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ARTICLE

Assessing Constitutional Amendment: Internal and External Standards of Legitimacy in Times of Autocratic Retrogression

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Abstract

Contemporary scholarship on constitutional amendment and change unfolds against a backdrop of significant, and often troubling, new developments. Amendments today are increasingly unmoored from their traditional purpose – to adapt constitutions to new realities and to reflect emerging consensus – and instead often emerge as part of projects that put core constitutional functions and commitments under stress. As a result, scholarly focus has shifted from questions of the object, modality, or frequency of constitutional amendment to questions of its legitimacy. This article calls for a broadening of our analytic vocabulary to foster a more expansive and critical discourse on the subject. It begins by showing how the growing complexity of constitutional amendment practices challenges traditional theoretical frameworks, such as the 'unconstitutional constitutional amendment' doctrine and other standards of *internal* legitimacy. In response, the article introduces the notion of '*external* legitimacy standards' and examines their various forms. Particular attention is given to an approach that ties the legitimacy of amendments to the provision of adequate justification. The article concludes by identifying two types of context in which recourse to the notion of external legitimacy standards may prove valuable, either independently or alongside standards of internal legitimacy.

Introduction

Contemporary scholarship on constitutional amendment and change unfolds against a backdrop of significant, and often troubling, new developments. Amendments today are increasingly unmoored from their traditional purpose – to adapt constitutions to new realities and to reflect emerging consensus – and instead often emerge as part of projects that put core constitutional functions and commitments under stress.

As a result, the central question we face today is no longer merely one of the object, modality, or frequency of constitutional amendment, but one of its legitimacy. In many countries, apex courts have developed doctrines of 'unconstitutional constitutional amendment' that provide important checks on amendment powers, often anchored in constitutional provisions that shield certain

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parts of the constitution from amendment, but sometimes even without such explicit support. As I will argue in this article, however, such doctrines are ultimately inadequate to address the full range of current challenges. They offer no remedy in contexts where courts refrain from reviewing the constitutionality of amendments or have already fallen under autocratic control. They also narrow the scope of public debate on amendments by framing legitimacy in purely doctrinal terms. And most significantly, they are powerless when a constitution has already been fundamentally compromised, and where its reconstruction requires much more than what these doctrines can offer.

In Mexico, for instance, constitutional amendments have occurred with relentless frequency over several decades, often passing through parliament with little recognition of the fact that it is the constitution, and not ordinary law, that is being altered. Unlike the apex courts of Brazil or India, which have responded to similar amendment frenzies by developing a robust practice of amendment review, the Supreme Court of Mexico has not articulated any theory of implicit limits to constitutional amendment and, at present, does not even review amendments for procedural compliance. Even if the Court were to adopt a more active stance, constructing a doctrine for substantive review would be fraught with difficulty, given the constitutional text's accumulated heterogeneity and incoherence after a century of piecemeal revisions. Like elsewhere, Mexico's situation therefore underscores the need for a broader public debate about the legitimacy of constitutional amendments, one that extends beyond judicial review and does not rely solely on 'internal' interpretive arguments confined within the existing constitutional text.

Against this background, this article calls for a broadening of our analytic vocabulary to foster a more expansive and critical discourse on constitutional amendment legitimacy. It begins by showing how the growing complexity of constitutional amendment practices challenges traditional theoretical frameworks, such as the 'unconstitutional constitutional amendment' doctrine and other standards of *internal* legitimacy. In response, the article introduces the notion of '*external* legitimacy standards' and examines their various forms. Particular attention is given to an approach that ties the legitimacy of amendments to the provision of adequate justification. The article concludes by identifying two types of context in which recourse to the notion of external legitimacy standards may prove valuable, either independently or alongside standards of internal legitimacy. Although this exercise is in many ways exploratory and preliminary, I hope it will highlight the need to strengthen our conceptual toolkit to better understand – and critically assess – the profound and immensely consequential legal and political developments at stake.

Constitutional scholarship in a much humbler constitutional world

Both academic analysis and public debate continue to be heavily permeated by inherited conceptions of how constitutions are created and changed. The classic and still influential view, largely inspired by Sieyès, presents a relatively straightforward picture:[1] constitution-making is the product of an extraordinary political moment, a rare eruption of the popular will. Constituent power is imagined as non-derived, unbound, and beyond the reach of legal constraints. It gives birth to the constitutional order, under which all subsequent powers are constituted and constrained by law. Within this framework, even the power to amend the constitution, though exercised in contexts more constitutionally significant than ordinary legislation, is nonetheless subordinate to the original 'sovereign' constituent power. It remains 'constituted' rather than 'constituent', and thus constrained by the boundaries established by the constitution.[2] The classic picture takes the shape of a descending hierarchy: the constituent power stands as giant and unassailable; below it, the power to amend

[1]Emmanuel Joseph Sieyès, *What Is the Third Estate*? (first published 1789, Pall Mall 1963).

