is to engage in an altogether new constitution-making process and to risk the uncertainty entailed by breaking legal continuity. Second, the standard design does nothing to guard against the judicial manipulation of the rules of constitutional change. As we have seen with case law from the Turkish Constitutional Court, even where constitutional designers limit the power of courts to a modest form of procedural review of constitutional amendments, the possibility and the likely eventuality remain that courts will enlarge their own powers contrary to the separation of powers.

## II. CONSTITUTIONAL DISMEMBERMENT: FORMS, THEORY, AND MUTUALITY

Constitutional dismemberment fills a void in the study of constitutional change. It identifies a phenomenon that is increasingly evident around the world; it situates that phenomenon in conceptual terms in the literature on constitutional change; it suggests a judicial doctrine to evaluate constitutional changes; and it is accompanied by a suite of strategies to structure how political actors should change the constitution in a given jurisdiction. In this Part, I explain the idea of constitutional dismemberment by illustrating how and why it occurs. I show that it applies to all constitutions—codified, uncoded, and partially codified. I also introduce the rule of mutuality, the default procedure I suggest for the rules of change in new constitutions that do not entrench two tracks of constitutional alteration.

### *A. An Amendment in Name Alone*

To amend a constitution is to elaborate it in light of experience or to free it from a discovered flaw. This understanding of an amendment begs an all-important question: by what standard are we to judge whether the constitution is in need of an elaboration or a fix? Is the constitution flawed when compared to global norms of constitutional law, to universal values of human rights, to the present views of the people? The answer is in the constitution itself. The structure and design of the constitution suggest how to identify when the constitution warrants an amendment, a concept derived from the Latin *ēmendāre*, meaning to remove errors or to improve. There are limits, however,

to what counts as error-correction and improvement. An amendment must be designed to help the constitution better achieve its purpose. A constitutional dismemberment, in contrast, involves a fundamental transformation of one or more of the constitution's core commitments. Consider three examples of constitutional changes that illustrate a dismemberment in three separate constitutional forms: Japan's codified constitution; the United Kingdom's uncodified constitution; and Canada's partially codified constitution.

### 1. *The War on Japan's Pacifist Constitution*

There were calls to replace the Japanese Constitution almost as soon as it was adopted in 1946. Described by many as "MacArthur's Constitution," in reference to the U.S. General who oversaw its drafting, the Japanese Constitution has long been regarded as a foreign imposition, not an autochthonous text reflecting homegrown values.<sup>123</sup> As early as 1955, the newly-formed Liberal Democratic Party (LDP) made it a central plank in its platform to rewrite the Constitution in order to give Japan its own charter of independence<sup>124</sup>—a pledge that has long remained in the party platform.<sup>125</sup> The LDP has yet to complete its constitution-remaking mission, but it is inching ever closer to it under Shinzo Abe, the leader of the LDP and Japan's current prime minister.

The LDP's main target for constitutional change is the Constitution's Peace Clause.<sup>126</sup> The Peace Clause, entrenched in Article 9, commits Japan "to an international peace based on justice and order" and cements into law the Japanese people's vow to "forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes."<sup>127</sup> At its creation, the Peace Clause was imposed by the laws of conquest into the law of Japan as a permanent reminder, according to one scholar, of the consequences of defeat.<sup>128</sup> Political actors mounted serious efforts to amend Article 9 almost immediately in order to remove the stain of conquest, but each of them failed, as did all others through the 1990s.<sup>129</sup> In all cases, one of the main reasons for the failure of constitutional amendment was the strong public support for the Peace Clause.<sup>130</sup> Popular acceptance of the Peace Clause has therefore grown over time, proving how social and political

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123. Sandra Madsen, *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 549, 555 (1993).

124. See Masmi Ito, *LDP Returns with All Its Old Baggage*, *JAPAN TIMES* (Dec. 25, 2012), <http://www.japantimes.co.jp/news/2012/12/25/reference/ldp-returns-with-all-its-old-baggage>.

125. GLENN D. HOOK & GAVAN MCCORMACK, *JAPAN'S CONTESTED CONSTITUTION* 8 (2004).

126. *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, art. 9 (Japan).

127. *Id.*

128. George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 *YALE L.J.* 1499, 1537 (2002).

129. See JOHN W. DOWER, *EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE, 1878-1954*, at 433-34 (1979); Michael A. Panton, *Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 *ASIAN-PAC. L. & POL'Y J.* 163, 182-84 (2009).

130. Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 *MICH. J. INT'L L.* 163, 82-84 (2009); DOWER, *supra* note 129; Panton, *supra* note 129.

circumstances can change dramatically in any given country.

Today, Article 9 is a super-constitutional norm that reflects deeply-rooted Japanese popular values. It is seen as the Constitution's most important provision outside of the preambular assertion of popular sovereignty.<sup>131</sup> The national commitment to peace has become constitutive of Japan's constitutional identity,<sup>132</sup> a "culturally embedded norm,"<sup>133</sup> and "an anchor of [Japan's] postwar identity."<sup>134</sup> This cultural entrenchment of Article 9 did not occur by happenstance. Article 9 was taught as a point of pride to schoolchildren<sup>135</sup> and was used to reinforce the work of the Committee to Popularize the Constitution, which had been convened to organize public lectures, publish books, produce films and songs, and distribute pamphlets to help ease the transition to the new post-war norm of pacifism.<sup>136</sup> Despite its importance, however, the Peace Clause today is not formally entrenched against amendment or repeal.<sup>137</sup> Its susceptibility to change has allowed political actors to undermine the spirit of Article 9,<sup>138</sup> as its text has been interpreted and reinterpreted by an executive agency, the Cabinet Legislation Bureau,<sup>139</sup> to ban only the offensive use of force and to authorize Japan to establish Self-Defense Forces that today operate on one of the world's largest military budgets.<sup>140</sup> And yet the text of the Peace Clause remains unchanged, still a symbol of Japanese values.

Formally amending Article 9 will be no easy feat. The Japanese Constitution establishes a three-step sequence for constitutional amendment: proposal by a two-thirds supermajority vote in each of the two houses of the national legislature, followed by ratification by a simple majority vote in a referendum, and finally promulgation by the Emperor.<sup>141</sup> Abe's amendment ambitions face a hurdle not only from an onerous amendment threshold but

131. Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127, 157 (2004).

132. See Chaihark Hahm & Sung Ho Kim, *To Make "We the People": Constitutional Founding in Postwar Japan and South Korea*, 8 INT'L J. CONST. L. 800, 814 (2010).

133. Akihiro Ogawa, *Peace, a Contested Identity: Japan's Constitutional Revision and Grassroots Peace Movements*, 36 PEACE & CHANGE 373, 374 (2011).

134. David Arase, *Japan, the Active State? Security Policy after 9/11*, 47 ASIAN SURVEY 560, 562 (2007).

135. See John M. Maki, *Japanese Constitutional Style*, in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-1967, at 27 (Dan Fenno Henderson ed., 1968).

136. See KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 217-22 (1997); Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalization of Jus Ad Bellum*, 30 U. PA. J. INT'L L. 267, 304 n.102 (2008).

137. Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L J. CONST. L. 655, 674-77 (2015).

138. J. MARK RAMSEYER & ERIC. B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN 19 (2010).

139. See Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers*, 40 FORDHAM INT'L L.J. 427 (2017). A related though distinguishable practice of pre-amendment review appears to have taken root in Romania. See Bianca Selejan-Guțan, *Informal Constitutional Changes in Romania*, 6 ROMANIA J. COMP. L. 35, 41 (2015).

140. See Ashley Kirk, *What Are the Biggest Defence Budgets in the World?*, TELEGRAPH (Oct. 27, 2015), <http://www.telegraph.co.uk/news/uknews/defence/11936179/What-are-the-biggest-defence-budgets-in-the-world.html>.

141. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

also from a conservative culture of formal alteration that has so far resisted modifying Article 9 and the rest of the Constitution.

Abe has made some progress toward formally altering Article 9 after first suffering a setback. When it became clear to him that he did not have the support needed to alter Article 9 directly, he suggested a two-step solution to change it indirectly: first, to alter the amendment rule from its high supermajority threshold in the legislature to a lower simple majority vote, and then, to deploy the new amendment rule to alter Article 9.<sup>142</sup> It appeared that Abe was trying to do indirectly what he could not do directly.<sup>143</sup> Abe's plan was exposed as a circumvention of the Constitution, and he faced substantial resistance around the country,<sup>144</sup> notably also from Japanese scholars who stood united against the effort to change the amendment rule despite their opposing views on whether to revise Article 9.<sup>145</sup> One scholar stated unequivocally that "[p]eople versed in constitutional law share the belief that it is inappropriate to relax the requirements for constitutional revision."<sup>146</sup> In spite of this controversy, Abe has persisted with his program in the face of significant opposition. His political coalition gained control of two-thirds of the national legislature in upper house elections in July 2016, giving him the amendment supermajority needed to initiate a popular referendum on amending Article 9<sup>147</sup>—the first time since the end of World War II that the ruling party or coalition had possessed this power.<sup>148</sup> Recent elections in October 2017 have further strengthened his hold on power.<sup>149</sup>

Abe may well succeed in altering Article 9 in the years remaining in his term. But this change to Article 9's renunciation of war and its attendant commitment to peace will be an amendment in name alone. Its effect will be transformative. It will remove one of the core commitments in the post-war Japanese Constitution. It would be wrong to call such a momentous

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142. Tobias Harris, *Shinzo Abe's Constitution Quest*, WALL ST. J. (May 16, 2013), <http://online.wsj.com/article/SB10001424127887323582904578486642338035044.html>; Reiji Yoshida & Ayako Mie, *Abe's Rightism: Campaign Ploy or Governance Plan?*, JAPAN TIMES (Dec. 2, 2012), <http://www.japantimes.co.jp/news/2012/12/02/national/abes-rightism-campaign-ploy-orgovernance-plan/#.UiX989JORIE>.

143. Editorial, *LDP Out to Undermine Constitution*, JAPAN TIMES (Apr. 18, 2013), <http://www.japantimes.co.jp/opinion/2013/04/18/editorials/ldp-out-to-undermine-constitution>; Colin P.A. Jones, *Tweak the Constitution Now, Think Later?*, JAPAN TIMES (June 25, 2013), <http://www.japantimes.co.jp/community/2013/06/25/issues/tweak-the-constitution-now-think-later>.

144. See, e.g., Aurelia George Mulgan, *Abe Rocks Japan's Constitutional Boat*, E. ASIA F. (May 21, 2013), <http://www.eastasiaforum.org/2013/05/21/abe-rocks-japans-constitutional-boat>; Linda Sieg, *Japan PM's "Stealth" Constitution Plan Raises Civil Rights Fears*, REUTERS (May 1, 2013), <http://www.reuters.com/article/2013/05/01/us-japan-politics-constitution-idUSBRE9400ZT20130501>.

145. *Japan's Scholars Set Up Association to Block Constitutional Revision*, JAPAN PRESS WKLY. (May 24, 2013), <https://www.japan-press.co.jp/modules/news/index.php?id=5726>.

146. *Id.*

147. Tomohiro Osaki, *LDP-Led Ruling Bloc, Allies Clear Two-Thirds Majority Hurdle in Upper House Poll*, JAPAN TIMES (July 11, 2016), <http://www.japantimes.co.jp/news/2016/07/11/national/politics-diplomacy/ruling-bloc-wins-big-in-upper-house/#.WAY90vkrKU>.

148. Tomohiro Osaki, *LDP Sets Aside 2012 Draft Constitution Ahead of Diet Debate on Revision*, JAPAN TIMES (Oct. 18, 2016), <http://www.japantimes.co.jp/news/2016/10/18/national/politics-diplomacy/ldp-sets-aside-2012-draft-constitution-ahead-diet-debate-revision/#.WAY7ifkrKUK>.

149. Motoko Rich, *Japan Election Vindicates Shinzo Abe as His Party Wins Big*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/world/asia/japan-election-shinzo-abe.html>.

constitutional change an *amendment* because it would be far from an ordinary amendment. This constitutional change is better understood as a constitutional dismemberment—simultaneously a deconstruction and reconstruction of an essential feature of the Japanese Constitution.

## 2. *The United Kingdom After Brexit*

Constitutional amendment in the United Kingdom does not occur the same way as it does in countries with a codified master-text constitution. Codified constitutions are commonly amended according to rules requiring forms of higher lawmaking, entailing special procedures and heightened approval thresholds that generally differ from those required for ordinary lawmaking.<sup>150</sup> In the United Kingdom, however, there is no formal distinction between higher and ordinary law. Constitutional amendments are made the same way as ordinary laws: by Parliament, which has the power to make and repeal any law, fundamental or not.<sup>151</sup> The lack of any special procedure or qualified majorities to amend the Constitution of the United Kingdom makes constitutional amendment relatively easier in the United Kingdom than elsewhere in the world.<sup>152</sup>

Yet the Constitution of the United Kingdom shares an important similarity with codified constitutions susceptible to formal amendment: both are hierarchical legal regimes. We can identify laws in both that are constitutional as opposed to ordinary, the former generally being ones that are textually entrenched in a codified constitution or that acquire a special status at the point of enactment or afterward over time. The difference is in how constitutional laws acquire their special status: codified constitutions generally distinguish ordinary from constitutional law in the way the law is made, whether by special procedures or with heightened approval thresholds, while the Constitution of the United Kingdom distinguishes ordinary from constitutional law by the way in which political actors treat the law. As Ian Cram has observed, “there are qualitative differences between say the Fixed-term Parliaments Act 2011 and the Scrap Metal Dealers Act 2013 or the Dangerous Dogs Act 1991.”<sup>153</sup> Some statutes are what Adam Perry and Farrah Ahmed define as a “constitutional statute,” a law that is “about state institutions and which substantially influences, directly or indirectly, what those institutions can and may do.”<sup>154</sup> In the United Kingdom, constitutional statutes

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150. See, e.g., AREND LIIPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 204-07 (2d ed. 2012); EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN 224-25 (2006); Richard Albert, *The State of the Art in Constitutional Amendment*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT, *supra* note 39, at 1, 12.

151. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39 (8th ed. 1982).

152. One study of formal amendment difficulty ranks the Constitution of the United Kingdom as the easiest to amend of thirty-nine “consolidated democracies,” tied with the Constitution of New Zealand. See Astrid Lorenz, *How to Measure Constitutional Rigidity: Four Concepts and Two Alternatives*, 17 J. THEORETICAL POL. 339, 359 (2005).

153. Ian Cram, *Amending the Constitution*, 36 LEG. STUD. 75, 76 (2016).

154. Adam Perry & Farrah Ahmed, *Constitutional Statutes*, 37 OXFORD J. LEG. STUD. 461, 471

are a close analogue to formal amendment, though differences remain.<sup>155</sup>

An example of a constitutional statute is the European Communities Act 1972.<sup>156</sup> The United Kingdom acceded to the European Economic Community in January 1973 when it passed this law, formally only an ordinary act of Parliament. Accession entailed the incorporation of European law into the law of the United Kingdom, a major constitutional change that was formalized into the body of constitutional law without special authorization. The effect of the Act was transformative: Parliament agreed to accept the European Economic Community's obligations and privileges, and to accept the legal supremacy of this supranational body by enacting the Act.<sup>157</sup>

The consequence of this enactment was that any new rule of the European Community would be automatically incorporated into the law of the United Kingdom without needing to pass discrete legislation in Parliament on each occasion that the rule was amended or supplemented with new rules. At the time of the Act, the new rule of automatic incorporation was an important change to the Constitution of the United Kingdom, because, as Dawn Oliver has explained, this new rule "altered the nature" and the exercise of parliamentary sovereignty, the cornerstone to the Constitution.<sup>158</sup> Over the years, the United Kingdom reinforced its interconnections with Europe through the 1992 Treaty on European Union and the 2007 Treaty of Lisbon, among others. Parliament also passed laws that further integrated the United Kingdom into the European project, including the Human Rights Act 1998,<sup>159</sup> an act incorporating the rights of the European Convention of Human Rights into the law of the United Kingdom.

The deep integration of the United Kingdom into the European Union has since come to a halt, and it will soon be undone. When the people of the United Kingdom voted in the Brexit referendum on June 23, 2016, they triggered a major period of constitutional change in the United Kingdom that will ultimately result in the country's withdrawal from the European Union and bring an end to the legal supremacy of the European Union in the United Kingdom. Under the Constitution of the United Kingdom, the vehicle that will legally end the relationship is the European Union (Withdrawal) Bill,<sup>160</sup> a bill

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(2017). Whether codified in an aggregated text or not, a constitutional hierarchy develops. See Wim J.M. Voermans, *Constitutional Reserves and Covert Constitutions*, 3 INDIAN J. CONST. L. 84, 87 (2009).

155. These differences have led some scholars in the United Kingdom to speak of "constitutional reform" or "constitutional change" instead of "constitutional amendment." See Robert Blackburn, *Constitutional Amendment in the United Kingdom*, in ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 359, 361 (Xenophon Contiades ed., 2013).

156. European Communities Act 1972, c. 68. This law has since been updated several times in order to reflect agreements in treaties subsequently ratified in connection with it.

157. *Id.* § 2(1).

158. Dawn Oliver, *The United Kingdom*, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 329, 342 (Dawn Oliver & Carlo Fusaro eds., 2011).

159. Human Rights Act 1998, c. 42 (Eng.).

160. European Union (Withdrawal) Bill 2017-19 HC Bill [5]; see also Press Release, Dep't for Exiting the European Union, Government Announces End of European Communities Act (Oct. 2, 2016), <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act> (announcing the U.K. government's plans to withdraw from the European Union).

that will repeal the European Communities Act 1972, terminate the domestic jurisdiction of the European Court of Justice, and instantaneously transform European Union laws into domestic laws, thereby authorizing Parliament to select those laws that will continue to have effect in the country and to eliminate all those that will not.<sup>161</sup>

The “Great Repeal Bill” will not create a new constitution for the United Kingdom, nor will it amend the Constitution in the conventional sense of correcting an error so as to better achieve its purpose. This bill, and everything it will collaterally entail, will take apart the Constitution of the United Kingdom as it currently exists. It will self-consciously formally end the Constitution’s legally subordinate status to the law of the European Union and it will redesign the architecture of authority in and around the Constitution, returning to the Parliament of the United Kingdom the sovereignty that it ceded forty-five years ago when it enacted the European Communities Act 1972. This constitutional change will neither amend the Constitution nor create a new one. This change is a constitutional dismemberment that transforms a fundamental rule in the Constitution.

