Constitutional Handcuffs

by Richard Albert

Abstract: This article makes three contributions to the literature on constitutional change. First, it reinforces the theoretical foundations of constitutional entrenchment by defining the spectrum of constitutional permanence. Second, it offers an original taxonomy of entrenchment clauses, including preservative, transformational and reconciliatory entrenchment. Third, in concluding that absolute entrenchment undermines the participatory values that give constitutionalism its meaning, it proposes an alternative to entrenchment: the entrenchment simulator. Whereas entrenchment clauses prohibit constitutional amendment, the entrenchment simulator provides a promising alternative that both embraces the expressive function of entrenchment and remains consistent with the promise of constitutionalism.

Introduction[1]

The advent of the written constitution has given rise to an enduring tension in constitutional statecraft, pitting constitutionalism against democracy.[2] Constitutionalism strikes a decidedly antagonistic posture toward democracy, restraining democracy by fastening handcuffs on its exercise and imposing limits on its expression. Whereas democracy celebrates the limitless horizons of collective action, constitutionalism takes a more skeptical view of popular movements, moderating its enthusiasm for active citizenship with careful vigilance for the dangers of majoritarianism. That is the very function of countermajoritarian constitutional concepts like bills of rights, judicial review and the separation of powers.

Democracy, in contrast, rejects this tyranny of the countermajoritarian minority and aspires to break free from the chains that constitutions shackle around it. For democracy, legitimacy flows neither from natural law nor moral truth but only from the freely given consent of the governed. The highest ambition of democracy is therefore to reflect civic preferences through majoritarian participatory politics.

Constitutional architects have constructed innovative constitutional devices to palliate the tension between constitutionalism and democracy. Their function is to insulate majoritarian popular will from judicial invalidation. Some of these devices confer upon legislatures the power to limit the scope of judicial review.[3] Others narrow the range of judicial authority.[4] Still others have emerged organically in the course of the judicial process.[5] What unites all of them is their purpose: to signal to citizens that it is citizens themselves – and not the institutions of the state – who possess the sovereignty to chart the constitutional course of the state.

Perhaps no constitutional mechanism more mightily captures this power of sovereignty than the constitutional amendment procedures enshrined in a constitutional text.[6] Indeed, the authority to amend the constitution is the best democratic answer to the enduring tension in constitutional statecraft between constitutionalism and democracy because the rules governing constitutional amendment unmistakably resolve this tension in favour of democracy – by giving citizens the key to unlock their constitutional handcuffs.

But some modern constitutions have instead resolved this tension in favour of constitutionalism. Constitutional designers have, in both the civil and common law traditions, expressly designated certain constitutional provisions *unamendable*.[7] Unamendable constitutional provisions are impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities. They are intended to last forever and to serve as an eternal constraint on the state and its citizens. Paradigmatic examples of unamendable constitutional provisions read, for example, that republicanism "shall not be a matter for constitutional amendment,"[8] amendments to federalism "shall be inadmissible,"[9] or that the secularism of the state "shall not be amended, nor shall [its] amendment be proposed."[10] Let us call these provisions *entrenchment clauses*.[11]

The highest ambition of democracy is therefore to reflect civic preferences through majoritarian participatory politics.

Entrenchment, as I see it, serves three purposes. First, entrenchment clauses are deployed to preserve certain structural features of the state. For instance, an entrenchment clause may preserve federalism, republicanism, secularism or some other constitutional structure. I call this *preservative entrenchment*.

Second, in addition to preserving an important element of the state, entrenchment may be used to transform the state by helping to paint a portrait of the state not as it is, but as it could be. This type of entrenchment clause guarantees a broad spectrum of rights and liberties that once were foreign to the state but now are new additions to its constitutional vocabulary. I call this *transformational entrenchment*. And third, an entrenchment clause may advance the cause of reconciliation between two or more previously warring factions which have joined together in peace to form a new or reconstructed state. This final type of entrenchment – which I call *reconciliatory entrenchment* – absolves members of these factions of prior wrongdoing and renounces all future claims to criminal or other penalties.

Although constitutional states avail themselves of entrenchment in the service of purposes that some may deem laudable,[12] entrenchment clauses nonetheless violate the fundamental promise of constitutionalism. They undermine the legitimacy of constitutionalism by throwing away the key to unlock the handcuffs that constitutions attach to the wrists of citizens. There is something therefore quite unsettling about entrenchment clauses. They deny citizens the democratic right to amend their own constitution and in so doing divest them of the basic sovereign rights of popular choice and continuing self-definition, all of which makes entrenchment clauses deeply troubling for democratic theory, and doubly troubling for democratic practice.

A constitution is a window into the soul of the citizenry, a mirror in which citizens should see themselves and their aspirations

reflected, precisely because it is citizens themselves who should give continuing shape and content to their constitutional text. Entrenchment, in contrast, short-circuits this fundamental premise of the larger promise of constitutionalism. Constitutionalism – and its attendant constitutional amendment rules and other innovations designed to palliate the tension between constitutionalism and democracy – should preserve for citizens the powers of self-definition and redefinition that give democracy its meaning. Loughlin puts it well when he declares that a constitution is "not a segment of being but a process of becoming."[13] Yet entrenchment presupposes the contrary: that the essence of a constitution must be frozen into permanence.

> A constitution is a window into the soul of the citizenry, a mirror in which citizens should see themselves and their aspirations reflected, precisely because it is citizens themselves who should give continuing shape and content to their constitutional text.

In the following section, I will explain and illustrate the idea of constitutional entrenchment. I will then propose an alternative to entrenchment clauses that I call *the entrenchment simulator*. In contrast to entrenchment clauses that render their amendment a constitutional impossibility, the entrenchment simulator provides a promising alternative that both embraces the expressive function of entrenchment clauses and remains consistent with the promise of constitutionalism. I will close with a few concluding thoughts about the enduring tension between constitutionalism and democracy.

Constitutional Entrenchment

Ordinarily, the text of a constitution is subject to evolving interpretations. This should come as no surprise insofar as a constitution is often drafted in expansive language whose terms, standing alone, can neither prescribe nor proscribe a particular course of action. Accordingly, the text undergoes a continual evolution in constitutional meaning manifesting itself as formal or informal interventions in the organic development of the constitution. These interventions, which either arrest or quicken the pace of constitutional change, take the form of constitutional amendments inscribed into the text of the constitution.[14]

Amending the constitution usually demands an extraordinary confluence and sequence of events launched by political institutions, traditionally either legislatures,[15] heads of state,[16] social forces like popular movements[17] or less obvious – though no less influential – coils of constitutional change like courts.[18] In the normal course of affairs, therefore, a constitution is susceptible to episodic revision consistent with the rules of constitutional amendment located in the constitutional text.

But not all constitutions are created equal. Some constitutional states enshrine constitutional provisions that are not subject to either regular or periodic amendment. They are unamendable. By unamendable, I do not mean that constitutional provisions are practically or virtually unamendable as a result of particularly onerous amendment formulae.[19] I mean to identify these entrenched provisions quite literally as fully resistant to the constitutional amendment procedures outlined in the text of the constitution insofar as they may not ever be lawfully amended – even if citizens and legislators achieve the requisite majorities commanded by the constitution. To entrench a constitutional provision is therefore expressly to remove what that provision enshrines – for instance a legal principle, social or moral value, governmental structure or political rule – from the parameters of the customary constitutional field of play.

Degrees of Permanence

Entrenchment is a matter of both degree and kind.[20] There are different stages of entrenchment ranging in increasing rigidity from provisional to permanent entrenchment. Just as a constitutional provision may be entrenched, so too may a law. Conventional laws are subject to legislative revision or repeal in the regular legislative process by the default rule of simple majority. But a legislature may entrench a law by requiring special legislative majorities or other unconventional decision rules to amend or repeal it. By imposing a higher threshold for amending that entrenched law, the legislature sets it apart from conventional laws. Likewise, a similar distinction applies to constitutional provisions. Entrenching a constitutional provision is to require special procedures to amend or revise the content of that entrenched constitutional provision. Whereas a constitution may, as a default rule, require a special legislative or popular majority, or both, to amend one of its provisions, amending an entrenched constitutional provision would entail something qualitatively or quantitatively more than the default rule demands.

> [Entrenchment clauses] undermine the legitimacy of constitutionalism by throwing away the key to unlock the handcuffs that constitutions attach to the wrists of citizens.

We may conceptualise entrenchment on a sliding scale of the type of legislative and/or popular majorities required to consummate a revision to an entrenched provision, be it a legislative or constitutional provision. At its core, then, entrenchment is a measure of permanence. Perhaps an illustration of the stages of entrenchment will help sharpen precisely what it means to say that there exist different degrees of entrenchment.

