

TITLE: Nonconstitutional Amendments

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I. Introduction

1 Amending the constitution is an event of high moment in the life of a constitutional state. Constitutional amendments rewrite the terms of the charter governing the boundary separating the citizen from the state, and citizens from themselves. Few changes are more fundamental to statehood. And fewer still are more difficult to consummate. For constitutional theory teaches us that a constitutional amendment springs from the rare convergence between an extraordinary expression of popular will and the successful navigation of exacting amendment procedures enshrined in the text of the constitution. Just as only an extraordinary legislative or popular majority may entrench a constitution, likewise it is only in accordance with the rigid constitutional amendment procedures specified in the constitutional text that an extraordinary majority may subsequently revise the terms of an entrenched constitution. So reads the conventional account from constitutional amendment theory.¹

2 But amendment practice sometimes departs in dramatic respects from amendment theory. Leading constitutional states follow amendment practices that stand in tension with the conventional view that the constitutional text enshrines the necessary and sufficient conditions for amending the constitution. The United States, Germany, South Africa, India -- each a prominent repository of constitutional law and doctrine -- reject the twin conventional claims that, first, a constitutional amendment must necessarily conform to the letter of the constitutional text and that, second, satisfying the strictures of the constitutional amendment procedures is sufficient to entrench a constitutional amendment. These liberal democratic constitutional states adhere to unconventional amendment practices that distinguish them from most other constitutional states -- namely Canada, Australia and Switzerland, to give just three examples -- whose amendment practices conform to conventional amendment theory. My project is to begin the work of reconstructing amendment theory to accurately reflect amendment practice.

3 Perhaps a taxonomy of constitutional change may help conceptualize the gulf between amendment practice and theory. I shall elaborate this taxonomy more fully in the pages to follow but for now let us start with a simple contrast. The procedures for amending the Canadian Constitution begin and end with the express terms of the constitutional text but the United States Constitution may be, and indeed has been, amended in ways that belie its constitutionally entrenched amendment procedures. We may restate this distinction in terms of the constitutionality of constitutional change: Canada authorizes only constitutional constitutional change, that is, constitutional amendments that respect the textual strictures of the constitution. In contrast, the United States permits extraconstitutional constitutional change, a phrase I use to refer to constitutional amendments whose entrenchment need not necessarily conform to the amendment procedures commanded by the constitutional text.

4 Other constitutional states adhere to an altogether different theory of constitutional amendment that departs from both the conventional theory of constitutional constitutional change and the American theory of extraconstitutional constitutional change. Germany, South Africa and India are flagbearers for this third theory of constitutional amendment. Their legal systems contemplate the possibility of constitutional amendments that violate the spirit of the constitution. Under this theory of unconstitutional constitutional change, it is squarely within the German, South African and Indian judicial power to declare a constitutional amendment unconstitutional -- even if that constitutional amendment fulfills the amendment procedures mandated by the constitutional text as a condition for entrenchment.

5 To these three theories of constitutional amendment -- constitutional, unconstitutional, and extraconstitutional constitutional change -- we may add a fourth: anticonstitutional constitutional change, a phrase I use to denote wholesale constitutional change that seeks to transform the entire constitutional order through violent or nonviolent revolution.

These four theories may be more manageably classified under two broad categories. The first is constitutional constitutional change, its own stand-alone category. The second category, which I call nonconstitutionality, includes the other three theories of constitutional amendment: unconstitutional, extraconstitutional and anticonstitutional constitutional change.

6 My task in these pages is to uncover the bases of nonconstitutional constitutional change. I will illuminate distinctions in the amendment practices of constitutional states and deploy those contrasts as a springboard to substantive insights about constitutional theory. I intend to demonstrate that amendment practices offer a window into more than simply how a constitutional state amends its constitution. Amendment practices also give us a blueprint for uncovering fundamental principles about statehood, namely where the state situates the seat of sovereignty and where it locates the locus of legitimacy. Constitutional amendment procedures may therefore hold the key to more deeply understanding the principles of constitutionalism that guide constitutional states.

7 I will begin, in Part II, by further developing my taxonomy of theories of constitutional change. Part III will apply this taxonomy to the American, German, South African and Indian models of constitutional change. Part IV will then return from practice to theory to suggest that the amendment practices adopted by these four states reflect their fundamental constitutional values. Specifically, we can trace origin of the American theory of extraconstitutional constitutional change to the very first principle of American constitutional government: popular sovereignty. In contrast, we can make sense of the German, South African and Indian theory of unconstitutional constitutional change only if we recognize that the seat of sovereignty in these states is not the citizenry as it is in the United States, but rather the judiciary. Indeed, what sustains the peculiar judicial power in Germany, South Africa and India to invalidate constitutional amendments is the uncommon theory of judicial sovereignty. Part IV will also hypothesize a connection between amendment practices, on the one hand, and the separation of powers and the concept of sociological legitimacy, on the other. Part V will conclude.

II. Amendment Theory

8 Constitutional change occurs in one of two ways: constitutionally or nonconstitutionally. To say that constitutional change is constitutional is simply to make a descriptive claim about the legality -- but not necessarily the legitimacy -- of how the constitutional text or the prevailing interpretation of that text has changed from one period to the next. Constitutional constitutional change therefore refers to constitutional amendments that become entrenched in conformity with the textual constitutional amendment rules that govern changes to the constitution. It also refers to constitutional change that springs from judicial constructions that depart from controlling constitutional interpretations.² The emblematic illustration of constitutional constitutional change is the recent Cameroonian constitutional amendment to abolish presidential term limits. Although some have called into question the legitimacy of this constitutional change,³ its legality is beyond doubt insofar as the constitutional amendment satisfied the procedural strictures enshrined in the text of the constitution.⁴

A. Nonconstitutional Constitutional Change

9 Constitutional change may also be nonconstitutional. I use the concept of nonconstitutionality to denote a category of actions that is distinguishable from the countervailing category of constitutional actions. It is constitutional, for example, for the President of the United States to refuse to assent to a bill that has passed both congressional chambers. The Constitution of the United States authorizes the President to do just that.⁵ It is in this sense that the presidential veto is constitutional. In contrast, the Parliament of Canada may not pass a law prohibiting citizens from voting in a national election. The Canadian Charter of Rights and Freedoms affirms,⁶ and the Supreme Court has confirmed,⁷ that all citizens are entitled to exercise the right to vote. Therefore to prevent a Canadian citizen from casting a ballot would be unconstitutional because it would run counter to the Canadian Charter. Unconstitutional actions like this one fall into the broader category of nonconstitutionality because they violate the terms or spirit of the constitutional order.

10 Constitutional amendments themselves may conceivably violate the constitutional order. The American founding, for instance, is a useful entrée to unconstitutional constitutional change. Consider that the 1787 Constitutional Convention required only a supermajority vote of the states to adopt the new United States Constitution even though the existing American charter (called the Articles of Confederation) had insisted on unanimous consent of the states. The new supermajority benchmark was a markedly lower measure of agreement than had been stipulated in the constitution of the day, and stood in direct conflict with the governing constitutional text. It is in this sense that the new supermajority ratification standard was unconstitutional.⁸

11 Yet to state that the new supermajority ratification standard was an unconstitutional amendment to the Articles of Confederation is not necessarily to suggest that the founding itself was unconstitutional. The latter does not inescapably follow from the former. Nonetheless, the notion of an unconstitutional founding is perfectly reasonable. To be sure, one might query whether the founding of a new state can ever be constitutional. As Scheuerman observes, correctly in my view, "every constitutional founding rests on an exercise of arbitrary power illegitimate from the perspective of the constitutional order which it intends to generate."⁹ I would disagree only with the use of the term illegitimate. That a constitutional founding departs from the terms or spirit of an existing constitutional order does not unavoidably render it illegitimate. But it does make that constitutional founding illegal or unconstitutional.

12 The concept of an unconstitutional constitutional amendment raises important questions about constitutionalism, constitutional legitimacy and the judicial function. What does it mean to declare a constitutional amendment unconstitutional? For Jacobsohn, we might as well ask whether the Bible can be unbiblical.¹⁰ This is a terribly important rhetorical point because it unmasks our presumptions about constitutionalism. The very thought that certain choices may be denied even to an extraordinary supermajority of citizens comes into direct and perhaps incommensurable tension with our elemental views on self-determination. Indeed, to prevent a willing and fully informed citizenry from voluntarily choosing to confer rights or obligations upon itself, others or the state, or to foreclose a people from structuring the apparatus of the state as it deems proper seems not only undemocratic in the basic procedural meaning of the term but more precisely tyrannical in its metaphorical sense.

13 Yet many liberal democracies have entrenched constitutional provisions that are impervious to constitutional amendment. These unamendable constitutional provisions are subject to amendment neither by judicial construction nor according to the constitutionally entrenched amendment procedures. For example, such modern citadels of constitutionalism like France¹¹ and Italy¹² entrench principles of constitutional structure. Younger constitutional states like Kazakhstan¹³ and Romania¹⁴ entrench territorial integrity and fundamental rights, respectively. Unamendable provisions such as those are not entrenched in the same way as are other entrenched yet amendable constitutional provisions: unamendable provisions possess a quality of superentrenchment. To actually amend an unamendable constitutional provision would require much more than a discrete revision to the constitutional text. It would require comprehensive constitutional renewal that only change on a revolutionary scale can bring.

14 Other questions about the concept of an unconstitutional constitutional amendment are equally important. For one, who ought to decide whether a constitutional amendment is unconstitutional? We can imagine several possibilities, each with its own animating impulse. For instance, mutual distrust among executive and legislative actors could provide the necessary impetus, as it did in Nepal, for conferring upon the judiciary the authority to declare constitutional amendments unconstitutional.¹⁵ Making this choice according to autochthonous factors may be the most useful way to decide. But quite apart from the peculiar political conditions that would compel political actors to rest this authority in the judiciary, liberal democratic constitutional theory would also champion the judiciary as the best choice on the strength of the argument that the judiciary is best positioned to assess the constitutionality of constitutional amendments given its analogous power of judicial review. But to advance this argument without more, as some have,¹⁶ is to preempt inquiry into why a court should be authorized to determine the limits, or horizons, of its own jurisdiction.

15 If not judges, then who should determine the constitutionality of constitutional amendments? Participatory theory might suggest, as has one scholar,¹⁷ that only a constitutional convention should decide. Yet even if we hold participatory democracy as our signpost, the range of qualifying alternatives seems limitless. Legislators, a citizens assembly, a national referendum, a special meeting of national and subnational elected officials -- all of these and still other decisionmaking bodies and institutions could conceivably satisfy the conditions of participatory democracy. Even assuming we can agree on who should decide, we must then weigh the merits of imposing substantive limits on the content of a constitutional amendment. Are there certain constitutional principles or liberal democratic values that should be shielded from revision, even by the most compelling legislative or popular majorities? There is of course no clear answer. Some have answered yes,¹⁸ others no.¹⁹ These are only some of the fascinating complexities raised by the concept of an unconstitutional constitutional amendment.

16 Unconstitutionality is only one form of nonconstitutionality. Another species of nonconstitutionality is anticonstitutionality. The purpose of an anticonstitutional action is to undermine the constitutional order. It is qualitatively different from an unconstitutional action on at least two grounds. First, an anticonstitutional action is decidedly antagonistic to the state whereas an unconstitutional action does not necessarily demand a hostile posture toward the state. Second, anticonstitutionality often entails some form of violent conduct in the pursuit of civil or political reorganization, perhaps even as dramatic as revolution. Unconstitutionality does not rise to this level of subversion because actors undertaking

unconstitutional actions do not contemplate exiting the existing constitutional order. They prefer instead to induce some measure of change within the established structure of government.

