

ARTICLES

SYMPOSIUM

KEYNOTE ADDRESS: CONSTITUTIONAL AMENDMENT IN CONSTITUTIONAL DEMOCRACIES: TRANSFORMATION, ETERNITY, ILLUSION

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A constitution and rules for its amendment are like a lock and key: one cannot work without the other. No wonder amendment rules appear in virtually all of the world's constitutions—over 96 percent.¹ Amendment rules are usually placed at the end of the constitution. We might think this means amendment rules are not that important, but for me this proves that last is not always least because no part of a constitution is more important than the procedures we use to change it.

The truth is that we know very little about the rules of constitutional amendment. How do we design them, what are their functions, what are their theoretical underpinnings, and what are their limitations? These are some of the questions that interest me, and that I hope will also interest you.

I am grateful to the *Indiana International and Comparative Law Review* for giving me the honor of hosting a symposium on the ideas in my recent book *Constitutional Amendments: Making, Breaking, and Changing Constitutions*.²

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1. Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 PUB. CHOICE 37, 37 (2003).

2. RICHARD ALBERT, *CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS* (2019).

I give special thanks to Editor-in-Chief Olivia Hess, Executive Articles Development Editor Patrick David Clark, Executive Symposium Editor Sean Farrell, and all of their colleagues on the Law Review for their tireless work in planning and hosting this event. I am grateful also to the symposium participants who commented on the ideas in the book.

My plan for these remarks is to draw from the ideas in *Constitutional Amendments: Making, Breaking, and Changing Constitutions* to show you how interesting it can be to study constitutional amendment rules. I'll do that by raising three questions—and I'll answer each of them. Each question has a theme: transformation, eternity, and illusion.

1. Transformation: When is an amendment not an amendment at all?
2. Eternity: Should anything in a constitution be unamendable, meaning impossible to change by legal means?
3. Illusion: Why would a one-party state bother to amend its constitution when it can just govern as it wants, free of any political opposition?

I. TRANSFORMATION

Let's begin with the first question: When is an amendment not an amendment at all? Let's turn the clock back to the year 1860, in the midst of the United States presidential election. Abraham Lincoln was running for president. As a candidate and then as president in his Inaugural Address, Abraham Lincoln supported the ratification of a controversial amendment proposal.³ Here is the text of the proposal: "No amendment shall be made to the Constitution which will authorize or give to Congress power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."⁴

The text of the amendment was drafted shrewdly to hide its purpose in plain sight, like much of the rest of the constitution which embeds slavery deep within its architecture but dares not speak its name. The amendment guaranteed states the power to regulate their own "domestic institutions" without interference from the federal government. This was an enticing carrot for the slave states: they would promise to remain in the Union in exchange for the right to keep their profitable practice of slavery without having to look over their shoulder in fear of federal intrusion. This amendment proposal was part of a larger effort to prevent the South from seceding. For Lincoln, the ends justified the means: better to suffer evil in the nation than to lose the Republic.

Lincoln was only one of hundreds of lawmakers to support the amendment. Both houses of Congress approved the amendment proposal by a 2/3 supermajority, the president at the time—James Buchanan—signed the proposal, then Illinois, Ohio and Maryland ratified the amendment. This controversial amendment protecting slavery was on its way to becoming the Thirteenth Amendment to the U.S. Constitution. But the onset of the Civil War interrupted

3. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

4. H.R. Res. 80, 36th Cong. (1861) (enacted).

the march to ratification. And in one of the great redemptive twists in the history of America, an amendment *prohibiting* slavery became inscribed in the U.S. constitution as the actual Thirteenth Amendment.

Let us recap. We have the twin Thirteenth Amendments: the failed Thirteenth Amendment and the successful Thirteenth Amendment—the one that failed would have made slavery legal and the one that succeeded made slavery illegal. These two Thirteenth Amendments confront us with the central question in the entire field of constitutional change: What counts as an amendment? I'll explain in a moment that only one of these two Thirteenth Amendments was actually properly understood as an *amendment*. The failed amendment that would have protected slavery was correctly called an amendment but the successful amendment—what we know today as the actual Thirteenth Amendment, the one that abolished slavery—is better understood as something more than a simple amendment: it is a constitutional *dismemberment*.