Let us therefore posit an ascending scale of entrenchment permanence consisting of five separate stations: (1) legislative non-entrenchment; (2) legislative entrenchment; (3) conventional constitutional entrenchment; (4) heightened constitutional entrenchment; and (5) indefinite constitutional entrenchment. Let us also stipulate that we find ourselves in a presidential system where the national bicameral legislature must pass laws by a majority vote of both houses and in which the constitution may be amended by a supermajority of each house of the national legislature, as well as a majority of the subnational legislatures.[21]

Beginning at the lowest end of the scale, we find a conventional law on a conventional subject passed by the bicameral legislature. To revise or even to repeal this law would require nothing out of the ordinary: a conventional law passed by a majority of the bicameral legislature will suffice. We may refer to this lowest level as simply *legislative non-entrenchment.*

Next, the second station of least permanence is occupied by an unconventional law passed by a conventional legislature. The law is unconventional because the legislature deems its subject matter sufficiently important as to insist that any effort to revise the law must muster more than a simple majority of the bicameral legislature. Perhaps the law concerns something of peculiar historical

significance to the nation. Given its importance, the law would be subject to higher threshold for amendment: a supermajority of the bicameral legislature. I refer to this second station as *legislative entrenchment.*

The third level of entrenchment in our sample sliding scale of permanence is a constitution. Let us posit that the drafters of this constitution, having had the foresight to prepare for the contingency that their constitution may require some modifications over the course of its duration, enshrined an amendment formula in the text of the document. The constitution stipulates that amending the constitution, perhaps to respond to changing social and political conditions, requires two conditions: the approval of a supermajority of the bicameral national legislature and the consent of a majority of the subnational legislatures. In my taxonomy, this third station is called *conventional constitutional entrenchment*. What follows this third level of entrenchment is what we might consider a superconstitutional provision requiring even more exacting conditions for amendment. The drafters may have deemed certain constitutional provisions particularly noteworthy or vital to the design of the state, in which case they may have set those provisions apart from the other constitutional provisions. Perhaps the drafters of the constitution believed that the rules of executive selection were so deeply constitutive of the state as to warrant special solicitude in the text of the constitution. Imagine, therefore, that the founding drafters established a special rule to amend this particular constitutional provision. Instead of requiring a supermajority of the bicameral national legislature and a majority of the subnational legislatures, any amendment to this superconstitutional provision would demand the approval of a supermajority of both the national legislature and the subnational legislatures. This fourth station of entrenchment is conspicuously more rigorous than the third, and of course far more exigent than the two other foregoing stations. I call it *heightened constitutional entrenchment*.

> Perhaps the founding generation regarded certain constitutional structures, values or principles as so fundamental to the existence and identity of the state that they charted the unusual course of carving out a special class of unamendable constitutional provisions.

This brings us to the fifth station in our ascending scale of entrenchment. As we intensify the degree of entrenchment from the first station through the fourth, the fifth and final station is permanence. Assume here that the founding drafters of the constitutional text were so convinced of the importance of a given constitutional provision that they chose to shield that provision from any future effort either to amend it or to remove it entirely from the constitution. Just as we can conceive that certain constitutional provisions that may be deemed of greater consequence than others, we may certainly conceive of constitutional provisions that are thought to be of such great consequence to the state as to warrant making them wholly immune to the amendment procedures enshrined in the constitutional text. These would include provisions that, in the view of the founding drafters, are special provisions which far surpass the solemnity of the superconstitutional provisions warranting heightened constitutional entrenchment. Perhaps the founding generation regarded certain constitutional structures, values or principles as so fundamental to the existence and identity of the state that they charted the unusual course of carving out a special class of unamendable constitutional provisions. What makes them special is that no measure of legislative or popular approval – not even unanimity among all institutions of the state in concert with the freely expressed wishes of the citizenry – would be sufficient ever to change these unamendable provisions. On our ascending scale of entrenchment, we might call this fifth and most uncompromising type of entrenchment *indefinite constitutional entrenchment*.

Entrenching Permanence

My focus in these pages is just that: indefinite constitutional entrenchment, which I shall henceforth refer to simply as entrenchment. The notion of entrenchment raises fascinating questions about the purpose of constitutionalism – and also about its promise – and challenges us to think critically about the relationship between constitutionalism and democracy. What is it about constitutions, for example, that gives them their force of reason? Does a constitution derive its legitimacy from liberal democratic principles, the consent of the governed, or should we revere a constitutional text because it displaces the seat of sovereignty from citizens to another more legitimate site? I suspect that the most compelling answer draws from each of these, and still other themes.[22]

Constitutionalism is an institution that at once celebrates and undermines democracy. On the one hand, constitutionalism is firmly rooted in popular will insofar as it aggregates and subsequently crystallises the disparate needs, demands, and aspirations of citizens. But, on the other hand, insofar as it takes possession of the sovereignty of citizens, constitutionalism is an affront to the most basic principle of democracy: the power to define and redefine oneself and to shape and reshape the contours of the state.

Entrenchment, more than any other constitutional device, illustrates how constitutions undermine democracy. This of course raises the question: what is democracy? I am sympathetic to Samuel Issacharoff's definition: democracy refers to a system of self-government in which legitimate authority derives from the freely expressed will of citizens expressing their views either directly or indirectly.[23] I therefore adopt procedural democracy, in contrast to substantive democracy, as my baseline understanding of the concept. Procedural democracy concerns itself with the process by which citizens make decisions about their collective future as members of the state.[24] Substantive democracy concerns itself with the values that underpin the actual decisions that citizens make.[25] In this respect, the former orients itself toward the decisional input and the latter, the decisional output.[28] This was the very basis of John Hart Ely's process-based theory of democracy,[27] which, in my view, captures the essence of democratic legitimacy. Democracy and its attendant institutions demand that citizens be given every opportunity to participate in the procedures for settling on, and ultimately setting, the trajectory of the state.[28]

> Constitutionalism is an institution that at once celebrates and undermines democracy.

What underlies my view of constitutionalism is therefore that popular choice is a value worth defending. Popular choice may admittedly depart from the commonly cited substantive values of

liberal democracy. But just as fairness, equality, and due process are first order values that are integral to modern civil society, popular choice should likewise occupy a privileged position because it is the very act of deliberation, reflection and ultimately choosing that gives democracy its meaning. Without choice and the right to exercise it, we detract from the purpose of joining together in the shared venture that is a community, be it a village, territory, nation or state.

Yet, procedural democracy on its own has proven to be an insufficiently strong basis upon which to stand up a new constitutional state.[29] Procedural democracy, to paraphrase Daniel Markovits, has had to bow to the mercy of the substantive values of democracy[30] and to accept that it is ill-equipped to address the needs of modernity. And perhaps with reason because the dangers of privileging process over substance are familiar to us all, and they serve as a frightening reminder that choice does not always produce righteous outcomes. We need only look to history, some of it alarmingly recent, for proof that citizens should not always be entrusted with the power of free choice because there is little assurance that they will act in the larger interests of justice and virtue. Nazism in Germany,[31] apartheid in South Africa[32] and Jim Crow laws in the United States[33] are but three vicious manifestations of majoritarianism.

Without choice and the right to exercise it, we detract from the purpose of joining together in the shared venture that is a community, be it a village, territory, nation or state.

That is precisely why constitutional drafters opt so wisely to restrict popular choice. By erecting barricades to guard against the menace of majoritarianism, constitutions and their attendant counter-majoritarian institutions aim to neutralise the dangers of majoritarianism, namely the popular predisposition to actualising short-term preferences over long-term investments, the inclination toward concrete benefits over abstract ideals, and the subjugation of minority rights to majority will.[34] It is, therefore, one thing to hold in high esteem the value of democratic popular choice, but quite another to set it as the definitive standard against which other values are measured. This common practice – the subordination of process to substance – is now standard procedure in the task of constitutional design.[35] Citizens have become accustomed to – and if they have not, they should resign themselves to – restrictions on their capacity to choose their own course, both as individuals and as members of a community, because it is the only way to neutralise the self-interest that informs, and perhaps more accurately constrains, our choices. And so it makes eminent sense to limit the scope of popular choice.

But to fully deny citizens any form of popular choice in designing and redesigning their very own constitution is another matter altogether. And it is similarly qualitatively different from – and significantly more objectionable than – denying citizens the right to speak through their elected representatives on matters of everyday legislative affairs. In my taxonomy of degrees of entrenchment, this latter example would correspond to the second level of entrenchment, pursuant to which a legislature passes a law that can be amended or repealed only with a special majority of legislators. Legislative entrenchment, as it is called, as opposed to constitutional entrenchment, has given rise to an engaging exchange among constitutional scholars, some arguing that one legislature may bind a subsequent legislature and others arguing the contrary.[36] The contemporary debate derives from the foundational work of the great English constitutional theorist, Albert Venn Dicey, which has since been refined by his modern counterpart, H.L.A. Hart. Both Dicey and Hart help illuminate competing notions of legislative sovereignty: the first incarnation of sovereignty granting a later Parliament the continuing sovereignty from which it may claim the right to overrule an earlier one; and the second placing Parliaments across the ages on an equal footing such that no one body may bind another.[37]

A constitution is a constitution only if it retains for citizens the right to define and redefine themselves and their state as they deem best.

Whether an earlier legislature may bind a future legislature invokes significantly lower stakes than whether a prior body of citizens may irreversibly bind a subsequent body of citizens against its will. Citizens acting as constitutional amenders may undo legislative entrenchment, but legislative entrenchment should not trump constitutional amendment. Legislative entrenchment admittedly compromises sovereignty. But it is a secondary, and indeed lesser, form of sovereignty that we may call *mediated sovereignty*, which refers to the people themselves acting through their duly elected legislative delegates. In contrast, constitutional entrenchment goes much further. First, constitutional entrenchment does not compromise mediated sovereignty; it instead constrains direct sovereignty, which refers to the people themselves acting of their own volition in their own name, unfettered by the bureaucratic and political hurdles that representative democracy presents. It is therefore the purest form of sovereignty imaginable, the very apex of constitutional legitimacy and legitimate authority. Second, constitutional entrenchment does not stop at simply *compromising* that sovereignty, as one might characterise the consequence of legislative entrenchment. Constitutional entrenchment does something far more grave and much more severe than legislative entrenchment: it extinguishes sovereignty.