### 3. *Canada at Patriation*

Canada offers another example of a successful dismemberment. Patriation dismembered the country’s constitutional structure of legal authority using an ordinary method of constitutional change. Some background on the Canadian Constitution is necessary to understand this example.

In contrast to the master-text U.S. Constitution and the uncodified British Constitution, the Canadian Constitution is partially codified and uncodified. Despite these opposing categories, all constitutions—even the ones we can point to as paradigmatically *written*—are in some measure unwritten insofar as they implicitly incorporate governmental conventions or norms about rights that have constitutional status.<sup>162</sup> What sets Canada apart is that its codified constitution expressly recognizes that there is more to it than that which is written. The Constitution itself declares that it is neither fully codified nor uncodified.<sup>163</sup> The Constitution defines itself as a non-exhaustive list of what it is and where it can be found, a point the Canadian Supreme Court has recognized in its interpretation of what constitutes the Constitution.<sup>164</sup>

This unusual constitutional arrangement has understandably confused scholars.<sup>165</sup> In an honest acknowledgement of his difficulty understanding the Canadian Constitution, Donald Lutz chose to exclude Canada from his

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161. See Alexandra Sims, *What is the Great Repeal Bill? The Brexit Law to End All EU Laws (That We Don’t Like)*, INDEP. (Oct. 3, 2016), <http://www.independent.co.uk/news/uk/politics/great-repeal-bill-brex-it-law-eu-law-theresa-may-david-davis-a7343256.html>.

162. See John Gardner, *Can There Be a Written Constitution?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 162, 179-80 (Leslie Green & Brian Leiter eds., 2011).

163. Constitution Act, 1982, pt. VII, s. 52(2), *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.).

164. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 32 (Can.).

165. Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85, 90 (2015).

influential study of amendment difficulty rather than risk making a mistake measuring the rigidity in the Constitution.<sup>166</sup> Lutz suggested that he could not produce a definitive count of constitutional amendments in Canada because he could not reliably identify what possesses constitutional status under the Constitution.<sup>167</sup>

Adding to the confusion is the status of the *Constitution Act, 1982*—the historic document that entrenched the globally admired Canadian Charter of Rights and Freedoms,<sup>168</sup> finally conferred upon Canada the power to amend its own Constitution,<sup>169</sup> and introduced the Notwithstanding Clause to the arsenal of weak-form constitutionalism.<sup>170</sup> Scholars and judges have inaccurately described the effect of the *Constitution Act, 1982*: some have called it an amendment,<sup>171</sup> others an addition,<sup>172</sup> and still others a new constitution.<sup>173</sup> None is quite right. The *Constitution Act, 1982* dismembered the Constitution of Canada as it then existed.

For all the attention it has garnered around the world as the core of the new Canadian model of constitutionalism,<sup>174</sup> the *Constitution Act, 1982* is not actually a Canadian law. It is in fact a schedule appended to the *Canada Act 1982*, itself a law passed by the Parliament of the United Kingdom.<sup>175</sup> The preamble of the *Canada Act 1982* acknowledges that the Parliament of Canada “has requested and consented to” the enactment of the *Constitution Act, 1982*. The *Canada Act 1982* accomplishes two major objectives. It enacts the *Constitution Act, 1982* by providing: “The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in

166. LUTZ, *supra* note 78, at 179 n.16.

167. *Id.*

168. See John Ibbitson, *The Charter Proves to be Canada’s Gift to the World*, GLOBE & MAIL (April 15, 2012), <http://www.theglobeandmail.com/news/politics/the-charter-proves-to-be-canadas-gift-to-world/article4100561>.

169. J. Peter Meekison, *The Amending Formula*, 8 QUEEN’S L.J. 99, 99 (1982-83).

170. Mark V. Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2785-88 (2003).

171. The best example is the Canadian Supreme Court’s advisory opinion on the legality of the procedure used to change the Constitution with this new Act. The opinion itself refers to the constitutional change as an “amendment” and indeed the reference questions themselves also speak of the constitutional change as an amendment. See Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Can.).

172. See Elmer A. Driedger, *The Canadian Charter of Rights and Freedoms*, 14 OTTAWA L. REV. 366, 377 n.36 (1982).

173. See, e.g., PATRICK MONAHAN, MEECH LAKE: THE INSIDE STORY 38 (1991); Peter W. Hogg, *Supremacy of the Canadian Charter of Rights and Freedoms*, 61 CAN. BAR. REV. 69, 71 (1983); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 769 (2012); Richard H. Leach, *Implications for Federalism of the Reformed Constitution of Canada*, 45 L. & CONTEMP. PROBS. 149, 163 (1983); Brian Slattery, *The Constitutional Guarantee of Aboriginal and Treaty Rights*, 8 QUEEN’S L.J. 232, 232 (1982-83); Brian Slattery, *Canadian Charter of Rights and Freedoms—Override Clauses Under Section 33—Whether Subject to Judicial Review Under Section 1*, 61 CAN. B. REV. 391, 395 (1983); Paul C. Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 J. L. REFORM 51, 51 n.2 (1984).

174. See Sujit Choudhry, *Does the World Need More Canada? The Politics of the Canadian Model in Constitutional Politics and Political Theory*, 5 INT’L J. CONST. L. 606 (2007); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006).

175. Canada Act, 1982, c. 11 (U.K.), reprinted in R.S.C. 1985, app II, no 44 (Can.).

Canada and shall come into force as provided in that Act.”<sup>176</sup> The *Canada Act 1982* also formalizes an extraordinary change in how Canada will thereafter be governed under law: “No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.”<sup>177</sup> The changes made by the *Canada Act, 1982* are qualitatively different from what an amendment does; these changes severed Canada’s constitutional cord to the United Kingdom and reconfigured the structure of legal authority.

To appreciate the extraordinary nature of these constitutional changes, we must return to the beginning, when the Constitution of Canada was adopted. In 1867, what we know today as the Constitution of Canada began as the *British North America Act, 1867*,<sup>178</sup> a statute passed by the Imperial Parliament to govern relations with its most prized colonies across the Atlantic. Since then renamed the *Constitution Act, 1867*, the *British North America Act, 1867* did not provide for its own amendment—an anomaly in contemporary constitutional design since nearly all codified constitutions today entrench at least one rule of change.<sup>179</sup> All amendments to the Canadian Constitution were to be made in London by the Parliament of the United Kingdom,<sup>180</sup> the clearest suggestion that Canada was a possession rather than a sovereign State. This arrangement of estranged amendment continued even after the 1931 Statute of Westminster that otherwise marked the legislative independence of dominion states. The fault was not London’s but rather Canada’s: Canadian political actors could not agree on rules for amendment, so they left the amendment power in London’s hands until Ottawa and the provinces could one day agree on a procedure.<sup>181</sup>

After failing nearly fifteen times to negotiate a domestic amendment rule,<sup>182</sup> federal and provincial actors in Canada finally agreed to a solution. But by then, uncodified rules of change had developed during a half-century of constitutional practice to the point where the Supreme Court could declare that the body of amendment practice had produced a constitutional convention on how to amend the Constitution. That rule was straightforward in its application though not in its interpretation: where an amendment touches on federal-provincial powers, “a substantial degree of provincial consent is required” to

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176. *Id.* at s. 1.

177. *Id.* at s. 2.

178. *British North America Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) [hereinafter *Constitution Act, 1867*].

179. See Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003) (reporting that “less than 4% of the world’s constitutions lack such a provision”). There were two major exceptions in the Constitution of Canada: provinces were authorized to amend their own provincial constitutions, see *Constitution Act, 1867*, s. 92, and the Parliament of Canada could make certain amendments in respect of the judiciary, see *id.* at s. 101.

180. Peter W. Hogg, *Formal Amendment of the Constitution of Canada*, 55 L. & CONTEMP. PROBS. 253, 253-55 (1992).

181. See Richard Albert, *Constitutions Imposed with Consent?*, in THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds., forthcoming 2018).

182. See JAMES ROSS HURLEY, AMENDING CANADA’S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS 25-63 (1996).

proceed with amendment.<sup>183</sup> After securing provincial consent for a proposed change, the federal government would send a joint resolution of both Houses of the Canadian Parliament to the Parliament of the United Kingdom for it to ratify and insert the amendment into the Canadian Constitution.<sup>184</sup> Every change to the Canadian Constitution followed the same path: agreement in Canada among political actors, and then ratification by the Parliament of the United Kingdom. As a matter of practice, then, the power of amendment belonged to Canada. But as a matter of constitutional law and legal necessity,<sup>185</sup> the amendment power resided in London.

The *Canada Act 1982* abolished the legal authority of the Parliament of the United Kingdom in and over Canada.<sup>186</sup> A change of this sort is qualitatively different from the corrective improvement that the Twelfth Amendment brought to presidential selection in the United States. It is a change on an altogether different plane of significance, far more consequential than what we commonly associate with our understanding of an amendment. And yet an amendment is how much of the conventional understanding in Canada understands Patriation.

The *Canada Act 1982* preserved constitutional continuity between the original and subsequent structures of legal authority in Canada. Yet the dismembering of the Canadian Constitution transferred the locus of domestic constitutional authority from London to Ottawa. In 1867, London had conferred limited legal authority upon Canada and retained for itself a vast reserve of constitutional power. It was only over one century later in 1982 that London ceded that power. The Canadian Constitution was dismembered as Canada finally gained its independence from London. Canada emerged from Patriation with a fundamentally revised configuration of powers; all legitimate authority was now exclusively in the hands of Canadian actors, something that had until then never been true as a matter of law.

### *B. The Forms of Dismemberment*

These constitutional changes in Canada, Japan, and the United Kingdom are not amendments. They may be labelled as such, but they generate an entirely new self-understanding of the constitution whose purpose, for better or worse, is not what it was prior to the change. These three changes transform

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183. Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 904-05.

184. Richard S. Kay, *The Creation of Constitutions in Canada and the United States*, 7 CAN.-U.S. L.J. 111, 114-23 (1984). One exception to the rule of substantial consent was the amendment of 1949, which gave the Parliament of Canada the same amendment power in relation to purely federal subjects as the *British North America Act, 1867* had given provinces in relation to their own provincial subjects. See *British North America Act (No. 2)*, 13 Geo. VI, c. 81 (1949) (U.K.).

185. London retained the amendment power as a legal necessity because someone had to possess the power to amend the Constitution of Canada, and Canadian political actors could not agree on a domestic amendment rule despite their many efforts to arrive at one—even after the 1931 Statute of Westminster. See W.R. Lederman, *The Process of Constitutional Amendment for Canada*, 12 MCGILL L.J. 371, 376 (1966-67).

186. There of course remains a constitutional connection to the monarchy but it is ceremonial in the sense that neither Westminster nor Buckingham Palace would intervene in domestic Canadian politics.

their respective constitutions in a way that does more than merely free the constitution from fault to better achieve its purpose. These changes destroy the core of the constitution and breathe a new purpose into it. The constitution itself might not be replaced in the formal sense but its identity, rights, or structure does not escape the change without substantial modification. This is the phenomenon I identify as a constitutional dismemberment. It is a constitutionally continuous transformation that can occur suddenly in a big-bang moment of constitution-unmaking or gradually by erosion or accretion; it can occur to constitutions both codified and uncoded; and it can occur with the effect of either enhancing or deteriorating liberal democracy. These changes are made using the ordinary rules of amendment, and are often described as amendments or even sometimes as new constitutions. But they are amendments in name alone. Conceptually, they are best understood as dismemberments.

### *1. Constitutional Rights, Structure, and Identity*

A constitutional dismemberment alters one or more of the constitution's essential features—specifically, its rights, structure, or identity. These are related categories. For example, a dismemberment to a constitution's structure may amount to a dismemberment of its identity. But at a high level of abstraction, these three forms of dismemberment are nonetheless distinguishable from each other and also from smaller-scale constitutional amendments, both corrective and elaborative. A dismemberment of a constitutional right involves the repeal or replacement of a fundamental right protected by the constitution—not just any right but one that is central to the political community. A dismemberment of a constitutional structure entails a clear break from how the constitution organizes the allocation of power, how it balances competing claims to and the exercise of authority, or how its public institutions function. Finally, a dismemberment of a constitution's identity results either in the extinguishment of a core constitutional commitment or the simultaneous extinguishment of a core constitutional commitment and the adoption of a new one. A core constitutional commitment is neither a right nor a structure but rather a constitutional value. Constitutional values are the foundation of a given regime. They help us rank the regime's legal rules, moral principles and political commitments relative to each other; they inform the choices political actors make; and they influence how judges interpret the constitution.<sup>187</sup> In this subsection, I offer examples of the constitutional dismemberment of rights in Brazil, Jamaica, and the United States; of structure in Ireland, Italy, and New Zealand; and of identity in the Caribbean.

#### *i. The Dismemberment of Constitutional Rights*

We can find examples around the world of each of the three forms of dismemberment—of rights, structures, or identity—some having failed where

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187. Albert, *supra* note 24, 239-47.

others have succeeded. For example, in the United States, the failed establishment of a national religion would have amounted to a dismemberment of constitutional rights. In the nineteenth century, a constitutional change to recognize the United States as a Christian nation gained support across the country. The idea did not make much progress in Congress, but it persisted in the twentieth century with over fifty-five “Christian Amendment” proposals introduced in Congress since 1947.<sup>188</sup> The Flanders Amendment, named after its sponsor Senator Ralph Flanders, is one such example: “This nation devoutly recognizes the authority and law of Jesus Christ, Savior and Ruler of nations, through whom are bestowed the blessings of almighty God.”<sup>189</sup> Imagine that the Flanders Amendment were reintroduced today as a modern version of the Christian Amendment and adopted in conformity with the formal amendment procedures of Article V. Could we properly call that change an amendment?

The Establishment Clause prohibits Congress from passing a law establishing an official religion,<sup>190</sup> and since 1947 this prohibition has extended to the states.<sup>191</sup> The Free Exercise Clause prohibits Congress—and, since 1940, the states<sup>192</sup>—from unconstitutionally infringing the right to freely practice one’s religion. The Court has interpreted these twin constitutional protections as having one “common purpose” to secure liberty.<sup>193</sup> Were the Flanders Amendment adopted today, it would better reflect its revolutionary effect on the rights protected under the U.S. Constitution to call this change a dismemberment rather than an amendment. Far from continuing the constitution-making project consistent with the existing meaning of the Constitution, the Flanders Amendment would be a profound departure from the present values of the Constitution.

Brazil, for its part, has recently completed a successful effort to dismember a constitutional right. In June 2016, the interim president proposed a constitutional amendment that would limit public spending for up to twenty years, with annual spending growth limited to the inflation rate of the prior year.<sup>194</sup> The purpose of the amendment—which would limit public spending on health and education in addition to other areas of public spending—was to address the increasing budget gap that has encumbered Brazil in recent years as tax revenues have failed to keep pace with rising expenditures.<sup>195</sup> The

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188. JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002*, at 64-65 (2003).

189. See MARK DOUGLAS MCGARVIE, *LAW AND RELIGION IN AMERICAN HISTORY: PUBLIC VALUES AND PRIVATE CONSCIENCE* 141 (2016).

190. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

191. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

192. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

193. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

194. Alonso Soto & Maria Carolina Marcello, *Brazil Seeks 20-Year Spending Cap to Curb National Debt*, REUTERS (June 15, 2016), <http://www.reuters.com/article/us-brazil-politics-idUSKCN0Z120S>.

195. Anna Edgerton & Mario Sergio Lima, *Temer Proposes Spending Cap in Effort to Fix Brazil’s Budget*, BLOOMBERG (June 15, 2016), <http://www.bloomberg.com/news/articles/2016-06-15/temer-proposes-spending-cap-in-attempt-to-fix-brazil-budget>.

amendment came into force in December 2016.<sup>196</sup>

This Public Spending Cap Amendment has been met with criticism from many corners despite its capacity to help assuage the economic pressures in the country.<sup>197</sup> The reason for this rests in the Constitution's entrenchment of social rights. The State commits in its preamble to ensuring the exercise of social rights,<sup>198</sup> and this undertaking is reflected elsewhere in the Constitution's text and in how political actors have enforced it. For example, the Constitution identifies "social values"<sup>199</sup> as one of its fundamental principles and declares that one of its foremost objectives is "to eradicate poverty and substandard living conditions and to reduce social and regional inequalities."<sup>200</sup> The Constitution moreover entrenches an entire section of social rights, including the rights to food and housing.<sup>201</sup> Another section explains the components of the country's social order: the Constitution grants everyone in Brazil the right to public healthcare,<sup>202</sup> social assistance,<sup>203</sup> and education.<sup>204</sup> Workers are given a special catalog of rights—rights to minimum wages, unemployment insurance, and wage-reduction protection—that consists of thirty-four separate parts, evidence of how broadly the Constitution seeks to protect labor.<sup>205</sup> The entrenchment of these social rights did not come by happenstance; it was a victory for civil society groups whose "mobilized energies" sought "to change the Brazilian reality" with "social demands" that were ultimately translated into an extensive entrenchment of social rights in the Constitution.<sup>206</sup> Unlike the rest of the Constitution, which has undergone roughly one hundred amendments since coming into force in 1988, the protections for social rights have not once been substantively altered.<sup>207</sup> That is, until this Public Spending Cap Amendment was ratified over vocal opposition.

The realization of social rights is likely to be severely compromised with the spending cap now in force. This is not a change of modest proportions; it will impact an entire generation, and its effects could reverberate far beyond that period. Juliano Zaiden Benvindo has put the point well:

It is no wonder that scholars have stressed how this amendment will signal a

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196. Paulo Trevisani, *Brazil's Senate Passes Constitutional Amendment to Cap Public Spending*, WALL ST. J. (Dec. 13, 2016), <https://www.wsj.com/articles/brazils-senate-passes-constitutional-amendment-to-cap-public-spending-1481647351>.

197. See, e.g., Anthony Boadle & Marcela Ayres, *Brazil Senate Passes Spending Cap in Win for Temer*, REUTERS (Dec. 13, 2016), <https://www.reuters.com/article/us-brazil-politics/brazil-senate-passes-spending-cap-in-win-for-temer-idUSKBN142203>.