Some constitutional amendments are not amendments at all. They are self-conscious efforts to destroy the foundations of the constitution and to repudiate its essential characteristics. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old.

These constitutional changes entail substantial consequences for the whole of law and society. Political actors must modify their behavior in accordance with new popular expectations, and courts must reinterpret the constitution in harmony with these changes. These changes make the constitution now seem entirely new, not merely amended. We call these transformative changes *amendments* but they are amendments in name alone. They are really much more than simple amendments. Let me give you a few examples of these dramatic constitutional transformations from around the world.

In Turkey, just a couple of years ago, the constitution was transformed from a parliamentary system to a presidential one.⁵ The new presidential system gave virtually unlimited powers to the president—a big change from the previous system which required parliamentary forms of decision-making. The constitutional change also reduced the number of Constitutional Court judges. There were tens of alterations to the text of the constitution in this constitutional change. It was identified and approved as an amendment. But it was a huge transformation of the constitution. More than a mere amendment.

In Italy, a major constitutional reform was proposed in 2016.⁶ The reform

5. See Selin Esen, *The 2017 Constitutional Reforms in Turkey: Removal of Parliamentarism or Democracy?*, IACL-AIDC BLOG (Mar. 15, 2017), <https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-the-2017-constitutional-reforms-in-turkey-removal-of-parliamentarism-or-democracy> [<https://perma.cc/V7UH-7HFK>].

6. See Lorenza Violini & Antonia Baraggia, *The Italian Constitutional Challenge: An Overview of the Upcoming Referendum*, INT'L J. CONST. L. BLOG (Dec. 2, 2016),

would have changed the Senate, the regions, the separation of powers, the confidence relationship between the government and the Parliament. The reform would have altered about 30 percent of the entire Italian Constitution. It was presented as a simple constitutional amendment. But it would have transformed the entire constitution from top to bottom. It was more than an amendment.

In the same year, Irish voters narrowly defeated a proposal to abolish the Senate.⁷ Had the proposal been ratified, there would have been 75 separate alterations to the text of the Constitution. The transformation of the Irish legislature from bicameral to unicameral would have substantially changed legislative representation, the law-making process and the separation of executive-legislative powers. This would have been no small change to the Constitution. The proposal was called an amendment and it would have been formalized using the rules of constitutional amendment in the Constitution. But its effect would have been quite dramatic.

These reforms amount to more than mere tinkering with their constitution. Their content makes them effectively a new constitution masquerading as a constitutional amendment. They are transformative constitutional changes that remake the constitution. Changes of this scale are not rare. They happen regularly around the world. But the question for us is whether they should.

Let me give you a few more examples. Come with me now to Latin America. Brazil recently amended its constitution.⁸ Legislators passed a Public Spending Cap Amendment that limits public spending for up to 20 years. The purpose of the amendment was to limit expenditures on health and education in addition to other areas of public spending in order to address the country's increasing budget gap.

But here is the problem: the amendment conflicts with the constitution's commitment to a social state. The preamble of the constitution commits the state to ensuring the exercise of social rights.⁹ The Constitution identifies "social values"¹⁰ as one of its fundamental principles and declares that one of its foremost objectives is "to eradicate poverty and substandard living conditions and to

<http://www.iconnectblog.com/2016/12/the-italian-constitutional-challenge-an-overview-of-the-upcoming-referendum/> [<https://perma.cc/KYV4-BTWK>].

7. See UDC CONSTITUTIONAL STUDIES GROUP, UDC SUTHERLAND SCHOOL OF LAW, A GUIDE TO THE REFERENDUM ON THE 32ND AMENDMENT TO THE CONSTITUTION 4 (2013), https://www.ucd.ie/t4cms/Guide_to_the_32nd_amendment%20final.pdf [<https://perma.cc/K79X-CJHY>].