Constitutional entrenchment also runs contrary to the promise that constitutionalism augurs for citizens. Constitutionalism is an institution that should reflect how citizens see themselves and their state – precisely because it is citizens themselves who should breathe ongoing life and meaning into their constitution. A constitution is a constitution only if it retains for citizens the right to define and redefine themselves and their state as they deem best. If the constitution sequesters this fundamental right of self-definition from citizens, then a constitution cannot be what it is intended to be – a continuing autobiography, a project of discernment and an evolving self-portrait.

If the constitution sequesters this fundamental right of self-definition from citizens, then a constitution cannot be what it is intended to be – a continuing autobiography, a project of discernment and an evolving self-portrait.

Some states strip their constitutional text of the very essence of constitutionalism. They entrench constitutional provisions

against amendment, in so doing handcuffing the wrists of their citizens and leaving them unable to escape their constitutional shackles. For that is precisely the effect of entrenchment on citizens: it transforms them from citizens into subjects, reminiscent of days long past when democracy was but a dream envisaged by heroic revolutionaries preparing to stand up against their imperial overlords. Mobilising in pursuit of a new social charter to govern how to relate to the state, and how to engage with themselves, citizens birthed the radical notion of a text that would enshrine their rights and liberties against infringement by the state. But the text itself was not cast in iron. It was instead left open and receptive to social and political change – discrete or grand changes that would occur as a result of either organic evolution or deliberate revision – on the implicit if not explicit understanding that it was not, nor could ever be, the text itself that was sacred. What was understood to demand reverence as sacrosanct was instead the source of the text's legitimacy. And back then, as today, there is but one singular basis of legitimacy and of legitimate authority: popular choice.[38]

That is the core of constitutionalism. And entrenchment undermines that critical core of constitutionalism. As the emblematic embodiment of the repudiation of popular choice, entrenchment fails not because it freezes for some period of time a particular feature or features of the state[39] – that is, after all, a legitimate function of a constitution – but rather because entrenchment freezes a constitutional provision indefinitely.[40] Entrenchment suppresses popular choice to the detriment of citizenship and narrows the range of possibilities that citizens envision for themselves and their state. Entrenchment, as it exists in constitutional states around the world, from the Americas to Africa, from Europe to Asia, works a devastating harm on the constitutional soul of citizens. For by shielding constitutional provisions against amendment, entrenchment takes possession of the fundamental civic right of self-definition that is an avenue into the meaning and virtue of democracy.

By shielding constitutional provisions against amendment, entrenchment takes possession of the fundamental civic right of self-definition that is an avenue into the meaning and virtue of democracy.

The Entrenchment Simulator

No right is more constitutive of citizenship than the power to amend the constitution, for a constitutional amendment derives from the highest of all democratic values: popular choice. The process of amending the constitution strikes at the heart of what it means to be a people whose disparate members have joined together in a common venture to define themselves as a collective and to build and sustain the apparatus of their state.

To withhold from citizens the power of constitutional amendment is to withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights. Nothing is more democratically objectionable than dispossessing citizens of the power to rewrite the charter governing the boundary separating the citizen from the state, and citizens from themselves. Sequestering this democratic right commandeers the sovereignty that gives democracy its meaning and throws away the key to unlock the handcuffs that constitutions fasten to the wrists of citizens.

The Expressive Function of Entrenchment

There is good reason, though, to design constitutions so as to handcuff the wrists of citizens. Citizens are, after all, self-interested individuals whose first instinct is more often inward-looking and self-regarding than oriented toward the larger, and more public, interests of the community. At their best, constitutions mould disparate persons into members of a joint undertaking who ultimately join together to become, and to see themselves as, citizens of the state.

Constitutions achieve this high ambition by facilitating the development of social conscience, and of a social consciousness, among the citizens of the state in three ways. First, by setting down markers distinguishing proper from improper conduct both by the state toward citizens, and by citizens toward themselves. Second, by clearly demarcating the respective spheres of jurisdiction for the institutions of the state. And, third, by constructing the archetype of a just or ideal society to which citizens and the institutions of the state alike should aspire.

To withhold from citizens the power of constitutional amendment is to withhold more than a mere procedural right. It is to hijack their most basic of all democratic rights.

Entrenchment aims – though falls wide of the mark in its attempt – to fulfil the function of creating a model society. It fails in its mission because it lacks legitimacy insofar as its dictates derive not from the freely given consent of the people but from the often unwelcome and self-imposed will of the past. It is this disconnect – between the aspiration to shape shared values and the coercion to adopt those values – that dooms entrenchment to failure. Nevertheless, entrenchment expresses an important message not only to those bound by the terms of the written constitution but likewise to those outside observers curious to discern the bases and principles upon which stand that particular constitutional state.

In addition to setting apart a legal principle, social or moral value, governmental structure or political rule from other constitutional provisions, entrenchment also conveys the symbolic value of that principle, value, structure or rule[41] – the symbolic value that the constitutional entrenchers attributed to it precisely by entrenching it.

This purely expressive function of entrenchment doubles as the core of its merit: deploying symbolic statements – as opposed to using force or other forms of compulsion – to set or correct social norms.[42] That purposeful symbolism is the subtle, yet paradoxically the most powerful, virtue of entrenchment. For by identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colours in its self-portrait.

The expressive function of entrenchment is not unlike the expressive function of constitutionalism or constitutional law. As Ashutosh Bhagwat writes, when judges interpret the constitution, they proclaim the values that constitute the constitutional culture of the state even as they shape those values.[43] Thus when courts engage in constitutional judicial review, they give "concrete expression to the unarticulated values of a diverse nation."[44] Yet entrenchment does more than merely express a symbolic statement of unarticulated values. It makes an unvarnished definitive

statement about the values that do and should bind citizens to the state, and citizens to themselves. There is nothing unarticulated about entrenchment. Quite the contrary, the very fact of entrenchment removes any spectre of doubt as to what should be the values of the state.

An important distinction emerges in constitutional scholarship on this point. Scholars distinguish between the expressive and communicative functions of a constitutional text.[45] The former – expression – refers to an act or omission that unintentionally conveys meaning while the latter – communication – refers to an actual intent to convey meaning. Expression may as a consequence of this distinction occur and exist on its own without communication. For instance, a person may act or fail to act in such a way as to express an affinity for someone or something but that person may not have intended to communicate that affinity. Therefore expression, which is subject to evolving interpretations from third party observers, is a gesture dissociated from intent. In contrast, communication is a gesture whose purpose is indeed to convey an intent and whose meaning is usually settled by the communicator herself. Insofar as the very nature of entrenchment entails a similarly constraining intent to communicate the importance of a principle, value, structure or rule, entrenchment goes beyond simply performing an expressive function. Entrenchment openly marries expression with communication by, first, clearly identifying a constitutional provision as unamendable and, second, just as clearly manifesting the intent to convey the meaning behind the decision to have made that provision unamendable.

That constitutional entrenchment merges expression with communication raises two concerns, each of which, on its own, divests entrenchment of the legitimacy that is the lifeblood of constitutionalism. First, the effect of blending expression and communication is to weaken the potent persuasive subtlety of the expressive force of entrenchment. Standing alone, expressive entrenchment seeps inconspicuously into the consciousness of citizens, slowly but assuredly taking root in the collective spirit of the citizenry. But when this intention is communicated outright, our intuition raises red flags about the motives behind the wish to instil the values entrenched in the constitution. Much better to use the constitutional text to make expressive statements about rights and values, and therefore to allow citizens to reach their own conclusions about the worth of particular values and which ones they wish to adopt as their own, than to impose them from the top downward.

> By identifying a constitutional feature of statehood as unamendable, entrenchment signals to citizens just as it does to observers what matters most to the state by fixing the palette of non-negotiable colours in its self-portrait.

Second, the risk inherent in authorising the state or founding drafters to reveal their intent to impose values on a class of citizen subjects – as is the case when expression and communication are combined – is that the chosen values may not find a welcome home in the individual hearts and the shared mores of those citizens. The costs incurred in entrenchment exceed its benefits when what we seek to entrench stands in conflict, and if not in conflict then in some tension, with existing or future beliefs or convictions. This echoes the stakes in the tug of war pitting constitutional structure versus political culture, the former mistakenly assuming that it can actually dictate the content of the latter. There is a grave danger in presuming that a constitutional structure, for instance entrenchment, can shape political culture, specifically social values. Indeed, the continuing dialogue about this very matter – a dialogue that is unlikely to achieve resolution any time soon[46] – demonstrates only one point beyond doubt: that constitutional structure and political culture enjoy a bi-directional relationship in which the form and fate of one is linked to the fate and form of the other.

Therefore, the critical institutional design challenge to breathing legitimacy into constitutional entrenchment is to find a way to isolate its redeeming expressive function from its unproductive communicative function. And that is just what I hope to do. With the entrenchment simulator that I shall unveil in the pages to follow, I will endeavour to achieve twin goals. First, I will aim to capture the salutary expressive essence of entrenchment within the entrenchment simulator. And second, I will seek to disengage entrenchment from its problematic consequence of constraining popular choice and pre-empting self-definition. The immediate purpose of the entrenchment simulator is to signal important social pre-commitments. But its larger purpose is to create sufficient space within which those pre-commitments may evolve over time, as of necessity they must.