198. CONSTITUIÇÃO FEDERAL [C.F.] pmb. (Braz.).

199. *Id.* art. 1, § IV.

200. *Id.* art. 3, § III.

201. *Id.* arts. 6-11.

202. *Id.* arts. 196-200.

203. *Id.* arts. 203-04.

204. *Id.* arts. 205-14.

205. *Id.* art. 7, §§ I-XXXIV.

206. Juliano Zaiden Benvindo, *The Forgotten People in Brazilian Constitutionalism: Revisiting Behavior Strategic Analyses of Regime Transitions*, 15 INT'L J. CONST. L. 332, 352 (2017).

207. See Juliano Zaiden Benvindo, *The Brazilian Constitutional Amendment Rate: A Culture of Change?*, INT'L J. CONST. L. BLOG (Aug. 10, 2016), <http://www.iconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change>.

change in the Brazilian social contract as it was originally drafted in the Constitution of 1988, a document originated from a broad social participation and wherein social rights have best represented the marriage of that constitutional moment with a new democratic impetus after years of dictatorship.<sup>208</sup>

The impact of this Public Spending Cap Amendment on the next generation's enjoyment of social rights in Brazil, combined with how directly it undermines the Constitution's founding and continuing commitment to social rights, suggests that it may be more than a simple amendment. Its purpose and effect suggest that it should instead be called a constitutional dismemberment.

We can point to an example of another successful dismemberment in Jamaica. The Constitution of Jamaica is the joint product of an Act of the Parliament of the United Kingdom and an Order in Council in the name of the Queen. On July 19, 1962, Parliament enacted the Jamaican Independence Act, 1962, which set the terms of Jamaica's independence,<sup>209</sup> and four days later an Order in Council promulgated the Jamaican independence Constitution.<sup>210</sup> Jamaica's Constitution recognizes a long list of fundamental rights and freedoms, including: the right to life;<sup>211</sup> the freedoms from arbitrary arrest,<sup>212</sup> detention,<sup>213</sup> and inhuman treatment;<sup>214</sup> and the freedoms of movement,<sup>215</sup> conscience<sup>216</sup> and assembly.<sup>217</sup> These and all other rights were inserted into the Constitution in a chapter denominated "Fundamental Rights and Freedoms."<sup>218</sup> None of them, however, was intended to have a new legal effect. The chapter on rights and freedoms was purely a restatement of existing law: the Privy Council declared that this chapter "proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law."<sup>219</sup> The text of the Constitution reinforces this point.<sup>220</sup>

In 2011, after decades of—at times sustained and at others interrupted—efforts at constitutional reform, Jamaican political actors adopted a home-grown Charter of Fundamental Rights and Freedom as an amendment to the Constitution.<sup>221</sup> Formally, the Charter repeals and replaces the entirety of the original Constitution's chapter on rights and freedoms.<sup>222</sup> Derek O'Brien and

208. Juliano Zaiden Benvindo, *Preservationist Constitutional Amendments and the Rise of Antipolitics in Brazil*, INT'L J. CONST. L. BLOG (Oct. 26, 2016), <http://www.icconnectblog.com/2016/10/preservationist-constitutional-amendments-and-the-rise-of-antipolitics-in-brazil>.

209. Jamaica Independence Act 1962, 10 & 11 Eliz. 2 c. 40 (U.K.).

210. Jamaica (Constitution) Order in Council 1962, Court at Buckingham Palace, July 23, 1962.

211. CONSTITUTION OF JAMAICA, 1962, § 14.

212. *Id.* § 15.

213. *Id.*

214. *Id.* § 17.

215. *Id.* § 16.

216. *Id.* § 21.

217. *Id.* § 23.

218. *Id.* ch. III.

219. *Dir. of Pub. Prosecutions v. Nasralla*, [1967] 2 A.C. 238, 247 (P.C.).

220. CONSTITUTION OF JAMAICA, 1962, § 26(8).

221. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, April 7, 2011 (Jam.).

222. *Id.* at sec. 2.

Se-shauna Wheatle have explained that the effect of the Charter was to quasi-patriate the Jamaican Constitution insofar as the Charter was passed as an Act of the Jamaican Parliament, reflecting both popular and political consensus on the scope of rights involving the death penalty, abortion, and sexual orientation.<sup>223</sup> There was a political imperative for political actors to support the Charter when it came up for a final vote: the “failure to support the *Charter* carried with it the risk that opponents could be characterised as . . . preferring a system of rights protection bequeathed by the former imperial power to something rooted in Jamaican soil and reflecting Jamaican values.”<sup>224</sup>

The Charter entrenches rights that might be described as both progressive and conservative. It expands equality rights under law,<sup>225</sup> formalizes the right to a healthy environment,<sup>226</sup> and protects the right to vote in free and fair elections.<sup>227</sup> But it also protects the death penalty and traditional marriage, making both of them immune to constitutional claims under the Charter.<sup>228</sup> This combination of rights has led Arif Bulkan to highlight the contrast it raises: “The 2011 Charter embodies a progressive realization of rights, precisely the kind of evolution that is expected to occur in a maturing society. Juxtaposed alongside these reforms, however, are a number of retrograde provisions that dilute previously existing constitutional protections.”<sup>229</sup>

The Charter also entrenches a significant structural reform that has some consequences for the Constitution’s rights and freedoms. The original Constitution entrenched a derogation clause that authorized Parliament to pass laws that were inconsistent with the Constitution’s rights and freedoms.<sup>230</sup> The Charter repealed that clause, formerly entrenched in Section 50 of the original Constitution.<sup>231</sup> What results from this repeal, when combined with the new menu of rights and freedoms, is a new rights regime beyond the possibility of express derogation by Parliament.

The Charter was entrenched using the rules of formal amendment in the Jamaican Constitution, and political actors identify the Charter as an amendment. In light of the significant effects of the new Charter—to quasi-patriate the Constitution, to entrench new rights and freedoms that sound in local values, and to protect those rights from direct legislative infringement—one would be right to ask whether an *amendment* is the proper concept to describe the new Charter. It is more accurate to say that the Charter

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223. Derek O’Brien & Se-shauna Wheatle, *Post-Independence Constitutional Reform in the Commonwealth Caribbean and a New Charter of Fundamental Rights and Freedoms for Jamaica*, 2012 PUB. L. 683, 699 (2012).

224. *Id.*

225. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, April 7, 2011, sec. 2 (Jam.).

226. *Id.*

227. *Id.*

228. *Id.*

229. Arif Bulkan, *The Limits of Constitution (Re)-making in the Commonwealth Caribbean: Towards the ‘Perfect Nation’*, 2 CAN. J. HUM. RTS. 81, 82-83 (2013).

230. CONSTITUTION OF JAMAICA, 1962, § 50.

231. The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, April 7, 2011, sec. 3 (Jam.).

dismembered the Constitution's prior rights regime.

*ii. The Dismemberment of Constitutional Structure*

We can likewise identify instances of the successful and unsuccessful dismemberment of constitutional structure. Ireland and Italy recently rejected proposals to change the Senate—in the case of Ireland, to abolish the Senate, and in the case of Italy, to reduce its power. In Italy, in December 2016, voters overwhelmingly decided against a major constitutional reform that would have altered thirty-three percent of the entire Constitution,<sup>232</sup> including the structure of the Senate, the constitutional status of the regions, and the confidence relationship between the government and Parliament.<sup>233</sup> This reform proposal was presented to Italians as a simple amendment to be formalized according to the amendment procedures in the Constitution. This constitutional change may have been an amendment in form, but it was not an amendment in content. It would have been a dismemberment.

The same could be said for Ireland. In the fall of 2013, Irish voters narrowly defeated a proposal to abolish the Senate by a margin of 42,500 votes in a referendum split 51.8 to 48.2 percent.<sup>234</sup> Writing prior to the referendum vote, Oran Doyle surveyed the breadth of the proposal and its consequences: it contained over forty discrete amendments intended not only to abolish the Senate but also to reconstitute the legislature as a unicameral parliament, to modify the rest of the Constitution's parts that were predicated on the existence of a Senate, and to prepare for the transition from bicameralism to unicameralism.<sup>235</sup> We should take care not to overstate matters, because the Constitution confers only quite limited powers on the Senate.<sup>236</sup> Still, although the Senate's legislative powers are minimal relative to other upper chambers and its representative function is not what it could be were Ireland a federal as opposed to a unitary State,<sup>237</sup> abolition would nonetheless have had substantial consequences for the structure of Irish governance and the country's politics.

Had the reform proposal been ratified, there would have been seventy-

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232. Steve Scherer & Gavin Jones, *Renzi to Resign After Referendum Rout, Leaving Italy in Limbo*, REUTERS (Dec. 3, 2016), <http://www.reuters.com/article/us-italy-referendum/renzi-to-resign-after-referendum-rout-leaving-italy-in-limbo-idUSKBN13T019>.

233. See Lorenza Violini & Antonia Baraggia, *The Italian Constitutional Challenge: An Overview of the Upcoming Referendum*, INT'L J. CONST. L. BLOG (Dec. 2, 2016), <http://www.iconnectblog.com/2016/12/the-italian-constitutional-challenge-an-overview-of-the-upcoming-referendum>.

234. Harry McGee & Steven Carroll, *Seanad to be Retained after Government Loses Referendum*, IRISH TIMES (Oct. 5, 2013), <http://www.irishtimes.com/news/politics/seanad-to-be-retained-after-government-loses-referendum-1.1551657>.

235. Oran Doyle, *Ireland Considers Move to Unicameral Parliament*, INT'L J. CONST. L. BLOG (July 7, 2013), <http://www.iconnectblog.com/2013/07/ireland-considers-move-to-unicameral-parliament>.

236. See Eoin Carolan, *Bicameralism and its Discontents: Ireland's Senate: An Introduction*, VERFASSUNGSBLOG (Oct. 16, 2014), <http://verfassungsblog.de/irelands-senate-introduction-2>.

237. See David Kenny, *The Failed Referendum to Abolish Ireland's Senate: Defending Bicameralism in a Small and Relatively Homogeneous Country* (2016) (manuscript at 3-6), [http://www.academia.edu/24588212/The\\_failed\\_referendum\\_to\\_abolish\\_the\\_Irelands\\_Senate\\_defendin\\_g\\_bicameralism\\_is\\_a\\_small\\_and\\_relatively\\_homogenous\\_country](http://www.academia.edu/24588212/The_failed_referendum_to_abolish_the_Irelands_Senate_defendin_g_bicameralism_is_a_small_and_relatively_homogenous_country).

five separate alterations to the text of the Constitution, according to one estimate.<sup>238</sup> More than the number of alterations, it is their combined effect that matters. Gone would have been the check on the Assembly's power to pass a bill, as would have been the capacity to delay an Assembly bill for ninety days.<sup>239</sup> The same would have been true of the Senate's other powers, including the ability to refer a bill to the people in a referendum and to have a voice in the removal of judges, the Auditor General, the Comptroller General, and the President.<sup>240</sup> More generally, the transformation of the legislature from bicameral to unicameral would have substantially changed legislative representation, the law-making process, the separation of executive-legislative powers, as well as the democratic functions of the Senate.<sup>241</sup> This would have been no small change to the Constitution. The proposal was called an amendment but its effect would have been to dismember the Constitution.

A successful dismemberment of constitutional structure occurred in New Zealand not long ago. From 1993 to 1996, New Zealand changed its electoral system from the traditional commonwealth model of first-past-the-post to a modern system of proportional representation.<sup>242</sup> Before the reform, New Zealand's Members of Parliament (MPs) had long been elected by simple plurality vote in single-member electoral districts. Under the reform, MPs would now be elected according to a combination of proportionate votes received by a party and by prioritized candidate rankings.<sup>243</sup> What largely prompted the change was dissatisfaction with the status quo: party representation in Parliament had commonly failed to reflect the popular vote,<sup>244</sup> and the single-party governments that had been produced by the old system magnified legitimate concerns about the lack of political accountability in the unicameral legislature.<sup>245</sup> The change was the culmination of more than a century-long effort to modernize the country's electoral rules.<sup>246</sup>

The result in the binding referendum—voters preferred the mixed-member proportional representation system (MMP) by a margin of fifty-four to forty-six percent<sup>247</sup>—led Parliament to reform the electoral system by way of

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238. Univ. Coll. Dublin Constitutional Studies Grp., *A Guide to the Referendum on the 32nd Amendment to the Constitution*, U.C. DUBLIN SUTHERLAND SCH. L. 4 (2013), [https://www.ucd.ie/t4cms/Guide\\_to\\_the\\_32nd\\_amendment%20final.pdf](https://www.ucd.ie/t4cms/Guide_to_the_32nd_amendment%20final.pdf).

239. *Id.*

240. *Id.*

241. See Oran Doyle, *The Dynamics of Constitutional Change*, 102 *STUD.: IRISH Q. REV.* 191, 199-200 (2013).

242. See Jack Vowles, *The Politics of Electoral Reform in New Zealand*, 16 *INT'L POL. SCI. REV.* 95, 113 (1995).

243. Jack H. Nagel, *What Political Scientists Can Learn from the 1993 Electoral Reform in New Zealand*, 27 *PS: POL. SCI. & POL.* 525, 525 (1994).

244. Janet Mackey, *The New Zealand Experience of Changing Electoral Systems*, in *DEMOCRACY, PARLIAMENT AND ELECTORAL SYSTEMS* 141, 142 (M.A. Griffith-Traversy ed., 2002).

245. Jonathan Boston et al., *The 1996 General Election in New Zealand: Proportional Representation and Political Change*, 69 *AUSTL. Q.* 1, 2-3 (1997).

246. See James B. Bolger, *New Zealand Adopts PR: A Prime Minister's View*, *POL'Y OPTIONS* (July 1, 2001), <http://policyoptions.irpp.org/magazines/votes-and-seats/new-zealand-adopts-pr-a-prime-ministers-view>.

247. Peter Aimer & Raymond Miller, *Partisanship and Principle: Voters and the New Zealand Electoral Referendum of 1993*, 41 *EUR. J. POL. RES.* 795, 798 (2002) (reporting the referendum result:

ordinary legislation. As in the United Kingdom, New Zealand does not have a codified constitution. The Constitution of New Zealand changes principally by law and convention. The New Zealand Parliament was therefore able to make this change by a simple law; it enacted the 364-page Electoral Act 1993, and the Act brought extensive electoral changes into law, specifically to introduce MMP, to create an Electoral Commission, and to repeal the Electoral Act 1956.<sup>248</sup> The Electoral Act 1993 also made significant changes to other laws, including the Constitution Act 1986, the Civil List Act 1979, the Remuneration Authority Act 1977, the Local Elections and Polls Act 1976, the Ombudsmen Act 1975, and the Public Finance Act 1989.<sup>249</sup>

Twenty years since the first election was held under the new MMP, we can perceive significant institutional, behavioral, and policy consequences,<sup>250</sup> over and above its constitution-level changes. In contrast to the results under the old first-past-the-post system, no party has since won an outright majority of seats, in large part because more parties are now competing in and winning races under this new system.<sup>251</sup> It is undeniable that MMP has had a transformative effect on the Constitution. The Electoral Act 1993 has “dramatically altered the constitutional dynamics of New Zealand” and “introduced more complexity and uncertainty to the process of governing” because it has “shifted New Zealand’s constitutional structure away from the streamlined hierarchy of agency relationships under a plurality electoral system to a structure requiring transactions between political parties for the exercise of political power.”<sup>252</sup> In this light, the Electoral Act 1993 is better seen as a dismemberment of the electoral regime that existed at the time, not an amendment to it.

### *iii. The Dismemberment of Constitutional Identity*

We can likewise demonstrate the dismemberment of constitutional identity. In addition to the example above of the dismemberment of the identity of the Japanese Constitution, the Caribbean offers a fascinating illustration of a partially successful and partially failed dismemberment of the colonial legacy of the countries of the Commonwealth Caribbean.

Many Commonwealth Caribbean constitutions have been dismembered in connection with the establishment of a regional court and the accession of individual States to its appellate jurisdiction as the court of last resort. The creation of this regional court is one step in a larger process of regional

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53.9 percent to 46.1 percent).

248. Electoral Act 1993, Pub. Act. 1993, No. 87 (N.Z.).

249. *Id.* at ss. 271-284.

250. Jonathan Boston, *Institutional Change in a Small Democracy: New Zealand’s Experience of Electoral Reform*, in REFORMING PARLIAMENTARY DEMOCRACY 25, 34 (F. Leslie Seidle & David C. Docherty eds., 2003).

251. Matthew S. Shugart & Alexander C. Tan, *Political Consequences of New Zealand’s MMP System in Comparative Perspective*, in MIXED-MEMBER ELECTORAL SYSTEMS IN CONSTITUTIONAL CONTEXT 247, 249 (Nathan F. Batto et al. eds., 2016).

252. Matthew S. R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587, 604-05 (2006).

capacity building toward the eventual recognition of true post-colonial independence.<sup>253</sup>

In February 2001, ten Caribbean States signed onto the Agreement Establishing the Caribbean Court of Justice, and another two States joined in February 2013.<sup>254</sup> The Court enjoys both original and appellate jurisdiction,<sup>255</sup> judges are appointed for the equivalent of life terms (until the age of seventy-two),<sup>256</sup> the Court is given a full staff and a complement of officers,<sup>257</sup> and the Court is fully financed.<sup>258</sup> The Agreement was intended to give the new Court the leading role in developing a Caribbean jurisprudence without threatening the sovereignty of the signatory Caribbean States.<sup>259</sup>

The Agreement makes the Caribbean Court of Justice the final court of appeal for those countries acceding to its appellate jurisdiction, thereby replacing the Judicial Committee of the Privy Council in London.<sup>260</sup> This is a significant change in legal authority in the region because the Court's appellate jurisdiction severs one of the remaining colonial vestiges of the legal subordination of the Caribbean to the United Kingdom. The Judicial Committee of the Privy Council has for too long remained the final court of appeal even after the countries of the Commonwealth Caribbean adopted their own independence constitutions between 1962 and 1980<sup>261</sup>—whether because they had grown accustomed to resolving their disputes as a final matter in London, because they were unready to assume control of their own law, or perhaps even because of political pressure to retain the Privy Council.<sup>262</sup> The rise of the Caribbean Court of Justice signals “the sunset of British colonial rule” in the region.<sup>263</sup> When the Court exercises its appellate jurisdiction, it applies the constitution, laws, and common law of the country concerned.<sup>264</sup> The Court is the last word on both civil and criminal matters, as well as on those matters concerning the interpretation of national constitutions.<sup>265</sup>

Writing before the creation of the Caribbean Court of Justice, Hugh Salmon captured the importance of the institution and why the countries of the Caribbean should finally establish it: “The establishment of a Caribbean Court

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253. See *infra* text accompanying notes 266-76.