8. See Paulo Trevisani, *Brazil's Senate Passes Constitutional Amendment to Cap Public Spending*, WALL ST. J., 9 (Dec. 13, 2016, 2:24 PM), <https://www.wsj.com/articles/brazils-senate-passes-constitutional-amendment-to-cap-public-spending-1481647351> [perma.cc/2SNB-MX8X].

9. BRAZ. CONST., pmb1.

10. *Id.* art. 1 § IV.

reduce social and regional inequalities.”¹¹ The Constitution moreover makes unamendable an entire section of social rights.¹² It grants everyone in Brazil the right to public healthcare, to social assistance, and to education.¹³ Workers are given a special catalog of rights—rights to minimum wages, unemployment insurance, and wage-reduction protection.¹⁴ And unlike the rest of the Constitution, which has undergone roughly one hundred amendments since coming into force in 1988, the protections for social rights have not once been substantively altered. That is, until this Public Spending Cap Amendment was ratified over vocal opposition.

The purpose of this Public Spending Cap Amendment as well as its impact on the next generation’s enjoyment of social rights in Brazil—all of this combined with how directly it undermines the Constitution’s founding and continuing commitment to social rights—suggest that it is more than a simple amendment. Its effect is larger and more significant than we expect of a constitutional amendment.

One last example, this time from Japan. The Japanese Constitution entrenches a commitment to pacifism in Article 9.¹⁵ This Clause has become a super-constitutional norm that reflects deeply rooted Japanese popular values. It is constitutive of Japan’s post-war constitutional identity. Prime minister Shinzo Abe has made clear his intention to amend Article 9. Amending Article 9 will be no easy feat. But Abe and his political coalition are motivated and powerful, and they have made this a centerpiece of their plans for reform. But an amendment that alters the Peace Clause will be an amendment in name alone. Its effect will be transformative. It will remove one of the core commitments in the Japanese Constitution.

One way to visualize the magnitude of this kind of large-scale reform is to think of an apple. The reforms in Brazil, Italy, Turkey, Ireland and Japan would be like removing the core of the apple from the apple. The apple survives but the apple becomes unlike what it was prior to its core being removed.

In some of the cases I have told you about, the reforms succeeded and in others they failed. But in all cases the reforms were presented as a constitutional amendment. And they were or would have been formalized as an amendment according to the ordinary amendment procedures in the constitution. But we need another term, another concept, to describe a constitutional change of that scale, to understand what kind of change these reforms would have been.

We have seen that there are major constitutional changes across the world—happening today—that are called amendments but that are not

11. *Id.* art. 3 § III.

12. *Id.* arts. 6-11.

13. *Id.* arts. 196-214.

14. *Id.* art. 7.

15. THE CONSTITUTION OF JAPAN, art. 9.

amendments, in my view. The question therefore presents itself: what are each of these constitutional reforms if not a constitutional amendment? At this point you would be right to ask: well, what counts as an amendment? If these changes—presented as amendments and called amendments in the countries—are not amendments, then what is an amendment?

An amendment, properly understood, is defined by four fundamental features: its subject, authority, scope, and purpose.¹⁶ An amendment is an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing framework and fundamental presuppositions. Sometimes approved using special procedures and sometimes not, an amendment has one overriding feature that matters more than all others: the scope of the change. The amended constitution must remain coherent and consistent with the pre-amendment constitution.

An amendment continues the constitution-making project in line with the existing design of the constitution. An amendment entails unbroken unity with the constitution being amended. An amendment improves on the constitution's design where necessary or useful to align expectations about how it should function. And amendment fixes a constitution's design flaws when they are discovered. But an amendment pushes the boundaries of the constitution no further than its outermost limits.

An amendment may have one of four distinct purposes. It can be corrective, elaborative, reformative, or restorative. Let me give you an example of each. Each of these is an amendment, properly defined and properly understood.