17 To see the point more clearly, consider that anticonstitutional constitutional change describes most revolutionary episodes seeking to transform the state. An instructive example of anticonstitutional constitutional change is the Iranian Revolution, whose leader openly denounced the existing regime and made plain his intention to set the state on a new course.²⁰ The French Revolution is another illustration of anticonstitutionality. It spawned the celebrated French Declaration of the Rights of Man and Citizen and moreover triggered sweeping changes to the face of the state and the national political culture.²¹ This, then, is anticonstitutionality.

18 Nonconstitutionality also folds within itself a third form of action: extraconstitutionality. Where unconstitutionality and anticonstitutionality orient themselves internally toward the text of the constitution or the spirit of the constitutional order, extraconstitutionality orients itself outwardly. Extraconstitutional constitutional change relies on strategies that derive their legitimacy from sources external to the text of the constitution. For instance, actors undertaking extraconstitutional constitutional change may make popular appeals to self-determination or may invoke divinity or natural law to legitimate their vision.

19 Extraconstitutionality differs from unconstitutionality insofar as the former violates neither the text nor spirit of the constitution as does the latter. And it is distinguishable from anticonstitutionality on one simple basis: extraconstitutional actions, as I define them, do not seek to undermine the existing constitutional order. We find an illustrative example of extraconstitutional constitutional change in Akhil Amar's theory of majoritarian constitutional change. Specifically, Amar argues that Article V of the United States Constitution does not provide the complete roadmap for implementing constitutional change. A popular majority of Americans, according to Amar, may lawfully amend the Constitution even though the Constitution gives no such express authorization.²² Amendment by popular majority is extraconstitutional for two reasons: first, and most importantly, the extraconstitutional actors rely on an extratextual authority; and second, they appeal to a higher source of law, in this case, the notion of popular sovereignty, to clothe themselves in legitimacy.

B. Sovereignty and Constitutional Change

20 These are useful and important categories for assessing constitutional change. I will use these categories of constitutional change -- constitutional, unconstitutional, anticonstitutional and extraconstitutional constitutional change -- to illuminate the most fundamental principle of constitutionalism: where states situate the seat of sovereignty. History and modernity confirm that there are several possible loci of sovereignty. One could imagine sovereignty resting in a national legislature as it did in the Imperial Parliament,²³ or in a unitary ruler like Hobbes' Leviathan,²⁴ or perhaps in the citizenry as in ancient Athens,²⁵ or even in a group of philosopher kings reminiscent of Plato's Kallipolis.²⁶ All of these are plausible possibilities, some surely more than others in the context of modern constitutionalism. I will say more about sovereignty in Part IV, but for now it suffices to introduce the concept of sovereignty as an irrefutable power that is held by the ultimate decisionmaking authority in a jurisdiction.

21 Before I tackle the connection between sovereignty and constitutional change, we must supplement our taxonomy of theories of constitutional amendment with a derivative taxonomy of models of constitutional amendment. Drawing from the concepts of constitutional and nonconstitutional constitutional change, I will argue, in the Part to follow, that we can identify at least three models of constitutional amendment from the practices of constitutional states: (1) the textual model of constitutional amendment, which authorizes only constitutional constitutional change; (2) the political model of constitutional amendment, which invites extraconstitutional constitutional change; and (3) the substantive model of constitutional amendment, which forbids unconstitutional constitutional amendments. Anticonstitutional constitutional change will not figure in our taxonomy of constitutional amendment models for one simple reason: the constitutional practices of constitutional states do not authorize anticonstitutional constitutional change because the very object of anticonstitutionality is to overturn the constitutional order.

III. Amendment Practice

22 Three models of constitutional amendment -- textual, political and substantive -- govern the amendment practices of constitutional states. These are neither exhaustive nor mutually exclusive, by which I mean not only that constitutional states may exhibit practices indicative of a fourth or nth constitutional amendment model but also that one constitutional state may exhibit amendment practices aligned with more than one model. Nonetheless, these three models are sufficiently distinguishable to strike instructive contrasts that may help illuminate the competing theories of sovereignty that underpin the amendment practices of constitutional states.

23 First, however, a preliminary word on each of them may be useful to frame the discussion to follow. Let us begin with the textual model of constitutional amendment. Textualist states adhere faithfully to the textual strictures of their constitutional amendment procedures. The principal tenet of textualist states is that the constitutional text enshrines the necessary and sufficient conditions for amending the constitution. The textual model most closely conforms to conventional amendment theory, which holds that if a constitutional amendment is adopted pursuant to the textual constitutional procedures for amending the constitution, it becomes part of the constitution. In this respect, the textual model derives from the concept of constitutional constitutional change.

24 In contrast, the political model of constitutional amendment rejects the textualist limits that restrain constitutional amendments, believing instead that the interactions of political actors may themselves give rise to constitutional amendments -- even if those amendments do not abide by the constitutionally enshrined procedures for amending the constitution. Under this political model, amendments may spring from expressions of popular will that manifest themselves in dialogic exchanges among the political branches and the citizenry. We can perceive the connection between the political model and the concept of extraconstitutional constitutional change insofar as the political model authorizes constitutional change that occurs extraconstitutionally, that is, unbound by the constitutional text.

25 The substantive model of constitutional amendment rejects both the textual and the political models. It does not accept the orthodoxy of the former, which privileges the process of constitutional amendment over its substance. And it finds discomfort with the extraconstitutional freelancing that characterizes the latter, regarding its deviation from the constitutional text as evidence of constitutional volatility. The substantive model chooses instead to elevate constitutional substance over political process, in so doing contemplating the possibility of invalidating constitutional amendments for departing from the spirit of the constitutional text -- even if those amendments satisfy the textual requirements for constitutional entrenchment. This third model has its roots in the concept of unconstitutional constitutional change.

26 Armed with our brief introduction to models of constitutional change, the important point to retain as we explore these models in greater detail is a comparative one: whereas the textual and political models neither recognize the concept of unconstitutional constitutional change nor prohibit the adoption of an unconstitutional constitutional amendment (the textual model permits any amendment that meets the procedural requirements of the constitutional text and the political model imposes no limits on supermajoritarian expressions of popular will), the substantive model proscribes unconstitutional constitutional amendments and authorizes the judiciary to invalidate constitutional amendments that, in its view, conflict with the basic values of the constitution. Let us continue our inquiry with a closer inspection of the textual model of constitutional amendment.

A. The Textual Model

27 In the normal course of affairs, a state will amend its constitution in accordance with the constitutional amendment procedures spelled out in the constitutional text. These amendment procedures will typically identify the individuals, institutions or bodies authorized to invoke a pre-determined democratic process to propose, and subsequently seek ratification of, an amendment to the existing constitution. If the amendment effort is successful, the new amendment will become part of the written constitutional order. This is the textual model of constitutional amendment. It is textual for two reasons. First, because the constitutional amendment procedures are located in the actual text of the constitution. And, second, because the result of a successfully executed amendment process is to inscribe the new amendment in the constitutional text.

28 Textual procedures are the conventional vehicle for amending the constitution. Where a constitution prescribes a certain threshold for amending its text -- for instance, conditioning approval of the amendment on supermajority support in both chambers of the national legislature and supermajority ratification by all subnational legislatures -- an amendment becomes law only if it meets those requirements. To satisfy this textual standard is to achieve a measure of legal unassailability that removes the amendment from the purview of constitutional invalidation. Indeed, to pass the textual test is to win the game of constitutional statecraft because opponents can invoke no higher power to overturn the amendment. The textual procedures are therefore both the beginning and the end of the constitutional amendment process.

29 The paradigmatic textualist model of constitutional amendment is the Canadian Constitution.²⁷ The document makes clear that an amendment is valid only if it adheres to the procedural requirements set out in meticulous detail in the Constitution.²⁸ Yet amending the Canadian Constitution is no small feat. Quite apart from the rigorous conditions that the Constitution imposes upon any constitutional movement seeking to tinker with the text, the Canadian Constitution has adopted a tiered amendment structure. Unlike many domestic constitutions whose constitutional amendment

procedures do not vary according to the subject-matter of the amendment,²⁹ the Canadian Constitution enshrines several disparate amendment standards that differ according to the content of the proposed constitutional amendment.³⁰

30 For instance, the general amending formula in Canada requires a majority of both houses of the national legislature and majority approval from seven of the ten sub-national provincial legislatures, provided that those seven provinces comprise at least 50 percent of the population of all ten provinces.³¹ This procedure applies to amendments that concern the Senate, proportional representation in the House of Commons, the Supreme Court of Canada and, among others, the addition of new sub-national units to Canada.³²

31 There are several variations to this general amending formula.³³ The most exacting variation is amendment by unanimity, requiring majority approval from both houses of the national legislature in addition to majority approval from each of the ten provincial legislatures. The matters falling within the scope of this tough standard are some of the most foundational to Canadian statehood: the offices of the Queen and the Governor General, national languages and, among others, provincial representation in the national legislature.³⁴ The least stringent variation on the general amending formula applies to a narrow class of changes to the national executive government and national legislature, and consequently demands only majority approval in both houses of the national legislature.³⁵

32 Canadian constitutional amendments are rare. There is only a small universe of episodes that can lay claim to having modified the Canadian constitutional order. All told, the Constitution has been amended fewer than one dozen times.³⁶ And each of those episodes is memorialised in a constitutional amendment whose adoption adhered to the procedures outlined in the constitutional text. There have been no other amendments to the Canadian state. In this respect, the Canadian Constitution is illustrative of the textualist model of constitutional amendment that derives from the concept of constitutional change.

B. The Political Model

33 In contrast to the textual model -- which looks to the constitutional text both to discern the rules for constitutional change and to identify the content of the constitutional order -- the political model of constitutional amendment incarnates the concept of extraconstitutional constitutional change. It differs from the textual model along three dimensions. First, the political model does not regard the constitutional text as the decisive authority for establishing the rules for constitutional change. It rejects the textual limits on constitutional amendment and instead invites amendments that do not adhere to the constitutionally enumerated amendment procedures. Specifically, the political model envisions amendments resulting from the dynamic and sustained interactions between social movements and elected officials.

34 Second, the political model rejects the view that only the constitutional text sets the standard for assessing the legality of constitutional change. Under the political model, a lawful constitutional amendment need not necessarily satisfy the textual constitutional requirements governing amendment. Third, the political model does not endorse the descriptive claim that anchors the textual model: that the constitution refers to the finite body of rules that are written in the constitutional text. In this respect, a state that adheres to the political model will have both a written and unwritten constitution: it will have an entrenched constitutional text but it will also contend that its actual constitution comprises much more than the provisions in that text. The political model therefore marries the written and unwritten traditions of constitutionalism, drawing from both to create a constitutional culture that privileges the political process.

35 The flagbearer for the political model of constitutional amendment is the United States.³⁷ The United States Constitution is a document that has made a lasting impression on the community of constitutional states. It has served, correctly in the view of many, as a model for democratic and democratizing states embarking on their own journey toward constitutionalism, some hoping to transplant the American brand of constitutional democracy within their borders.³⁸ This, however, is a hopeless exercise. For even the most dutifully meticulous study of the constitutional text of the United States -- beginning with the preambular words *We the People* to the very last words of the very last constitutional amendment -- would fail to uncover anything but the very rough contours of the American constitutional order.