254. Agreement Establishing the Caribbean Court of Justice, *opened for signature* Feb. 14, 2001, [http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj\\_agreement.pdf](http://www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf).

255. *Id.* art. III.

256. *Id.* art. IX.

257. *Id.* art. XXVII.

258. *Id.* art. XXVIII.

259. *Id.* pmbi.

260. *Id.* art. XXV.

261. See David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 171, 172-76 (2005).

262. See Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 198-99 (2005).

263. *Id.* at 227.

264. Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 FORDHAM INT'L L.J. 930, 931 (2004).

265. Agreement Establishing the Caribbean Court of Justice, *opened for signature* Feb. 14, 2001, at art. XXV.

of Justice represents one of those defining moments which will determine our ability as a nation and as a region to take our destiny into our own hands.”<sup>266</sup> For Salmon, the Court was a necessary indigenous and local institution deeply needed in the region. He questioned the place of London’s court in the Caribbean: “Can we realistically expect such jurisprudence to be fashioned in tune with those aspirations by a judicial body however distinguished which remains remote both in terms of distance and in terms of the depth of understanding which can only arise from local and regional moorings?”<sup>267</sup> He stressed that it was time to “recognize that the continued existence of a final Court of Appeal located outside the region is an inhibiting factor to the development of an indigenous jurisprudence which is more responsive to the values within our society and our aims and aspirations as independent Caribbean nations.”<sup>268</sup>

Despite these high aspirations for the Court, only four countries have so far acceded to its appellate jurisdiction: Barbados and Guyana in 2005, Belize in 2010, and Dominica in 2015.<sup>269</sup> Each of the four signatories formalized its accession either through its domestic formal amendment process, in three cases, or, in one case, through the legislative process as authorized by the constitution. In Barbados, Parliament formally amended the Constitution to remove references to the Judicial Committee of the Privy Council and to insert the declarative statement that “a decision of the Caribbean Court of Justice is final and shall not be the subject of any appeal or enquiry in any tribunal or other court.”<sup>270</sup> In Guyana, the Constitution authorizes Parliament to pass a law authorizing the creation of a court of appeal for the Caribbean, which would serve as the final court of appeal for the country.<sup>271</sup> Parliament passed such a law in 2004 to implement the Agreement Establishing the Caribbean Court of Justice and, specifically, among others things, to make the Court the country’s tribunal of last resort.<sup>272</sup> In Belize, the national legislature adopted a constitutional amendment “to remove the Privy Council as the final appellate court for Belize and to replace it with the Caribbean Court of Justice,”<sup>273</sup> even substituting the words “Caribbean Court of Justice” for “Her Majesty in Council” wherever it appeared in the Belizean Constitution.<sup>274</sup> Most recently, Dominica adopted a constitutional amendment in which the words “Judicial Committee” were deleted and replaced with “Caribbean Court of Justice”

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266. Hugh M. Salmon, *The Caribbean Court of Justice: A March with Destiny*, 2 FLA. COASTAL L.J. 231, 231 (2000).

267. *Id.* at 234.

268. *Id.*

269. Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 L. & CONTEMP. PROBS. 89, 90 (2016).

270. Constitution (Amendment) Act, 2003, art. 9(c) (Barb.).

271. CONSTITUTION OF THE CO-OPERATIVE REPUBLIC OF GUYANA ACT, Feb. 20, 1980, art. 123(4).

272. Caribbean Court of Justice Act 2004, Act No. 16 of 2004, pt. III (Guy.).

273. Belize Constitution (Seventh Amendment) Act, 2009.

274. *Id.* art. 2.

where they occurred in the Constitution<sup>275</sup> and inserted a rule that in no case shall an appeal “be brought from or in respect of any decision of the Court of Appeal to the Judicial Committee.”<sup>276</sup> Future accessions to the appellate jurisdiction of the Caribbean Court of Justice are likely to follow this model.

But these constitutional changes are more than mere amendments. Although political actors have formalized them using the procedures of constitutional amendment, these changes accomplish something different from what we understand amendments to do. These changes deconstruct the constitution; they do not continue to build the constitution as it exists. They are transformative alterations that simultaneously unmake the constitution while reorienting it toward a new direction. This turn to a new direction, however, does not constitute a new constitution, since these alterations are formalized within the existing constitution. They are self-conscious, legally continuous efforts to unmake colonial constitutions but do not promulgate new democratic constitutions. These efforts have succeeded in four countries, but they have so far failed in others.

## 2. *Measuring Transformational Change*

These examples of constitutional dismemberment around the world—in Barbados, Belize, Brazil, Canada, Dominica, Guyana, Ireland, Italy, Jamaica, Japan, New Zealand, the United Kingdom, and the United States—raise an important question: what makes them dismemberments instead of amendments? In other words, how do we measure whether a constitutional change amounts to a transformative one that rises to the level of dismemberment? Let me suggest three possibilities: a change can amount to a transformative one when measured (1) against the founding constitution; (2) against a normative vision of what a constitution should protect; or (3) against the understanding of the relevant actors and the people at the time the change is made. For reasons I will explain below, the third option strikes me as the best one.

The first possible measure turns on what was *first in time*. What matters here is how different the amended or dismembered constitution will be when compared with the founding constitution. We compare the nature of the right, structure, or identity of the constitution when the constitution came into force at Time One with the same right, structure, or identity of the constitution at Time Two, when the constitutional change is proposed. This is a reasonable approach but it raises two challenges. First, uncovering an original purpose or intent behind a constitutional provision or principle is difficult, to say the least, and indeed in the United States this question is the battleground for arguably the most important constitutional controversies. Measuring change against the original meaning of a constitutional right, structure, or identity is unlikely to yield agreement on what precisely constitutes that original meaning. In addition, the original meaning of a constitutional right, structure, or identity

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275. Constitution of Dominica (Amendment) Act, 2014, arts. 3-7.

276. *Id.* art. 9.

may have since been superseded by a new informal understanding that better reflects what the constitution means. In such a case, it would be better to measure the nature of the change against that existing understanding rather than against an obsolete one.

The second possible measure turns on *first principles*. What matters here is how different the amended or dismembered constitution will be when compared with a normative vision of what a constitution should protect. We compare the nature of the right, structure, or identity of the constitution in the present with the same right, structure, or identity of the constitution at Time Two, when the constitutional change is proposed. If the proposed change is inconsistent with the existing constitution and would yield a constitution that better conforms with what we believe a constitution should look like, we can identify the change as a dismemberment. The challenge with this approach is its normativity. How can we reliably measure what should be in a constitution and what a constitution should look like and protect? This is as much a culturally and politically dependent answer as it is one of time and place. What was once morally accepted, such as the sale of persons as chattel, is today rejected, and what may today be morally accepted, such as the eating of animals, may tomorrow be rejected as immoral. Agreement about what is right is unlikely.

I choose a third measure of significance: I focus on neither what was first in time nor what is rooted in contestable first principles and instead focus on what, according to the relevant actors at the moment of the proposed change, was *first in their minds*. What matters here is how different the amended or dismembered constitution will be when compared with the understanding of the relevant actors and the people at the time the change is made. We compare the nature of the right, structure, or identity of the constitution as it is presently understood with how the change to some right or structure or the identity of the constitution is understood at Time Two. What is in the minds of those governed by and operating under the constitution determines whether the change is a simple amendment or a bigger dismemberment. In other words, the self-understanding of the relevant actors—do they believe themselves to be amending or dismembering the constitution—will indicate whether the change amounts to a transformative one. A dismemberment, after all, is a self-conscious effort to repudiate an essential characteristic of the constitution and to dismantle one of its fundamental constituent parts while at the same time building a new foundation rooted in principles contrary to the old. A change is a dismemberment where the relevant actors understand themselves to be engaged in such a transformation.

The theory of constitutional dismemberment is not rooted in a normative understanding of the constitution. It is concerned less with defending liberal democracy than abiding by the constitution as it is conventionally understood. What matters is the present constitutional settlement and how changes are made to it. Constitutional dismemberment takes no prior view of what a constitution should do, entrench, or protect. Constitutional dismemberment instead sets as its baseline the present commitments and understanding of the

constitution and from there evaluates whether a constitutional change breaks so significantly with that baseline so as to amount to a transformation of a fundamental constitutional right, structure, or identity. A constitution, then, may be dismembered either to improve liberal democratic outcomes or to weaken them. We can accordingly speak of the dismemberment of the Turkish Constitution from democratic to authoritarian, just as we can interpret the Civil War Amendments as dismembering the infrastructure of slavery in the U.S. Constitution. Whether a change enhances or deteriorates liberal values is unrelated to the more important inquiry into the nature of a change as either an amendment or a dismemberment.

### 3. *Content and Procedure in Constitutional Change*

The problem is that political actors make transformative constitutional changes like these often without assembling the deep popular support such significant changes ought to command. This problem is the consequence of the standard design of the rules of change, which rarely distinguish between changes that amount to mere amendments and those that rise to the level of dismemberment. The standard design instead generally entrenches one procedure to modify anything in the constitution, from small aesthetic changes to more dramatic ones that shift the locus of authority, diminish or enhance a right or liberty, or reconstruct the infrastructure of government. In other words, the standard design does not vary the procedures of change according to the content of the change itself. This standard design is short-sighted in treating all changes the same way.

I have already identified a small number of constitutions whose rules of change properly vary the procedures of change according to the content of the changes. The Austrian, Costa Rican, Spanish, Swiss, and U.S. Constitutions implicitly authorize amendments using a lower threshold of agreement than required for dismemberment. But there is a third design—call it the modern design—that is more nuanced than both the standard design and the few existing examples of constitutions that distinguish between amendment and dismemberment.

The South African Constitution reflects this more modern design. It explicitly entrenches multiple thresholds of escalating difficulty, each specially designated for use in connection with particular parts or provisions of the Constitution. In the case of South Africa, three thresholds purport to cover the universe of constitutional alteration. The highest threshold, requiring the approval of three-quarters of the National Assembly and two-thirds of the National Council of Provinces, must be used for changes to the rules of formal alteration and to the Constitution's declaration of constitutional values.<sup>277</sup> The intermediate threshold requires two-thirds approval in both the National Assembly and the National Council of Provinces; it must be used for changes to provincial rights, powers, or other provincial matters including the National

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277. S. AFR. CONST., 1996, § 74(1).

Council of Provinces.<sup>278</sup> The lowest threshold—two-thirds approval in the National Assembly—is the default procedure for alterations not otherwise allocated to another threshold.<sup>279</sup>

The Canadian Constitution is similar in its escalating design. It creates five related procedures for formal alteration, each designated for use in connection with specific parts of the Constitution. The lowest threshold authorizes provinces to amend their own constitutions.<sup>280</sup> The next-lowest threshold confers an analogous power on the Parliament of Canada to amend the provisions relating to Parliament itself.<sup>281</sup> The third threshold authorizes the two Houses of Parliament to make alterations affecting “one or more, but not all, provinces” with the consent of the legislative assemblies of those affected provinces.<sup>282</sup> This procedure must be used for changes involving provincial-federal matters that have regional but not national scope. The fourth requires the approval of both Houses of Parliament and of each provincial assembly.<sup>283</sup> It must be used for changes to Canada’s relationship with the monarchy, the right to provincial representation in the House of Commons relative to the Senate, Canada’s official languages beyond their provincial or regional use, the composition of the Supreme Court of Canada, and Canada’s formal alteration procedures themselves.<sup>284</sup> The final procedure serves as the default change mechanism: it requires approval from both Houses of Parliament and from the provincial assemblies of at least two-thirds of the provinces whose aggregate population amounts to at least half of the total population.<sup>285</sup> In addition to its use as a default procedure for changes not otherwise assigned, it also applies to specifically enumerated changes, including those involving proportional representation in the House of Commons, the powers and membership of the Senate, the method of senatorial selection, matters concerning the Supreme Court of Canada for all items except its composition, the creation of new provinces, and the boundaries between provinces and territories.<sup>286</sup> As I will explain below, we can build an effective structure of the rules of change drawing in part from the features of this modern design.

### *C. The Rule of Mutuality*

The rule of mutuality is the core prescription of constitutional dismemberment for new constitutions. The rule of mutuality combines the modern design’s escalating framework for rules of change with the basic features of those constitutions that entrench the distinction between amendment

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278. *Id.* § 74(2)

279. *Id.* § 74(3)

280. Constitution Act, 1982, pt. VII, s. 45, *being* Schedule B to the Canada Act, 1982 c. 11 (U.K.).

281. *Id.* at s. 44.

282. *Id.* at s. 43.

283. *Id.* at s. 41.

284. *Id.*

285. *Id.* at s. 38.

286. *Id.* at s. 42.

and dismemberment. This combination generates an escalating structure of rules of change with procedures of variable difficulty keyed to the content of the proposed change. The more significant the change, the more onerous the procedure: the degree of difficulty rises in terms of the degree of direct or mediated popular support needed to approve the change. At the high end of the scale of difficulty, the rule of mutuality requires symmetry between the procedure required to dismember the constitution and the procedure originally used to ratify it. There are some exceptions to the symmetry principle in the rule of mutuality.

### 1. *Instability in Constitution-Making*

Constitutions around the world are changing in ways that defy our expectations about how they should. In recent years, political actors have exploited the formally democratic institutions of constitutional change to make new constitutions that masquerade as amendments. They have, in other words, sought to dismember the constitution using the ordinary procedures of amendment—to unmake the constitution using the procedures designed to perfect it. From Colombia to Hungary, Egypt to Honduras, Turkey to Russia, and also in the countries of the Commonwealth, we have seen increasing evidence that the rules of formal constitutional change are inadequately designed to combat what French constitutional theorist Georges Liet-Veaux first described in 1943 as “fraude à la constitution.”<sup>287</sup> Constitutional fraud occurs when political actors abide by the letter of the constitution’s rules but intend to violate its spirit. Political actors’ strict adherence to the text makes it possible for them to claim the mantle of legality all the while acting illegitimately.

It is no secret what drives political actors to commit constitutional fraud or to smuggle transformative constitutional changes through easy constitution-changing procedures; they understandably wish to avoid the risk of failure that attends the creation of a new constitution. Jon Elster has observed that “new constitutions almost always are written in the wake of a crisis of exceptional circumstance of some sort.”<sup>288</sup> As a result, “the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making.”<sup>289</sup> What exacerbates these challenging beginnings of the constitution-making process are the competing interests that may exist in the effort to achieve a constitutional settlement: there is often misalignment among the personal interests of constitution-makers, the group interests of the identity-based or subnational groups, and the institutional interests of the bodies created for the purpose of creating the constitution or of the bodies to be created by the

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287. Georges Liet-Veaux, *La “fraude à la constitution”: Essai d’une analyse juridique des révolutions communautaires récentes: Italie, Allemagne, France*, 59 *REVUE DU DROIT ET DE SCIENCE POLITIQUE EN FRANCE ET À L’ÉTRANGER* 116, 145 (1943).

288. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *DUKE L.J.* 364, 370 (1995).

289. *Id.* at 394.

constitution.<sup>290</sup> A good solution to the problems that prompt the constitution-making process is therefore unlikely to emerge or be sustainable.<sup>291</sup>

These competing interests in constitution-making are not constrained as they would be in a legal and transparent process that begins and ends within an existing constitutional order. Where political actors are bound by known and identifiable procedures of change—and where there is a political culture of adhering to them or where pressure is applied to abide by them—the outcome is likely to differ because the constraints can more effectively guide them toward a legal fix. The current debate in the United States about convening a constitutional convention to write a new constitution illustrates both the real and perceived risks in constitution-making.<sup>292</sup> Scholars may agree with Sanford Levinson that the U.S. Constitution is broken,<sup>293</sup> but they have so far resisted his call to action for a new constitution, largely out of fear of a “runaway convention,”<sup>294</sup>—the concern being that the convention process cannot be regulated by law and that anything is possible when political actors step outside of the constitution to remake it. The reality, however, is that the content of constitutions is “sticky,” as eighty percent of a constitution generally survives after its rewriting, suggesting that a new U.S. Constitution would remain much like what it is today.<sup>295</sup>

The theory of constitutional dismemberment privileges evolution and transformation while maintaining legal continuity. It invites changes big and small to occur within the same regime without requiring political actors and the people to step outside of the constitution in order to fix a problem, real or imagined. The challenge of designing the rules of constitutional change is how to compel political actors to check themselves.

## 2. *Transformational Change with Legal Continuity*

Consider the Republic of Georgia. Its Constitution has recently undergone a historic transformation. In a series of constitutional changes passed at once, Parliament altered the Constitution from top to bottom, making it virtually unrecognizable when compared to its previous form.<sup>296</sup> Under the Constitution’s formal rules of change, this package of major alterations became official only after two parliamentary approval votes.<sup>297</sup> But Georgian Dream’s

290. *Id.* at 376-82.

291. *Id.* at 394.

292. *America Might See a New Constitutional Convention in a Few Years*, ECONOMIST (Sept. 30, 2017), <https://www.economist.com/news/briefing/21729735-if-it-did-would-be-dangerous-thing-america-might-see-new-constitutional-convention> (describing the dangers of a constitutional convention).

293. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006).

294. See Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1528-31 (2010).

295. See Ozan O. Varol, *Constitutional Stickiness*, 49 U.C. DAVIS L. REV. 899, 902-03 (2016).

296. *Georgia Revises Constitution “Without Public Consent”*, OC MEDIA (June 27, 2017), <http://oc-media.org/georgia-revises-constitution-without-public-consent>.