First, an amendment can be corrective. It can correct the constitution to align expectations with performance. The Twelfth Amendment to the U.S. Constitution, for example, is a corrective amendment.¹⁷ The founding constitution required each presidential elector to cast two votes for president: the candidate with the most votes would become president and the runner-up, vice president. The election of 1800 exposed the design flaw in this arrangement when two candidates earned the same number of electoral votes. It took three dozen ballots of voting by state delegations for the House of Representatives to ultimately break the tie and select Thomas Jefferson as president. Reformers believed it was necessary to correct this technical flaw in the original constitution. They passed the Twelfth Amendment to reduce the possibility of a tie by requiring electors to differentiate their selections for president and vice president.

An amendment can also be elaborative. Like a correction, an elaboration continues the constitution-making project in line with the current design of the constitution. But instead of repairing an error in the constitution, an elaboration advances the meaning of the constitution as it is presently understood. For example, the Nineteenth Amendment to the U.S. Constitution is an elaborative amendment.¹⁸ It advances the meaning of the Fourteenth Amendment, which codifies the Equal Protection Clause, and it builds on the Fifteenth Amendment's

16. ALBERT, *supra* note 2, at 79.

17. *See generally* U.S. CONST., amend. XII.

18. *See generally* U.S. CONST., amend. XIX.

protection for the right to vote without regard to race. The Nineteenth Amendment makes good on this promise of equality at Reconstruction by extending constitutional protections to women.

Third, an amendment can be reformative. A reformative amendment revises an existing rule in the constitution but does not undermine the constitution's core principles. It changes the operation of a feature of the constitution in a non-transformative way. For example, the Twentieth Amendment reformed the original U.S. Constitution by shortening the period between presidential election and inauguration by almost two months, moving the date of the president's installation from March 4 to January 20.¹⁹ This amendment is neither corrective nor elaborative. The amendment is truly reformative in purpose and function because its aim was to put into power the elected president several weeks earlier than the original constitution allowed.

Finally, fourth, an amendment can be restorative. A restorative amendment returns the Constitution to its earlier meaning—an earlier meaning that lawmakers believe has been lost or eroded. The Twenty-Second Amendment was restorative in this sense.²⁰ Its origins date to the first president, George Washington, who refused to run for a third term even though he could have kept running and winning. His successors followed his example—until Franklin Delano Roosevelt broke this two-term tradition in the Second World War on the argument that the country needed steady leadership during this unprecedented moment of crisis. Shortly after the death of Roosevelt in 1945, the United States approved an amendment that limited presidents to no more than two terms. This amendment restored the constitution to its prior bounds.

Amendments, then, can be corrective, elaborative, reformative, or restorative. The key in all cases is that an amendment—whether it corrects, elaborates, reforms, or restores—must cohere with the existing constitution and must keep the constitution consistent with its pre-change form. Otherwise it is more than an amendment.

But what about the changes in Brazil, Ireland, Italy, Japan, Turkey and elsewhere? Those changes were called amendments, proposed as amendments, and understood as amendments. I have insisted that they are not amendments. What are they, if not amendments? They are constitutional dismemberments.²¹

A *constitutional dismemberment* is a constitutional change that is incompatible with the existing framework of the constitution. It seeks to achieve a conflicting purpose. A constitutional dismemberment can occur suddenly in a big-bang moment or gradually by erosion or accretion. It can occur to constitutions both codified and uncoded, and it can either enhance or deteriorate liberal democracy. These changes are often made using the ordinary rules of amendment, and they are commonly described as amendments or even sometimes as new constitutions. But they are amendments in name alone.

A constitutional dismemberment entails a fundamental transformation of one

19. U.S. CONST., amend. XX.

20. See generally U.S. CONST. amend XXII.

21. ALBERT, *supra* note 2, at 76-78, 84-94.

or more of the constitution's core commitments. Constitutional dismemberment alters the identity, the fundamental rights or the structure of the constitution. It intends deliberately to disassemble one or more of a constitution's elemental parts. An amendment does not go nearly as far because, properly defined, it keeps the altered constitution coherent with its pre-change identity, rights, and structure. To use a rough shorthand, the purpose of a constitutional dismemberment is to unmake a constitution.