> Constitutional structure and political culture enjoy a bi-directional relationship in which the form and fate of one is linked to the fate and form of the other.

The Challenge of Constitutional Democracy

But before I proceed to introduce the entrenchment simulator, we must first return to the question that began this inquiry: what is the proper balance between constitutionalism and democracy? This is of course harder said than done. Despite the richness and diversity of constitutional texts around the world, it is difficult to identify a constitutional state whose constitutional text has successfully managed to solve the enduring tension between constitutionalism and democracy. Granted, it may be too much to expect of constitutional designers to do anything but modestly lessen that tension. After all, scholars have long recognised its inevitable persistence,[47] some even arguing that there is merit to the tension itself and that we should not resolve it.[48]

If successful efforts to assuage the tension are few and far between, quite the contrary is true of constitutional texts that veer too sharply toward either constitutionalism or democracy. Begin first with the former. Above, I have chronicled and illustrated how constitutional states privilege constitutionalism at the expense of democracy by entrenching discrete constitutional provisions. But there exists something far worse than that: constitutional states which entrench the entire constitutional text – each and every constitutional provision – instead of a mere single provision or a few provisions.

To find what is perhaps the most egregious example of a constitutional text that elevates constitutionalism so high above democracy as to render democracy virtually meaningless, we must look to Mexico. True, Mexico permits amendments to its constitution provided that the amendment is approved by a two-thirds supermajority of the national legislature and a majority of the subnational legislatures.[49] But that is the extent of the revisions or additions permitted by the constitution. Anything more than

discrete amendments to the text is expressly forbidden insofar as the constitution does not contemplate, and indeed rejects, the possibility of a new constitution ever being created to replace the existing one – even if a popular revolution ensues.[50] The Mexican Constitution consequently makes revolution illegitimate and deprives it of any force of reason before one is ever launched.

That the Mexican Constitution tilts so militantly in favour of constitutionalism as to outlaw revolution – which is the very apex of democratic mobilisation and popular will – should concern anyone infused with the democratic spirit and otherwise committed to the core democratic principles of popular choice and self-definition. The importance of this point cannot on any conceivable grounds be overestimated because its implications are just that colossal. For the Mexican Constitution takes a radical position that effectively holds time and space forever constant, never permitting the kind of political change that has made possible the great democratic transformations in human history, namely the constitutional birth of the United States in 1787,[51] the founding of the first French Republic in 1789,[52] or the social renewal of South Africa in 1996.[53] These possibilities are foreclosed to Mexicans, even if conditions in their state deteriorate so intolerably as to require broad popular mobilisations to reclaim the nation from a despot or illegitimate rulers. There may, therefore, be no better example than the Mexican Constitution to demonstrate how the reverence for written constitutionalism has in some constitutional states suppressed democracy and prevented citizens from exercising their legitimate authority to change or chart the constitutional course of their state.

But let us also recognise that constitutional states can just as well commit the contrary though equally objectionable offence, that is to say, privileging democracy at the expense of constitutionalism.[54] Switzerland is the paradigmatic model of a state where procedural democracy is the highest value. Long regarded as the modern cradle of direct democracy,[55] Switzerland has accordingly conferred upon itself a constitution that grants unreviewable power to its citizens, placing no matter of law, rights or policy beyond their reach. Citizens may vote in referenda to overrule legislation, revise and reverse matters of social policy, reconfigure the organs of the state, and engage in wholesale constitutional change.[56] And Swiss citizens may do all of this with a bare majority.[57]

That Swiss citizens have the final say in constitutional matters is not out of the ordinary. American citizens, for example, retain determinative control over their constitution, provided they can muster the requisite supermajorities to successfully navigate the amendment process.[58] However, what makes the Swiss model so exceptional in its inclination toward majoritarian democracy and in its disinclination toward constitutionalism is that, quite unlike the United States and other leading liberal democracies, Switzerland does not allow judicial review of federal legislation.[59]

This unbridled Swiss majoritarianism is just as alarming as the Mexican constitutional entrenchment is restrictive. Both do equal parts injustice and harm to popular choice [...].

This is consistent with the theme that runs through the entire Swiss public constitutional apparatus: majoritarian public choice. Whereas courts typically function as the supervisory force against the threat of majoritarianism in liberal democracies, courts in Switzerland have no such role. No check, therefore, constrains the majoritarian wishes – or more accurately, the impulses – of Swiss citizens.

This unbridled Swiss majoritarianism is just as alarming as the Mexican constitutional entrenchment is restrictive. Both do equal parts injustice and harm to popular choice, the former because it fails to test the strength and sustainability over time of that choice, and the latter because it gives insufficient respect to it. And that is the harm in subscribing indiscriminately to either constitutionalism or democracy without recognising that each has strengths that compensate for the weakness of the other.

Our challenge, then, is to make peace between constitutionalism and democracy. Resolving the tension between them will require, first, building on their respective strengths and compensating for their respective weaknesses and, second, fashioning a constitutional structure that will make real the promise that both hold for humanity. This, in my view, is no small feat insofar as it demands the design of a constitutional device exhibiting three components: (1) entrenchment; (2) expression; and (3) an escape hatch.

Before I outline each of these three items, let me say a short word on each. First, the text need not necessarily entrench a legal principle, social or moral value, governmental structure or political rule. But if it does, it should not resort to indefinite constitutional entrenchment. The text should instead entrench that principle, value, structure or rule in a way that corresponds to the fourth station of entrenchment – which I call *heightened constitutional entrenchment*[60] – pursuant to which the constitutional text demands special procedures (which depart from the default constitutional amendment procedures) to amend that entrenched item. Second, it is preferable to enshrine some degree of entrenchment beyond the third station of entrenchment – which I call *conventional constitutional entrenchment*[61] – because of the expressive and symbolic value that only a special form of entrenchment can convey. And since the fifth and final station – *indefinite constitutional entrenchment* – is much too constraining, only the fourth station remains as a possibility.[62]

We cannot resolve the tension between constitutionalism and democracy merely by tilting the scales less so in favour of constitutionalism. We must instead make a very real effort to actualise the underlying premise of procedural democracy while, nonetheless, guarding against the menace of majoritarianism.

Finally, we cannot resolve the tension between constitutionalism and democracy merely by tilting the scales less so in favour of constitutionalism. We must instead make a very real effort to actualise the underlying premise of procedural democracy while, nonetheless, guarding against the menace of majoritarianism. We can achieve this balance if, alongside the use of some degree of constitutional entrenchment, we grant citizens an escape hatch to pull if they wish to extricate themselves from the handcuffs that entrenchment wraps around their wrists. That escape hatch is provided by the fourth station of entrenchment – *heightened constitutional entrenchment* – precisely because it does not consign citizens to life under indefinite constitutional entrenchment but rather allows them to exercise their popular choice. It is true, however, that citizens exercise their popular choice under constrained conditions, but this restriction on democracy is both politically useful and socially vital in a liberal democracy.

Designing Constitutional Democracy

The entrenchment simulator achieves each of these three objectives. It is a constitutional structure whose aim is to reconcile constitutionalists with democrats by pooling the virtues of constitutionalism and democracy, and by mitigating their respective limitations. The entrenchment simulator creates a new constitutional arrangement whose function is to govern both the content and timing of constitutional amendments. Were constitutional states to adopt this entrenchment simulator, they would achieve the expressive benefits of constitutional entrenchment while not compromising the popular choice and self-definition underlying procedural democracy.

Three elements form the basic apparatus of the entrenchment simulator: (1) interim induction; (2) constitutional rank; and (3) sequential approval. The first, interim induction, seeks to respond to the challenge that confronts constitutional designers when they endeavour to introduce, and in so doing to entrench, new values into the national consciousness. Constitutional designers may often face resistance from citizens, who may for various reasons be unreceptive to new values; for instance, a new founding commitment to preserving federalism or unitarism; presidentialism or parliamentarism; republicanism or monarchism; religion or secularism; or a commitment to transforming the state through civil and political rights or through electoral procedures, or even a new founding commitment to reconciliation. In order to allow sufficient opportunity for the new values to take root in the citizenry, the entrenchment simulator mandates a period of induction – measured from the date the entrenchment comes into force – during which those newly entrenched values enjoy absolute immunity from constitutional amendment. Not even unanimity may overturn the entrenched provision.

Induction serves an important function. Insofar as there are long odds facing any attempt to deploy constitutional structure to shape political culture, induction helps facilitate the process of infusing new values into the lives and being of citizens. Induction – by which I mean a period of acculturation during which new constitutional values introduced by entrenchment are assimilated – gives those new values a chance to take root and, once rooted, to remain in the consciousness of citizens. Consider it a mandatory trial run whose animating hope is that, by the end of the designated induction stage, what may have been viewed initially as controversial or foreign values imposed by elites ultimately become ingrained in the quilt of state and the fabric of citizenship – so deeply that they become constitutive of nationhood, just as the constitutional framers had hoped.