[2]Sieyès actually conceived the *pouvoir constituant* as unbound by existing law but bound by natural law. See Victor Ferreres Comella, 'Emmanuel Sieyès, 'What is the Third Estate?' (1789)', in Sujit Choudhry, Michaela Hailbronner & Mattias Kumm (eds), *Global Canons in an Age of Contestation: Debating Foundational Texts of Constitutional Democracy and Human Rights* (Oxford University Press 2024) 63.

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the constitution occupies a middle ground – less foundational than the original constituent act yet more consequential than ordinary legislation; activated by high political energy and capable of substantial reform but still constrained by constitutional boundaries; and further down lie the mundane operations of the legislative, executive, and judicial branches.[3]

Yet contemporary realities shatter this picture. On one side, we see what scholars like Andrew Arato describe as 'post-revolutionary constitutional making', a process starkly different from the revolutionary paradigm of 18th-century United States and France (and later Latin America).[4] Unlike the classic model driven by sovereign, omnipotent assemblies, post-revolutionary constitution-making unfolds through elite negotiations, the involvement of international actors, engagement by social movements in dialogue with existing powers, multi-stage deliberations, and intervening judges.[5] Such processes are far removed from the omnipotent, sovereign acts of the old days, both in terms of political momentum and their legal framing, as many non-revolutionary constituent processes are now heavily patterned in legal terms.[6] On the other hand, we know of many constitutional amendment episodes that deviate from their characterisation as energetic and deliberative yet relatively orderly and legally constrained acts in classical theory. Some amendments are as intense and politically charged as full-fledged constituent processes; others disregard established amendment procedures entirely. In some instances, constitutional amendment procedures are almost impossible to distinguish from ordinary legislation; and in still others, amendments produce outcomes so drastic that they might more accurately be described as constitutional 'dismemberments' rather than amendments, or amount, in substance if not in name, to the creation of an entirely new constitution.[7]

The classic hierarchy – strong constituent power, limited amendment power – may sometimes be completely reversed; far more often, however, it is blurred and reshaped in diverse ways. Occasionally, amendments can surprisingly become a moment of extraordinary democratic engagement, as in Ireland's 2018 referendum to repeal the Eight Amendment, which had prohibited abortion.[8] More commonly, though, contemporary amendment processes are marked by a narrowing or distortion of democratic participation. In countries like Brazil or Mexico, constitutional amendment has been trivialised, reduced to routine political manoeuvring.[9] Meanwhile, in Hungary, Poland, Turkey, and Russia, dominant political actors exploit constitutional amendments with alarming ease to entrench power and reshape institutions.[10] The broader trend is clear: constitutional

[3]This image has been fortified by the popularity of Bruce Ackerman's distinction between constitutional politics and ordinary politics. Constitutional politics are those under way when the Constitution is amended – either through the procedure set forth in Article V of the *Constitution of the United States*, or through a particular concatenation of political events. See Bruce Ackerman, *We the People* (vol 1, 'Foundations') (Harvard University Press 1993).

[4]Andrew Arato, *Post Sovereign Constitutional Making: Learning and Legitimacy* (Oxford University Press 2016); Andrew Arato & Gábor Attila Tóth, 'The multifaceted sovereign: Domestic and international actors in constitutional regime change', in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (Routledge 2019).

[5]Arato & Tóth (n 4).

[6]Ferreres Comella (n 2) 66–68.

[7]Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (Oxford University Press 2019) 76–84.

[8]David Kenny, 'Abortion, the Irish Constitution and Constitutional Change' (2019) 5 Journal of Constitutional Research 257.

[9]Leonardo Augusto de Andrade Barbosa, 'Legislative Process and Constitutional Change in Brazil: On the Pathologies of the Procedures for Amending the 1988 Constitution', in Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019); Francisca Pou Giménez & Andrea Pozas-Loyo, 'The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition while Blocking Democratic Consolidation', in Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019); Francisca Pou Giménez, 'Constitutionalism, Old, New and Unbound: The Case of Mexico', in Colin Crawford & Daniel Bonilla Maldonado (eds), *Constitutionalism in the Americas* (Edward Elgar 2018).

[10]On Poland, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019). On Hungary, see Kriszta Kovács, 'Changing Constitutional Identity via Amendment', in Paul Blokker (ed), *Constitutional Acceleration within*

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amendments are increasingly converging with ordinary politics and legislation. As Paul Blokker aptly observes, in times of constitutional 'acceleration', the constitution increasingly serves as an object of daily political contention, not as a framework for it.[11] The distinction between constitution-making, amendment, and legislation grows ever smaller and less predictable.

A structural – rather than political – factor helps explain why contemporary constitutional amendment has become more pragmatic and less exalted than traditionally envisioned. Unlike their historical counterparts, modern constitutions frequently include procedural and substantive limits on amendments. This shift has given rise to a new player in constitutional change: the courts, which now engage in judicial review of amendments, whether the constitution explicitly imposes procedural or substantive limits on amendments or not. This judicial intervention is undoubtedly one reason why the amendment process increasingly resembles the back-and-forth between institutions that we commonly associate with everyday politics, contributing to the sense that we now inhabit a much more 'humble' constitutional landscape, where constitutions have shed their once sacred aura: instead of enduring as untouchable frameworks, they are now routinely debated, revised, expanded, and even struck down.