We are now ready to return to the two Thirteenth Amendments to ask whether both are properly called amendments. One is an amendment, and the other is not.²²

The failed Thirteenth Amendment—the one that sought to protect slavery across the country—was an elaboration of the existing constitution, consistent with its meaning, in harmony with its formative principles, and embedded coherently into its architecture. It was consistent with the major pillars of slavery in the Constitution: the Three-Fifths Clause, the Fugitive Slave Clause, the Migration or Importation Clause, and the Proportionate Tax Clause, and the Equal Suffrage Clause for state representation in the Senate. This failed amendment did no more than elaborate the meaning of the existing constitution within its natural boundaries. It was an amendment, plain and simple.

But the eventual Thirteenth Amendment—the successful one that abolished slavery—was not an amendment. It did not correct the constitution in terms of fixing an error in its operation, it did not elaborate the constitution's meaning consistent with its legal understanding before Reconstruction, it did not reform the constitution in a way that retained fidelity with its existing design, nor did it seek to restore the meaning of the constitution to what it once meant under law.

The successful Thirteenth Amendment was a transformative moment in the United States. It consolidated the Union victory over the Confederate States and proclaimed the triumph of the free-state north over the slave-state south. Its most important function, however, was to demolish the infrastructure of slavery in the original constitution. The successful Thirteenth Amendment and the rest of the Reconstruction tore down the major pillars of America's original sin of slavery. It was more than a mere amendment. Its effect was to unmake the constitution as it existed at the time. It transformed the constitution. It set the constitution and the country on a new course. It was a constitutional dismemberment.

Here is another example. Brexit is a constitutional dismemberment, not a mere constitutional amendment. Brexit will terminate the domestic jurisdiction of the European Court of Justice and it will instantaneously transform European Union laws into domestic laws.²³ Brexit and everything it will entail collaterally

22. *Id.* at 82-84.

23. See Alexandra Sims, *What is the Great Repeal Bill? The Brexit Law to End All EU Laws (That We Don't Like)*, THE INDEP. (Oct. 3, 2016), <https://www.independent.co.uk/news/uk/politics/great-repeal-bill-brexit-law-eu-law-theresa-may-david-davis-a7343256.html>[perma.cc/AE6R-

will take apart the Constitution of the United Kingdom as it currently exists. It will self-consciously formally end the Constitution's legally subordinate status to the law of the European Union and it will redesign the architecture of authority in and around the Constitution. Brexit will not create a new constitution for the United Kingdom, nor will it amend it in the conventional sense of correcting an error in order for it to better achieve its purpose. Brexit is a change of a larger scale. It is a constitutional dismemberment.

That answers our first question: what counts as an amendment? Now we know that an amendment is an authoritative change to higher law that corrects, elaborates, reforms, or restores the meaning of the constitution consistent with its existing framework and fundamental presuppositions.

II. ETERNITY

Let's turn now to the second question: Should anything in a constitution be unamendable?

We return to Latin America. Manuel Zelaya was elected president of Honduras in 2005 but he soon found himself losing support only a few years later in 2009. His lack of popularity did not deter him from attempting to change a rule in the constitution that prohibited any president from serving more than one four-year term. The Honduran Constitution explicitly states that the single-term limitation is unamendable, or in the words of the constitution, "the presidential term . . . may not be amended."²⁴ And yet Zelaya proposed a non-binding referendum to gauge whether the population wished to amend this unamendable rule.

Just before the referendum was held, the Supreme Court ordered the military to detain President Zelaya on charges of treason and abuse of power. The military entered Zelaya's home and jarred him out of his sleep with sounds of gunfire. Zelaya was captured, removed from his home, and placed on a military airplane—destination unknown, at least to Zelaya. Only when the plane landed in Costa Rica did Zelaya finally know his location. Zelaya is said to have still been in his pajamas.