Without this period of courtship between the text and the citizen, a constitutional state may never be fully capable of making a clean break from the past and charting a new direction. With the possibility looming of a constitutional amendment returning the state to days past or changing constitutional clothes yet again, there is no assurance that the vision of the framers will ever be given a real opportunity to take hold. But induction creates and cultivates that opportunity.

Just how long this period of induction should last before citizens may once again reclaim their right to amend the constitution is a difficult matter. On the one hand, limiting the induction period to a few years may be too short a time span because it would be insufficiently long to inculcate citizens with new values. On the other, extending induction to much more than an entire generation, say over twenty years or so, may be too long because it would approximate too closely the perilous conditions of constitutional entrenchment we have canvassed above.

Induction serves an important function. Insofar as there are long odds facing any attempt to deploy constitutional structure to shape political culture, induction helps facilitate the process of infusing new values into the lives and being of citizens.

Looking to those constitutional states currently imposing a comparable though not quite similar temporal restriction against amending new constitutional provisions, we may conclude that they generally ban amendments anywhere from five to ten years from the date of enactment.[63] Afterwards, the constitutionally protected provision reverts to normal status and may be freely amended according to the conventional rules of constitutional amendment. Five or even ten years seems like much too little time to allow new values to permeate the state and its citizens. However, one generation or more seems right, although each constitutional state availing itself of the entrenchment simulator could of course tailor this time period to its own indigenous needs and conditions. Still the principle remains clear: induction – which entrenches a constitutional provision for only an abbreviated period of time – serves the purpose of breathing new values into citizens, fully consistent with what constitutional entrenchers hope will transpire when a people confers a new constitution upon itself.

But induction on its own is insufficient to help right the balance between constitutionalism and democracy. Without more added to our design, an entrenched constitutional provision will revert to being a conventional constitutional provision after the designated time has elapsed following the interim induction period. The entrenchment simulator addresses this problem with its second component: constitutional rank. To understand the notion of constitutional rank, we must return to the fourth station of constitutional entrenchment: heightened constitutional entrenchment.

What motivates constitutional designers who adopt indefinite constitutional entrenchment is the conviction that certain features of the state are more important, and if not more important then more constitutive, of the state and its citizens. For that is the effect, either real or perceived or both, of entrenching a legal principle, social or moral value, governmental structure or political rule. Constitutional designers resort to indefinite constitutional entrenchment to establish a hierarchy of constitutional provisions, which represents an implicit rank ordering of constitutional values. Indefinitely entrenched provisions are regarded by the framers as not only qualitatively different but more valuable than the conventionally entrenched provisions – and those framers hope that these entrenched values will ultimately come to be seen as such both by citizens and third-party observers. This is the inevitable consequence of indefinite constitutional entrenchment. By entrenching a particular feature of the constitution, constitutional designers envelop that feature in a certain measure of legitimacy – founding legitimacy, as opposed to continuing popular legitimacy (though the two are not mutually exclusive) – which results in elevating that feature above all other conventionally entrenched constitutional provisions. The upshot of indefinite constitutional entrenchment is that it creates tiers of significance among constitutional provisions. That is what I mean by constitutional rank.

Using the concept of constitutional rank, the entrenchment simulator establishes tiers of escalating significance among constitutional provisions. But it does so in a way that retains the amendability of those constitutional provisions designated as most important in the constitutional order. Recalling that the entrenchment simulator rejects indefinite constitutional entrenchment as illegitimate and imprudent, the alternative that presents itself is heightened constitutional entrenchment. Two positive benefits flow from inviting constitutional states to rely on heightened constitutional entrenchment in their constitutional design. First, heightened constitutional entrenchment exercises the same expressive function as indefinite constitutional entrenchment, signalling both to citizens and to third party observers what is thought to be most important about the state: its design and its citizens. Second, it goes beyond simply distinguishing between the two tiers of entrenchment – indefinite constitutional entrenchment and conventional constitutional entrenchment – that we discern in constitutional states deploying indefinite constitutional entrenchment. Rather, heightened constitutional entrenchment folds within itself an infinite possibility of tiers of entrenchment that constitutional designers can use to distinguish among several tiers of constitutional provisions. Those possibilities range from conventional constitutional entrenchment to multiple incarnations of heightened constitutional entrenchment, but they exclude indefinite constitutional entrenchment.

Heightened constitutional entrenchment folds within itself an infinite possibility of tiers of entrenchment that constitutional designers can use to distinguish among several tiers of constitutional provisions.

We might imagine, for example, a hypothetical presidential state designating four tiers of constitutional provisions.[64] The fourth, and lowest, tier could include the basic structural provisions of the constitution, namely providing that the chambers of the bicameral national legislature consist of 300 representatives in the lower house and 100 senators in the upper house. This bottom tier would be subject to the default rules of constitutional amendment mandated in the constitutional text. Let us posit, in this instance, that the default rule for amending the constitution requires two-thirds concurrence of each chamber as well as two-thirds concurrence of the subnational legislatures.

Moving upward along our constitutional hierarchy, the third tier of constitutional provisions would require a more exacting threshold for amending the constitution – say, three-quarters concurrence of each chamber and two-thirds of the subnational legislatures – and consist of constitutional provisions thought by the framers to be more important than the simple distribution of seats in the bicameral legislature, for instance term limits on presidential service. In the second tier, which could include, just as an example, a constitutional provision requiring the president and the bicameral national legislature to pass a balanced budget each year, the rule for amending the constitution would be tougher even still: three-quarters approval of each legislative chamber and three-quarters of the subnational legislatures.

Finally, the first and highest tier of constitutional rank in our hypothetical could conceivably include a rule that is so deeply interconnected with the founding moments of the state – consider perhaps the secular nature of the state – that it requires an even more exigent quantum of popular and legislative approval: three-quarters approval from both the bicameral national legislature and the several subnational legislatures as well as three-quarters approval of the citizenry in a referendum.

Constitutional rank, then, is the incarnation of heightened constitutional entrenchment. For when one invokes the latter, one is by implication declaring that there exists an echelon of merit according to which each constitutional provision may be classified. If a principle, value, structure or rule is regarded as minimally more important than a conventional constitutional provision but less important than the most important constitutional feature of the state, then it should be categorised according to the lowest level of heightened constitutional entrenchment – the lowest constitutional rank within that degree of entrenchment. Conversely, if it is viewed as markedly more important than a conventional constitutional provision and minimally less important than the most important constitutional feature of the state, then it should be categorised according to the highest level of heightened constitutional entrenchment – otherwise understood as the highest constitutional rank within that degree of entrenchment.

If a principle, value, structure or rule is regarded as minimally more important than a conventional constitutional provision but less important than the most important constitutional feature of the state, then it should be categorised according to the lowest level of heightened constitutional entrenchment.

Constitutional designers may accordingly enjoy the sweet without suffering through the sour if they adopt this strategy, because it bestows upon the constitution and the state the expressive benefits of entrenchment while not weakening the democratic core of the citizenry. By highlighting the richness of entrenchment possibilities that lie between conventional constitutional entrenchment and indefinite constitutional entrenchment, heightened constitutional entrenchment and its incarnation in the notion of constitutional rank demonstrates the merit of this second feature of the entrenchment simulator.

Now, having reached the third element of the entrenchment simulator, the entire mechanism begins to take final shape. If induction serves the purpose of creating a safe harbour within which constitutional framers may endeavour to shape the contours of and instil new values into citizens, and if ranking allows framers to express both implicitly and explicitly what they deem most constitutive of statehood and citizenship, then the third element – sequential approval – is the mechanism through which citizens may manifest their intention to free themselves from the handcuffs that the constitutional entrenchers have wrapped around their wrists. It is, in short, the escape hatch that citizens can pull to liberate themselves from the past and to propel themselves into their own self-defined collective future.

Sequential approval requires that citizens express their freely-given views on whether to amend a particular constitutional provision falling within a class of heightened constitutional entrenchment. But sequential approval requires that citizens express their consent to such an amendment more than once, in at least one initial and one subsequent confirmatory vote, and according to a clearly delimited majority defined in the constitutional text. Although the actual majority threshold would presumably vary from one constitutional text to another – as would the number of times

that citizens would be required to reach that particular majority in different votes separated by a constitutionally defined period of time – the principle remains the same despite any wrinkles that may exist among constitutional states adopting the entrenchment simulator.

Let us deconstruct the following hypothetical constitutional rule mandating sequential approval: "In order to be approved, an amendment to [provision x] shall require a supermajority of eligible citizens to vote in favour of the amendment on two separate occasions separated by five full years as of the day of the first vote." We should note three things about this hypothetical rule. First, the threshold for amendment is high: a supermajority of citizens. Second, the confirmatory vote occurs only in the event of a successful supermajority vote in favour of the amendment at the initial vote. Third, the confirmatory vote is separated from the initial vote by five full years, which would mean in most constitutional democracies that there had been intervening legislative or executive elections, or both.

This is significant for three reasons: namely that the supermajority threshold tests the strength and intensity of popular will for an amendment; that the five-year waiting period would verify the sustainability over time of the popular choice to amend the constitution; and that the intervening elections would have afforded electoral candidates the opportunity to voice their opinion on the amendment at a time when citizens would have been most likely to engage attentively to the ongoing political discourse. Of course, this hypothetical constitutional rule is just that – hypothetical.[65] Nevertheless, it lays bare the usefulness of sequential approval.

> Sequential approval [...] is the mechanism through which citizens may manifest their intention to free themselves from the handcuffs that the constitutional entrenchers have wrapped around their wrists.