297. ს ა ქ ა რ თ ვ ე ლ ო ს კ ო ნ ს ტ ი ტ უ ე ო ა [CONSTITUTION OF GEORGIA] Aug. 24, 1995, art. 102, § 3.

supermajority control of Parliament left no doubt that the package of reforms would pass. And indeed it did—over the President’s initial veto.<sup>298</sup> The reforms will take effect after the next presidential election.<sup>299</sup>

What should concern the people of Georgia is that this major reform amounts to more than mere tinkering with their Constitution. It is a new constitution masquerading as a constitutional amendment. Georgian Dream wrote protections for itself into the Constitution. The political party’s constitutional changes imposed restrictions on the powers of its political opposition, most notably by banning electoral blocs.<sup>300</sup> The reforms consolidate Georgian Dream’s powers by abolishing the existing semi-presidential system that separates powers and encourages bipartisanship.<sup>301</sup> In its place, the reforms create a pure parliamentary system that amplifies the power of the governing majority and gives it free rein to do virtually anything it wants.<sup>302</sup> The constitutional changes also give Georgian Dream the power to stack the judiciary in its favor; now judges of the Supreme Court will be selected by a simple parliamentary vote.<sup>303</sup> Georgian Dream’s reforms also bring new social and political values into the Constitution. They define Georgia as a “social state,”<sup>304</sup> place restrictions on private property,<sup>305</sup> and limit marriage to the union of one man and one woman.<sup>306</sup> The content of these changes makes them more than mere amendments.

This historic constitutional reform should not have been passed with an easy legislative vote that Georgian Dream could dictate with no risk of real opposition, let alone a threat of defeat. This extraordinary constitutional transformation should have been passed with the popular approval of the people in a national referendum. Georgian Dream instead effectively rewrote the entire Constitution without building the popular consent necessary to give legitimacy to a set of reforms so significant that they amount to a new constitution.

No constitutional change should be beyond the power of political actors and the people. The dismemberments Georgian Dream has entrenched into the Constitution should not have been barred by the Constitution or by the judiciary when evaluating the constitutionality of these changes. Nor should Georgian Dream have had to engage the constitution-making process to make these changes and, as a consequence, risk the instability and failure that attends the writing of a new constitution. But nor should Georgian Dream have made

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298. Thea Morrison, *Georgian President Signs New Edition of Constitution*, GEOR. TODAY (Oct. 20, 2017), <http://georgiatoday.ge/news/7909/Georgian-President-Signs-New-Edition-of-Constitution>.

299. CONSTITUTION OF GEORGIA, Oct. 13, 2017, ch. XI, art. 78, <https://matsne.gov.ge/ka/document/view/30346?impose=translateEn>.

300. *Id.* art. 37.

301. *Id.* chs. III-IV.

302. *Id.*

303. *Id.* art. 61, § 2.

304. *Id.* pmb., art. 5.

305. *Id.* art. 19.

306. *Id.* art. 30.

dismemberments using the simple procedures of constitutional amendment. All changes should be possible without breaking legal continuity but not without gathering whatever quantum of agreement from peoples and institutions that is required to legitimate the change.

As dismemberments, these transformative changes demand a higher level of direct or mediated popular consent since their effect is to unmake the constitution—here, specifically, both its fundamental rights and its basic constitutional structure. These changes should have been authorized only by constituent power, which is to say by the configuration of peoples and institutions recognized as validly exercising the constitution-making power in Georgia. As a default rule, where the constitution is silent about what precisely constitutes this configuration of peoples and institutions, the constitution-making power should be understood as that configuration of peoples and institutions used to ratify the constitution at its creation. This is only a default rule, to which some qualifications are attached, including one that recognizes that what is now perceived as a legitimate configuration of peoples and institutions may have since evolved.

### 3. *Redeeming the Theory of Constituent Power*

The logic of constituent power has endured for centuries. It has an intuitive appeal inspired by the Lockean ambition of a stable constitutional settlement legitimated by the consent of the governed.<sup>307</sup> But even Locke himself failed to be true to his own theory when he designed the formally unamendable Fundamental Constitutions of Carolina, a constitution he designed to “be and remain the sacred and unalterable form and rule of government of Carolina forever.”<sup>308</sup> There is no constitution more antagonistic to the principle of popular consent than an unamendable constitution that binds the people of tomorrow to the irreversible choices of yesterday.

Yet for all of its theoretical appeal, the conventional theory of constituent power is unhelpful for its lack of operational specificity. To say that a transformative constitutional change may be authorized only by constituent power, as opposed to the constituted powers, gives us a high-level theory but not an applicable practice to translate it into action. Worse yet, its generality creates a space of indeterminacy that makes it possible for courts to exploit the theory when they render judgments on the constitutionality of constitutional alterations like the ones from the Turkish Constitutional Court or elsewhere in the world where the outcomes strike us as incorrect.<sup>309</sup>

Faced with the theory of constituent power that is often less useful than not, we therefore confront a choice. We may content ourselves with the sweeping generalities that characterize the conventional theory of constituent

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307. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 47-48, § 89 (MacPherson ed., 1980).

308. See THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA art. 120 (1669); see also David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THEORY 602 (2004) (discussing Locke's role in writing the North Carolinian Constitution).

309. See *supra* Section I.C.3.

power and the consequences of those generalities for the judicial interpretation of constitutional alterations, or we may invest in redeeming the theory by introducing particularities that allow political actors to use and enforce the theory's basic organizing logic according to the democratic values that underpin it.

I choose here to redeem it. I draw from the difficulty of identifying and enforcing the dividing line between the powers of constitution-changing and constitution-making. I also draw from our earlier reinterpretation of the design of Article V and our exposition of the deficiencies in the standard design of formal alteration. Tying together these different strands, I suggest a rule for how to legitimate transformative constitutional alterations that are inconsistent with the existing constitution: the rule of mutuality. The rule of mutuality may be incorporated into the design of the rules of constitutional alteration. It may also be used where a constitution's rules of formal change do not distinguish between the procedures to make and unmake a constitution; here, it operates as a default rule where the constitution is silent.

Recall that courts rely on the conventional theory of constituent power to invalidate transformative constitutional changes when political actors make those changes using the ordinary rules of constitutional alteration instead of, according to courts, invoking constituent power to make those transformative changes. Courts see themselves as defending the constitution from significant alteration by anything other than a valid exercise of constituent power.<sup>310</sup> The problem is how to determine when constituent power has acted to validate a major change. The rule of mutuality intervenes to constrain how courts review the constitutionality of constitutional changes by giving observable specificity to the theory of constituent power.

Under the rule of mutuality, a constitution may be dismembered using the same procedure that was used to ratify it. The purpose of the rule is to offer a justification for saving constitutional alterations from invalidation when a court concludes that the change is inconsistent with the existing constitution. The ratifying procedure for a new constitution is recognized as a legitimate vehicle for creating a new constitutional settlement, and that procedure should be sufficient—with exceptions I describe below—to transform the constitution into something different, even contrary, as though a new constitution were being created. Requiring political actors to respect the rule of mutuality avoids the instability that attends the making of a new constitution because the rule authorizes political actors to make big changes within the same constitutional order. Unlike the conventional approach to constitutional change, which disallows revolutionary changes on the theory that they create a new constitution, the theory of constitutional dismemberment and its accompanying rule of mutuality instead authorize political actors to make any change they wish—subject to its legitimation by the relevant bodies—all the while maintaining legal continuity and discouraging the extraordinary judicial action of invalidating a constitutional change.

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310. *See supra* Part I.

The rule of mutuality comprises four factors. Some are qualifications and others are explications. Together they round out the principle of symmetry—between original constitutional ratification and subsequent constitutional dismemberment—that sits at the base of the rule.

The first factor is differentiation: where the entrenched threshold for constitutional alteration is lower than the original threshold for constitutional ratification, only amendments may be made using that lower threshold. For example, assume the codified federal constitution of State A entrenches a threshold for formal alteration requiring a two-thirds supermajority agreement in the bicameral national legislature and a simple majority agreement among the subnational legislatures. Further assume that the constitution was ratified by a majority vote in a specially-constituted constituent assembly followed by a national referendum. Here, the formal alteration threshold requiring two-thirds approval in the legislature could be used only to amend the constitution. We would interpret the differentiated thresholds as specially designed for different purposes; the entrenched rule for formal alteration would be intended to allow only constitutional amendments.

The second factor is unification: where the entrenched threshold for constitutional alteration is the same as the original ratification threshold, we can interpret both powers of amendment and dismemberment as incorporated under that unified entrenched threshold. Unification is evident in the fourth procedure in Article V of the U.S. Constitution: it entrenches the procedure that was used to ratify the U.S. Constitution at the Founding.<sup>311</sup> Here, the formal alteration procedure may be used both to amend and to dismember the constitution. The alteration rule unifies the amendment and dismemberment authorities into a single procedure. Consider more generally a codified unitary constitution for State B establishing the same rule for constitutional alteration as was used for constitutional ratification: a two-thirds supermajority agreement in the bicameral legislature and a national referendum. This makes it difficult to justify a court invalidating a transformative constitutional alteration because this unified threshold suggests the constitutional designers believed there ought to be no difference between the amendment and dismemberment powers.

The third factor is symmetry: we should understand the original constitutional ratification threshold as creating a default ceiling on the threshold required for constitutional dismemberment. Return to the constitutional ratification threshold for State A above: a majority vote in a specially-constituted constituent assembly followed by a national referendum. It would be permissible to dismember the constitution—that is to say, to unmake it by introducing a formal alteration that changed something about the constitution's fundamental rights, structure, or identity—by using the threshold that had been used to ratify the constitution in the first place. The theory here is that the decision to unmake the constitution must be validated by the same quantum of agreement that originally mobilized behind the choice to make the

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311. U.S. CONST. art. V.

constitution. Where constitutional designers differentiate the rules for alteration and ratification, we can more democratically justify a court invalidating a transformative constitutional alteration made using an amendment procedure, because it suggests that designers wanted to distinguish the amendment and dismemberment powers and to have their different uses enforced. The symmetry between the thresholds to make and unmake the constitution is intended to neutralize claims about the illegitimacy of the change.

The fourth factor is recognition: the ceiling on the threshold required for a valid dismemberment may be lowered where political elites and the people recognize the legitimacy of a dismemberment made using a threshold lower than the one used to ratify the constitution. Return again to the constitution of State A. The ratification threshold was a majority vote in a specially-constituted constituent assembly followed by a national referendum. Ordinarily under the theory of constitutional dismemberment, the rule of mutuality would require political actors to respect this threshold in order to make a transformative change to the constitution. But where the body we call “the people”—the constituent power—has changed in its composition or in its configuration such that political actors and the people recognize as valid a dismemberment made with a quantum of agreement lower than the ratification threshold, this transformative constitutional change must be accepted as a valid exercise of constituent power. Only in rare cases, however, should the threshold ever rise above the quantum required to ratify the constitution to begin with. The theory of constitutional dismemberment does not seek to discourage constitutional changes but rather to invite political actors and the people to take active ownership of their constitution. The point here is simply that the nature of constituent power can change over time.<sup>312</sup>

Together, these four factors suggest that new constitutions should entrench an escalating structure of the rules of constitutional change within a two-track framework that creates differentiated procedures for amendment and dismemberment. For example, a new constitution should have one set of procedures for amendment that is less onerous than the ratification procedure entrenched as the dismemberment rule. In a federal State, dismemberment might require a three-quarters approval vote in each house of the bicameral legislature along with the approval of three-quarters of the legislatures of the subnational states for dismemberment. In that same State, constitutional designers could entrench an escalating structure of amendment procedures: beginning at the least onerous end of the scale with agreement by two-thirds in a single subnational state enough to make changes to its own constitution, mirrored by a two-thirds rule for changes by the national legislature regarding constitutional matters regulating its own affairs. The next highest threshold of change would involve a two-thirds approval vote in the national legislature as well as a simple majority vote in the legislatures of the subnational states when involving matters of national significance. What results from this escalating

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312. For a U.S. example of how this can happen, and a theoretical explication of why, see Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT’L J. CONST. L. 639, 654 (2015).

structure of the rules of change is a hierarchy of constitutional importance that suggests that the higher the degree of entrenchment under the rules of change, the more important those higher-entrenched provisions or principles. It would make sense, then, to protect the fundamental rights, structure, and identity of the constitution from constitutional alteration unless one of these is dismembered according to a high threshold that leaves little question about the validity of the constitutional consensus that has formed behind the change. This escalating structure would have its own internal logic based on the degree of relative insulation from alteration the provisions or principles are given under the entrenched rules of constitutional change.

### III. DISMEMBERMENT IN CONTEMPORARY PROBLEMS

The distinction between amendment and dismemberment suggests answers to important questions in constitutional change today. Three of the questions at the forefront of debates on constitutional change are: (1) how the rules of change should be designed to prevent liberal democratic degeneration; (2) whether courts should have the power to invalidate constitutional changes that judges believe amount to a new constitution; and (3) more generally, whether and how constitutions should be made to endure. The theory of constitutional dismemberment offers an approach to each.

#### *A. The Problem of Liberal Democratic Degeneration*

The new wave of scholarship in constitutional change is concerned principally with what we might call democratic degeneration. The basic claim of the new wave is that political actors around the world are increasingly exploiting the mechanisms of constitutional change to undermine the liberal values of constitutionalism, and the tasks of constitutional scholars, judges, and designers are, respectively, to develop theories, apply doctrines, and engineer constitutions to prevent these attacks on constitutionalism.<sup>313</sup> Yet the new wave

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313. See, e.g., Ali Acar, *De-constitutionalism in Turkey?*, INT'L J. CONST. L. BLOG (May 19, 2016), <http://www.iconnectblog.com/2016/05/deconstitutionalism-in-Turkey>; Michael Blauberger & R. Daniel Kelemen, *Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU*, 24 J. EUR. PUB. POL'Y 321 (2016); Bojan Bugarič, *A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands In-Between" Democracy and Authoritarianism*, 13 INT'L J. CONST. L. 219 (2015); Tom Gerald Daly, *Time to View Democratic Decay as a Unified Research Field?*, INT'L J. CONST. L. BLOG (Sept. 30, 2016), <http://www.iconnectblog.com/2016/09/time-to-view-democratic-decay-as-a-unified-research-field>; Laura Gamboa, *Opposition at the Margins: Strategies Against the Erosion of Democracy in Colombia and Venezuela*, 49 COMP. POL. 457 (2017); Aziz Z. Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018); R. Daniel Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 GOV'T & OPPOSITION 211 (2017); Tomasz Tadeusz Konieczny, *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*, INT'L J. CONST. L. BLOG (Dec. 6, 2015), <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>; Miguel Ángel Martínez Meucci, *Symposium on "Venezuela's 2017 (Authoritarian) National Constituent Assembly"—Maduro's National Constituent Assembly: Constituent Power to Build an Undemocratic Regime*, INT'L J. CONST. L. BLOG (Aug. 29, 2017), <http://www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assembly>; Miguel Ángel Martínez Meucci, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANN. REV. POL. SCI. 249 (2016); Jan-Werner

does not explain why its normative view of constitutionalism should be the standard for evaluating the world's constitutions.

### 1. *The New Wave*

This new wave of legal scholarship in constitutional change builds on the older scholarship in political science on competitive authoritarianism, a term used to refer to regimes that are democratic in form but authoritarian at their core. As Steven Levitsky and Lucan Way have theorized, “[i]n competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy.”<sup>314</sup> Scholars have observed this phenomenon around the world.<sup>315</sup>

For new wave scholars, Hungary is a leading expositor of liberal democratic degeneration. The common view is that the Fidesz Party in Hungary has at best severely damaged democracy and the rule of law and at worst destroyed it.<sup>316</sup> This populist nationalist party has used its elected parliamentary majority to introduce constitution-level and sub-constitutional reforms that have been described as conservative and Eurosceptic.<sup>317</sup> The field of constitutional change is moving toward consensus on these reforms: they are formally legal but substantively illegitimate because, although political actors acted in strict compliance with democratic procedures, they made non-democratic changes to the polity. Hungary's new Constitution of 2012 is one of David Landau's examples of this phenomenon, which he terms “abusive constitutionalism.”<sup>318</sup> The Constitution has been criticized both for the way it was adopted and for its content. As to its adoption, the Venice Commission has observed that it lacked transparency and dialogue between the government and the opposition, provided little opportunity for public debate, and was adopted too quickly.<sup>319</sup> The Venice Commission also observed that the Constitution

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Müller, *Defending Democracy Within the EU*, 24 J. DEMOCRACY 138 (2013); Ulrich Sedelmeier, *Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession*, 52 J. COMMON MKT. STUD. 105 (2014).

314. Steven Levitsky & Lucan A. Way, *The Rise of Competitive Authoritarianism*, 13 J. DEMOCRACY 51, 52 (2002).

315. See Stephan Giersdorf & Aurel Croissant, *Civil Society and Competitive Authoritarianism in Malaysia*, 7 J. CIV. SOC'Y 1 (2011); Ellen Lust-Okar, *Elections Under Authoritarianism: Preliminary Lessons from Jordan*, 13 DEMOCRATIZATION 456 (2006); Scott Mainwaring, *From Representative Democracy to Participatory Competitive Authoritarianism: Hugo Chávez and Venezuelan Politics*, 10 PERSPECTIVES ON POL. 955 (2012); Stephanie A. Matti, *The Democratic Republic of the Congo? Corruption, Patronage, and Competitive Authoritarianism in the DRC*, 56 AFR. TODAY 42 (2010); Lucan A. Way, *The Sources and Dynamics of Competitive Authoritarianism in Ukraine*, 20 J. COMMUNIST STUD. & TRANSITION POL. 143 (2004).

316. See Attila Ágh, *Decline of Democracy in East-Central Europe: The Last Decade as the Lost Decade in Democratization*, J. COMP. POL., July 2014, at 4, 14-25.

317. See Neil Buckley & Henry Foy, *Poland's New Government Finds a Model in Orban's Hungary*, FIN. TIMES (Jan. 6, 2016), <https://www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f>.