36 Much of American constitutionalism is absent from the United States Constitution. Even the most commonly identifiable feature of American constitutionalism -- the power of judicial review -- is nowhere to be found in the actual words of the constitutional text. The same is true of far less prominent but equally important features of American constitutionalism. Ernest Young has made this point quite well, ably demonstrating that American constitutionalism cannot be explained solely by reference to the constitutional text without an appreciation of the vast body of extracanonical congressional statutes, executive orders, administrative practices and democratic conventions missing from the Constitution.³⁹ All of this means, quite interestingly, that the American constitutional text does not tell the whole story of American constitutionalism.

37 Not only are some fundamental constitutive rules absent from the text of the United States Constitution but so too are some foundational constitutional amendments. The reason why is simple: certain constitutional amendments are unwritten. These unwritten constitutional amendments have been the product of the political process unfolding outside of the Article V constitutional amendment process. They are non-trivial amendments whose content is in some ways perhaps as consequential to the structure of American government as the actual written amendments that appear in the constitutional text.

38 Which is why, for Levinson, it is too easy a question to ask whether the twenty-seven explicit textual additions to the United States Constitution exhaust the inventory of American constitutional change: the answer is obviously no.⁴⁰ Strauss agrees, brandishing a long list of the unwritten amendments to the United States Constitution, including the rise of political parties, the renewal of the state in the aftermath of the Civil War, the expansion of executive authority in the twentieth century, the consolidation of power in the federal government and, among others, the social revolution of the civil rights era.⁴¹ All of these now occupy a starring role in the history of American democratic government despite their absence from the written constitution.

39 We need not look any further than the constitutional text itself to understand why the American constitutional order has endured, and moreover legitimated, unwritten constitutional amendments that take root through the political process. The Constitution prescribes an exceedingly difficult amendment process.⁴² To satisfy its demanding conditions is to accomplish the constitutional equivalent of scaling Mount Everest: many attempt it but few actually reach the summit.⁴³ An easier amendment process would likely provide fertile soil for more frequent success in passing written constitutional amendments.⁴⁴ That much we can gather from both constitutional design theory and Lutz's meticulous comparative study of constitutional regimes.⁴⁵

40 But institutional design is only part of the story. We must take stock of the institutional forces that have given rise to these unwritten constitutional amendments. The institutional forces at play were often a combination of presidential leadership, social movement pressure, legislative action and advocacy, and judicial ratification of popular will. Dialogic interactions among institutions such as these have sometimes spawned what Eskridge and Ferejohn call superstatutes, which are, at bottom, ordinary statutes passed through the regular channels of the legislative process yet are also, conceptually, extraordinary statutes that enjoy quasi-constitutional status.⁴⁶ Superstatutes are forward-looking laws that achieve an intense resonance with the citizenry, so compelling in fact that all related laws come to be measured against the standard that superstatutes set. These three features -- forward-looking innovation, public resonance and standard-setting -- conspire to confer upon superstatutes a peculiar quality that can only be analogized to a constitutional amendment,⁴⁷ the principal difference between the two being that the latter is formally enshrined in the constitutional text while the former is not.

41 Like constitutional amendments and indeed constitutional provisions in general, superstatutes construct a regulated space within which a certain range of official or private conduct is permissible.⁴⁸ Similarly, superstatutes, like constitutional amendments and other constitutional provisions, may serve as a basis to constrain the scope of subsequent congressional legislation.⁴⁹ More broadly, superstatutes, again like constitutional rules, discharge a public signalling function that serves notice upon the state and the citizenry alike that a certain identifiable principle merits special solicitude.⁵⁰ Whether that principle is an ideal (equality,⁵¹ for instance) or a practice (say, environmental sustainability⁵²), the effect of a superstatute corresponds to the effect of a constitutional rule. And just as constitutional principles require judicial construction to achieve the full measure of their intended force, so too superstatutes can only retain their elevated status with judicial backing.

42 Courts have done just that, interpreting superstatutes as controlling law that demands conformity from competing statutes.⁵³ Two examples bear this out: the Civil Rights Act of 1964⁵⁴ and the Administrative Procedure Act⁵⁵. Both are superstatutes whose undeniable effect has been to fundamentally change the structure and function of American constitutional government. Notice, however, that superstatutes embody a curious fusion of written and unwritten constitutional principles: they are not entrenched in the constitutional text but they do appear in an actual statutory text that has quasi-constitutional status. Nevertheless, while a superstatute may look and feel like a constitutional amendment, it is most certainly not one.

43 It is not difficult to locate an instance of actual unwritten constitutional change in the United States. Earlier, I raised judicial review as one example of an institution that is not discernible from reading the American constitutional text. To be sure, it is a forceful example of an unwritten constitutional principle that continues to guide the course of the American state. But I wish to distinguish the example of judicial review from other examples of unwritten constitutional change on one important basis: judicial review was born of a judicial declaration in the text of a judicial opinion.⁵⁶ Were

we to measure constitutional change according to judicial interpretations that announce or uncover a new reading or proposition of American constitutional law, nearly every Supreme Court judgment would amount to an unwritten constitutional amendment.

44 That is precisely what I hope to avoid by focusing on a narrower class of unwritten constitutional amendments: those in which the principal agent of change is not the judiciary. For our purposes, the relevant principal agent of change -- the actor that inspired or instigated constitutional change -- is the president, legislators, civil servants, pressure groups or citizens themselves, often in concert with one another. Their complex socio-political interactions generate unwritten constitutional amendments that do not require judicial involvement but rather only judicial acquiescence. These episodes of constitutional change are effectively "policy revolutions"⁵⁷ in which non-judicial policy elites lead the charge for change. Perhaps the most illustrative example is the New Deal revolution.

45 Any account of the unwritten constitutional change that sprang from the New Deal era must begin with the dualist theory of Bruce Ackerman.⁵⁸ Dualist democracy, which is what Ackerman believes best captures the structure of American democracy, contemplates two types of political engagement in the United States. In the first -- the period of ordinary politics -- citizens do not fully engage in the political discourse of the day, preferring instead to leave those matters to their designated agents serving in national and state capitols while citizens tend to their own personal, inward-looking, private concerns. In the second period -- the rare moments of constitutional politics -- citizens become keenly engaged with an important issue and assume their higher function as public-regarding stakeholders in the American project of democracy.

46 Constitutional politics are intense occasions of civic engagement during which public officials and their citizen principals enter into a national conversation about the future course of the state. Impassioned public and private actors alike create a unique institutional dynamic that often produces singular political developments, for instance the Founding, Reconstruction, the New Deal⁵⁹ and the civil rights transformation.⁶⁰ This public discussion leads to a constitutional moment whose consequence is conceptually to modify the existing terms of the United States Constitution. These modifications, for Ackerman, are not formally memorialized in the constitutional text. They instead apply informally, though no less authoritatively, to constrain and compel official conduct. They also achieve a measure of authority as a result of becoming so ingrained in the national political and social consciousness. In this way, these constitutional moments are unwritten constitutional amendments that take hold outside of the constraints of Article V. That describes precisely what has emerged from the New Deal revolution.⁶¹

47 The dualist theory of unwritten constitutional amendments has attracted considerable criticism.⁶² But one need not rely on the Ackermanian theory of constitutional moments to accept that the United States adheres to the political model of constitutional amendment. Indeed, Ackerman is not alone in arguing that the New Deal marked the equivalent of a constitutional amendment to the United States Constitution.⁶³ And even scholars who question the Ackermanian dualist model concede that the New Deal effected a transformational shift in American constitutionalism.⁶⁴

48 We may also set aside the New Deal example and venture comfortably beyond it to illustrate the operation of the American political model of constitutional amendment. Scholars in fact have done just that, crafting theories both descriptive and normative to deconstruct and explain the peculiar dimension of American constitutionalism pursuant to which political actors can in effect amend the constitution without actually amending the written text.⁶⁵

49 The critical analytical point for our purposes is that the political model of constitutional amendment, as exhibited in the United States, not only contemplates, but invites, extraconstitutional constitutional change. In the Part to follow, I will explore the theoretical basis for this peculiarly American constitutional trait. But first, let us turn to the third model of amendment that we can discern from the amendment practices of constitutional states.

C. The Substantive Model

50 In contrast to the textual and political models, the substantive model erects barriers governing the content of constitutional amendments. Whereas the textual model of constitutional amendment demands only that a constitutional amendment meet the procedural requirements enshrined in the constitutional text, the substantive model requires not only that a constitutional amendment meet those constitutional textual procedures but it also imposes an additional hurdle that a successful constitutional amendment must clear: conformity with the existing constitution.

51 This vision of constitutionalism contemplates the possibility of an unconstitutional constitutional amendment. The substantive model of constitutional amendment authorizes a designated branch of the government -- most commonly the judiciary⁶⁶ -- to invalidate a constitutional amendment that runs counter to the spirit of the constitution even if that amendment meets all of the procedural conditions that the constitutional text requires political actors to satisfy in order

to consummate a constitutional amendment. The substantive model therefore rejects the two implicit propositions that underpin the textual and political models: first, that constitutional amendments derive their legality from process or politics; and second that there is an infinite universe of potential constitutional amendments. The substantive model instead sets the constitution itself as the limiting reagent for subsequent constitutional revision.

52 A few examples are in order. The concept of a substantive constitutional amendment is perhaps most closely discernible in three constitutional states: (1) India; (2) Germany; and (3) South Africa. Before proceeding to illustrate the substantive model, I pause to make three observations. First, the constitutional texts of India, Germany and South Africa do not expressly authorize their respective domestic courts to strike down constitutional amendments. Second, the judiciary in these constitutional states has taken bold steps to assert itself within the constitutional order. Finally, courts in each of these regimes have invoked the structure or spirit -- as distinct from the text -- of their respective constitutional texts as higher law that trumps other law, including even written constitutional provisions. These three observations are crucial to orienting our inquiry into substantive constitutional amendments in India, Germany and South Africa. I will begin with the Indian model of substantive constitutional amendments.

53 We must first situate ourselves within the constitutionally entrenched rules for amending the Indian Constitution. The Indian Parliament possesses plenary power, according to the Constitution, to exercise its legislative authority to amend the Constitution pursuant to the amendment procedures in the constitutional text itself.⁶⁷ Those procedures condition the success of an amendment on achieving only a majority vote in both chambers of Parliament with at least two-thirds of the membership of each chamber present.⁶⁸ But the constitutional text alone is misleading. For it would be inaccurate to claim that all constitutional amendments that successfully meet these procedural tests automatically become part of the Indian constitutional order. Not at all, because the judiciary may deny the validity of a duly passed constitutional amendment if it declares that the amendment does not conform to the spirit of the constitution.⁶⁹

54 Yet this extraordinary power is not the product of an express constitutional delegation of authority to the judiciary. It is instead the outgrowth of years of constitutional challenges against parliamentary action, over the course of which the judiciary has developed the doctrine of the basic structure of the Indian Constitution. Holding that the Indian Constitution possesses an internal consistency deriving from certain unalterable constitutional values and principles, the basic structure doctrine imposes limits upon legislative powers -- limits that defy the conferral of exclusive amending authority to the legislature in the Indian constitution. The judiciary may therefore invoke the basic structure doctrine to invalidate parliamentary acts and constitutional amendments if it deems those laws or amendments incompatible with the constitutional values and principles underpinning the Indian Constitution.