This episode is remarkable for many reasons. The one that interests me most is that the constitution's unamendable rule prohibited the president from consulting the people on a possible constitutional change. Is this right? Should Hondurans have been denied the right to speak their views on an issue so central to their political life? It is, after all, their constitution, and they are the ones who must live with it.

This constitutional design—unamendability—was once rare but it is now

EPLU].

24. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS [Constitution of Honduras], art. 374.

increasingly common in modern constitutions: from 1789 to 1944, no more than 20 percent of all new constitutions codified some form of unamendability; from 1945 to 1988, the number grew to 25 percent; and today, since 1989, over 50 percent of new constitutions make something unamendable.²⁵

Anything can be made unamendable. In France the “republican” nature of the state is unamendable,²⁶ in the Czech Republic the “democratic” character of the state is unamendable,²⁷ and in Turkey the national flag is unamendable.²⁸ There is no limit to what constitutional designers may codify as unamendable. But *should* constitutional designers use this feature? Is unamendability a good idea? There are many reasons why designers codify an unamendable rule in the constitution:

1. Unamendability can be used to express a constitutional value. For example, the Cuban Constitution makes socialism unamendable—a statement of what is most significant in the country.²⁹
2. Unamendability can be used to manage moments of crisis, or to prevent crises from worsening. For instance, the Constitution of Montenegro makes the entire constitution unamendable during an emergency, martial law, or a state of siege or war.³⁰
3. Unamendability can be used in an effort to transform the state and its respect for human rights. For instance, the rebuilt Constitution of Bosnia and Herzegovina makes all civil and political rights unamendable.³¹
4. Unamendability can be used to preserve something integral about the state. For instance, the Afghan Constitution establishes Islam as the official religion of the state because the authors of the Constitution wished to recognize Islam as the core value of the Afghan Constitution.³²
5. Unamendability can be used to reconcile opposing parties in conflict. In Niger and Ghana, for example, the constitution gave wrongdoers an irrevocable immunity for past crimes—and made this grant of immunity unamendable—in an effort to help the countries move forward and stop fighting the past.³³
6. Unamendability can be used to reassure reticent parties. In the United States, the slave trade was made unamendable in order to reassure slave-holding states that they could join the free states, without fear of being

25. YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 20-21 (2017).

26. CONSTITUTION FRANÇAISE DU 4 OCTOBRE 1958 [Constitution of France] art. 89

27. Ústavní zákon č. 1/993 Sb., Ústava České Republiky [Constitution of the Czech Republic], art. 9.

28. TÜRKİYE CUMHURİYETİ ANAYASASI MADDE [Constitution of Turkey] arts. 3, 4.

29. ALBERT, *supra* note 2, at 148-49.

30. *Id.* at 147-48.

31. *Id.* at 146-47.

32. *Id.* at 144-46.

33. *Id.* at 143-44.

forced to give up their great evil institution.³⁴

7. Finally, unamendability can be used to reinforce a settlement, an agreement, or the constitution itself. For instance, the Cape Verdean Constitution prohibited amendments for a fixed number of years beginning immediately upon its ratification in order to give the constitution time to take root in the country and in the hearts and minds of the people.³⁵

Perhaps these seven examples of unamendability are all good uses that lead to good outcomes. But the question for us is whether unamendability itself is a good idea. Should constitutional designers ever make something in the constitution unamendable?

I say no.³⁶ Assuming unamendability ever has any real bite—after all, courts may interpret unamendable rules to be freely amendable and motivated political actors may try to amend even a formally unamendable rule—unamendability handcuffs the constitution and the people subject to its rules. Amendment is more than a structural feature of constitutions. It is a fundamental right that inheres in the nature of a constitution. The right to amend a constitution is part of a larger bundle of democratic rights, alongside rights to informed citizenship and deliberative procedures, adequate and equal opportunity to participate in public debate, as well as the right to effective representation.