318. David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 191, 208-11 (2013).

319. Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Draft Opinion on the New*

limits the powers of the judiciary, undermines the separation of powers, and insufficiently protects fundamental rights.<sup>320</sup>

Critics contend that Hungary's Constitution does not meet our expectations for constitutionalism. Kim Lane Scheppele has argued that this new constitutional framework raises obstacles to "constitutionalism and democracy" in the country.<sup>321</sup> According to Gábor Halmai, Fidesz enacted the new Constitution "not with the intention to entrench constitutionalism, but rather to constitutionally entrench its political preferences by weakening checks and balances of its power, and guarantees of rights."<sup>322</sup> All of this has led Renáta Uitz to suggest that Hungary is an illiberal democracy in formation, if not in present reality. The governing regime has entrenched itself in power, eroded checks and balances on its power, and been unwilling "to comply with minimum standards of constitutionalism."<sup>323</sup>

There are as of yet no good solutions to the problem of liberal democratic degeneration. New wave scholars themselves recognize as much, conceding that the current generation of constitutional design has not innovated the tools to combat it, assuming it is even possible to rely on formal rules to discipline the exercise of political authority in regimes with weak traditions of the rule of law.<sup>324</sup> This is perhaps why Halmai has suggested that the answer, if indeed there is one, is to develop a democratic culture that conforms to the values of liberal constitutionalism.<sup>325</sup> Another solution offered to the problem of liberal democratic degeneration is more concrete. It relies on courts to evaluate the constitutionality of constitutional changes against the standard of transnational norms in democratic constitutions. As Rosalind Dixon and David Landau explain, this strategy relies on courts to consider "institutional practices and jurisprudence across a range of other democratic constitutional systems."<sup>326</sup> Courts, they say, should compare the domestic constitutional change against the global practice of democracies and then invalidate a constitutional change that does not fit within the range of what the global community of liberal democratic constitutions deems acceptable.

## 2. *National Constitutions and their Purposes*

The ambition to constrain constitutional change in the service of liberal

*Constitution of Hungary*, Opinion No. 618/2011, June 6, 2011, para. 145, [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2011\)032-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2011)032-e).

320. *Id.* paras. 147-49.

321. Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA 111, 122 (Armin von Bogdandy & Pál Sonnevend eds., 2015).

322. Gábor Halmai, *An Illiberal Constitutional System in the Middle of Europe*, 2014 EUR. Y.B. HUM. RTS. 497, 512.

323. Renáta Uitz, *Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 INT'L J. CONST. L. 279, 281 (2015).

324. See Landau & Dixon, *supra* note 39, at 861-62.

325. Gábor Halmai, *The Decline of Liberal Democracy in Europe's Midst*, EUROZINE (Sept. 27, 2016), <http://www.eurozine.com/pdf/2016-09-27-halmai-en.pdf>.

326. Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606, 629 (2015).

democratic values is admirable, but it is a normative ambition that is not common to all constitutions, nor should it be. Constitutions have both functional and aspirational purposes, and the two should remain distinct, given that all constitutions have similar functions but not the same aspirations. There is much more to say about the relationship between a constitution and constitutionalism than is possible here, but as a basic matter, we can understand a constitution as a set of rules for governance—rules that are aggregated or disaggregated in one or more texts, are rooted in shared understandings of norms that filter through laws and regulations, and are refined and reinforced by practices that shape how political actors interact with themselves and the governed. Functionally, a constitution separates powers by creating an internal structure of authority that serves as a referent for disputes: it identifies either expressly or by practice the class of persons bound by its rules; and it adopts explicitly or implicitly a purpose to guide the conduct of its governors. Constitutionalism, for its part, is a culturally-specific sociological principle that concerns how a constitution is lived, how its rules are practiced, and how the governed and the governors perceive themselves in relation to it and each other. What new wave scholars fail to acknowledge is that liberal democratic constitutionalism, like a liberal democratic constitution, is only one of many possible variations.<sup>327</sup>

Neither a constitution nor constitutionalism necessarily entails acceptance of or adherence to values of liberal democracy however much we may want countries and peoples to honor them. A constitution is a vessel with no pre-determined intrinsic moral or ideological orientation. It may be deployed for any purpose given to it. A constitution can, of course, aspire to a higher moral purpose than its basic functions of creating, describing, and governing the structure and operation of government. But a constitution remains a constitution whether or not it conforms to the modern vanguard of liberal democratic constitutionalism. The recent scholarship on authoritarian constitutions shows that these constitutions are as much constitutions as any other.<sup>328</sup>

Take the Hungarian case for example. To say that it does not respect the expectations of constitutionalism is inaccurate unless one has a normatively-grounded understanding of constitutionalism. However, scholars who criticize the Hungarian Constitution for failing to meet the standards of liberal constitutionalism are in fact right. Leaders in Hungary have made no secret of their intention to depart from the dominant Western conception of liberal constitutionalism. Indeed, the Prime Minister publicly disclaimed any aspiration to liberal democracy in a speech he delivered after he and his party were reelected:

What is happening in Hungary today can accordingly be interpreted by stating that the prevailing political leadership has today attempted to ensure that people's personal work and interests, which must be acknowledged, are closely linked to the

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327. Mark Tushnet, *Varieties of Constitutionalism*, 14 INT'L J. CONST. L. 1, 1 (2016).

328. See, e.g., CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

life of the community and the nation, and that this relationship is preserved and reinforced. In other words, the Hungarian nation is not simply a group of individuals but a community that must be organised, reinforced and in fact constructed. And so in this sense the new state that we are constructing in Hungary is an illiberal state, a non-liberal state. It does not reject the fundamental principles of liberalism such as freedom, and I could list a few more, but it does not make this ideology the central element of state organisation, but instead includes a different, special, national approach.<sup>329</sup>

To the extent that concerns about liberal democratic degeneration have led scholars to endorse the idea that illiberal constitutional changes should be invalidated, their approach betrays normative priors that are not universally shared as a descriptive reality, whatever we may hope as an aspirational objective for the world.

The argument that domestic constitutional changes should be constrained by a transnational core rooted in the values of liberal constitutionalism raises a problem of the same kind but of a different degree. It is one thing to critique the implementation of a constitution for failing to live up to the standards one believes best reflect the aspirations of liberal constitutionalism. But it is quite another more serious intrusion into a nation's sphere of sovereignty and the self-determination of its peoples to impose on a national constitution a requirement of conformity with the values of others. Requiring conformity with transnational values—not to mention the problems involved in identifying what those values are and how they are to be enforced against a set of contextual facts and institutions—undermines the fundamental purpose of having a national constitution at all.

### 3. *The Constitution of Consent*

A more promising solution to the problem of liberal democratic degeneration might not be a constitution-level fix. It could be a fix that comes from below in the interactions of the people and their representatives in government. Doyle has suggested that unwritten constitutional norms—or constitutional conventions—can better manage constitutional change.<sup>330</sup> Though he was writing specifically in the context of a transition from one constitutional order to another, Doyle's insights are transferable to constitutional changes within the same order where those changes revise the operating framework of the existing constitution. This is to say that, rather than amending the constitution, those changes would instead seek to dismember it.

Doyle argues that constitutional change should be constrained principally by social rules internal to the polity governing how democratically accountable political actors are to undertake and manage constitutional change. Doyle has two principal objectives in his project: (1) to ensure, as much as possible, a

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329. Prime Minister Viktor Orbán, Speech at the 25th Bálványos Summer Free Univ. & Student Camp (July 26, 2014), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

330. See Oran Doyle, *Constitutional Transitions, Abusive Constitutionalism and Conventional Constraint*, 37 NAT'L J. CONST. L. 67 (2017).

majoritarian foundation for major constitutional change and, relatedly, to resist the use of minoritarian controls on constitutional change to the extent the values advanced in the use of those controls do not converge with majoritarian preferences; and (2) to encourage political actors to self-regulate their conduct consistent with the views of the popular majorities to which they are accountable.<sup>331</sup> Doyle's approach is similar but distinguishable from Halmai's suggestion that, in the Hungarian case, the solution is to develop a democratic culture of liberal constitutionalism. Doyle does not set the values of liberal constitutionalism as the limiting reagent to legitimate constitutional change. Instead, he argues that constitutional change should be constrained by democratic principles—but importantly only where “democratic majorities themselves . . . determine the contours of their democracy.”<sup>332</sup>

Of course, the limit to Doyle's approach is that it relies on the good faith of the political actors who operate the levers of change to restrain themselves from exploiting their powers. Yet there is something appealing from a democratic perspective about the majoritarian foundations of Doyle's theory of conventional constraint. It rejects the minoritarian doctrine of unconstitutional constitutional amendment, yet it nonetheless seeks a way to protect the constitution from illegitimate changes.

There is an abundance of scholarship today on the judicial review of constitutional amendments. Yaniv Roznai's scholarship is the most innovative to date, drawing on his fluency in multiple jurisdictions and disciplines to enrich our understanding of this deeply contested judicial practice.<sup>333</sup> Roznai's more recent work suggests a spectrum theory of constitutional amendment powers. For Roznai, the more closely the amending actors embody constituent power, the more deference courts should afford them when reviewing the constitutionality of a constitutional amendment. In contrast, the closer the amending actors reflect an ordinary constituted power, the less deference courts should give them when reviewing one of their constitutional amendments.<sup>334</sup> This is a sophisticated theoretical framework, but it does not translate constituent power into a quantifiable measure of what constituent power looks like. The rule of mutuality seeks to fill that void where a constitution is silent; the optimal solution is to entrench procedures for partial and total reform in the rules of change themselves.

The theory of constitutional dismemberment offers a way to quantify the democratic majorities needed to validate a major constitutional change, even where the change runs counter to the existing constitutional framework. The rule of mutuality authorizes democratic majorities to make major constitutional

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331. *Id.* at 78-81.

332. *Id.* at 89.

333. See, e.g., Yaniv Roznai, *Unamendability and the Genetic Code of the Constitution*, 27 EUR. REV. PUB. L. 775 (2015); Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*, 8 VIENNA J. INT'L CONST. L. 29 (2014); Yaniv Roznai, *The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557 (2013); Roznai, *supra* note 57, at 670-710.

334. See Roznai, *supra* note 39, at 37-48.

reforms using the same or similar procedures used to ratify the constitution in the first place. Under the principle of symmetry in the theory of constitutional dismemberment, a constitution may be dismembered using the original ratification threshold. Importantly, the original threshold sets the default ceiling that political actors should observe to dismember the constitution. Political actors may dismember the constitution using a lower threshold where it is clear that the change is supported by a substantial democratic majority that reflects the considered judgment of the political community. Conventional understandings are a helpful standard to constrain political actors in determining what does and does not claim substantial democratic majority support. It is a contextual inquiry and, to be sure, one that requires political actors to restrain themselves; however, the principle of symmetry quantifies the upper limit of the majorities needed for the change.

Whether or not a given major constitutional change is consistent with liberal constitutionalism is irrelevant to the inquiry. Recognizing that the people of one country may wish to define their polity according to values that differ from those defining another, the theory of constitutional dismemberment does not impose substantive parameters on what changes are permissible or good in a normative sense. What matters instead is the quantum of popular support for the change. Just as the theory of constitutional dismemberment must credit as democratically legitimate the Civil War Amendments that destroyed the infrastructure of the United States' slavery Constitution, so too must the theory credit a constitutional change that dismembers Japan's pacifist Constitution, Brazil's social Constitution, and indeed any other transformative yet legally continuous constitutional change that earns the support of a substantial democratic majority of the relevant people.

As I will illustrate further below, this is not a strictly proceduralist approach to constitutional change. The heart of the theory of dismemberment is a careful evaluation of the substantive implications of the change for the constitution. The kind of identified change—whether an amendment or a dismemberment—will determine the procedures political actors should follow to incorporate the change into the constitution. This approach is therefore driven by the relationship between content and procedure and equally by design and necessity.

### *B. The Problem of Juristocracy*

One of the most important trends in constitutionalism since the last great war is what Ran Hirschl has described as “juristocracy”—the rise of courts to the highest seat of power.<sup>335</sup> Political actors have chosen, for strategic reasons of hegemonic self-preservation, to confer the power of judicial review on courts. Over time, juristocracy has brought increasingly more matters into the purview of judicial authority, leading to what Hirschl has called the judicialization of “mega-politics,” described as “core political controversies

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335. RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

that define the boundaries of the collective or cut through the heart of entire nations.”<sup>336</sup> These controversies include matters commonly thought to raise distinctly political questions: macroeconomic planning, national security, electoral procedures, secession and independence, the formation of collective identity, and the kinds of nation-building processes that have historically remained beyond the realm of judicial control.<sup>337</sup> The problem of juristocracy is therefore a problem of democratic participation; courts commonly suffer from a democratic deficit relative to other political branches insofar as courts are out of the reach of electoral politics and the accountability they entail. The rise of courts as a check on the power of constitutional alteration is an aggravated manifestation of juristocracy.

Constitutional dismemberment contemplates a role for courts but avoids the problem of juristocracy raised by the power to invalidate a constitutional amendment. The role for courts under the theory of constitutional dismemberment is catalytic, not obstructive. Courts retain an important function in the review of constitutional alterations, but they should take a defensive, collaborative, and constructive posture to the amending actors, rather than a confrontational one.

### 1. *In Defense of the Constitution*

The purpose for judicial review of constitutional alteration should not be to compel the people and their representatives to adopt a particular set of liberal democratic norms. The better purpose should be to ensure that the people and their representatives have expressed their considered judgment about the changes they wish to make. The objective of the court should not be to defend liberal democracy but rather to defend the constitution itself.

Two cases from Honduras highlight the problem of juristocracy in the context of constitutional change. The Honduran Constitution limits the president to only one four-year term<sup>338</sup> and makes the provision entrenching this term limit formally unamendable.<sup>339</sup> Then-President Manuel Zelaya tested this provision when, in 2009, he proposed a referendum on whether the unamendable term limit should be amended to allow him to extend his presidency.<sup>340</sup> The National Congress ousted Zelaya and named Roberto Micheletti the new president,<sup>341</sup> while the Supreme Court approved a military order to detain Zelaya on charges of treason and abuse of authority.<sup>342</sup> The

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336. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 98 (2008).

337. *Id.* at 98-106.

338. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS, Jan. 11, 1982, art. 237.

339. *Id.* art. 374.

340. See Elisabeth Malkin, *Honduran President is Ousted in Coup*, N.Y. TIMES (June 28, 2009), <http://www.nytimes.com/2009/06/29/world/americas/29honduras.html>.

341. See William Booth & Juan Forero, *Honduran Military Sends President into Exile: Supportive Congress Names Successor*, WASH. POST (June 28, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062800635.html>.

342. See Marc Lacey, *Leader's Ouster Not a Coup, Says the Honduran Military*, N.Y. TIMES (July 1, 2009), <http://www.nytimes.com/2009/07/02/world/americas/02coup.html>.

Court enforced the constitutional text as written, interpreting the formally unamendable provision entrenching a single-term limit as definitively barring any extension of the presidential term.

Only a few years later in 2015, the Honduran Supreme Court took the directly contrary position. In a unanimous judgment, the Court rendered inapplicable and without effect the unamendable constitutional provision that established a single-term presidential limit.<sup>343</sup> Not too long prior, the Court had supported the removal of Zelaya from the presidency for trying to amend this unamendable provision. There have been other efforts to amend unamendable provisions—most notably a successful attempt in Portugal<sup>344</sup>—but this Honduran example should strike us as particularly odd in light of the two directly conflicting Supreme Court judgments separated by a period of just six years.

There are good reasons to reject the Court's 2016 judgment. The Court contradicted itself for what seems to be political, rather than legal, justifications; it broke with recent precedent, and it failed to give reasonable meaning to the Constitution's unamendable rule against amending term limits.<sup>345</sup> There is a deeper reason why the Court's 2016 judgment was problematic: the Court undermined the Constitution and exercised its extraordinary power of amendment review in order to defend a self-interested view of narrow democratic politics instead of the Constitution's own pre-commitment to presidential rotation.

Whatever the core of a constitution, the role of a court is to defend it unless there is evidence of substantial popular support to change it. There was no evidence adduced in this Honduran case of popular support for the Court to disapply the unamendable provision of a single-term limit for presidents. We know that this unamendable provision formed part of the core of the Honduran Constitution because its drafters chose to place it beyond the reach of the power of amendment. There are many reasons why constitutional designers would choose to entrench a provision against formal amendment: to formalize a bargain or to preserve a founding norm, to transform the State or to reconcile previously warring groups, or quite simply to express a constitutional value, whether authentic or not. However, at a minimum, we must honor the choice as reflecting one of the constitution's most important parts, whether functionally, formally, or symbolically, and in any case as part of its core.

The Honduran Supreme Court should not have rendered the provision inapplicable—a decision with an effect amounting to a constitutional dismemberment—without confirming the substantial popular support for such a fundamental change to the core of the Constitution. As it was, the Court

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343. Leiv Marsteintredet, *The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions*, INT'L J. CONST. L. BLOG (May 2, 2015), <http://www.iconnectblog.com/2015/05/Marsteintredet-on-Honduras>.

344. See Yaniv Roznai, *Amending 'Unamendable' Provisions*, CONST. MAKING & CONST. CHANGE (Oct. 20, 2014), <http://constitutional-change.com/amending-unamendable-provisions>.

345. See David Landau, *Honduras: Term Limits Drama 2.0—How the Supreme Court Declared the Constitution Unconstitutional*, CONSTITUTIONNET (May 27, 2015), <http://www.constitutionnet.org/news/honduras-term-limits-drama-20-how-supreme-court-declared-constitution-unconstitutional>.

dismembered the Constitution on its own, a role that is not properly the Court's but rather the people's.

The rule of mutuality offers a roadmap for how to legitimate a constitutional dismemberment. Here the principle of symmetry in the rule of mutuality is key: the original constitutional ratification threshold creates a default ceiling on the threshold required for constitutional dismemberment. To alter the core of the Honduran Constitution—represented in this case by the unamendable constitutional provision on presidential term limits—the Court should have been satisfied that this threshold had been met by the considered judgment of the people. Yet there was no vote held to undo the unamendable provision—let alone any constitutional alteration at all—because the Court made its extraordinary decision in the context of ordinary litigation. If this Honduran case teaches us anything it is the confirmation of juristocracy and the attendant judicialization of mega-politics.

Where a constitution does not formally entrench anything against alteration, it will be more difficult to identify what constitutes the constitutional core. I have suggested above that a constitution's core may be located by homing in on its most central rights, its basic constitutional structure, or its values-based constitutional identity.<sup>346</sup> A court can help identify the constitutional core in these cases, though the same risk of judicial self-interest illustrated so clearly by the Honduran case remains a problem without much of a solution internal to the court itself.