55 To understand this curious basic structure doctrine, we must return to 1973, the year of the landmark *Kesavananda* case.⁷⁰ The High Court framed the issue before it in no uncertain terms: are there any limitations on the parliamentary power to amend the Indian Constitution?⁷¹ A majority of the court answered in the affirmative, declaring that it is beyond the powers of Parliament to alter what most of the justices identified as the basic structure of the constitutional text. But neither the full 13-member court nor even the smaller majority itself agreed on what precisely constitutes this basic structure of Indian constitutionalism. Part of the difficulty follows from the several opinions that comprise the judgment in *Kesavananda*: there were nearly one dozen separate concurrences and dissents. The Chief Justice defended the proposition that the Indian Constitution possesses a basic structure held together by six principles: (1) the supremacy of the constitution; (2) republicanism; (3) democratic government; (4) secularism; (5) the separation of powers; and (6) federalism. Other justices in the majority offered different, though not necessarily inconsistent, accounts of the basic structure of the Indian Constitution.⁷²

56 Still today, the contours of the basic structure doctrine remain unsettled. The doctrine lingers in the realm of ambiguity because courts have yet to issue a definitive statement about what falls within its four corners. Yet this much is clear from the Indian Supreme Court case law on this fundamental yet elusive doctrine: the basic structure, whatever its content, is invariable and immune to the legislative or amendment process: "The basic structure of the Constitution is unchangeable and only such amendments to the Constitution are allowed which do not affect its basic structure and rob it of its essential character."⁷³ Justices have, in separate cases, held that the basic structure of Indian constitutionalism includes free and fair elections,⁷⁴ judicial review,⁷⁵ the rule of law,⁷⁶ judicial independence,⁷⁷ gender equality,⁷⁸ socialism,⁷⁹ fundamental freedoms,⁸⁰ but does not include the freedom from capital punishment.⁸¹ To this list one might add the principle of constitutional supremacy, which, for Indian jurists and scholars, is unshakably ingrained in the basic structure of the constitution.⁸²

57 Despite the haze that envelops Indian case law on the basic structure doctrine, one Supreme Court judgment stands apart as the fulcrum of the concept of the basic structure. In its four-to-one majority opinion in *Minerva Mills*, the Su-

preme Court invalidated two amendments to the Indian Constitution, in so doing issuing an unmistakably clear ruling on this important point: the basic structure doctrine does not tolerate an unlimited parliamentary amendment power.⁸³ The first of the two disallowed amendments provided that no constitutional amendment "shall be called in question in any court on any ground."⁸⁴ The second stipulated that "for the removal of doubt, 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."⁸⁵ The majority rejected both constitutional amendments.

58 Writing for the majority, Chief Justice Chandrachud declared that these amendments ran counter to the Constitution itself. In his view, the very basis of the Indian Constitution subsumes limits on the power to rewrite it: "Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed."⁸⁶ But Chandrachud later articulated this point with even sharper clarity, bringing us closer to assimilating what is at stake when we speak of the basic structure of the Indian Constitution: "The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power."⁸⁷ The critical word in this passage is identity. The basic structure doctrine safeguards a particular concept of the Indian story of nationhood and preserves Indianness, a notion that stands in defense of the integral elements of Indian democracy, and whose constituent parts chronicle the steps forged toward independence. For the majority, one of those constitutive features of Indian democracy was a limited parliamentary amendment power.

59 Even the lone holdout, Justice Bhagwati, endorsed this view. The basic structure of the Indian Constitution insists on restrictions upon the legislative power to rewrite the blueprint for Indian statehood: "the limited amending power of Parliament is itself an essential feature of the Constitution, a part of its basic structure, for if the limited power of amendment was enlarged into an unlimited power the entire character of the Constitution would be changed."⁸⁸ For Bhagwati, the basic structure doctrine requires, at a minimum, that parliamentary powers be limited and that the judiciary be tasked with the responsibility to ensure the integrity of the Constitution. To allow otherwise would be to "damage the basic structure of the Constitution because there are two essential features of the basic structure which would be violated, namely, the limited amending power of the Parliament and the power of judicial review with a view to examining whether any authority under the Constitution has exceeded the limits of its powers."⁸⁹

60 The basic structure doctrine and the rule of limited parliamentary amending power was therefore the result of an ambitious exercise in judicial interpretation. For neither the basic structure doctrine nor the strict limitation on parliamentary amendment authority appears in the Indian Constitution. On the one hand, the cynic might regard the basic structure doctrine as the clearest possible illustration of judicial activism.⁹⁰ Certainly, the origins of the doctrine do not undermine this contention insofar as the Indian Supreme Court appears to have wrestled the power of constitutional amendment away from the exclusive command of the legislature. Still, it is one thing to make the descriptive claim that the basic structure doctrine emerged from a judicial pronouncement and quite another to make a normative judgment about whether or not the court should have taken such bold action. Indeed, to endorse the former is not necessarily to accept the latter. A more sympathetic, yet nonetheless realist, view is to concede that the basic structure doctrine is a judicial invention⁹¹ but that the notion of the basic structure is entirely in keeping with the Indian Constitution.⁹²

61 In either case, we must accept that the judiciary occupies an influential station in India. The assertiveness of the Indian judiciary will come as no surprise to comparative constitutional scholars. Among the constitutional states of the world, the countermajoritarian difficulty is perhaps nowhere more discernible than in India, whose courts have attracted both criticism and praise for their confrontational posture toward the other branches of government and their liberal construction of constitutional rights.⁹³ The Indian judiciary has reached unabashedly into what is typically thought to be the forbidden realm of politics.⁹⁴ Yet whether or not one approves of the course the judiciary has charted in India, surely all would agree that the aggressiveness of the Indian judiciary helps clarify the emergence and continued vitality of the Indian substantive model of constitutional amendment.

62 Consider next the South African Constitution. The text establishes several different amendment formulae that turn on whether the proposed constitutional amendment involves sub-national governments.⁹⁵ But the general amendment formula imposes only one condition to pass a constitutional amendment: the approval of two-thirds of the national legislature.⁹⁶ These constitutional rules seem straight-forward and suggest only one possibility: South Africa falls within the textual model of constitutional amendment.

63 Yet further scrutiny suggests that South Africa is closer to the substantive model of constitutional amendment. Two sources lead us to this conclusion. The first is the Constitution itself and the second is Constitutional Court case law. Turning first to the South African Constitution, we perceive that the text does not expressly confer upon the judiciary

the power to negate duly-passed constitutional amendments. But the text appears implicitly to authorize the judiciary to invalidate constitutional amendments that fall short of the substantive standard of humanity that the Constitution sets as its signpost irrespective of whether those amendments meet the various procedural requirements in the constitutional text.

64 The very first section of the first chapter of the Constitution underscores the values upon which the South African state is founded -- namely human dignity, human rights, equality, the rule of law, democratic government.⁹⁷ This section also makes special mention of another founding value -- the supremacy of the constitution -- which reappears once again in its very own section in the first chapter, providing that any law that undermines the Constitution is invalid.⁹⁸ The language of the South African Constitution is crucial to constructing a case for judicial invalidation of constitutional amendments. Consider that the text requires that a constitutional amendment be passed as a regular law with the approval of a supermajority of the national legislature. This intimates the possibility that a South African court could invalidate a constitutional amendment if the court determines that the law purporting to amend the South African Constitution is inconsistent with the Constitution.

65 To be sure, South African case law suggests that this may be more than mere intimation. In an early decision of the South African Constitutional Court, the court touched on, though did not squarely address, whether a constitutional amendment could plausibly violate the spirit of the Constitution.⁹⁹ Petitioned by the then-Premier of a South African province to declare unconstitutional a series of amendments to the South African Constitution, the Constitutional Court declined to find in his favour. The Court took what appears to be a textual stance, stating that "there is a procedure which is prescribed for amendments to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable."¹⁰⁰ The Court could have stopped there but it did not. It proceeded to add, with detailed reference to the Indian constitutional experience, that the Court could conceivably invalidate a constitutional amendment for departing from Constitution: "It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."¹⁰¹ By acknowledging that a constitutional amendment could in fact be subject to implied constitutional limitations, the Court has opened the door to substantivism.

66 Yet there is evidence even more compelling that South Africa is sympathetic to a substantive construction of constitutional amendments: the South African Constitution itself is a creation of a substantivism. The South African Constitution became law only after the Constitutional Court first struck down the proposed constitution for failing to respect constitutional principles. To make sense of this momentous occurrence, as well as the curious course of events that led the South African High Court to invalidate its founding republican constitution, we must return to the first moments of the South African transition to democracy.

67 Constitutional design in South Africa presented a difficult tension between the proceduralist and substantive conceptions of democracy.¹⁰² Following a tumultuous period of constitution-making,¹⁰³ the judiciary was tasked with the duty to review, and if warranted to approve, the new constitutional text as a precondition of its coming into force.¹⁰⁴ In assessing the merits of the proposed constitutional text, the Constitutional Court measured the text against a set of pre-determined liberal democratic constitutional principles.¹⁰⁵ These constitutional principles had their origin in the peace negotiations that had followed the end of apartheid,¹⁰⁶ and included such values as democracy, equality, the separation of powers, an independent judiciary and, among others, constitutional supremacy.¹⁰⁷ Their contemporaneous function was to deny free range to the Constitutional Assembly,¹⁰⁸ some of whose members may have been tempted either to revert to old predispositions and prejudices or to entrench retributive provisions.¹⁰⁹ Today, the function of these principles is more informal, though perhaps no less constraining, because they serve as an interpretative lens through which to assess the meaning of the constitutional text.¹¹⁰

68 In an courageous judgment, and a notable first in the history of constitutionalism,¹¹¹ the Constitutional Court proclaimed the South African Constitution unconstitutional.¹¹² The Court detailed precisely how the proposed constitution had failed to comply with some of the pre-determined liberal democratic constitutional principles, most notably including constitutional supremacy.¹¹³ But the Court also added that the violations were quite readily remediable and accordingly invited the constitutional drafters to revise the founding charter.¹¹⁴ The Constitutional Assembly did just that, and its new effort ultimately received judicial assent.¹¹⁵

69 By ultimately granting its approval to the Constitutional Assembly and giving its blessing to new constitutional text, the Constitutional Court knowingly proclaimed an historic message to South Africans: that the new national charter painted a democratic portrait of the new South Africa,¹¹⁶ a reconstructed state in which the concept of democracy would

be disentangled from its traditional majoritarian terms and reconceived into an forward-looking conception of fundamental rights and substantive limits on popular choice. That conception -- the central concept that now gives coherence and unity to the new South African Constitution -- is ubuntu, a standard of humanity and common values that underlies the constitutional text.¹¹⁷ But beyond the historical and theoretical basis for ubuntu, its strength also lies in its reflection of the shared vision of community and fundamental rights that South African courts use to guide their decisionmaking.¹¹⁸

70 Today, the door remains open to a substantive construction of constitutional amendments. What we can draw from the Constitutional Court's controversial invalidation of the South African draft constitution is that South African constitutional values and principles are binding not only on legislative actors but equally on the judiciary. The court must uphold them even if it requires such unconventional action as invalidating a popular constitutional text that commands the support of a unanimous legislative assembly. Exceptional though it may seem, the ruling striking down the South African draft constitution is now a precedent that rests atop the South African constitutional pyramid. This is fully in line with the transformation of the South African state from oppression to liberty. Indeed, the South African constitutional revolution was consummated according to the very idea that popular will does not confer legitimacy, that democratic decisionmaking is subordinate to constitutional norms, and that procedure must not trump substance. Substantivism, on this view, is consistent with modern South African history.