Recall our baseline premise: we must mitigate the menace of majoritarianism, which typically manifests itself in mob mentality that prefers to act on emotion in the immediacy of the moment rather than to take the necessary time to deliberate carefully and critically about the proper course of action. Requiring sequential approval helps ensure that the popular will accurately reflects the considered and thoughtful judgment of the citizenry instead of its most primal predispositions, which is precisely the source of our discomfort about majoritarianism. Quite apart from the temporal element of sequential approval, combining time and threshold makes it even harder to amend a provision that has been entrenched pursuant to heightened constitutional entrenchment because it requires a special majority to do so. That citizens in favour of reversing the entrenched provision must meet the designated special majority threshold more than once is yet another way to mitigate majoritarianism. For were citizens to form the requisite majorities successfully twice over the designated period of time, it would rebut the presumption of the transient and fickle nature of citizens – the very vices that raise concerns about majoritarianism.

That is the entrenchment simulator. It consists of three distinguishable elements: first, an interim induction period, during which new values or principles are given time to integrate into the constitutional culture of the state and its citizens; second, a constitutional ranking arrangement, pursuant to which constitutional designers may designate, with the use of heightened constitutional entrenchment, different tiers of constitutional provisions on the basis of their respective significance to the state; and third, a requirement of sequential approval, which imposes both temporal and voting threshold obstacles to amending those entrenched constitutional provisions. Each of these three elements, taken together, helps us address the enduring tension between constitutionalism and democracy.

To recap the ground we have covered, let us reflect on the concern that prompted our inquiry: many constitutional states have, to their liking and with several different devices, resolved the tension between constitutionalism and democracy in favour of constitutionalism, most notably by indefinitely entrenching constitutional provisions beyond the reach of the citizenry. The consequence of prohibiting citizens from exercising their right to amend their own constitution is to divest citizens of their right to self-definition and popular choice, in essence forever tying their hands with no recourse ever to free themselves from their predicament. We should of course expect that constitutions would handcuff citizens, in so doing preventing them from taking actions that the state, the founding drafters, as well as intervening generations of constitutional amenders deem improper in that particular society at that particular time. But indefinite constitutional entrenchment does not simply handcuff citizens – something that all constitutions do, as they should. Indefinite constitutional entrenchment throws away the keys to those handcuffs, consigning citizens into the permanent custody of the entrenching generation.

Constructing a mechanism to return those keys to citizens is no easy task. But the entrenchment simulator may hold promise for meeting that challenge. In confronting the tension between constitutionalism and democracy, the entrenchment simulator strikes a compromise between, on the one hand, the unforgiving rigidity that is characteristic of indefinite constitutional entrenchment and, on the other, the public autonomy that democratic liberty entails. Three points are useful by way of summary.

First, the entrenchment simulator recognises the importance of entrenchment. But it privileges heightened constitutional entrenchment over indefinite constitutional entrenchment because the former keeps the keys to self-definition within the reach of citizens, however complicated the labyrinthine rules to amend a provision subject to heightened constitutional entrenchment may be. Second, the reason why the entrenchment simulator looks so favourably upon some measure of entrenchment is precisely because of the expressive value that entrenchment entails. Fixing common civic objectives and anchoring the state in shared social and political values is exceedingly important to creating and cultivating a community of citizens. The entrenchment simulator latches onto expressiveness as the vital means to that critical end.

> But indefinite constitutional entrenchment does not simply handcuff citizens – something that all constitutions do, as they should. Indefinite constitutional entrenchment throws away the keys to those handcuffs, consigning citizens into the permanent custody of the entrenching generation.

Finally, the entrenchment simulator acknowledges that it is an event of high moment to undertake the process of unentrenching a constitutional provision whose drafters thought it was so foundational as to merit entrenchment in the first place. That is why

the entrenchment simulator adds a temporal element to the task of amending an entrenched constitutional provision. To guard against the perils of majoritarianism, the entrenchment simulator calls for special majorities to express their collective wish to unentrench an entrenched provision – not only on one occasion, for instance a single referendum conducted on a single day, but rather on multiple occasions over different periods of time. This last wrinkle strives to ensure both that, in the interest of constitutionalism, a sustained special majority has sufficient time to deliberate on the enormity of amending an entrenched constitutional provision and that, in the interest of democracy, citizens retain determinative decision-making authority to shape their state.

Conclusion

Perhaps the tension between constitutionalism and democracy will never quite fade. Constitutionalism and democracy are, after all, each anchored in opposing visions of statehood and citizenship. The former orients itself toward substantive principles that can often be achieved only by pinching down on the procedural values that give meaning to the latter. And the latter privileges civic participation in the very democratic processes that the former constrains with rules about who may participate, when and how they may do so, and toward what ends. It therefore seems unavoidable that constitutionalism and democracy would sometimes clash, and that the former would prevail in some contexts just as the latter would reign in other contexts.

What is not inescapable, however, is that one would so dominate the other as to reduce it to a mere shell of itself. Yet that is precisely what results from entrenchment. When constitutional drafters entrench constitutional provisions against amendment by even the most compelling popular or legislative majorities, the consequence is to cast constitutionalism in the leading role and to relegate democracy to the background. Entrenchment invites constitutionalism to breathe in all of the available oxygen, and in so doing it chokes democracy into submission. For by divesting citizens of the fundamental civic right to popular choice and self-definition, entrenchment undermines the promise of citizenship and the possibilities of constitutionalism.

Entrenchment invites constitutionalism to breathe in all of the available oxygen, and in so doing it chokes democracy into submission.

The entrenchment simulator begins the critical work of reversing the tide of constitutionalism in constitutional states. The purpose of the entrenchment simulator is not necessarily to elevate democracy over constitutionalism. It is more modestly to right the balance that has undeniably shifted away from democracy since the advent of the written constitution. Indeed, if anything may be said about the preferences betrayed by the entrenchment simulator, it is that it cedes to constitutionalism much of the terrain once governed by democracy. But with good reason, given the inherent dangers of majoritarianism that modernity has demonstrated with sharp and disconcerting clarity.

There, nevertheless, remains much work left to do to strike the proper balance between constitutionalism and democracy. The road ahead is admittedly long. But the entrenchment simulator holds promise for resolving this enduring tension – a tension that continues to define the stakes in constitutional law and theory to this very day. Only by holding firm to foundational principles of statehood and citizenship – namely the freedom of popular choice, the right to self-definition, and the legitimacy of public authority – may we ultimately achieve a comfortable consensus on how rigidly constitutionalism may constrain democracy and what democracy must surrender to constitutionalism.

Notes

1 Editorial note: This is an abbreviated version of a longer article originally published in volume 42 (3/2010) of the Arizona State Law Journal, pages 663-715.

2 The tension sets liberal constitutionalism in opposition to procedural democracy. See, e.g., Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 701–02 (1995); James E. Fleming, The Missing Selves in Constitutional Self-Government, 71 Fordham L. Rev. 1789, 1793 (2003); James E. Fleming, Constructing the Substantive Constitution, 72 Tex. L. Rev. 211, 219 n.35 (1993); José Julián Álvarez González, Another Look at the Discretionary Constitution, 71 Rev. Jur. U.P.R. 1, 22 (2002); Samuel Issacharoff, Constitutionalizing Democracy in Fractured Societies, 82 Tex. L. Rev. 1861, 1861 (2004); Robert Justin Lipkin, Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution, 28 Cardozo L. Rev. 1055, 1061 (2006); Frank I. Michelman, Brennan and Democracy, 86 Cal. L. Rev. 399, 400 (1998); Irwin P. Stotzky, The Role of a Free Press and Freedom of Expression in Developing Democracies, 56 U. Miami L. Rev. 255, 256 n.2 (2002); Cass R. Sunstein, Constitutionalism and Secession, 58 U. Chi. L. Rev. 633, 636 (1991). But see Jed Rubenfeld, Freedom And Time: A Theory of Constitutional Self-Government 163 (2001) (advancing a theory of constitutionalism as democracy); Stephen Holmes, Precommitment and the Paradox of Democracy, in Constitutionalism and Democracy 195, 197 (Jon Elster & Rune Slagstad eds., 1988) (arguing that constitutionalism and democracy are mutually reinforcing).

3 See, e.g., Constituição Federal [C.F.] [Constitution] tit. IV, ch. 1, sec. IV, art. 52(x) (Braz.) (authorising the Senate to limit the scope of a judicial decision); Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11 § 33(1) (U.K.) (authorising Parliament or provincial legislatures to suspend the application of a judicial decision).

4 See, e.g., New Zealand Bill of Rights Act 1990, 1990 No. 109, Part 1 §§ 4(b), 6 (compelling the judiciary to interpret a parliamentary law in a manner that avoids invalidating it); United Kingdom Human Rights Act of 1998, § 4 (authorising the judiciary to issue declarations of incompatibility but not to invalidate legislation).