## 2. *Collaboration and Confirmation*

The conventional theory of constituent power has long insisted that the best way to defend the constitution is to invalidate all transformative constitutional alterations unless those changes are formalized in a new constitution. I have thus far argued that these far-reaching changes—constitutional dismemberments, as I have labeled them—should not be invalidated where the people and their representatives formalize those changes into the existing constitution in accordance with the rule of mutuality. As I have explained, the rule of mutuality authorizes the dismemberment of the constitution where the people and their representatives successfully deploy the same procedure that was used to ratify it. The rule of mutuality reflects the idea of symmetry: the original constitutional threshold used to ratify the constitution creates a default required at a later period for constitutional dismemberment. The rule of mutuality is qualified by the factor of recognition, which holds that the ceiling on the threshold required for constitutional dismemberment may be lowered where legal elites and the people recognize the legitimacy of a dismemberment made using a lower threshold than the one used to ratify the constitution.

Courts can play a catalytic role in evaluating whether to credit a lower threshold as properly reflecting the considered judgment of the people and their

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346. For a discussion of the complexities of constitutional identity, see GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* (2010).

representatives. Rather than invalidating a constitutional alteration that the reviewing court believes extends beyond the power of the amending actors, the court should not strike down such a change and should instead work collaboratively with those actors to confirm that the change is indeed the product of considered popular judgment. In performing this task, courts can draw from the idea of inter-temporality.

In the conventional theory of constitutional change, courts invalidate constitutional alterations out of doubt that the amending actors represent the will of the people. This is why courts adhere to the binary proposition that a constitutional alteration is either an amendment or a new constitution, and that where it amounts to a new constitution the people must exercise their constituent power to authorize its creation.<sup>347</sup> I have taken an external perspective to show why this binary proposition is flawed. But from a perspective internal to courts in the midst of evaluating the constitutionality of a formal alteration, their concern is that amending actors may be exploiting temporary majorities to make significant changes to the constitution without the assurance that these temporary majorities represent the authenticated will of the people. Temporary majorities may give amending actors the capacity to meet the required thresholds to accomplish major constitutional changes, but these majorities cannot be seen as reflecting the will of the people if they collapse quickly. It is therefore right to interrogate the durability of the majorities that form behind amending actors seeking to make transformative changes to the constitution. Only durable majorities can be legitimately representative of popular will.

The key is to test majorities for their durability. The escalating amendment thresholds we see in Canada and South Africa are insufficient on their own to test the durability of majorities, because a particularly strong but fleeting majority could meet any of those thresholds at any one time. We need a test to evaluate whether popular support for a transformative constitutional change is stable and representative. The idea of inter-temporality recognizes that the strength of majorities is directly proportionate to their stability of time. Supermajority support alone cannot give democratic legitimacy to any popular choice, but a sustainable supermajority over time has a strong claim to representativeness. As Jed Rubenfeld has written, even the “most solemn act of memorialization, backed up by the unanimous vote of every citizen alive at the moment of proclamation, does not guarantee that a nation is in fact committed to the proclaimed purpose or principle.”<sup>348</sup> No single supermajority vote can “claim the full authority of a popular commitment unless it succeeds over time: unless it takes and holds.”<sup>349</sup> Rubenfeld concludes, quite rightly, that “[c]ommitments take time.”<sup>350</sup>

Courts can promote the idea of inter-temporality by advising amending

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347. *See supra* Section I.B.

348. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 175-76 (2001).

349. *Id.* at 176.

350. *Id.* at 175.

actors pursuing a major constitutional change that they should confirm their choice to proceed along these lines. Confirmation could take the form of at least two votes separated by some period of time: the first initial vote according to the constitutionally-required threshold to enact the change and the second confirmatory vote again according to the same threshold. Some constitutions adopt this model of sequential approval separated by the dissolution of the legislature and its reconstitution after an intervening election.<sup>351</sup> The interim period between the votes can vary, but a multi-year period can cool passions and delay radical changes,<sup>352</sup> though no change should be forbidden altogether. Sequencing multiple votes on major constitutional changes creates opportunities for public discussion and legislative deliberation, invites the people in a constitutional State to express themselves on a given constitutional change, and tests the durability of the support behind a transformative constitutional alteration, thereby neutralizing the risk that a fleeting majority momentarily captures the amendment process.

The role for the court here is not to prohibit a change but rather to raise the costs for amending actors to pursue it. By raising a flag on a transformative constitutional change that the court believes should be held to special scrutiny, judges can signal to the constitutional community that something worth their attention is in the process of happening, though the court should not have the power to stop the change on its own. The power to stop the change should belong only to the amending actors whose choice should be modulated by the will of a durable majority.

### 3. *Supermajority in Constitutional Review*

Constitutional review of constitutional amendments today follows the ordinary practice of judicial review of legislation: courts may generally decide by a simple majority to invalidate a constitutional amendment, just as courts may generally invalidate ordinary laws by simple majority. Scholars have inquired whether a simple majority should be sufficient to invalidate an ordinary law.<sup>353</sup> It is worth asking just as well whether a simple majority should be sufficient for courts to invalidate a procedurally perfect constitutional amendment.

Return to the Indian cases that created the basic structure doctrine. None of the major cases we have surveyed were unanimous decisions, and indeed two of the three were simple majority judgments that show the degree to which the doctrine itself was contested at the time of its creation. In *Golaknath*, the Indian Supreme Court split six to five on the question whether Parliament had the power to invalidate a constitutional amendment that in some way violated

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351. See, e.g., CONSTITUTION OF THE KINGDOM OF NORWAY, May 17, 1814, art. 112; REGERINGSFORMEN [RF] [CONSTITUTION] 8:15 (Swed.).

352. See JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 117-25 (2000).

353. See, e.g., Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003); Jeremy Waldron, *Five to Four: Why do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692 (2014).

fundamental constitutional rights.<sup>354</sup> In *Kesavananda*—the decision in which the Court unveiled the basic structure doctrine—judges were split seven to six.<sup>355</sup> The Court was less than unanimous even in *Minerva Mills*, a case in which judges relied on the basic structure to annul a series of procedurally perfect constitutional amendments.<sup>356</sup>

For a doctrine that has migrated across borders and been adopted by constitutional and supreme courts in every region of the world, its democratic foundations are rather weak. The doctrine of the basic structure in India—and as it has been applied elsewhere—is rooted in the split judgments of the Indian Supreme Court. As I have shown above, these judgments are themselves rooted in the conventional theory of constitutional change.<sup>357</sup> And as I have also shown, the conventional theory of constitutional change in turn rests on the legal fiction of constituent power that the people actually and mechanically authorize the creation of constitutions.<sup>358</sup> The more we probe the basic structure doctrine, the more doubts that should occur to us about the strength of its democratic foundations, both in theory and in its application.

The theory of constitutional dismemberment seeks to redeem the theory of constituent power by giving it a clearer, more specific, context-dependent definition. The rule of mutuality is the core of constitutional dismemberment. As I have shown, there are some qualifications to the rule of mutuality, including the factor of recognition, discussed above.<sup>359</sup> Courts are given an important role in the theory of constitutional dismemberment, but it is not the one they currently exercise in countries around the world, where we have seen them invalidate constitutional alterations. In the theory of constitutional dismemberment, courts would retain the power of judicial review of ordinary legislation, but they would not have the legal authority to invalidate a constitutional alteration. Their role instead would become advisory, and their influence would resonate more in politics than in law. A court would issue advisory judgments on the nature of the transformative change that amending actors are pursuing, and on the quantum of agreement that the court believes is necessary to legitimate that change. The persuasiveness of a court's advisory judgment on whether to hold a confirmatory vote would vary according to the kind of supermajority vote the court can assemble. A simple judicial majority would likely be insufficiently authoritative as a political matter to persuade amending actors to hold a confirmatory vote on a transformative constitutional change.

But a unanimous vote of the reviewing court would hold special significance and would be more persuasive to the amending actors. A unanimous judgment that a given constitutional change should be sent back to the amending actors for a confirmatory vote would be more likely to compel

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354. *Golaknath v. State of Punjab*, (1967) 2 SCR 762 (India).

355. *Kesavananda Bharati Sripadagalvaru v. Kerala*, (1973) 4 SCC 225 (India).

356. *Minerva Mills Ltd. v. Union of India* (1981) 1 SCR 206 (India).

357. *See supra* Section I.B.1

358. *See supra* Section I.A.2.

359. *See supra* Section II.C.3.

amending actors to vote again on the transformative constitutional change. A supermajority judgment would, of course, be more persuasive than a simple majority judgment and less persuasive than a unanimous judgment. In all cases, the choice to hold a confirmatory vote would remain with the amending actors after the court has issued its judgment. This would create an incentive for courts to find agreement on key issues that they believe the people and their representatives should consider when weighing whether to proceed with the transformative change. The court's reasons for subjecting the change to a confirmatory vote would provide a referent for public debate.

### *C. The Problem of Legal Discontinuity*

In their study of the world's constitutions past and present, Zachary Elkins, Tom Ginsburg, and James Melton inquire into the conditions that promote constitutional endurance.<sup>360</sup> They conclude that three mutually reinforcing features—inclusion, flexibility, and specificity—can enhance the probability that a constitution will endure.<sup>361</sup> They show that a constitution is likely to endure if it has been designed in an inclusive process, if it accommodates changes as the polity evolves, and if its rules are detailed clearly and specifically.<sup>362</sup> They ultimately conclude, from a normative perspective, that the answer to the question whether constitutions *should* endure is contextual.<sup>363</sup> One advantage of constitutional endurance is legal continuity. The discontinuity in law that ordinarily attends the writing of a new constitution can of course mark a profitable break with the past. But legal discontinuity can also create a period of legal vacuity that breeds instability in the absence of the rule of law.

Constitutional States that prefer to retain legal continuity rather than take the route of discontinuity associated with adopting a new constitution would find useful resources in the theory of constitutional dismemberment. For codified constitutional States, the theory of constitutional dismemberment offers a way to make and legitimate transformative constitutional changes to the polity—all within the same constitutional order—without breaking the formal legal continuity that can escape a constitutional State that chooses to engage in a new constitution-making process. Constitutional dismemberment can therefore foster constitutional endurance in the formal sense. The constitutional endurance that the theory of constitutional dismemberment can provide may ultimately serve the important interest of constitutional stability insofar as Elkins, Ginsburg, and Melton have shown that stable democracies do not replace their constitutions frequently.<sup>364</sup>

In this Section, I explore three cases where legal continuity raises

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360. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009).

361. *Id.* at 78-92.

362. *Id.* at 78-84.

363. *Id.* at 34.

364. *Id.* at 212.

questions for constitutional actors, and where the theory of constitutional dismemberment can be useful in finding answers. The first and second cases concern imposed and colonial constitutions: how should amending actors make transformative constitutional changes if they wish to retain their formal constitutions? The third concerns the concept of constitutional resilience, a new concept in the literature that differs from constitutional endurance. The question here is not whether a constitution should endure but rather how it can be reinforced to be resilient in periods of shock.

### 1. *An Imposed Constitution: The Case of Japan*

Prior to his electoral victory in the summer of 2016, Shinzo Abe delivered a major address in the legislature. Anticipating his future moves toward constitutional change, Abe asked: “Isn’t it time to hold deep debate about revising the Constitution? For the future of Japan, shouldn’t we accomplish in this Parliament the biggest reform since the end of the war?”<sup>365</sup> Recent moves to amend the Japanese Constitution highlight the challenge of imposed constitutions. The question raised by Shinzo Abe’s efforts to repeal the Peace Clause in Article 9 is how amending actors should legitimate this transformative constitutional change.

The Constitution imposes no formal limitation on amending actors. Any constitutional alteration may be made using the procedure entrenched in Article 96, which requires a two-thirds vote in each House to propose an amendment, followed by ratification by a simple majority in a referendum, and finally promulgation by the Emperor.<sup>366</sup>

Yet arguments that amending Article 9 would be illegitimate have only grown louder as Abe has consolidated his power in the Diet, having now won a series of convincing electoral victories. Abe has been confronted near his office by protestors crying out, “Don’t destroy Article 9.”<sup>367</sup> Nobel Prize laureate Kenzaburo Oe created the Article 9 Association to defend the Peace Clause from constitutional alteration.<sup>368</sup> Yoichi Komori, a member of the Association, has suggested that Article 9 has attained, or should attain, the status of informal unamendability, so important it is to the nation’s identity.<sup>369</sup> A renowned artist has pleaded with politicians that they “‘shouldn’t be messing’ with the foundation of the country.”<sup>370</sup> From abroad, Noam Chomsky has argued that

365. Martin Fackler, *Prime Minister Abe Appeals to Japanese on Pacifist Constitution*, N.Y. TIMES (Feb. 12, 2015), <http://www.nytimes.com/2015/02/13/world/asia/abe-makes-impassioned-appeal-to-change-constitution.html>.

366. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

367. Linda Sieg & Kiyoshi Takenaka, *Japan Takes Historic Step From Post-War Pacifism, OKs Fighting for Allies*, REUTERS (July 2, 2014), <http://www.reuters.com/article/us-japan-defense-idUSKBN0F52S120140702>.

368. Maya Jaggi, *In the Forest of the Soul*, GUARDIAN (Feb. 4, 2005), <https://www.theguardian.com/books/2005/feb/05/featuresreviews.guardianreview9>.

369. *Japan Rallies Call for Protection of War-Renouncing Constitution*, JAPAN TIMES (Nov. 4, 2016), <https://web.archive.org/web/20171018200016/http://www.japantimes.co.jp/news/2016/11/04/national/politics-diplomacy/japan-rallies-call-protection-war-renouncing-constitution/#.Wgcnz2hSyUk>.

370. Jun Hongo, *Hayao Miyazaki: Leave Constitution Alone*, JAPAN TIMES (July 25, 2013), <http://www.japantimes.co.jp/news/2013/07/25/national/miyazaki-leave-constitution-alone/#.WDXNw>

“the pacifist Constitution, in particular, is one legacy of the occupation that should be vigorously defended,” adding that “insofar as Japan’s behavior is inconsistent with the legitimate constitutional ideals, the behavior should be changed—not the ideals.”<sup>371</sup> Critics of Abe’s plan see the rules in Article 96 as insufficient to undo Article 9, a provision that forms the core of Japan’s constitutional identity. How can a mere amendment procedure be used to repeal what “has become the heart and soul of the people” in Japan?<sup>372</sup>

What seems lost in the debate is that the rules of constitutional change in Article 96 are more difficult than the rules used to adopt the “new” Japanese Constitution back in 1946. The new Constitution was formally an amendment to the old Meiji Constitution; it was not adopted as an altogether new constitution. As Robert Ward has explained, General MacArthur thought it was important to abide by the old constitution’s rules:

Technically this took the form of a bill of total amendment to the Meiji Constitution. To avoid charges of illegality or the occurrence of a constitutional interregnum, SCAP was most insistent that the procedure of amendment specified in Article 73 of the Meiji Constitution be literally followed.<sup>373</sup>

Article 73 of the Meiji Constitution imposed a two-thirds quorum rule in each house of the national legislature, and required each House to approve an amendment by two-thirds in order for it to become valid.<sup>374</sup> The Emperor would then promulgate it.<sup>375</sup> There was legal continuity between the old and new constitutions, since the constitutional actors approving the new Constitution of 1946 abided by the rules of constitutional alteration in the old one. Of course, conceptually we should regard the altered Constitution as an altogether new constitution with new foundations, but as a matter of legal fact, there was no new constitution at all. On November 3, 1946, the Emperor announced the promulgation and stressed that it was consistent with the rules of Article 73 in the Meiji text:

I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said constitution.<sup>376</sup>

The 1946 amendments add the requirement of a referendum to the process of constitutional alteration, making it even harder to amend the Constitution than it was to create it to begin with.<sup>377</sup>

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371. See David McNeill, *Noam Chomsky: Truth to Power*, JAPAN TIMES (Feb. 22, 2014), <http://www.japantimes.co.jp/news/2014/02/22/world/politics-diplomacy-world/noam-chomsky-truth-to-power/#.WDXHO7IrKUK>.

372. See CHAIHARK HAHM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 96 (2015).

373. Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980, 1004 n.59 (1956).

374. DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [MEIJI CONSTITUTION], art. 73 (Japan).

375. *Id.* art. 6.

376. KENPŌ [OFFICIAL GAZETTE], Nov. 3, 1946, at 1 (Japan).

377. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96 (Japan).

In the language of constitutional dismemberment, the 1946 constitutional alteration was not an amendment, even though it was defined as such. It should instead be understood as a constitutional dismemberment. The same would be true of a change to Article 9: although amending actors would abide by the procedures for constitutional amendment in Article 96, the result would be a constitutional dismemberment, not an amendment. Under the theory of dismemberment, the process used to formalize the change would have to abide by the rule of mutuality, which imposes as a default ceiling the requirement that the dismemberment procedure mirror the procedure used to ratify the constitution. What this means in the case of Article 9 is that it would be sufficient for amending actors to alter Article 9 using the original procedure in Article 73, which calls for only two-thirds approval in the national legislature in order to alter the Constitution.

But legality is of course different from legitimacy. The structure of Article 96 is such that it unifies the entrenched threshold for constitutional alteration with the original ratification threshold by incorporating the inferior ratification threshold into the larger alteration threshold. This reflects the constitutional designers' intent to make any future constitutional alteration more difficult than it had previously been.<sup>378</sup> The powers both of amendment and dismemberment are incorporated into a single threshold in Article 96, but the history of ratification in 1946 suggests that we can differentiate them. Nonetheless, in order to meet the test of both legality and legitimacy, an effort to alter Article 9 should satisfy the procedure in Article 96, which requires the additional hurdle of a national referendum. It would be inconsistent with the text of Article 96 to recognize as valid any constitutional change that had not satisfied its onerous restrictions for constitutional alteration. The upshot from the theory of constitutional dismemberment as applied to the case of the imposed Constitution of Japan is therefore that the procedures of Article 96 are sufficient in and of themselves to legitimate in law an alteration to Article 9. But the reality is that the people and political actors could be unlikely to recognize this as a legitimate exercise of constituent power, and this suggests that the nature of constituent power could have changed since 1946.