71 Let us turn now to the German Basic Law, the last of our three examples of the substantive model of constitutional amendment. Its text declares, quite plainly, that the Basic Law may be freely amended by any law that enjoys the support of two-thirds of the members in each chamber of Parliament.¹¹⁹ But there are two additional constitutional provisions that suggest that amending the Basic Law is not as easy as simply passing a law with supermajority support. First, the Basic Law establishes a hierarchy according to which the Basic Law stands above the three branches of the German state.¹²⁰ This is not unlike the hierarchy that other constitutional states establish, either impliedly or expressly, to convey the sanctity of the constitutional text and its attendant protections for the citizenry. Second, the Basic Law also declares that all legislation must conform to the constitutional order.¹²¹

72 At first glance, this provision appears merely to expressly authorize judicial review. Yet it does more than that. Recall that only a parliamentary law can amend the Basic Law. Since all laws must conform to the constitutional order, it therefore follows that all constitutional amendments -- which are no more than parliamentary laws passed with the requisite supermajorities -- must likewise conform to the constitutional order. When read together, these two provisions provide a roadmap for German constitutional actors to argue that a constitutional amendment may indeed be unconstitutional.

73 This is precisely the course that the German Constitutional Court has followed in developing its theory of unconstitutional constitutional amendments. The German rendering of this theory begins from the text of the Basic Law, which makes certain constitutional provisions unamendable. The concept of an unamendable constitutional provision is not unique to Germany, for many constitutional states have incorporated unamendability into their respective constitutional texts.¹²² In Germany, the Basic Law states in express terms that the following principles may not be assailed by any constitutional amendment: democracy,¹²³ federalism,¹²⁴ human dignity and human rights,¹²⁵ and constitutional supremacy.¹²⁶ The Constitutional Court has embraced its role as the designated enforcer of these constitutional prohibitions, recognizing that some Basic Law amendments may conceivably be unconstitutional.¹²⁷

74 But the Constitutional Court has ventured beyond the finite list of textual limits that the Basic Law imposes on constitutional amendments. The Court has expanded the range of these constitutional textual limits, transforming the prohibition on constitutional amendments from a discrete list of unamendable constitutional provisions to a broader theory of unconstitutionality. It is from this theory of unconstitutionality that the German judiciary has derived its authority to review the constitutionality of constitutional amendments. Most recently, the Constitutional Court upheld the constitutionality of a constitutional amendment authorizing electronic surveillance in a home.¹²⁸ The most interesting part of the judgment was the court's important discussion of the internal coherence of the Basic Law. All constitutional provisions, wrote the court, must be read in concert with the others, and each provision must be interpreted with a view to its sister provisions so as to ensure conformity with the larger fundamental principles underpinning the constitutional text.¹²⁹

75 The seeds for this German theory of internal constitutional coherence were planted in the years immediately following the adoption of the Basic Law in 1949. While still in its infancy, the Constitutional Court articulated two important principles that have anchored German judicial construction to this day. The Constitutional Court articulated the first of these principles -- constitutional coherence -- against the backdrop of a dispute about federalism, proclaiming that the

Basic Law is sustained by a core of superseding values that give the document an internal unity linking all provisions to each other, such that the reach of one provision cannot be fully measured independently of others:

An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.¹³⁰

The second principle -- constitutional supremacy -- follows from the first. It holds that the constitutional text must govern the content of all laws, whether statutory or constitutional, and that the constitutional principles underlying the text may preclude the addition of certain provisions to the constitution:

That a constitutional provision itself maybe null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.¹³¹

These principles are interconnected. The first, constitutional coherence, is related to and complements the second, constitutional supremacy. For it is the internal coherence of the constitutional text that allows courts to uncover its overarching principles, the very principles that inhere in its structure and give it unity. Equipped with these principles, German judges find themselves better able to uphold the standard against which legislative and executive action is measured. The latter cannot exist without the former: in order to understand what it is about the Basic Law that must remain inviolate and what we mean by the principle of constitutional supremacy, there must first be some descriptive account of what holds together the Basic Law as a unified and coherent document. And it is upon this very principle of coherence that the Constitutional Court relies to claim the power to assess the validity of constitutional amendments.¹³²

76 German case law bears this out. The Constitutional Court has invoked the principle of internal coherence to bolster the concept of an unconstitutional constitutional amendment.¹³³ In two noteworthy cases, the Article 117¹³⁴ and Klass¹³⁵ cases in 1953 and 1970, respectively, judges on the Constitutional Court took the position that a constitutional amendment could in fact be unconstitutional if it undermined the principle of constitutional supremacy and ran afoul of the internal coherence of the Basic Law. The 1991 Bodenreform¹³⁶ case was perhaps more significant insofar as the Constitutional Court's decision to review, though ultimately not deny, the constitutionality of a constitutional amendment was itself a momentous development. It demonstrated the Court's willingness to entertain the possibility of invalidating a constitutional amendment.¹³⁷ Of these cases, the Klass case offers the most thorough elaboration of the concept of unconstitutional amendments. Klass, on Kommers' reading, conveys one of the governing principles of German constitutionalism: that the judiciary will declare unconstitutional any constitutional amendment that violates the core values of the Basic Law, or fails to conform to its spirit.¹³⁸ This appears to mirror the corresponding amendment practice in India and South Africa.

IV. Amendment Principles

77 We have seen that it is decidedly not the case that all constitutional states adhere to the conventional amendment theory that political actors need only follow the discrete constitutionally-prescribed steps in order to revise their constitution. Only the textual model fits this description. In contrast, the political and substantive models both bring to bear new wrinkles in amendment practice that one could not predict from amendment theory. On these grounds we can discern clear differences between the textual model, on the one hand, and the political and substantive models on the other.

78 The political and substantive models are themselves distinguishable on fascinating bases. Probing these two amendment traditions is the task I have given myself in this Part. This inquiry will uncover some of the elemental constitutional principles on which stand the American, German, Indian and South African legal orders. There may in fact be no better way to ascertain the foundations of a constitutional state than by comparing constitutional amendment procedures. For the process of amending the constitution strikes at the heart of what it means to be a people who have joined together in a common venture both to define itself as a collective and to build the apparatus of their state. And that is the very purpose of constitutionalism.

79 At the outset, I have three hypotheses that may explain the differences between the political and substantive models. First, each model places the seat of sovereignty in different stations. The political model adheres to the theory of

popular sovereignty whereas the substantive model reflects a theory of judicial sovereignty. Second, these different theories of sovereignty shape how each model regards the political process. The political model regards the political process as a vehicle for achieving legitimacy. In contrast, the substantive model rejects the proposition that the political process necessarily leads to a legitimate outcome. Finally, the separation of powers also helps to understand the stakes involved in the political and substantive models of constitutional amendment.

80 Before I proceed to explore each of these lines of inquiry, let me stress that these hypotheses are just that -- hypotheses. Let me also note that these theories are neither mutually exclusive nor comprehensive: one or more of these theories may apply to a single amendment tradition, and even all three together may be insufficient to fully explain the dynamics that have led to either the political or substantive amendment tradition. Nevertheless, these hypotheses provide a useful point of departure in the study of constitutional amendment traditions.

A. The Seat of Sovereignty

81 We begin first by locating where the political and substantive models of constitutional amendment situate the seat of sovereignty. Sovereignty is at once a simple and multilayered concept. It is straightforward because, at its core, it means no more than power. Yet defining sovereignty in this way without greater care is to look past the complexities that make such an interesting subject. Sovereignty entails legal, political and sociological dimensions that often cannot be disentangled from each other. Any thorough treatment of the concept of sovereignty must navigate this terrain. A satisfactory account of sovereignty must also speak to Hart's rule of recognition and the corresponding matter of legitimacy.¹³⁹ For it is one thing to declare that a person or institution exercises supreme power in a given territory, and quite another to ask not only whether that authority is, but also should be, regarded as legitimate by the relevant observers.

82 I do not intend to grapple with these intricacies of sovereignty.¹⁴⁰ But it is nonetheless critical to stipulate a working understanding of sovereignty. And so, for our purposes, sovereignty will be understood to rest in the body or institution that retains final decisionmaking authority in the constitutional order. It was, after all, the great English theorist Dicey who wrote that the sovereign possesses the power to make or unmake any law, and that its laws enjoy immunity from override or repeal.¹⁴¹ Put simply, then, sovereignty is the power of the final word. We can therefore understand the concepts of parliamentary, popular and judicial sovereignty as placing ultimate decisionmaking authority in Parliament, citizens and courts, respectively.

83 To identify the seat of sovereignty in substantive model states, we must begin with the structure of their constitutional texts. We can perceive an internal logic in substantivist constitutions that is reflective of their intended design. Substantivist regimes profess to possess an immutable constitutional structure. Whether it is the basic structure of the Indian Constitution, the notion of ubuntu that informs the construction of the South African Constitution or the idea of constitutional coherence in the German Basic Law, all three substantivist constitutions are held together by a constitutional logic that gives them interpretative unity.

84 Closer inspection reveals that all three constitutional structures also share common constitutive values. Recall the values that the domestic courts in each substantivist regime have unearthed from their respective constitutions: democracy, equality and judicial independence -- obvious values that all liberal democracies would regard as indispensable to the integrity of their constitutional order. Beyond these values, substantivist constitutional states have also placed unmistakable significance on an additional constitutional value: constitutional supremacy.

85 It is not immediately clear what it means to declare constitutional supremacy an underlying value that inheres in the structure of constitution. Constitutional supremacy could signal many meanings. It could, for example, mean that the constitution is the supreme law of the state. Constitutional supremacy could also mean that the organizing logic of the constitution requires that individual provisions be read in concert with the rest of the text so as to avoid establishing a hierarchy of constitutional norms. Alternatively or in addition, it could mean that the constitution has preemptive force: any law that conflicts with the constitution is void or voidable. This third view, like the first two, is well within the range of reasonable and conventional views about the function of a constitution in a constitutional state.

86 The extraordinary judicial power to disallow duly passed constitutional amendments does not follow comfortably from any of these three conventional constructions of constitutional supremacy. Substantivist courts must therefore intend to convey a different interpretation of the concept of constitutional supremacy when they invoke it to justify their power to invalidate constitutional amendments that contravene the spirit of the constitution. For what remains unstated is the critical premise upon substantivist courts must rely plausibly to claim the power to strike down constitutional amendments. It is a vital premise without which courts would be unable to connect the principle of constitutional su-

premacny to the judicial authority to invalidate constitutional amendments. What is missing, then, is a bridge between the two propositions.

87 Here is where we begin to see with greater clarity precisely what Indian, South African and German judges mean when they appeal to the principle of constitutional supremacy. They mean to say, without actually saying it, that judges possess supreme and unreviewable authority to give meaning to the constitution and to assess legislative and executive action against the standard that the constitution sets. This judicial authority is exceptional in both quantitative and qualitative respects. First, it confers upon the judiciary the exclusive authority to delineate its own power¹⁴² and, second, it makes the judiciary peerless in the constitutional order because no other body or institution, not even a towering supermajority of citizens, may call that authority into question. It is therefore perhaps no wonder that substantivist courts hesitate to frame their constitutional authority in terms other than the innocuous and disarming notion of constitutional supremacy.

88 Constitutional supremacy therefore serves as a cloak for something more accurately resembling judicial supremacy.¹⁴³ Judicial actors in each of these states deploy the concept of constitutional supremacy to create wide latitude for the judiciary to render judgments ranging from the most conventional, for instance whether the constitution grants jurisdiction to a sub-national legislature on a particular issue, to the most unconventional, namely whether a popularly ratified constitutional amendment is unconstitutional. Without this connecting premise -- that judges are supreme -- the principle of constitutional supremacy does not in and of itself generate the judicial authority to approve or disapprove of constitutional amendments.