5 See David M. Beatty, The Ultimate Rule of Law (2004) (tracing the development of proportionality analysis).

6 See Donald S. Lutz, Toward a Theory of Constitutional Amendment, 88 Am. Pol. Sci. Rev. 355, 355–57 (1994).

7 Scholars have used various terms for these unamendable provisions. For instance, some have called them eternity clauses. See, e.g., Robert J. Delahunty, The Battle of Mars and Venus: Why do American and European Attitudes Toward International Law Differ?, 4 Loy. U. Chi. Int'l L. Rev. 11, 29–30 (2006); James J. Killean, Der große Lauschangriff: Germany Brings Home the War on Organized Crime, 23 Hastings Int'l & Comp. L. Rev. 173, 186–87 (2000); Donald P. Kommers, German Constitutionalism: A Prolegomenon, 40 Emory L.J. 837, 846 (1991); Manfred Zuleeg, What

Holds a Nation Together? Cohesion and Democracy in the United States of America and in the European Union, 45 Am. J. Comp. L. 505, 510 (1997); Peter L. Linseth, Book Review, 25 L. & Hist. Rev. 229, 229–30 (2007) (reviewing Michael Stolleis, A History of Public Law in Germany 1914–1945 (Thomas Dunlop trans. 2004)). Others have called them perpetuity clauses. See, e.g., Gunnar Beck, The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness, 25 Penn St. Int'l L. Rev. 615, 615 n.2 (2007); Colin B. Picker, International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, 41 Vand. J. Transnat'l L. 1083, 1093 n.46 (2008); Richard Stith, Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court, 11 Am. U. J. Int'l L. & Pol'y 47, 48 n.5 (1996). Still others call them nonamendable clauses. See, e.g., William E. Forbath, The Politics of Constitutional Design: Obduracy and Amendability – A Comment on Ferejohn and Sager, 81 Tex. L. Rev. 1965, 1982 n.65 (2003); Burt Neuborne, Constitutional Court Profile: The Supreme Court of India, 1 Int'l J. Const. L. 475, 495 n.84 (2003); Vijayashri Sripati, Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000), 14 Am. U. Int'l L. Rev. 413, 440 n.155 (1998).

8 Costituzione [Cost.] [Constitution] art. 139 (Italy).

9 GG art. 79(3) (F.R.G.).

10 Türkiye Cumhuriyeti Anayasasi [Constitution] part I, art. 4 (Turk.).

11 This term is not new. See, e.g., Alexander Hanebeck, Democracy Within Federalism: An Attempt to Reestablish Middle Ground, 37 San Diego L. Rev. 347, 363 (2000); John R. Vile, Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby, 27 Cumb. L. Rev. 445, 496 (1996); Scott J. Bowman, Comment, Wild Political Dreaming: Constitutional Reformation of the United States Senate, 72 Fordham L. Rev. 1017, 1028 (2004); see also David Fontana, Comment, A Case for the Twenty-First Century Constitutional Canon: Schneiderman v. United States, 35 Conn. L. Rev. 35, 44 n.41 (2002) (discussing the theory of entrenchment). There exists, however, some ambiguity in the literature between an entrenchment clause and an entrenched clause. In my view, the best reading of these terms suggests that the former is the mechanism that entrenches the latter. But not all scholars agree. Compare Charles A. Kelbley, Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality, 72 Fordham L. Rev. 1487, 1529 (2004) (referring to entrenched clauses as entrenchment clauses), and Sydney Kentridge, Civil Rights in Southern Africa: The Prospect for the Future, 47 Md. L. Rev. 271, 277–78 (1987) (same), and Yoram Rabin & Arnon Gutfeld, Marbury v. Madison and its Impact on Israeli Constitutional Law, 15 U. Miami Int'l & Comp. L. Rev. 303, 313 n.30, 313 n.34 (2007) (same), with Anthony D'Amato, Legal Uncertainty, 71 Cal. L. Rev. 1, 28 n.59 (1983) (correctly, yet implicitly, distinguishing between entrenched and entrenchment clauses); Ernst Willhelm, Review of Australian Public Law Developments, 30 Melb. U. L. Rev. 269, 270–71 (2004) (same). In these pages, I will refer to entrenched clauses as entrenchment clauses in the interest of consistency. For a helpful discussion of the distinction between entrenched clauses and entrenchment clauses, see Jason Mazzone, Unamendments, 90 Iowa L. Rev. 1747, 1818 (2005); Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1044 n.1 (1988); Frank I. Michelman, Book Review, Courts and Constitutions: Thirteen Easy Pieces, 93 Mich. L. Rev. 1297, 1303 & n.27 (1995) (reviewing Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., 1995)); see also Matthew S.R. Palmer, Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution, 54 Am. J. Comp. L. 587, 609–10 (2006) (correctly distinguishing between the two types of clauses but using the term entrenching instead of entrenchment).

12 See, e.g., Bruce Ackerman, We the People: Foundations 320-21 (1991); John Rawls, Political Liberalism 238-40 (2d ed. 2005); Cass R. Sunstein, American Advice and New Constitutions, 1 Chi. J. Int'l L. 173, 185 § 7 (2000); Stephen Townley, Perspectives on Nation-Building, 30 Yale J. Int'l L. 357, 365 (2005). But see Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 Harv. L. Rev. 1693, 1727 n.118 (2008) (suggesting, though not asserting, concerns with entrenchment).

13 Martin Loughlin, The Idea of Public Law 113 (2003).

14 On the notion of unwritten constitutional amendments, see Ackerman, supra note 11; Bruce Ackerman, We the People: Transformations (1998); 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 Responding to Imperfection: The Theory and Practice of Constitutional Amendment 13, 25-32 (Sanford Levinson ed., 1995); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 884 (1996).

15 See, e.g., Constitución de la República de Cuba [Constitution] ch. XV, art. 137 (Cuba); República Dominicana [Constitution] tit. XIII, art. 116 (Dom. Rep.); Const. of the Kingdom of Norway, pt. E, art. 112 (1814).

16 See, e.g., Constitution de la République Gabonaise [Constitution] tit. XII, art. 116 (Gabon); La Constitution de la République de Madagascar [Constitution] tit. VIII, art. 140 (Madag.); La Constitution de la République Tunisienne [Constitution] ch. X, art. 76 (Tunis.).

17 See Jack M. Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 Suffolk U. L. Rev. 27, 27-28 (2005); William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2064-65 (2002); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 351 (2001).

18 See Andrei Marmor, Interpretation and Legal Theory 142 (2d ed. 2005).

19 See, e.g., Michael J. Klarman, What's So Great About Constitutionalism?, 93 Nw. U. L. Rev. 145, 184 (1998) (suggesting that the rules to amend the United States Constitution are so arduous that the Constitution is, for all intents and purposes, entrenched); Wendy Turnoff Atrokhov, Note, The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in The Russian Federation Amidst the Chechen Crisis, 32 Cornell Int'l L.J. 367, 381 (1999) (referring to the difficulty of amending the Russian Constitution).

20 Although constitutional scholars do not discuss entrenchment in these terms, the notion of degrees of entrenchment is implicit in their work. See, e.g., Lourens W. H. Ackermann, The Legal Nature of the South African Constitutional Revolution, 2004 N.Z. L. Rev. 633, 645 (2004); Robert Kwame Ameh, Doing Justice After Con-

flict: The Case for Ghana's National Reconciliation Commission, 21 Can. J.L. & Soc'y 85, 101 (2006); Carlos E. Gonzalez, Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?, 80 Wash. U. L.Q. 127, 229 (2002); A. Leon Higginbotham, Jr. et al., De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice, 1990 U. Ill. L. Rev. 763, 783 n.77; Tayyab Mahmud, Jurisprudence of Successful Treason: Coup d'Etat & Common Law, 27 Cornell Int'l L.J. 49, 60 (1994); Ariel Porat & Omri Yadlin, Promoting Consensus in Society Through Deferred-Implementation Agreements, 56 U. Toronto L.J. 151, 176 (2006).

21 The number of stations in our sliding scale would of course vary from one jurisdiction to the next, depending on the structure of the legal order (namely whether it is presidential, parliamentary, semi-presidential or otherwise), on the rules of constitutional modification enshrined in the text of the constitution, and on the profile of its constitutional hierarchy (specifically where sovereignty rests within each of these models, for instance in the legislature, judiciary, executive, elsewhere or some form of shared sovereignty).

22 Walter Dellinger makes a good case that constitutional legitimacy flows from the consent of the governed. See Walter Dellinger, The Legitimacy of Constitutional Change: Rethinking the Amendment Process, 97 Harv. L. Rev. 386, 387 (1983).

23 Samuel Issacharoff, Constitutionalizing Democracy in Fractured Societies, 82 Tex. L. Rev. 1861, 1861–62 (2004).

24 See Gregory H. Fox & Georg Nolte, Intolerant Democracies, 36 Harv. Int'l L.J. 1, 14–15 (1995).

25 Id. at 16.

26 Larry Alexander, Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution), 50 Vand. L. Rev. 327, 329–31 (1997).

27 See John Hart Ely, Democracy and Distrust (1980).

28 Id. at 87.

29 Jiri Priban, Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post- Communist Constitution-Making, 38 Law & Soc'y Rev. 407, 415 (2004).

30 Daniel Markovits, Democratic Disobedience, 114 Yale L.J. 1897, 1906 (2005).

31 See, e.g., William L. Shirer, The Rise and Fall of the Third Reich: A History of Nazi Germany (1991). Indeed, the German Basic Law is the product of a distinctly substantive, rather than procedural, conception of democracy. See Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L.J. 2009, 2066–67 (1997); Judith Wise, Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party, 5 U. Chi. L. Sch. Roundtable 301, 302 (1998). For a concise chronicle of the motivations behind the substantive focus of the German Basic Law, see Brendon Troy Ishikawa, Toward a More Perfect Union: The Role of Amending Formulae in the United States, Canadian, and German Constitutional Experiences, 2 U.C. Davis J. Int'l L. & Pol'y 267, 281– 86 (1996).