## 2. *A Colonial Constitution: The Case of Canada*

In the conventional theory of constitutional change, the secession of Quebec from Canada would result conceptually in a new constitution, even if the change were codified as an amendment in Canada's partially codified Constitution. The change would require a total reconfiguration of national institutions including Parliament, where a certain number of seats are reserved for Quebec in both the House and the Senate.<sup>379</sup> In addition, the Supreme Court, whose nine-judge bench must, according to a constitution-level law,

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378. See Charles L. Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 POL. SCI. Q. 215, 245 (1989).

379. See Constitution Act, 1867, ss. 22, 37, 40.

include three justices from Quebec, would need to be changed.<sup>380</sup> Secession would entail enormous implications for political relations between Quebec and Canada, citizenship, borders, national debt, the armed forces, commercial and economic relations, mobility and migration, the environment, currency and monetary policy, and First Nations.<sup>381</sup> Were the secession of Quebec from Canada formalized as an amendment to Canada's Constitution, it would amount to more than a constitutional amendment; it would be a constitutional dismemberment.

Yet the Supreme Court of Canada has held that Quebec's secession from Canada may proceed by simple formal amendment. In the *Secession Reference*, the Court wrote that "under the Constitution, secession requires that an amendment be negotiated."<sup>382</sup> The Court noted that although a referendum has no "direct role or legal effect in our constitutional schedule, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion."<sup>383</sup> On the strength of a clear majority vote in favor of secession, Québécois political actors could point to the "expression of the democratic will of the people" to initiate a constitutional amendment.<sup>384</sup> A successful referendum "would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations" in order to entrench an amendment formalizing Quebec's secession.<sup>385</sup> The Court stressed that any amendment arising out of these negotiations would need to respect the unwritten principles of the Canadian Constitution, including federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.<sup>386</sup>

But the Court's decision did not specify which of Canada's five amendment procedures would apply to a constitutional amendment on secession. This is surprising in light of the Court's emphasis on the primacy of the codified parts of Canada's Constitution. As Donna Greschner has observed, "even though the Court states that 'our Constitution is primarily a written one' . . . and that constitutional texts 'have a primary place in determining constitutional rules' . . . , it writes 70 paragraphs without any explicit reference to a specific written provision on constitutional amendment."<sup>387</sup> The reason why the Court chose not to specify which of the five rules of constitutional

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380. See Supreme Court Act, R.S.C., 1985, c. S-26, s. 6. The Supreme Court of Canada has constitutionalized this statute, making it no longer amendable by ordinary law. See Reference re Supreme Court Act, ss. 5-6, [2014] 1 S.C.R. 433 (Can.).

381. For a discussion of these and other implications, see *THE SECESSION OF QUEBEC AND THE FUTURE OF CANADA* (Robert Young ed., 1998).

382. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 32 (Can.).

383. *Id.* para. 87.

384. *Id.*

385. *Id.* para. 88.

386. *Id.* paras. 88-105.

387. Donna Greschner, *The Quebec Secession Reference: Goodbye to Part V?*, 10 CONST. F. 19, 19 (1998).

alteration applied to Quebec's secession may well be what Sujit Choudhry and Robert Howse have speculated: that it would have been inappropriate to appeal to the *Constitution Act, 1982*, because it lacks legitimacy for many in Quebec. The Quebec provincial government rejected the *Constitution Act, 1982* when it was proposed and has yet to formally accept it to this day, even though the constitutional text nevertheless binds Quebec as it does every other province in the country.<sup>388</sup>

The scholarly community is divided on which amendment procedure must be used.<sup>389</sup> It seems clear that neither the unilateral provincial amendment procedure nor the federal amendment procedure could be used to formalize a provincial secession,<sup>390</sup> nor could the regional amendment procedure be used either.<sup>391</sup> The debate therefore pits the general default multilateral procedure against the unanimity procedure.<sup>392</sup> But the Court did explain why secession was possible by amendment:

The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.<sup>393</sup>

We are unlikely to ever read a passage like this one in a decision of the Indian Supreme Court, or any other court that has endorsed the concept of an unconstitutional constitutional amendment. The theory and doctrine of unconstitutional constitutional amendment is rooted in the theory of constituent power presupposing a distinction between the people themselves and their agents in the constituted forms of government. Recall that, according to this conventional theory, the constituted powers may only amend the constitution; any change that extends beyond the significance of a mere amendment must be accomplished by the people alone in the exercise of their constituent power.

The Canadian Supreme Court departs in the above passage from the

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388. Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CAN. J.L. & JURIS. 143, 150 (2000).

389. See Kate Puddister, "The Most Radical Amendment of All": *The Power to Secede and the Secession Reference*, in CONSTITUTIONAL AMENDMENT IN CANADA 271, 282-86 (Emmett Macfarlane ed., 2016).

390. Compare Constitution Act, 1982, pt. VII, s. 44, being Schedule B to the Canada Act, 1982 c. 11 (U.K.) (authorizing unilateral federal amendment on some matters), with *id.* at s. 45 (authorizing unilateral provincial amendment on some matters).

391. *Id.* at s. 43.

392. Compare *id.* at s. 38 (authorizing amendment on some matters—and as the default rule for all other matters not assigned to one or another amendment procedure—on the approval of both Houses of Parliament and seven out of 10 provinces representing at least half of the total population), with *id.* at s. 41 (authorizing amendment on some matters only upon the approval of both Houses of Parliament and all ten provinces).

393. Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 84 (Can.).

conventional theory of constituent power. The Court explains that all constitutional changes, be they ordinary or “radical and extensive,” may be accomplished by the constituted powers with recourse to the rules of constitutional amendment.<sup>394</sup> We can therefore interpret Canada’s constitutional amendment rules, at least as they have been interpreted by the Supreme Court, as entrenching rules for both amendment and replacement, as we have seen in Austria, Costa Rica, Spain, and Switzerland.<sup>395</sup> Codifying constitutional change procedures for the entire range of possible constitutional alterations—from minor adjustments to major revisions—entails an advantage: it allows the polity to maintain legal continuity in the event of a transformative constitutional change that dismembers the constitution. But this is only the Court’s interpretation of the design of the rules of change.

The Constitution of Canada has come a long way since Confederation. It has gone from a colonial constitution in 1867, to functionally an independence constitution by the 1960s, and formally to an independence constitution at Patriation in 1982. But it is worth noting that most of the formal amendment procedures entrenched in the *Constitution Act, 1982* are much more difficult than the procedure by which Canadian political actors indicated to the Parliament of the United Kingdom their agreement to alter the Constitution. On Canada’s side, Patriation was an act of executive federalism. The terms of Patriation were negotiated by the prime minister and the provincial premiers, and the final agreement was passed in the Parliament of Canada as a joint resolution of both Houses addressed to the Parliament of the United Kingdom.<sup>396</sup> There was neither provincial legislative ratification nor much of anything else to authorize this transformative constitutional change to Canada’s Constitution.<sup>397</sup> This is significant for determining the quantum of agreement needed to formalize a provincial secession.

Recall that the rule of mutuality in the theory of constitutional dismemberment requires transformative constitutional changes to be made in accordance with the ratification procedure that established the constitution at its point of origin. If we consider Patriation and the *Constitution Act, 1982* as the point of origin of Canada’s modern constitutional arrangements, the rule of mutuality would authorize a province to secede with the same measure of political agreement required to formalize Patriation. And if we understand provincial secession as effecting a constitutional dismemberment, as I believe we should, this would mean that Quebec could secede from Canada after negotiation and final agreement among the prime minister and the provincial premiers—the same process that was used internally within Canada to patriate the Constitution.

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394. *Id.*

395. *See supra* notes 100-05 and accompanying text.

396. *See* House of Commons Debates, 32nd Parl., 1st Sess., Vol. 12, Dec. 2, 1981, at 13663 (Can.); Senate Debates, 32nd Parl., 1st Sess., Vol. 3, Dec. 8, 1981, at 3428 (Can.).

397. It has been reported that “no legislative assembly (save Alberta’s, which debated the November 5 agreement for one day on November 10) examined the package, held public hearings or authorized it.” JAMES ROSS HURLEY, AMENDING CANADA’S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS 65 (1996).

This is not unlike how secession would likely unfold as a political imperative in the event of a clear majority in Quebec expressing its desire to secede from Canada in response to a clear question in a referendum. A successful referendum result would trigger a duty on the part of Canadian political actors—the prime minister along with the premiers—to negotiate with Quebec’s premier. Whether the applicable amendment procedure is the general default multilateral procedure or the unanimity procedure, these political actors would seek to arrive at an agreement that could command the support of their respective legislative assemblies. The content of the agreement, then, would likely be negotiated in the same way as Patriation—in an act of executive federalism with consultation only to the extent necessary to mitigate the possibility of opposition at the stage of legislative ratification. The principal difference would be that, unlike at Patriation, legislative ratification would now be a formal requirement pursuant to the new rules of formal amendment entrenched in the *Constitution Act, 1982*. On the theory of constitutional dismemberment, however, secession could be accomplished in an act of executive federalism alone, unless we could argue that, as in the case of Japan, the nature of constituent power has changed since 1982.

### 3. *Constitutional Resilience*

Another variation on the problem of legal discontinuity involves the difference between constitutional resilience and constitutional endurance. In a follow-up to their influential study of the models of constitutional change in democratic States,<sup>398</sup> Xenophon Contiades and Alkmene Fotiadou describe the difference between resilience and endurance in this way:

[C]onstitutional resilience is different from constitutional endurance: it signifies the ability of a constitution to adapt navigating through hardships, retaining its core purpose. Textual survival may count as endurance but not as resilience. Resilience is endurance plus. It accounts for endurance, but endurance does not presuppose having experienced shocks and survived them, nor the ability to absorb shocks. What’s more, resilience does not have to do with time and is not measurable with relation to time: what is important is the continuance in performing the necessary functions in the face of disaster. Resilience has to do with shock resistance and not with time endurance.<sup>399</sup>

The concept of resilience incorporates four factors: legal continuity, functional continuity, enduring text and purpose, and temporal detachment. First, a resilient constitution can survive shocks either internal or external to the regime. Contiades and Fotiadou use the 2008 global financial crisis to illustrate the kind of shock that a resilient constitution is able to withstand.<sup>400</sup> A resilient constitution will have the capacity to trigger built-in mechanisms, like amendment rules and extraordinary fast-track powers that allow it to adapt to

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398. Xenophon Contiades & Alkmene Fotiadou, *Models of Constitutional Change, in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA, *supra* note 155, at 417.

399. Xenophon Contiades & Alkmene Fotiadou, *On Resilience of Constitutions: What Makes Constitutions Resistant to External Shocks?*, 9 VIENNA J. ON INT’L CONST. L. 3, 22 (2015).

400. *Id.* at 4-8.

new pressures without resorting to anti- or extra-constitutional procedures.<sup>401</sup> These mechanisms allow the constitution to maintain legal continuity as it copes with the shock. Second, a resilient constitution will also retain functional continuity, meaning that its core purpose will be achievable even when confronted by the shock.<sup>402</sup> There may be a period of adjustment to deal with the shock while the constitution recalibrates to the new conditions, but the point is that the purpose of the constitution will neither change after the shock nor be frustrated by it. For example, if the purpose of a given constitution is to protect human rights, that constitution cannot be described as resilient if it violates them when the shock hits.<sup>403</sup> Third, when faced with an internal or external shock, the constitution's purpose endures but so does its text. Textual endurance is not sufficient but it is a necessary factor in the resilience of constitutions.<sup>404</sup> Fourth, unlike the concept of constitutional endurance which is time-bound, constitutional resilience is temporally detached. As Contiades and Fotiadou explain, "[R]esilience does not have to do with time and is not measured with relation to time: what is important is the continuance in performing the necessary functions in the face of disaster."<sup>405</sup> These four factors explain constitutional resilience.

Constitutional dismemberment reinforces the idea of resilience insofar as it offers constitutions a way to retain their legal continuity in the event of a transformative constitutional change that may be occasioned by an internal or external shock. The rule of mutuality and its corresponding ideas of differentiation, symmetry, unification, and recognition are the kinds of built-in mechanisms that political actors may invoke to save the constitution in a period of crisis or emergency without recourse to anti- or extra-constitutional procedures. Constitutional dismemberment is also temporally detached in the sense that its objective is not to privilege endurance over time but rather to privilege legal continuity, in order to extend the lifespan of a constitution. It is on the second and third factors where constitutional resilience and constitutional dismemberment diverge in their normative underpinnings. Constitutional resilience is oriented principally toward retaining the purpose of the constitution after a shock, while constitutional dismemberment recognizes that a constitution's purpose may change—and perhaps indeed should change—when confronted by a cataclysmic event that cannot help but change the constitution itself and the people whose objectives it is intended to serve.

Constitutional dismemberment takes no view on the goodness of a constitution's purpose. Constitutional dismemberment defers instead to the considered judgment of the people and their representatives to trace and retrace their own path, whatever it may be and however they wish to pursue it, as long as it satisfies the twin tests of legality and legitimacy, where legitimacy is a sociological measure, not a legal or moral one. The rule of mutuality in the

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401. *Id.* at 7.

402. *Id.* at 8.

403. *Id.* at 22.

404. *Id.*

405. *Id.*

theory of constitutional dismemberment gives the people and political actors a roadmap to make transformative constitutional changes within the existing constitutional framework in a way that preserves legal continuity but that need not preserve the constitution's original purpose.

Constitutional dismemberment accommodates and indeed invites alterations to the constitution's fundamental purpose—what the vocabulary of dismemberment describes as either its core constitutional rights, its core constitutional structure, or its core constitutional identity—and it moreover creates a way to legitimate those alterations to the constitution's purpose. In contrast, the theory of constitutional resilience privileges the constitution's purpose, whatever it may be. This is the consequence of protecting the constitution's purpose from basic reconsideration after a shock intervenes. The theory of constitutional resilience may work well in the context of the financial crisis, but its disappointing implication in the U.S. context is that the organizing logic and infrastructure of slavery in the U.S. Constitution should have been made resilient enough to survive the shock of the Civil War. The theory of constitutional dismemberment avoids that implication and suggests both a constitutional design and a default procedure to legitimate transformative changes that occur within the same constitutional order.

#### CONCLUSION—A PHENOMENON AND ITS FEATURES

Constitutional dismemberment is a phenomenon and a concept. We cannot deny that constitutional dismemberment exists as a phenomenon today: around the world, we continue to see efforts to make transformative constitutional changes without breaking legal continuity. I have sought to identify this phenomenon by giving it a name: constitutional dismemberment. A constitutional dismemberment seeks deliberately to alter the fundamental rights, structure, or identity of the constitution with recourse to the ordinary rules of constitutional amendment. The conventional theory of constitutional change denies the legitimacy of a constitutional dismemberment. Courts therefore ordinarily disallow constitutional dismemberments for exceeding the amendment power held by the amending actors.

Yet in the conventional theory of constitutional change, a constitutional alteration yields only one of two results. It is either an amendment, in which case courts recognize it as constitutional, because the amendment changes the constitution consistent with its existing framework and presuppositions. Or, alternatively, it introduces a change to the constitution that fails to cohere with the existing constitution, in which case courts generally invalidate the change made as an amendment and require political actors to engage in an altogether new constitution-making process in order to formalize the transformative change they wish to make. The concept of constitutional dismemberment occupies the space between an amendment and a new constitution. It recognizes that a transformative change need not amount conceptually to a new constitution and that, instead, the transformative change should be understood as the unmaking of the constitution within the existing constitutional order subject to its own internal rules.

Constitutional dismemberment is at once a doctrine and a theory. The doctrine of constitutional dismemberment concerns how courts should approach the review of constitutional alterations. Courts should be catalytic, not obstructive; courts should not invalidate amendments but should instead join collaboratively and constructively with political actors to verify that the transformative change reflects the considered judgment of the people and their representatives. I have suggested that the rule of mutuality should be the default expectation that political actors should satisfy when they endeavor to dismember the constitution. The rule of mutuality comprises four factors—differentiation, symmetry, unification, and recognition—each necessary, but none on its own sufficient to justify a transformative constitutional change. The role of the court in its application of the doctrine of dismemberment is to defend the constitution, to urge amending actors to verify that there is substantial democratic support for a transformative change to the constitution, and to protect the underlying constitutional bargain struck in the name of the people.

The theory of constitutional dismemberment builds on the phenomenon, concept, and doctrine of dismemberment to incorporate the full suite of strategies to manage the process of constitutional change. The theory of dismemberment is prompted by the theory of constituent power—a theory that I have suggested is presently both inadequately equipped to guide political actors in how they alter the constitution and insufficiently precise to allow the constitutional community to evaluate the legitimacy of a transformative constitutional change. The theory of constitutional dismemberment seeks to redeem the theory of constituent power in light of the modern constitutional changes we have witnessed. At its core, the theory of constitutional dismemberment is concerned with the present constitutional settlement and how changes are made to it; the theory does not advance a normative claim about what makes a good constitution or what should be entrenched in a constitution. The theory is localist, not globalist or transnationalist. It defers to indigeneity and local norms, national sovereignty, and to the fundamental reality that the theory of constituent power will manifest itself differently across borders.

Constitutional dismemberment counsels jurisdiction-specific constitutional design for the rules of constitutional alteration. Political actors ought to structure their rules of constitutional alteration however best reflects their historical circumstances and present political realities. Political actors should not as a matter of course conform to values promoted by external forces that may not cohere with their own. Where political actors do feel such pressure, they stand on firm ground when they invoke the very meaning of a constitution as a jurisdictionally-bounded and locally-legitimated set of rules that governs a distinctly national institution that can, of course, be informed by external forces but that ultimately derives its legitimacy from the consent of those bound directly by its terms. The one exception to the presumption against universality is the rule of mutuality: where the constitution does not entrench rules for its own replacement, political actors may dismember the constitution

in accordance with the procedure used to ratify the constitution at its creation. This rule remains deeply local in its foundation: the rule of mutuality recognizes the legitimacy in the multiplicity of ways that a constitution may have been ratified at its point of origin.

One can accept that constitutional dismemberment occurs as a phenomenon in constitutional States without endorsing either the judicial doctrine or the larger theory of dismemberment. One can also accept the phenomenon without recognizing the concept. Yet the theory of constitutional dismemberment offers a framework both to understand constitutional change as it happens today in the world and also to prescribe how the rules of constitutional change should be designed.