89 What underlies the substantive model of constitutional amendment accordingly reflects, at bottom, a theory of judicial sovereignty. I understand judicial sovereignty to mean what Kramer suggests: a regime in which the judiciary is exclusively responsible for interpreting the Constitution and is authorized to overturn the views of institutions that are more democratic,¹⁴⁴ where democracy is defined in purely procedural terms.¹⁴⁵ This conception of sovereignty tracks almost seamlessly the current constitutional order in India, South Africa and Germany. Each is home to an unusually strong judiciary whose extraordinarily robust power of judicial review distinguishes it from other constitutional states.¹⁴⁶

90 The judicial branch in these substantivist states predominates in the constitutional order. In India, scholars commonly argue that the judiciary has transferred sovereign decision-making authority from the people to itself and has consequently successfully arrogated to itself the constituting power that properly belongs in the hands of the citizenry.¹⁴⁷ In other words, what was once a regime based on popular sovereignty has now evolved (or devolved, depending on one's perspective) into judicial sovereignty. Likewise, South Africa, which is now what Perry refers to as a judicial ultimacy,¹⁴⁸ has relocated sovereignty from a small but politically powerful class of South African citizens who formerly exercised their will in the service of oppressive ends,¹⁴⁹ to the judiciary, which is now firmly secure as the distinctly antimajoritarian guardian of the constitution. Judicial sovereignty, then, is the South African answer to the problematic possibilities of popular sovereignty when sovereignty is mediated through an ill-intentioned legislature.¹⁵⁰ The same is true of Germany: the seat of sovereignty has shifted from the people to judges inasmuch as the judiciary has withdrawn from citizens the authority to define and redefine themselves through the process of constitutional amendment.¹⁵¹

91 In contrast to the theory of judicial sovereignty that governs states adhering to the substantive model of constitutional amendment, the American political model of constitutional amendment rests on the theory of popular sovereignty. That the United States conceives of popular sovereignty as its foremost principle of democratic governance -- the very first of its first principles of government -- is not an original observation. Leading constitutional historians have developed this point in exquisite detail. Wood, for instance, has written in his seminal study of the American founding era that Americans made a conscious choice to locate the locus of sovereignty in the citizenry. There was "no doubt," observes Wood, "where they would place the final supreme power," stressing that "if sovereignty had to reside somewhere in the state -- and the best political science of the eighteenth century said it did -- then many American concluded that it must reside only the people-at-large."¹⁵² Others have advanced similar interpretations.¹⁵³

92 Perhaps better than any other historical source, the American constitutional text itself embodies the theory of popular sovereignty. The preamble, for instance, begins with the powerfully evocative -- and peculiarly American -- battlecry We the People. Subsequent amendments to the constitutional text have only deepened the founding commitment to popular sovereignty.¹⁵⁴ As Amar observes, twentieth century written and unwritten amendments are a tangible expression, and further entrenchment, of the American theory of popular sovereignty.¹⁵⁵ Viewed together, the post-founding era amendments demonstrate what he identifies as a "democratizing trendline,"¹⁵⁶ a progressive expansion of popular democracy that gradually makes evermore real the promise of participatory democracy that the founding charter had heralded but nonetheless denied to large segments of the American population.¹⁵⁷

93 Consider briefly a few examples of written American constitutional amendments that reduce barriers to participation and shrink the space between citizenship and governance. Three amendments have increased the range of eligible participants in the democratic process by extending the franchise not only to women¹⁵⁸ and ethnic minorities¹⁵⁹ but also to younger citizens.¹⁶⁰ Other amendments have given Americans more direct control over the selection of their legislative and executive agents in Washington. For instance, Americans now cast separate presidential and vice presidential ballots,¹⁶¹ play a mediated role in filling a vice presidential vacancy,¹⁶² elect by direct vote the members of the upper chamber in the national legislature,¹⁶³ and keep a shorter leash on an outgoing congress.¹⁶⁴ Another amendment has permitted residents of a non-state to vote¹⁶⁵ and yet another has eliminated voting taxes.¹⁶⁶

94 The portrait could not be any clearer. Only by viewing the United States Constitution through this lens may we begin to perceive the American constitutional equivalent of the basic structure of the Indian Constitution, the constitutional unifying notion of ubuntu in the South African Constitution, or the constitutional coherence of the German Basic Law. Popular sovereignty is both the fundamental theory of American government and the principle that gives structural coherence to the United States Constitution. It is of course true that the actual exercise of popular sovereignty in American political life is constrained in important respects. After all, American citizens are not participants in a direct democracy but more precisely members of a liberal constitutional democracy. Nonetheless, the structure of the constitution points toward the participatory impulse that popular sovereignty is meant to cultivate in citizens.¹⁶⁷ For popular sovereignty stands at the base of the moral design of the American constitution.¹⁶⁸

95 Even the American political model of constitutional change is a manifestation of popular sovereignty. If sovereignty means the power of the final word, then we can see why the American political model of constitutional amendment rests sovereignty in the citizenry: the citizens of the United States retain the power of the final word about the meaning of their constitution. They may define and redefine themselves and their state by exercising their sovereignty either through Article V or by effecting extraconstitutional constitutional change.

96 There is a fascinating logic behind the connection between popular sovereignty and the American political model of constitutional amendments. Begin with the proposition that Article V facilitates the expression of the will of the citizenry. I agree. What else but the successful exercise of popular sovereignty could we possibly conclude from an amendment that had achieved the requisite legislative supermajorities under Article V? Arguably not much else. The usual counterclaim that legislation is subject to capture by interest groups loses much, though not all,¹⁶⁹ of its force because it is exceedingly difficult to reap a comparable measure of rent seeking success under Article V as is typically possible for interest groups to achieve in the normal course of the legislative process.¹⁷⁰

97 Yet Harris wisely cautions that the Article V amendment process is too often confounded with popular sovereignty.¹⁷¹ He is right. We must distinguish the view that Article V facilitates the expression of popular sovereignty from the erroneous presumption that Article V constitutionalizes popular sovereignty and provides the mechanism for its exercise. To take the latter position is to hold, incorrectly in my view, that popular sovereignty can be either cabined in a constitutional text or limited in its modalities of expression. Popular sovereignty does not tolerate limitations on its exercise and unabashedly rejects any procedural restrictions that a mere text would purport to place on it. It is in this spirit that Amar states that the Article V amendment procedures should not be read to preclude by implication other channels of constitutional amendment beyond the four corners of Article V.¹⁷² That popular sovereignty cannot be tamed, either by conventional practice or written constitutional procedures, is the basic operating principle of American constitutionalism. It is therefore more accurate to state that the constitutional amendment procedures in Article V do not constitutionalize the exercise of popular sovereignty but rather only outline a constitutional textual roadmap for its exercise.

98 And so, now, let us return to the question that frames our inquiry: where do the substantivist and political models of constitutional amendment situate the seat of sovereignty? Each model proffers its own distinctive answer with its own distinctive basis. The substantive model of constitutional amendment, which we see operating in Germany, South Africa and India, adheres to the principle of constitutional supremacy. At its deepest core, constitutional supremacy reflects a theory of judicial sovereignty pursuant to which the judiciary retains exclusive authority over the content and meaning of the constitutional text. Only if we conceive of sovereignty as resting in the judiciary may we make sense of the judicial practice to declare constitutional amendments unconstitutional.

99 In contrast to the theory of judicial sovereignty that we discern in substantivist states, we see something quite different in the political model of constitutional amendment: popular sovereignty. The American theory of popular sovereignty helps us understand why and how constitutional amendments occur extraconstitutionally. American citizens and political actors have developed creative ways to express their popular sovereignty, most notably by venturing beyond the parameters of the Article V amendment procedures. Perhaps the best way to conceptualize the American political

model of constitutional amendment is to state that Americans at once exhibit the most profound reverence for their constitutional text yet also stand untethered to its procedural limitations.

B. Legitimacy and the Political Process

100 The political and substantive models of constitutional amendment differ in another important respect: how each regards the political process. The American political model views the political process as a vehicle for achieving legitimacy whereas the Indian, South African and German substantive models deny the political process the same force of reason that it commands in the United States. The political model therefore grants not only the legality but also the legitimacy of extraconstitutional constitutional change.

101 Legitimacy, like sovereignty, is a term of rich complexity. It entails several dimensions that cover vast terrains in law, philosophy, sociology and political science. I use legitimacy to mean sociological legitimacy, which refers to the quality of acceptability that characterises official action and the respect that a claim of authority warrants from the perspective of the public. As Fallon has masterfully elaborated, an institution or action may claim sociological legitimacy if "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."¹⁷³

102 Returning to our comparative study, it appears that the American constitutional text alone does not set the standard for assessing the legitimacy of constitutional change. The American political model also measures legitimacy according to sources external to the constitutional text. This is consistent with the concept of extraconstitutionality from which springs the American political model of constitutional amendment. To illustrate, consider that the ultimate source of legitimacy for constitutional change in the American context is not the constitutional text itself as is the case under the textual model nor is it the supremacy of the constitution as it is under the substantive model. The determinative source of legitimacy under the American political model is instead popular sovereignty as it is expressed in the political process.¹⁷⁴

103 Pre-revolutionary America anchored the notion of legitimacy in moral principles. But the ultimate source of legitimacy in the United States is now the political process. Sanford Levinson steers us toward this conclusion in his illuminating discussion of the evolution of the concept of legitimacy in the United States: "In the past," writes Levinson, "law was legitimate because it was based on moral principles; in the future, law would receive its legitimacy from being the incarnation of the focused energies of the body politic."¹⁷⁵ Legitimacy, therefore, derives from the political process, perhaps in large part because the last word in American constitutional politics emerges not from the legal process but more squarely from politics.¹⁷⁶ This is consistent with the theory underlying the political model of constitutional amendment, which invites extraconstitutional constitutional change.

104 We may now understand more clearly why the unwritten constitutional advancements of the New Deal and civil rights eras echo the claims to legitimacy of written constitutional amendments and remain so compelling to this day despite their absence from the constitutional text. Just as constitutional change is an inter-temporal conversation between the past and the present, so too extraconstitutional constitutional change in the United States is a way for the current generation to engage in dialogue not only with itself about its course for the future but also with a prior generation of Americans.¹⁷⁷ Successful constitutional and extraconstitutional constitutional change both mark the political triumph of a particular vision of the American state -- a vision that resonates so persuasively with large enough segments of the American political class and civil society as to win the advocacy and backing of the political incumbents of the time. To be sure, it was the exercise of popular sovereignty in the political process that legitimated the sweeping changes introduced to American constitutionalism in the New Deal and civil rights eras.

105 While the political process provides legitimacy in the United States, the political process is viewed with suspicion in substantivist states. That appears to be why states adhering to the substantive model of constitutional amendment have devised strategies to mitigate the risks of a constitutional culture oriented toward popular sovereignty. There are institutional, socio-political and historical reasons that help explain the predominance of judicial sovereignty in substantivist states. Hirschl has outlined the institutional explanation, namely that judicial sovereignty is an entrenchment mechanism for political elites.¹⁷⁸ Holmes has suggested a complementary socio-political reason: that judicial sovereignty is a blame-deflecting device for elected officials.¹⁷⁹

106 Quite apart from these institutional and socio-political reasons why new constitutional states like India, South Africa and Germany have conferred upon their respective judiciaries such broad powers of judicial review, historical explanations -- particular to each regime -- may help supplement our understanding of the judicial function in these constitutional states. Indeed, modern history demonstrates not only the fragility of the connection between legitimacy and

the political process in India, South Africa and Germany but moreover why what results from the political process does not command the same degree of legitimacy as it does in the United States.