How has this shift reshaped the vocabulary and conceptual framework of constitutional scholarship? It would be inaccurate to claim that we still analyse contemporary developments using outdated theoretical tools. At the very least, *descriptive* analysis has made significant strides. The recent surge in comparative studies on constitutional change has introduced new terminology, more refined analytical categories, and deeper explanatory frameworks. For instance, scholars now differentiate between different modalities of constitution-making – conventional, legislative, participatory, and crowd-sourced.[12] We have also developed a detailed taxonomy of amendment processes, classifying them as formal or informal, single or multi-track, and mono- or multi-generational.[13] Beyond conceptual mapping, a burgeoning field of empirical research on constitutional change has emerged.[14] Equally notable is the rise of a vibrant debate on the unconstitutionality of constitutional amendments, which has attracted an extraordinary number of scholars. This debate is partly descriptive, documenting the practice in countries like Colombia, Brazil, India, or Hungary, and

the European Union and Beyond (Routledge 2019). On Turkey, see Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale Journal of International Law 1, 26–29. On Russia, see Anna Zotééva, 'From the Russian Constitution to Putin's Constitution: Legal and Political Implications of the 2020 Constitutional Reform' (Swedish Institute of International Affairs Brief No 5/2020, October 2020) <https://www.ui.se/globalassets/ui.se-eng/publications/ui-publications/2020/ui-brief-no.-5-2020.pdf> accessed 1 Feb 2025; Sergei Belov, 'The Content of the 2020 Constitutional Amendments in Russia' (IACL-AIDC Blog, 1 Apr 2021) <https://blog-iacl-aidc.org/new-blog-1/2021/04/01-constitutional-amendments-in-russia-content> accessed 1 Feb 2020.

[11]Paul Blokker, 'Introduction: Constitutional Challenges, Reform and Acceleration', in Paul Blokker (ed), *Constitutional Acceleration within the European Union and Beyond* (Routledge 2019).

[12]Silvia Suteu, 'Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland' (2015) 38 Boston College International and Comparative Law Review 251; Silvia Suteu, 'Women and Participatory Decision-Making', in Helen Irving (ed), *Constitutions and Gender* (Edward Elgar 2017); Xenophon Contiades & Alkmene Fotiadou (eds), *Participatory Constitutional Change: The People as Amenders of the Constitution* (Routledge 2017).

[13]Rosalind Dixon, 'Constitutional Amendment Rules: A Comparative Perspective', in Tom Ginsburg (ed), *Comparative Constitutional Law* (Edward Elgar 2011); Thomas Pereira, 'Constituting the Amendment Power: A Framework for Comparative Amendment Law', in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017); Contiades & Fotiadou, *Participatory Constitutional Change* (n 12); Albert, *Constitutional Amendments* (n 7).

[14]Zachary Elkins, Tom Ginsburg & James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009); Tom Ginsburg & James Melton, 'Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty' (2015) 13 International Journal of Constitutional Law 686; George Tsebelis & Dominic Nardi, 'A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries' (2016) 46 British Journal of Political Science 457; David S Law & Ryan Whalen, '*Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison*', in Xenophon Contiades & Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020).

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partly normative, evaluating when the amendment power is used legitimately or illegitimately. In doing so, it grapples with increasingly urgent questions about how to respond to troubling trends in constitutional manipulation and abuse.[15]

At the *normative* level, however, the picture remains far less clear. Our traditional vocabulary and frameworks have evolved in some respects while staying constant in others; several things are happening at the same time. On one front, the classic distinction between constituent and amendment power persists, but primarily to reinforce the notion that constituent power cannot be measured against standards of legitimacy, as it continues to be viewed as an expression of sovereign, legally unconstrained authority – though a growing body of scholarship now cautiously identifies, and in limited cases defends, the invalidation of original constitutional provisions.[16] On the other front, regarding amendment power, two divergent trends have emerged: (1) a *deferential* approach, which largely accepts amendments as legitimate exercises of political authority; and (2) a *scrutinising* approach, which subjects amendments to judicial review and entertains the possibility of declaring them unconstitutional.