32 See, e.g., P. Eric Louw, The Rise, Fall, and Legacy of Apartheid (2004). In South Africa, the oppressive regime was in the minority and the oppressed peoples formed the majority. But the minority created political institutions, most notably the Tricameral Parliament, designed with special procedures to permit the minority to govern as the de facto majority over the de jure majority. See Richard Spitz & Matthew Chaskalson, The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement 9 (2000).

33 See, e.g., Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2004).

34 Erwin Chemerinsky, The Supreme Court 1988 Term-Foreword: The Vanishing Constitution, 103 Harv. L. Rev. 43, 83–84 (1989).

35 Id. at 64–74.

36 Compare Eric A. Posner & Adrian Vermeule, Legislative Entrenchment: A Reappraisal, 111 Yale L.J. 1665 (2002) (arguing that an earlier legislature may bind a future legislature), with John O. McGinnis & Michael B. Rappaport, Symmetic Entrenchment: A Constitutional and Normative Theory, 89 Va. L. Rev. 385 (2003) (critiquing the theory of legislative entrenchment advanced by Posner and Vermeule), and John C. Roberts & Erwin Chemerinsky, Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule, 91 Cal. L. Rev. 1773 (2003) (same).

37 A.V. Dicey, Introduction to the Study of the Law of the Constitution 18–25 (Liberty Fund 8th ed. 1982); H.L.A. Hart, The Concept of Law 148–52 (2d ed. 1994).

38 See Sanford Levinson, The Political Implications of Amending Clauses, 13 Const. Comment. 107, 116–17 (1996).

39 Samuel Issacharoff, Fragile Democracies, 120 Harv. L. Rev. 1405, 1429 (2007).

40 Ernst Benda, The Protection of Human Dignity, 53 Smu L. Rev. 443, 445 (2000) (elaborating this point in the context of German constitutionalism).

41 Jon Elster, Constitutionalism in Eastern Europe: An Introduction, 58 U. Chi. L. Rev. 447, 471 (1991)

42 See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2024–25 (1996).

43 Ashutosh Bhagwat, Hard Cases and the (D)Evolution of Constitutional Doctrine, 30 Conn. L. Rev. 961, 1002 (1998).

44 Philip Bobbitt, Constitutional Fate: Theory of the Constitution 211 (1982).

45 See, e.g., Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1508 (2000).

46 See, e.g., Daniel Halberstam & Roderick M. Hills, Jr., State Autonomy in Germany and the United States, 574 Annals Am. Acad. Pol. & Soc. Sci. 173, 178 (2001); Gary Jeffrey Jacobsohn, The Permeability of Constitutional Borders, 82 Tex. L. Rev. 1763, 1775–76 (2004); Peter Krug, Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution, 14 Cardozo Arts & Ent. L.J. 297, 336–37 (1996); Roger B. Myerson, Economic Analysis of Constitutions: The Strategic Constitution, 67 U. Chi. L. Rev. 925, 928–29 (2000); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power, 78 Ind. L.J. 1, 3 (2003).

47 See, e.g., Kim Lane Scheppele, Parliamentary Supplements (Or Why Democracies Need More than Parliaments), 89 B.U. L. Rev. 795, 807 (2009); Mark Tushnet, The Hartman Hotz Lecture: Dialogic Judicial Review, 61 Ark. L. Rev. 205, 206 (2009).

48 See, e.g., John Agresto, The Supreme Court and Constitutional Democracy 165–67 (1984); Matthew C. Stephenson, "When the Devil Turns…": The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59, 85–86 (2003); George Thomas, The Tensions of Constitutional Democracy, 24

Const. Comment. 793, 797 (2007) (reviewing Walter F. Murphy, Constitutional Democracy: Creating and Maintaining a Just Political Order (2007)).

49 Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, tit. VIII, art. 135, 5 de Febrero de 1917 (Mex.).

50 Id. tit. IX, art. 136, 5 de Febrero de 1917 (Mex.).

51 See David O. Stewart, The Summer of 1787: The Men who Invented the Constitution (2008).

52 See Horace Mann Conaway, The First French Republic (1902).

53 See Heather Deegan, South Africa Reborn: Building a New Democracy (1999).

54 One particularly fascinating example that appears to privilege democracy at the expense of constitutionalism, yet actually does the reverse, is the El Salvadorian Constitution, which obliges citizens to mount an insurrection in the event that an entrenched rule is violated. See Constitución de la República de el Salvador [Constitution], tit. III, art. 88 (1983) (El. Salv.). While this would appear to celebrate the democratic mobilisation without which insurrection would be impossible, the implicit purpose of that mobilisation actually undermines the popular choice and self-definition that mobilisation presupposes – precisely because the constitutional text commands eternal obedience to an unchangeable constitutional rule.

55 See, e.g., Kris W. Kobach, The Referendum: Direct Democracy in Switzerland (1993); Peter Sager, Swiss Federalism: A Model for Russia?, 1995 St. Louis-Warsaw Transatlantic L.J. 163, 164 (1995).

56 Constitution Fédérale de la Confédération Suisse, April 18, 1999, SR 101, RO 101, art. 138–41 (Switz.).

57 Id. art. 142.

58 U.S. Const. art. V.

59 See Nicholas Aroney, Formation, Representation and Amendment in Federal Constitutions, 54 Am. J. Comp. L. 277, 286 (2006).

60 See discussion supra *Degrees of Permanence*.

61 See discussion supra *Degrees of Permanence.*

62 See discussion supra *Degrees of Permanence.*

63 See, e.g., The Constitution of the State of Kuwait pt. V, art. 174 (disallowing amendments within five years of the coming into force of the constitution); Permanent Constitution of the State of Qatar pt. V, art. 148 (disallowing amendments within ten years of the coming into force of the constitution); see also Constituição da República Portuguesa [Constitution] pt. IV, tit. II, art. 284(1) (Portuguese Republic) (requiring a wait of five years between each constitutional amendment, in the absence of the agreement of 80% of the national legislature); 1975 Syntagma [Syn] [Constitution] 4, § 2, art. 110(6) (Greece) (imposing a five-year wait between constitutional amendments); Undang-Undang Dasar Republik Demokratis Timor Leste [Constitution] pt. VI, tit. II, art. 154(2)–(4) (E. Timor) (forbidding amendments fewer than six years apart, unless 80% of the national legislature agrees otherwise).

64 I use four tiers only as an example to accentuate the possibilities for innumerable tiers of constitutional provisions. Some countries use fewer, or more, tiers to categorise their constitutional provisions, in the process signalling to citizens and to observers just what is more or less important than others. It is plainly a rank-ordering of constitutional principles and values. See, e.g., Commonwealth of Australia Constitution Act, 1900, ch. VIII, art. 128 (creating two tiers of constitutional provisions, each requiring adherence to different rules of amendment); Part V of the Constitution Act, 1982, Schedule B to the Canada Act 1982, ch. 11, §§ 41–47 (U.K.) (establishing roughly half a dozen tiers of constitutional provisions, each with its own corresponding amendment threshold); Constitution of the Republic of Ghana ch. 25, § 290–91 (establishing two tiers of constitutional provisions and two different rules for amending provisions in each tier); Constitution of the Republic of Rwanda tit. XI, art. 193 (creating two tiers of constitutional provisions, each with its own corresponding threshold for amendment); Constitution of the Republic of South Africa No. 108 of 1996 ch. 4, § 74 (distinguishing among nearly half a dozen tiers of constitutional provisions, each with its own amendment threshold); Constitution of the Kingdom of Swaziland Act ch. XVII, § 245– 47 (distinguishing among four tiers of constitutional provisions and four different rules for amending the provisions in each tier).

65 Some constitutional states currently use a comparable technique for amendments to the constitution. See, e.g., Konstitusiya Azerbaycan Respublikasinin [Constitution] § V, ch. XII, art. 156 (Azer.) (requiring two sustained majority votes, each separated by a period of six months); Constitution of Eritrea ch. VII, art. 58 (1997) (providing that a constitutional amendment must be approved by two separate votes one year apart). Haiti does something quite interesting with respect to the timing of the coming into force of amendments: an amendment that is passed by the national legislature does not become valid until after the installation of the next duly-elected president. Constitution de la République d'haïti tit. XIII, art. 284–2. This appears to be an effort to avert political self-dealing.

This contribution is in part derived from an article originally published in the Arizona State Law Journal (Ariz. St. L.J. 42:0663). *The original article contained an additional section located between the sections on Constitutional Entrenchment and The Entrenchment Simulator of this article addressing "Popular Retrenchment". That section is omitted here for reasons of space. The original convention for endnotes and citations has been preserved.*

Richard Albert studies constitutional amendment from comparative, doctrinal, historical and theoretical perspectives. He has been appointed Professor of Law at Boston College Law School and visiting professor at the University of Toronto, Externado University of Colombia, the Interdisciplinary Center (Herzliya) and Yale University. In January 2018 he will join the faculty at the University of Texas at Austin School of Law.

Contact details:
Richard Albert
Boston College Law School
885 Centre Street
Newton, MA 02459 · USA
E-Mail: richard.albert@bc.edu