107 Begin first with India. It was only after the instability and uncertainty of emergency rule during the first Gandhi regime that the judiciary stood up against the other branches in the name of civil and political rights.¹⁸⁰ The judiciary was widely thought to have abdicated its public trust and laid down its arms during this episode, unwilling as it was to challenge the authority of the executive branch.¹⁸¹ But its eventual assertion of authority after the emergency was an effort not only to right a prior wrong but also to rehabilitate its standing.

108 The emergency period and its aftermath concretized the volatility of the Indian political process and, for some, the untrustworthiness of elected officials. In the face of anxiety about what could come from a majoritarian legislature exercising its will without a formidable counterweight, the judiciary proclaimed itself a champion of the Indian citizenry and has since become the primary institution to which Indians look for direction and security.¹⁸² Today, the Indian judiciary casts itself as the citizen shield against the vicissitudes of the political process.¹⁸³

109 It would be naïve to think that the Indian judiciary is an apolitical institution. For Indian judges occupy just as prominent a role in the Indian political process as do elected politicians.¹⁸⁴ The difference, however, lies in the motivation that spurs them to action in the political process. The Indian judiciary appears to have inserted itself into the political process not only in response to the inherent weaknesses of majoritarian government but also because of the popular perception of the political process as illegitimate.¹⁸⁵

110 Just as the Indian substantivist model is the result of distrust of the legislature, the South African substantivist model likewise owes its creation to misgivings about the majoritarian political process. Consider that the once-oppressed majority under apartheid accounted for roughly 85 percent of the South African population whereas the oppressive minority totalled only 15 percent.¹⁸⁶ To transition from apartheid to majoritarian democracy without creating potent counter-majoritarian institutions like a strong judiciary could have led to retributive action.¹⁸⁷ This is what most had feared, and indeed had feared most, and also what would have been most costly to the prospect of South African reconciliation.¹⁸⁸ The substantivist model is therefore a symbol of the hope that, never again, would South Africa witness, nor South Africans experience, the pain of institutionalized inequality and subjugation that had once been commonplace.

111 Perhaps more than anything, the choice to confer ultimate authority upon the judiciary has betrayed a deep-seated discomfort about the dangers of an unconstrained political process. There were of course many concerns that conspired to persuade the South African political class to cede ultimate authority to the judiciary, including integrating into the international community, signalling stability to economic investors, preventing the reemergence of the horrors of apartheid, and bringing formerly warring citizens toward reconciliation.¹⁸⁹ But there could be no stronger repudiation of the once-governing rule of parliamentary sovereignty in South Africa than to set the judiciary as the highest authority in the state. And that is precisely what followed from the South African constitutional revolution: the end of the sovereignty of parliament.¹⁹⁰

112 The modern German institutional design echoes the South African experience. Germany conferred upon itself an independent and powerful judiciary as a forward-looking defence against the perils of majoritarianism that had, only years earlier, descended the state into brutal absolutism.¹⁹¹ Justifiably fearful of mass movements and direct popular participation in the political process, the constitutional designers of the Basic Law had little trouble making peace with the decision to subordinate popular sovereignty to what they believed to be higher, and more substantive, democratic values.¹⁹² Which is why, today, the German Constitutional Court is such a powerful organ in the German state,¹⁹³ created as it was to "stand guard over [the German] dominion of constitutional justice," according to Kommers.¹⁹⁴

113 It is therefore fitting that one scholar calls Germany a "judiciary state."¹⁹⁵ German politics is in many ways governed by the Constitutional Court, either directly by judicial review or indirectly by the threat of judicial review. The decision to place the Constitutional Court at the apex of the constitutional order is both salutary and not, depending on one's democratic values. It may be salutary as a matter of substantive democracy insofar as the judiciary stands as a sentinel against the tyranny of the majority. Yet it may be undemocratic as a matter of procedural democracy because the unusually expansive powers of the court threaten to undermine the political process.¹⁹⁶ However one regards the role of the German Constitutional Court, one thing is certain: the consequence of the supremacy of the Constitutional Court in Germany is to restrict the range of popular sovereignty as directly expressed through the majoritarian political process.

114 That the judiciaries in substantivist states like India, South Africa and Germany stand as an embankment against the tide of majoritarian excess is of course an insufficient basis upon which to distinguish them from courts under the

American political model of constitutional amendment. For American courts likewise discharge an important function as a safeguard against the menace of majoritarianism.¹⁹⁷ After all, it was the great American constitutional scholar Alexander Bickel who once exposed what he regarded as the countermajoritarian quality of the Supreme Court of the United States.¹⁹⁸ Something else, therefore, must explain the difference between courts under the substantive and political models of constitutional amendment because both are countermajoritarian.

115 The difference lies in the degree to which these courts are countermajoritarian. If American courts are countermajoritarian, then substantivist judiciaries discharge what amounts to a supercountermajoritarian function. Whether substantivist judiciaries exercise the power of judicial review in the normal course of affairs or strike down a duly passed constitutional amendment, the result is conclusive. The last word belongs to courts under the substantive model because their rulings are immune from reversal. In contrast, the judiciary in the American political model of constitutional amendment is never assured of the last word.

116 Consider an illustrative scenario. Assume the United States Supreme Court has issued a decision holding that constitutional provision A means X. Further assume that the other branches of government, their state equivalents, and the citizenry disagree with the ruling, believing instead that constitutional provision A means Y. Constitutional change may reverse that Supreme Court judgment in one of two ways, either as a formal constitutional amendment pursuant to the procedures outlined in Article V or as an extraconstitutional constitutional amendment pursuant to the political model of amendment. This is not merely theory disconnected from practice. Judicial opinions in the United States have often spurred constitutional change: the American Congress has, on four occasions, successfully invoked the Article V constitutional amendment process to overturn a judgment of the Supreme Court.¹⁹⁹

117 But such a scenario would be unthinkable both as a matter of theory and practice in substantivist states. Neither India, South Africa nor Germany would permit a legislature or citizens to invoke the constitutional amendment process or to effect extraconstitutional constitutional change in order to reverse a constitutional judgment. Substantivist states place the judiciary at the summit of the constitutional order and no other institution can call its judgments into question. The Indian, South African and German courts are sovereign, possessing the very last word on the meaning of the constitution. Nothing but a constitutional revolution may change the rules governing the standing of these courts in relation to the other branches of government.

C. Institutional Conflict and Consolidation

118 Beyond situating the seat of sovereignty in different loci and taking divergent postures toward the political process, the substantive and political models of constitutional amendment are also at odds along an important institutional dimension. To understand this fundamental difference between the American political model and the German, Indian and South African substantive model, we must return to the most basic distinction in governmental structure: the United States is a presidential system and the three substantivist states are parliamentary systems.

119 Given the perils posed by majoritarian parliamentarism and the inherent institutional checks in presidential systems, we can hypothesize that parliamentary judiciaries should, as a matter of constitutional design, be granted broader powers than presidential judiciaries. In this brief section, I will begin the task of proving this hypothesis. But let me be clear on this point: I will not suggest that structural differences necessarily explain why states have adopted different amendment models. Rather, I will advance the more modest descriptive claim that constitutional structure can help us understand the stakes involved in the political and substantive models of constitutional amendment.

120 Presidentialism and parliamentarism differ in significant respects.²⁰⁰ The most relevant one for our purposes concerns the difficulty in achieving institutional consolidation. By consolidation, I refer to the point at which the governing party rallies sufficient political will, acquires sufficient support from counterpart branches of government, and registers sufficient popular agreement for one of its given policy proposals. The party in power seeks consolidation because it allows the party to pursue its legislative program for the state. Achieving consolidation is valuable for another reason: it is a requirement for entrenching a constitutional amendment. In order to achieve consolidation behind a constitutional amendment, preferences must become aligned across the executive and legislative branches as well as the citizenry. Only in the event of consolidation may a constitutional amendment be approved and subsequently entrenched.

121 The American political model regards consolidation as an unassailable achievement, one before which no institution should stand and whose results no institution should deny. Which means that when the American political class and citizenry consolidate behind a constitutional amendment, either pursuant to Article V or extraconstitutional amendment processes, the judiciary cannot, but moreover should not, invalidate it. The judiciary must instead cede to that expression of popular sovereignty, not only because it is an unmistakable statement of popular will but also because consoli-

ation is evidence of the triumph of the political process over the intervening institutional and electoral barriers erected by the separation of governmental powers.

122 And that warrants deference under the American presidential model. Just consider what it means to have successfully navigated the labyrinth of separated powers. The separation of powers places obstacles throughout the legislative process²⁰¹ and deliberately creates friction among the political branches of government.²⁰² Before a policy becomes law or a constitutional amendment becomes entrenched under the American presidential system, it must therefore travel a great distance from proposal to law. Not only must it enjoy the support of the legislative branch but it must also receive assent from the executive. Insofar as the separation of powers establishes a default rule of institutional conflict, presidentialism creates a presumption that weighs heavily against institutional consolidation. The intensely partisan nature of American politics only reinforces the default presumption against consolidation.²⁰³ Therefore to achieve institutional consolidation in the American presidential system is no small feat.²⁰⁴

123 What does this mean for the political model of constitutional change? Two things. First, the separation of powers mitigates against majoritarianism.²⁰⁵ And, second, by requiring a convergence of preferences between the legislative and executive branches as a condition of consolidation, the separation of powers moderates the pressure on the judiciary to stand watch by itself against abuses of power. Rather than relying on the judiciary to serve as a lone sentinel for constitutional rights, presidential systems rely on a cluster of sentries that situate themselves along different points throughout the legislative and constitutional processes.

124 In contrast, the dangers of majoritarianism are perhaps more imminent in parliamentary systems. A policy proposal must typically travel a much shorter path to become law in a parliamentary system. Consolidation behind a particular policy, legislative program or even a constitutional amendment is typically much easier in a majority parliamentary setting than it is in a presidential system because the executive leader may with little trouble persuade legislative colleagues to fall in line. The fusion of legislative and executive powers²⁰⁶ and the strictures of responsible government²⁰⁷ combine to give the governing parliamentary party the power to make the legislative branch accede to the commands of the executive if for no other reason but that one depends on the other for its political survival.²⁰⁸

125 This is especially true in the Indian, South African and German substantivist regimes. To pass a constitutional amendment under their general amending formulae, the governing parliamentary party need only control the national legislature. In India, a constitutional amendment requires simple majority support²⁰⁹ while two-thirds approval is required in South Africa²¹⁰ and Germany.²¹¹ Given the rule of responsible government and the fusion of powers in these parliamentary states, the majority parliamentary party could, without more, have a virtually unobstructed path toward effecting constitutional change. But, as we now know, parliamentary majorities in substantivist states do not have free reign to pass constitutional amendments with simple majority or supermajority approval in the legislature.

126 Indeed, parliamentary majorities in weakly separated parliamentary systems such as India, South Africa and Germany would have free reign to change the constitution were it not for the power of their high courts to review constitutional amendments for their content.²¹² Whether or not substantivist courts have given themselves this extraordinary authority because of the threat of institutional consolidation in parliamentary systems, the consequence of this immense judicial authority is clear: the power to invalidate constitutional amendments mitigates against the risk of majoritarian excess that is characteristic of parliamentary systems.