The first is exemplified by what Lael Weis terms 'popular-sovereignty-based theories of constitutional amendment', which view amendments – like the original constitution – as a product of the popular will.[17] Scholars diverge, however, on how the popular will manifests in this framework. 'Popular constitutionalists', in the words of Weis, argue that the popular will emerges *outside* the amendment procedures; 'formalists', by contrast, locate the emergence of the popular will *within* the legally prescribed amendment process.[18] Joel Colón-Ríos, who exemplifies the formalist approach, grounds the constitution's normative authority in whether its formal amendment procedures preserve the constituent power.[19] Conversely, Bruce Ackerman's reconstruction of US constitutional practice aligns with the popular constitutionalist view.[20]

In either manifestation, popular-sovereignty-based theories offer little basis for constraining amendment power. Once we recognise an authentic expression of 'We the People' making an amendment, the question of legitimacy has answered itself once the proper subject has spoken – by

[15]See, eg, Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008); Gábor Halmai, 'Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective' (2015) 50 Wake Forest Law Review 951; Gary Jeffrey Jacobsohn, 'Constitutional Identity' (2010) 68 The Review of Politics 361; Yaniv Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61 The American Journal of Comparative Law 657; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017); Richard Albert & Bertil Emrah Oder, *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018); Rosalind Dixon & David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13 International Journal of Constitutional Law 606; Monika Polzin, 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law' (2016) 14 International Journal of Constitutional 411; Zoran Oklopcic, 'Constitutional Theory and Cognitive Estrangement: Beyond Revolutions, Amendments and Constitutional Moments', in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017); among many others.

[16]William Partlett, 'Courts and Constitution-Making' (2015) 50 Wake Forest Law Review 921; Vicki C Jackson, '"Constituent Power"? Or Degrees of Legitimacy?' (2018) 12 Vienna Journal on International Constitutional Law 319; Richard Albert, 'Four Constitutions and their Democratic Foundations' (2017) 50 Cornell Journal of International Law 169; David Landau, Rosalind Dixon & Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8 Global Constitutionalism 40.

[17]Lael Weis, 'Constituting "the People": The Paradoxical Place of the Formal Amendment Procedure in Australian Constitutionalism', in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 253.

[18]ibid 253–254.

[19]Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge 2012).

[20]Ackerman (n 3).

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definition, in a democracy amendments derive their validity from their sovereign source, the people. When the amending subject is inherently legitimate by definition, the crucial theoretical task would not be to distinguish between legitimate and illegitimate amendments, but rather to develop criteria for identifying authentic expressions of 'We the People'.

Despite their theoretical appeal, I will set aside popular-sovereignty-based theories in this analysis for three reasons. First, they build on assumptions that have grown increasingly implausible in our contemporary 'humble' constitutional landscape that is characterised by pragmatism rather than romanticised popular will. Second, these theories become particularly dangerous in an era of populist governance, where authoritarian leaders routinely claim exclusive embodiment of 'the People's' voice. Third, and most importantly, such theories fail on both descriptive and normative grounds. They strain credulity when applied to today's accelerated, often cynical amendment processes, and by offering virtually no framework for evaluating amendment limits, they provide no meaningful standard to assess the legal and constitutional battles that increasingly threaten democracy's foundational conditions.

A defender of popular-sovereignty-based theories might counter that today's often cynical amendment processes do not genuinely reflect the People's will. But this merely shifts the debate to a circular question: What truly counts as an authentic expression of popular sovereignty? This theoretical pivot proves doubly problematic. For scholars, it obscures rather than illuminates the crucial issues – namely, how to evaluate the legitimacy, correctness, and validity of specific constitutional changes. For real-world politics, where academic concepts are increasingly weaponised to validate political moves,[21] it provides perfect cover for authoritarian populists. Leaders like Donald Trump, Viktor Orbán, Boris Johnson, López Obrador, and Narendra Modi routinely position themselves as the true voice of the people – an especially powerful claim when attempting to alter constitutions drafted decades ago by bodies that fail to meet modern standards of democratic inclusivity. This perceived historical illegitimacy becomes a convenient pretext for claiming a more 'authentic' representation of the will of the people, thereby justifying even the most undemocratic constitutional changes under the mantle of popular legitimacy. In other words, when every amendment can potentially claim popular legitimacy simply by asserting it, we lose all meaningful criteria to challenge constitutional changes.

The second trend in normative amendment theory – the *scrutinising* approach – takes the opposite view. It contends that legitimate amendments must strictly adhere to constitutional limitations. This approach maintains that amendments, both procedurally and substantively, cannot cause the amended constitution to deviate significantly from its original form. This concept has gained remarkable traction in theory and practice, achieving a dominance comparable to the once-prevailing notion that 'an unconstitutional constitution' represented a logical contradiction.[22] Its ascendance has coincided with the global expansion of judicial review of constitutional amendments and the widespread adoption of the doctrine of unconstitutional constitutional amendments – even in jurisdictions whose constitutions lack explicit amendment restrictions, as implicit limits are often found to exist. As Richard Albert aptly describes it, this has become 'the conventional theory of constitutional change'.[23]

This second framework places the legitimacy of constitutional amendments at the heart of the discourse, intrinsically connected to analyses of constitutionality and unconstitutionality. I will now examine the merits and limitations of anchoring legitimacy assessments around this concept – operating within what I term a standard of *internal* amendment legitimacy.