Unamendability undermines each of these. It disables public discourse. It dilutes the vote of present and future generations. It negates informed citizenship and devalues deliberation. Perhaps most important, it denies effective representation to the present generation. Unamendability moreover stifles democratic innovation and the collective learning that may persuade present and future generations of the desirability of departing from an absolutely entrenched constitutional rule chosen long ago.

The force of a constitution should derive from the promise that the social contract is a living charter, one whose terms are neither static nor unreflective of the contemporary views of the polity, but, rather, open, dynamic, receptive to new influences, and also adaptable to modern social and political contexts. Unamendability shuts this door. Constitutional designers should reject unamendability and seek alternatives that achieve its functional purposes.

III. ILLUSION

Let's now turn to the third question: Why would a one-party state bother to amend its constitution when it can just govern as it wants, free of any internal political opposition? Is it theater, order, or both?

We now come back to Asia. The democratic world sounded the alarm when China amended its Constitution in 2018 to abolish the country's presidential term

34. *Id.* at 141-43.

35. ALBERT, *supra* note 2, at 148.

36. *Id.* at 194-201.

limits.³⁷ Observers described President Xi Jinping as a “new emperor”³⁸ who had made a “power grab”³⁹ to “rule indefinitely.”⁴⁰ This was part of a larger package of numerous changes approved by the National People’s Congress. China insisted on abolishing its presidential term limits only in strict conformity with the detailed rules of amendment codified in its constitution. The revelation here is that even a one-party state amends its constitution. But why?

Amendment rules create a legal process for reformers to alter the constitution. Yet amendment rules serve important purposes even if the constitution is never amended at all because they have essential uses beyond the obvious one of textual alteration. Amendment rules have three categories of uses: formal, functional, and symbolic.⁴¹ Their formal uses include repairing imperfections, distinguishing constitutional from ordinary law, entrenching rules against easy repeal or revision, and establishing a predictable procedure for constitutional change. Their functional uses include checking the court, promoting democracy, heightening public awareness, pacifying change, and managing difference. Symbolically, the design of amendment rules can be used to express constitutional values.

But there is a dark side to amendment rules, and also to constitutions. How can we tell whether the values expressed in amendment rules or in an amendment itself reflect authentic political commitments?

Codified constitutions became synonymous with democracy in the nineteenth and twentieth centuries. Authoritarian regimes have seized on this positive identification, exploiting what Giovanni Sartori describes as the “favorable emotive properties” of the word “constitution.”⁴² Authoritarian regimes commonly exploit this association to hide behind a strategically drafted democracy-embracing constitutional text that may appear consistent with democratic constitutionalism but in reality may be only a façade. The truth is that a constitutional text sometimes does not tell the truth. It tells a lie.⁴³

Democratic commitments on paper have been known to conceal undemocratic practices in reality. The 1936 Soviet Constitution exposes just how widely political practice may diverge from the constitutional text: it was a mere

37. XIANFA [Constitution of China] art. 79 (superseded by art. 45 of reform package).

38. See Robert Fulford, *China's New Emperor Has A Lot to Hide, and the Power to Make It Happen*, NAT'L POST (Mar. 16, 2018) <https://nationalpost.com/opinion/robert-fulford-chinas-new-emperor-has-a-lot-to-hide-and-the-power-to-make-it-happen> [<https://perma.cc/ZK7E-VNC9>].

39. See Chris Buckley, *How Xi Jinping Made his Power Grab: With Stealth, Speed and Guile*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/world/asia/china-xi-jinping-party-term-limit.html> [<https://perma.cc/SBU5-GC54>].

40. See Chun Han Wong, *Xi Jinping Clear to Rule Indefinitely as China Scraps Presidential Term Limits*, WALL ST. J. (Mar. 11, 2018), <https://www.wsj.com/articles/xi-jinping-clear-to-rule-indefinitely-as-china-scraps-presidential-term-limits-1520757321> [<https://perma.cc/8FXW-7LX3>].

41. ALBERT, *supra* note 2, at 40-49.

42. Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 855 (1962).