127 Viewed in this light, the judicial power to review the constitutionality of constitutional amendments begins to look less like an indefensible arrogation of power and more like a necessary check in parliamentary states that authorize the national legislature to amend the constitution without popular ratification. If true, this would bring us closer to defining the concept the judicial sovereignty in a way that complements, but does not undermine, the concept popular sovereignty. A difficult task, to be sure. But it would allow us to paint a more positive portrait of the judicial function than we might otherwise glean from critics of substantivist courts. Perhaps substantivism is neither a judicial usurpation of popular sovereignty nor the judicial sequestration of popular will but instead a carefully constructed judicial practice to serve the interest of liberal democracy. Both of these exploratory accounts, and indeed maybe others too, may be useful in making the liberal democratic case in favour of the extraordinary powers of substantivist courts. For now, the connection between constitutional change and the separation of powers is only a hypothesis -- one of three hypotheses that help sharpen and elaborate the differences between the substantive and political models of constitutional amendment.

Conclusion

128 The political model of constitutional amendment in the United States and the substantive model of constitutional amendment in India, South Africa and Germany magnify the tension between competing visions of democracy. The

former is anchored in participatory democracy whereas the latter reflects the aspirations of social democracy. Both models raise fundamental questions of constitutional statecraft, namely, when may constitutionalism defensibly constrain supermajoritarian popular will, what are the merits and shortcomings of construing a constitutional text as enshrining the necessary and sufficient conditions for constitutional amendment, and whether constitutional change should be viewed apprehensively as a threat to constitutional pre-commitments or instead as an optimistic affirmation of active citizenship? These are challenging questions that constitutional states must face at one time or another. Except perhaps those states adhering to the textual model of constitutional amendment -- which is evident in Canada, Australia and Switzerland -- because their modalities of constitutional change begin and end with the express terms of the constitutional text.

129 What should follow from our comparative analysis of these three models of constitutional amendment is a deeper appreciation of the richness of constitutionalism. We have uncovered a peculiar feature of some written constitutions: constitutional amendment rules that either conceal much about the actual practice of constitutional amendment or simply do not accurately reflect the political norms that shape and inform the practice of constitutional amendment. Our voyage through legal traditions on five continents demonstrates that although constitutionalism may at its most basic level admittedly concern constitutions, constitutionalism also reaches well beyond the four corners of the constitutional text. For the theory and practice of constitutionalism is at once rooted in constitutional texts, public institutions, judicial interpretation, political practice, extratextual customs, and citizens themselves.

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1 See, e.g., Hans Kelsen, *General Theory of Law and State*, trans. by Anders Wedberg (Cambridge, MA: Harvard University Press, 1945) at 259-60; Donald Lutz, *Principles of Constitutional Design* (New York, NY: Cambridge University Press, 2006) at 146; Walter F. Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (Baltimore, MD: Johns Hopkins University Press, 2007) at 298; Dennis C. Mueller, *Constitutional Democracy* (New York, NY: Oxford University Press, 1996) at 181-82, 324; Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999) at 20; John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992) at 1-17.

2 Judicial constitutional interpretation sometimes changes the constitution in ways that echo formal constitutional amendments. See, e.g., Andrei Marmor, *Interpretation and Legal Theory*, 2d ed. (Oxford: Hart, 2005) at 142.

3 See, e.g., Ozong Agborsangaya-Fiteu, "Cameroon's Descent: Another Failed State?" *International Herald Tribune* (10 April 2008) 6.

4 The Cameroonian Constitution may be amended by a simple majority of the parliamentary congress. See Constitution of Cameroon, Part XI, art. 63(3). A supermajority of the Cameroonian parliamentary congress approved the constitutional amendment abolishing presidential term limits. See James Butty, "Cameroon's Parliament Lifts Presidential Term Limit" *U.S. Federal News* (11 April 2008), available at www.voanews.com/english/archive/2008-04/2008-04-11-voa5.cfm?CFID=20906719&CFTOKEN=89626922 (last visited Sept. 30, 2008).

5 Constitution of the United States, art. I, s. 7, cl. 2.

6 Canadian Charter of Rights and Freedoms, s.3; Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Note 7: *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519.

8 George Anastaplo, "Constitutionalism, the Rule of Rules: Explorations" (2001) 39 *Brandeis L.J.* 17 at 24-25; Michael J. Klarman, "What's So Great About Constitutionalism?" (1998) 93 *Nw. U. L. Rev.* 145 at 184-85.

9 William E. Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt" (1997) 10 *Can. J.L. & Juris.* 141 at 144.

10 Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4: 3 *Int'l J. Con. L.* 460 at 460.

11 Constitution of France, Title XIV, art. 89(5).

12 Constitution of Italy, Title VI, s. II, art. 139.

13 Constitution of Kazakhstan, s. IX, art. 91(2).

14 Constitution of Romania, Title VI, art. 148(2).

15 Richard Stith, "Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court" (1996) 11 *Am. U. J. Int'l L. & Pol'y* 47 at 55.

16 See Tom Ginsburg & Gombosuren Ganzorig, "When Courts and Politics Collide: Mongolia's Constitutional Crisis" (2000) 14 *Colum. J. Asian L.* 309 at 319.

17 See Jos. F. Ingham, "Unconstitutional Amendments" (1928) 33 *Dickinson L. Rev.* 161 at 168.

18 See, e.g., Stephen Townley, "Perspectives on Nation-Building" (2005) 30 *Yale J. Int'l L.* 357 at 365; Cass R. Sunstein, "American Advice and New Constitutions" (2000) 1 *Chi. J. Int'l L.* 173 at 185; Howard Newcomb Morse, "May an Amendment to the Constitution be Unconstitutional?" (1948) 53 *Dickinson L. Rev.* 199 at 199.

19 See, e.g., Elai Katz, "On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment" (1995) 29 *Colum. J. L. & Soc. Probs.* 251 at 255.

20 See generally Hamid Algar, ed., *Islam and Revolution: Writing and Declarations of Imam Khomeini* (Berkeley, CA: Mizan Press, 1981) (reprinting a selection of Khomeini's advocacy).

21 See Nigel Aston, *The French Revolution, 1789-1804: Authority, Liberty, and the Search for Stability* (Basingstoke: Palgrave Macmillan, 2004) at 97-118; Linda S. Frey & Marshal L. Frey, *The French Revolution* (Westport, CT: Greenwood Press, 2004) at 37-45.

22 Akhil Reed Amar, "Philadelphia Revisited: Amending the Constitution Outside Article V" (1988) 55:4 *U. Chi. L. Rev.* 1043 at 1060.

23 See Walter Bagehot, *The English Constitution* (London: Collins/Fontana, 1973 [1867]).

24 See Thomas Hobbes, *Leviathan* (1650).

25 See P.J. Rhodes, *Athenian Democracy* (Oxford: Edinburgh University Press, 2004).

26 See Plato, *The Republic*.

27 Constitution of Canada (Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.). It is by design that I have highlighted the Constitution Act, 1982, instead of the founding Canadian text (the British North America Act, later renamed the Constitution Act, 1867 (U.K.), 30 & 31 *Vict.*, c. 3, reprinted in R.S.C. 1985, App. II, No. 5.). The year 1982 marked the approval of new textual constitutional procedures for constitutional amendments in Canada. Prior to then, the Canadian experience with constitutional amendments was assuredly not in conformity with the textual model of constitutional amendment. Not only does the adoption of the Constitution Act, 1982, itself belie the textual model but it is moreover a well-worn view that, between 1867 and 1982, Canadian courts transformed the Canadian state from its original design as a tightly centralized state to a dramatically decentralized judicially reconstructed state. See, e.g., Nicholas Aroney, "Formation, Representation and Amendment in Federal Constitutions" (2006) 54 *Am. J. Comp. L.* 277 at 296-98. For perhaps the most illuminating examination of this point within the larger context of constitutionalism, see Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005) at 206-09.

28 Constitution Act, 1982, s.52(3).

29 See, e.g., Commonwealth of Australia Constitution Act, Ch. VIII, art. 128; Constitution of Brazil, Title IV, Ch. 1, s. VIII, Subsection II, art. 60; Constitution of Italy, Pt. II, Title VI, s. II, art. 138; Constitution of Japan, Ch. IX, art. 96; Constitution of Mexico, Title VIII, art. 135; Constitution of Portugal, Title II, arts. 284-86.

30 Canada is not the only state to establish different amendment thresholds for different types of amendments. See, e.g., Constitution of Paraguay, Pt. II, Ch. IV, Title IV, arts. 289-90; Constitution of Switzerland, Title IV, Ch. 2, arts. 138-40; Constitution of Spain, Part X, s.s. 166-68.

31 Constitution Act, 1982, s.38(1).

32 *Ibid.* at s.42(1).

33 The various standards for amending the Canadian Constitution have, on some occasions, led to uncertainty as to which particular amending formula applies to a given constitutional amendment. Perhaps the most salient example is the current debate in Canada concerning whether Senators should be directly elected in provincial elections. See, e.g., Sarah Barmak, "Why the Senate Deserves Props" *Toronto Star* (9 March 2008) D1; Joan Bryden, "Harper's Bill to Limit Terms for Senators Sidelined; Top Court Ruling Needed, Grits Say" *Globe and Mail* (7 June 2007) A10; Susan Delacourt, "Ontario Bluntly Rejects Proposal to Reform Senate" *Toronto Star* (22 September 2006) A7.

34 Constitution Act, 1982, 41(a)-(e), being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.

35 *Ibid.* s.44.

36 See, e.g., Constitution Act, 1999 (Nunavut) (authorizing representation in the national legislature for the new territory of Nunavut); Constitution Amendment Proclamation, 1993 (New Brunswick Act) (establishing English and French as official languages in the province of New Brunswick); Constitution Act, 1985 (Representation), 33-34-35 Elizabeth 11, c. 8 (authorizing the national legislature to readjust provincial representation).

37 But one can of course also discern very strong tinges of the textual and substantive models of constitutional amendment in the American constitutional tradition. The constitutional text prescribes a method for constitutional amendment. See Constitution of the United States, art V. ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.") Scholars have also posited a substantive floor below which amendments to the United States Constitution cannot fall. See, e.g., John Rawls, *Political Liberalism*, 2d ed. (New York: Columbia University Press, 1996) at 231-39; Joan Schaffner, "The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?" (2005) 54 *Am. U. L. Rev.* 1487 at 1493-97; Jeff Rosen, "Was the Flag Burning Amendment Unconstitutional?" (1991) 100 *Yale L.J.* 1073 at 1084-86.

38 See, e.g., A. E. Dick Howard, "Toward Constitutional Democracy: An American Perspective" (2003) 19 *J. L. & Politics* 285 at 288-95; Wojciech Sadurski, "Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights" (2002) 65 *Law & Contemp. Probs.* 223 at 223-24.

39 Ernest Young, "The Constitution Outside the Constitution" (2007) 117 *Yale L.J.* 408 at 414. A recent book by a leading American constitutional scholar is also relevant on this point. See Laurence H. Tribe, *The Invisible Constitution* (New York: Oxford University Press, 2008).

40 Sanford Levinson, "How Many Times has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change" in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) at 25-32.

41 David A. Strauss, "Common Law Constitutional Interpretation" (1996) 63 *U. Chi. L. Rev.* 877 at 884.

42 See Neal Devins, *The Democratic Constitution* (New York: Oxford University Press, 2004) at 23. But some regard the difficulty of amending the constitution as a virtue. See John R. Vile, *Contemporary Questions Surrounding the Constitutional Amending Process* (Westport, CT: Praeger, 1993) at 146.

43 Since the ratification of the United States Constitution, there have been over ten thousand attempts to amend its text. Donald J. Boudreaux & A. C. Pritchard, "Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process" (1993) 62 *Fordham L. Rev.* 111 at 152.

44 Carlos E. Gonzales, "Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?" (2002) 80 *Wash. U. L. Q.* 127 at 201.

45 Donald Lutz, "Toward a Theory of Constitutional Amendment" (1994) 88 *Am. Pol. Sci. Rev.* 355.

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