[21]Kim Lane Scheppele, 'Autocracy under Cover of the Transnational Legal Order', in Gregory Shaffer, Tom Ginsburg & Terrence Halliday (eds), *Constitution-Making and Transnational Legal Order* (Cambridge University Press 2019).

[22]Gary Jeffrey Jacobsohn, 'An unconstitutional constitution? A comparative perspective' (2006) 4 International Journal of Constitutional Law 460.

[23]Albert, *Constitutional Amendments* (n 7) 69.

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Why the unconstitutional constitutional amendment doctrine is not enough

The increasing recognition of procedural and substantive limitations on constitutional amendments in positive law has given rise to the unconstitutional constitutional amendment (UCA) doctrine, which contributes to blur the line between legality and legitimacy.[24]

The UCA doctrine, advanced in varying forms by courts and scholars, posits that amendments may be unconstitutional on two grounds: procedural violations (failure to follow the constitution's prescribed amendment process) and substantive violations (contravening what the constitution designates as unamendable). However, courts and scholars have articulated divergent, often sophisticated interpretations of what the constitution designates as unamendable. The clearest manifestation of this doctrine occurs when constitutions explicitly declare certain principles, concepts, or institutions to be unamendable, such as the 'eternity clauses' found in the constitutions of Germany, Portugal, Brazil, Turkey, and Greece. Beyond such express limitations, courts have also implicitly inferred an unamendable constitutional core from the broader structure or identity of a constitution. This includes prohibitions against altering the basic structure of the constitution (India), compromising the constitutional identity (Germany), and attempts at wholesale 'substitution' of a constitution with a new constitutional order (Colombia).

Indeed, the Colombian Constitutional Court has famously held that the power to amend the constitution is limited to *amending* the constitution, not *substituting* it with an entirely different one. The Court has framed this distinction as a matter of *procedural*, not substantive, validity – assuming, in Kelsenian parlance, that a legal rule is valid only if enacted by an authority with legally established jurisdiction, following the legally prescribed procedure. At the same time, the Court has articulated specific criteria for distinguishing amendment from substitution, which inevitably require a degree of *substantive* analysis. Scholars, too, have often invoked the concept of unconstitutional constitutional amendments when addressing what David Landau terms 'abusive constitutionalism', the strategic use of formally impeccable constitutional amendments to erode commitments, rules, or institutions that are critical for the preservation of constitutional democracy.[25] In this way, the doctrine has become a critical analytical tool for understanding and resisting the growing trend of undermining democracy and constitutionalism from within – using their own tools – and for examining the judicial strategies developed to safeguard constitutionalism in the face of such challenges.

As Oran Doyle aptly observes, the doctrine ultimately holds that amendments that are morally and conceptually unconstitutional must be treated as invalid no less than those that are formally unconstitutional.[26] If procedural review of amendments, which effectively distinguishes legitimate amending authorities from usurpers, is widely accepted and persuasive, why should extending this logic to the substantive realm pose any difficulty? After all, substantive review is necessary to draw a line between what falls within the scope of the amendment power and what belongs exclusively to the constituent power, and many courts around the world have done just that in recent years. Nor can such substantive review be dismissed as improper judicial moralising. Constitutional frameworks have, for decades, incorporated moral considerations into their own structural boundaries, not least because the very logic of fundamental rights jurisprudence demands

[24]For a comprehensive analysis of these doctrines, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

[25]David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189. These ideas have been developed further in David Landau & Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859; Dixon & Landau, 'Transnational constitutionalism' (n 15); David Landau & Rosalind Dixon, 'Tiered Constitutional Design' (2018) 86 George Washington Law Review 438; Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

[26]Oran Doyle, 'Constraints on Constitutional Amendment Powers', in Richard Albert, Xenophon Contiades & Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017).

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it. In other words, substantive review is not based on subjective ethics, but on foundational principles that are presupposed by the constitutional order itself.

Yet in an era of populist constitutionalism and authoritarian legalism, the UCA doctrine – despite its moral and conceptual advances – faces new complexities and limitations. While the debate over its strengths and weaknesses is hardly new,[27] certain challenges have become especially pressing in light of the populist capture of constitutions and courts. I argue that the central challenge today is not that the doctrine has become too powerful, but that it is not powerful enough. Three key limitations emerge: first, the authoritarian corruption of constitutional texts; second, the co-optation of the judiciary by authoritarian regimes; and third, broader shifts in law's relationship with morality.