43. David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 865 (2013).

smokescreen.⁴⁴ Judging by its constitutional text alone, we would describe the Soviet Constitution as the world's most protective of rights, because it promised an abundance of freedoms and liberties. But the truth was plainly the opposite. Rights as we know them today were not recognized then. The point is that a gulf, sometimes on purpose, can develop between the codified legal constitution and the real political constitution.

Formal amendment rules are no less susceptible to authoritarian commandeering. They are a profitable and inexpensive site where authoritarian regimes may express inauthentic values while securing for themselves the goodwill that may come from their public association with democratic ideals. Examples abound of suspicious amendment design.

For example, some sham constitutions proclaim a robust commitment to human rights in their formal amendment rules. The constitutions of Afghanistan, Algeria, and the Central African Republic all entrench unamendable rules protecting fundamental rights and freedoms, purporting to express the state's authentic commitment to these rights.⁴⁵ These countries are not havens of freedom. Authoritarian regimes sometimes design their amendment rules only to benefit from the goodwill of the uninformed at home and abroad, who read the constitution believing the texts reflect reality when, in fact, political practice defies these textual guarantees.

IV. DEMOCRATIC VALUES IN CONSTITUTIONAL AMENDMENT

We have covered three big questions currently at the forefront of the study of constitutional amendment. One involved transformation, another eternity, and a third, illusion. These three questions are just a sample of the kinds of important questions that the study of constitutional amendment brings to light. There are many more questions to explore. For example, which constitution is the world's most difficult to amend and how do we know?⁴⁶ Is there such a thing as amendment culture?⁴⁷ Should there be multiple procedures for amending a constitution?⁴⁸ Should courts have the power to invalidate a constitutional amendment?⁴⁹ And how should a constitution indicate that it has been amended?⁵⁰

But first let me now conclude with a few thoughts. Constitutional amendment has important democracy-enhancing virtues. At their best, constitutional amendment rules create a public, predictable, and transparent way to express the aggregated preferences of lawmakers and the people they represent. Formal

44. Benjamin R. Barber, *Constitutional Rights—Democratic Instrument or Democratic Obstacle?*, in *THE FRAMERS AND FUNDAMENTAL RIGHTS* 23, 30 (ROBERT A. LICHT, ed., 1992).

45. CONST. OF THE ISLAMIC REPUBLIC OF AFGHANISTAN, art. 149; CONST. OF THE PEOPLE'S REPUBLIC OF ALGERIA, art. 212, CONST. OF THE CENTRAL AFRICAN REPUBLIC, art. 153.

46. ALBERT, *supra* note 2, at 95-138.

47. *Id.* at 110-18.

48. *Id.* at 177-94.

49. *Id.* at 217-28.

50. *Id.* at 229-60.

amendment rules telegraph when and how a constitution changes, and they produce legislatively or popularly validated changes that are accepted as authoritative. Their procedures invite civic engagement when they are invoked and, whether the amendment is ultimately successful after it is proposed, the process of formal amendment performs an educative function in society as reformers and voters consider choices about what they wish for their constitution and themselves.

Amendment rules and their design are a central concern in the study of constitutionalism. Edmund Burke was right to insist that “a state without the means of some change is without the means of its own conservation.”⁵¹ An unamendable constitution is not a reasonable option in the modern world. It would lack the legitimacy of present popular consent, it would expose the exaggerated self-assurance the authoring generation has in itself and the distrust it harbors for its successors, and its formal rigidity could conceal a brittle flexibility that might ultimately provoke instability.

Yet hyper flexibility is as inadvisable as hyper rigidity because it erodes the distinction between a constitution and a statute. The prime objective in amendment design, then, must be to create rules of change that keep the constitution stable and true to popular values yet always changeable when necessary.

My sincere thanks, once again, to the *Indiana International and Comparative Law Review* for inviting me to give this keynote address and to the entire leadership team at the Law Review for their work in conceiving and executing this fabulous event.

51. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, AND ON THE PROCEEDINGS IN CERTAIN SOCIETIES IN LONDON RELATIVE TO THAT EVENT 29 (1790).