The first limitation stems from the doctrine's reliance on the distinction between the formal and the 'material' (or 'real') constitution. This distinction typically draws on a variant of Carl Schmitt's conceptual framework, which defines the constitution as a set of fundamental political decisions – what Schmitt termed the 'positive' concept of the constitution.[28] These fundamental decisions are often described in terms such as the constitution's 'identity', 'basic structure', or 'essence' – that which must remain intact to avoid substitution by an entirely different constitutional order. Unfortunately, as Schmitt's own historical influence illustrates, this framework is dangerously pliable: it can be mobilised just as easily to dismantle a constitution as to defend it. It is neutral regarding what constitutes 'fundamental decisions' or constitutional identity. Consider Hungary as an example. Had the Hungarian Constitutional Court applied Schmitt's reasoning to the 1989 amendments to the constitution, it could have invalidated them for destroying the Soviet-inspired 1946 Constitution. By the same token, the doctrine could now be invoked to argue that the 2011 amendments illegitimately altered Hungary's constitutional identity.[29]

The content-neutrality of the Schmittian-inflected version of the UCA doctrine has functioned reasonably well in recent years, particularly against the backdrop of constitutions with a broadly liberal-democratic character. The pressing question now is what happens when courts invoke this doctrine to uphold and enforce constitutions that have already been reshaped by illiberal, inegalitarian, or antidemocratic amendments – changes that, for various reasons, have not been invalidated or purged by judicial review. While courts and scholars have traditionally favoured democracy-preserving interpretations of constitutional identity, in times of democratic regression, this same concept may lead toward entirely different outcomes. Yaniv Roznai and Tamar Hostovsky Brandes have observed that the UCA doctrine proves ineffective against the gradual erosion characteristic of authoritarian legalism and the creeping rise of illiberal constitutionalism – unless it is applied holistically through what they term 'aggregated review'. Such an approach requires shifting focus away from isolated constitutional amendments and toward the cumulative impact of changes over time.[30] They also argue that, to effectively combat contemporary abusive constitutionalism, the doctrine may need to be extended beyond amendments to encompass 'constitutional replacements'.[31] Yet even the aggregated approach may fail in cases where constitutional transformation is, for the longest time, too incremental or subtle to meet the threshold of an illiberal 'replacement'.

[27]See Landau, Dixon & Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution?' (n 16) for an impeccable summary.

[28]Carl Schmitt, *Constitutional Theory* (first published 1928, Duke University Press 2008).

[29]Kovács (n 10).

[30]Yaniv Roznai & Tamar Hostovsky Brandes, 'Democratic Erosion, Populist Constitutionalism and the Unconstitutional Constitutional Amendment Doctrine' (2020) 14 Law and Ethics of Human Rights 19, 40–43. For an earlier presentation of the argument in a more general form, see Dixon & Landau, 'Transnational constitutionalism' (n 15) 613–614, which emphasises that the differences between democratic and authoritarian regimes are often best understood as a spectrum. It also highlights the difficulties of ascertaining whether a particular action or move is dangerous, underscoring the need to assess *ex post* its effect on the preservation of the constitutional system.

[31]Roznai & Hostovsky Brandes, 'Democratic Erosion' (n 30) 44–46.

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This reveals a fundamental limitation of the UCA doctrine: once constitutional damage has become sufficiently entrenched to warrant the doctrine's application, courts may paradoxically find themselves bound to uphold the authority of a constitution that is already profoundly compromised.

The UCA doctrine's second major limitation is its vulnerability to judicial manipulation, with few safeguards against such abuse. Critics have highlighted this weakness as creating a 'super counter-majoritarian difficulty': by empowering courts to block constitutional amendments, it might also foreclose the political branches' ability to respond to judicial interpretations through amendment.[32] More generally, the challenge lies in the doctrine's reliance on abstract, high-stakes interpretations. Courts applying the UCA doctrine must grapple with inherently indeterminate concepts: democracy, federalism, the rule of law, and constitutional identity. Though interpretation of indeterminate principles is not unique to the UCA context and also arises in ordinary judicial review, the interpretive leeway is considerably greater for principles of such a foundational nature. Indeed, some scholars have suggested that international or transnational legal frameworks could serve as 'anchors' to guide and constrain the interpretation, thereby reducing the risk that judges simply substitute their own moral or political convictions for constitutional imperatives.[33] Yet even when drawing on international and transnational frameworks, the potential for judicial 'reconstruction' remains vast – particularly in jurisdictions with older, fragmented, or heavily amended constitutions, which may be burdened by internal contradictions. In such cases, judges face competing historical interpretations and possibly contradictory constitutional provisions that have accumulated over time, which creates opportunities for selective citation of historical precedents that support a judge's preferred outcome, rendering the application of the UCA doctrine almost boundless.

The pressing question, then, is what should be done once neo-authoritarian populists have gained access to state institutions and begun to co-opt, weaken, or pack the judiciary. In practice, the UCA doctrine has often been effective in curbing such leaders' efforts to dismantle constitutional constraints on public power. Yet there is reason to fear that, as courts are increasingly stacked with loyalists – judges more committed to enabling authoritarianism than defending constitutional principles – the doctrine that once protected democracy becomes a tool to legitimise its dismantling.[34] Several Latin American countries already illustrate how executive-aligned judges can invoke the UCA doctrine in ways that ultimately undermine foundational constitutional principles.[35] And the strategic appointments of ideologically aligned judges by leaders like Recep Tayyip Erdoğan, Donald Trump, Viktor Orbán, and Evo Morales suggest a troubling trajectory for the doctrine's future efficacy.

The third and final limitation of the UCA doctrine lies in its tendency – across its various formulations, whether based on constitutional identity, basic structure, or the 'material' constitution – to avoid direct engagement with moral reasoning. While it does engage with moral considerations (at least when moving beyond purely procedural constraints), the doctrine's effectiveness relies on filtering moral arguments through a severely restricted conceptual framework: terms like 'constitutional amendment', 'constitutional replacement', and 'constitutional identity', among a few others, become the sole vehicles for deeper normative debate. To be sure, all moral reasoning

[32]Gary Jeffrey Jacobsohn, 'The Permeability of Constitutional Borders' (2004) 82 Texas Law Review 1763.

[33]Dixon & Landau, 'Transnational constitutionalism' (n 15).

[34]Roznai & Hostovsky Brandes, 'Democratic Erosion' (n 30) 31–33.

[35]Landau, 'Abusive Constitutionalism' (n 25); Elena Martínez-Barahona, 'Constitutional Courts and Constitutional Change: Analyzing the Cases of Presidential Re-Election in Latin America', in Detlef Nolte & Almut Schilling-Vacaflor (eds), *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012); Juan Muñoz-Portillo & Ilka Treminio, 'The Politics of Presidential Term Limits in Central America: Costa Rica, El Salvador, Guatemala, and Honduras', in Alexander Baturo & Robert Elgie (eds), *The Politics of Presidential Term Limits* (Oxford University Press 2019); Alan E Vargas Lima, 'La reelección presidencial en la jurisprudencia del Tribunal Constitucional Plurinacional de Bolivia: La ilegítima mutación de la constitución a través de una ley de aplicación normativa [Presidential Reelection in the Jurisprudence of the Plurinational Constitutional Court of Bolivia: The Illegitimate Mutation of the Constitution Through a Statute of Normative Application]' (2015) 19 Iuris Tantum Revista Boliviana de Derecho 446, 457–459.

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in constitutional law is mediated, insofar as it must ultimately translate into public, rather than private, justifications.[36] However, the UCA doctrine imposes a distinctly more restrictive, secondary limitation on normative considerations. It requires that all potentially relevant moral arguments be painstakingly compressed and reframed as either an assault on the constitution's essential core or as a moral or conceptual subversion of the very idea of the constitution.[37]

In stable democratic periods, grounding political discourse within constitutional parameters effectively promotes public reasoning and channels diverse perspectives into a collective dialogue about constitutional meaning. But in periods of neo-authoritarian resurgence, this approach risks trapping us in ever-narrowing boundaries of permissible contestation. As constitutions themselves become political battlegrounds rather than enduring normative frameworks for political action, relying on constitutional fundamentals as the foundation for assessing the legitimacy of our collective arrangements may prove both ineffective and self-defeating. The liberal-democratic constitutions of the post-war period – many of them deliberately receptive to international and transnational developments – have historically provided robust platforms for comprehensive legitimacy assessments. While this continues to be the case in many jurisdictions, an alarming number of constitutional systems now fail to offer such a capacious normative framework.

In short, the UCA doctrine faces a paradoxical fate: it is becoming increasingly overcharged and increasingly ineffectual. Much is asked of it. While it remains a compelling idea in theory and has, at times, delivered promising results in practice, its success is highly contingent on the character of the court that applies it and the nature of the constitution it seeks to protect. When weaponised by captured courts or applied to flawed constitutional structures, the doctrine, albeit designed to safeguard democracy, can instead accelerate its erosion. It also carries a subtler cost: it risks obscuring or neutralising the difficult but essential debates about constitutional legitimacy that a political community must be willing to face head-on.

Greater clarity about the legitimacy of constitutional amendments is therefore necessary beyond a technical refinement of the UCA doctrine: we need a richer vocabulary of legitimacy to evaluate constitutional amendments. The UCA doctrine's great strength lies in its invocation of arguments of *internal* legitimacy – arguments that draw authority from within the legal system itself, speaking in the name of the constitution. This gives it a rhetorical and institutional power that few arguments of *external* legitimacy can match. To say that a measure 'destroys the constitution' or 'is not a valid amendment' resonates far more forcefully than any abstract appeal to democratic values or justice. Yet this raises a crucial question: How can arguments that do not originate within the constitution – or even within the legal system – claim a legitimate place in debates about the legitimacy of constitutional amendments? In what ways, in which fora, and under what conditions can external considerations become relevant? And, perhaps most importantly, what exactly are considerations that lie outside the law but still bear on the legitimacy of constitutional amendment?

Four dimensions of self-standing external legitimacy

Self-standing, external arguments about amendment legitimacy are arguments that do not depend on principles explicitly or implicitly derived from the constitution itself or from other para-constitutional sources of higher law, such as international human rights treaties. These latter sources

[36]Silje Langvatn, Mattias Kumm & Wojciech Sadurski (eds), *Public Reason and Courts* (Cambridge University Press 2020); Owen Fiss, *The Law as It Could Be* (New York University Press 2003).

[37]The Swiss Constitution contains a clause that could be read as an exception to the moral limitation, in that it declares that the Constitution may be amended in whole or in part at any time (Article 192), but that any amendment must respect the 'mandatory principles of international law' (Articles 193 and 194), a phrase that is open to flexible interpretation. See Federal Constitution of the Swiss Federation (18 Apr 1999) (unofficial English translation as of 1 Jan 2020) <https://fedlex.data.admin.ch/filestore/fedlex.data.admin.ch/eli/cc/1999/404/20210101/en/pdf-a/fedlex-data-admin-ch-eli-cc-1999-404-20210101-en-pdf-a.pdf> accessed 1 Feb 2025.

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represent what I refer to as standards of *internal* legitimacy – they derive their authority from within the framework of a particular legal order, no matter how broadly that order is defined. *External* standards of legitimacy, by contrast, rely on normative or evaluative criteria that must, of course, be publicly justifiable. These standards are fundamentally moral rather than legal, meaning they do not derive their force from positive law. However, they are not based on particular morality codes, but appeal to self-standing standards of correction that are moral in nature.

Of course, identifying these external criteria will not be without controversy, and neither will be their operationalisation. This is evident from the rich academic debate that has emerged in recent years around a different application of the internal/external distinction – one not focused on legitimacy but on performance (ie, standards for evaluating constitutional success and failure).[38] Tom Ginsburg and Aziz Huq, for instance, distinguish between internal and external criteria for assessing constitutional performance. They define internal criteria as those rooted in the specific context of a given constitution or the political community it governs, whereas external criteria are conceived as generalisable or universal across some or even all countries.[39] They specifically focus on four external dimensions: (1) the extent to which constitutions function as sources of legitimacy; (2) their effectiveness in channelling political conflict; (3) their capacity to reduce principal-agent problems in representative democracy; and (4) their ability to create structures for the provision of public goods and to solve collective action problems.[40] Building on and engaging with Ginsburg and Huq's framework, Rosalind Dixon and Theunis Roux – together with a team of contributors – identify four broad thematic areas for evaluating constitutional performance: (1) democratic constitutionalism and constitution-making; (2) rule of law, corruption, and accountability; (3) gender justice; and (4) race, poverty, and social and economic transformation.[41]

As the overlaps and divergences between these two approaches suggest, what counts as 'external' to the law can take many forms. the context of assessing constitutional performance, Dixon and Roux underscore the inherent interdependence between internal and external criteria. 'Internal criteria for assessment', they note, 'will themselves be notoriously difficult to identify in any meaningful or objective way',[42] while 'the way in which we construct our understanding of "external" constitutional purposes is often deeply informed by the scope and practices – or internal goals – of actual constitutional systems'.[43] Ultimately, Dixon and Roux argue that the aims we ascribe to constitutions are largely the product of a complex dialogue between national, international, and transnational legal spheres.[44]

The idea of a 'transnational anchoring' is indeed a notion proposed by Rosalind Dixon and David Landau in the debate on constitutional amendment, offering a framework to prevent the judiciary from misusing its powers when assessing the constitutionality of constitutional amendments. According to them, when courts must safeguard a constitutional democracy's core against abusive amendment practices, reference to a body of shared principles and practices emerging from contemporary comparative constitutional practice can serve as a valuable guide.[45]

[38]I thank an anonymous reviewer for suggesting an exploration of the relationship between the two academic debates.

[39]Tom Ginsburg & Aziz Huq, 'What Can Constitutions Do? The Afghan Case' (2014) 24 Journal of Democracy 116–130; Tom Ginsburg & Aziz Z Huq, 'Assessing constitutional performance', in Tom Ginsburg & Aziz Huq (eds), *Assessing Constitutional Performance* (Cambridge University Press 2016) 5.

[40]Ginsburg & Huq, 'Assessing constitutional performance' (n 39) 6–10.

[41]See Rosalind Dixon & Theunis Roux, 'Introduction', in Rosalind Dixon & Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018) 9–10.

[42]ibid 10.

[43]ibid 11.

[44]ibid.

[45]Dixon & Landau, 'Transnational constitutionalism' (n 15), 623, 627–636. See also Landau & Dixon, 'Constraining Constitutional Change' (n 25) 887–888.

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Useful and reasonable as these proposals are, we must situate our discussion within broader conceptual boundaries. First, the focus here is not on performance (success or failure) but on legitimacy – a more demanding evaluative standard than mere effectiveness or functionality. We must preserve the space to ponder whether a pattern of constitutional amendment (or a constitutional system) is legitimate or illegitimate, even if we cannot classify it as 'failure' in terms of its performance. Normative legitimacy is more than just success. Second, we should not confine the criteria for amendment legitimacy solely to transnational anchoring. As I have argued, transnational practice is likely to lose its persuasive force in the coming years, especially after the erosion caused by the recent wave of neo-authoritarianism. Rather than retroactively deriving democratic principles from a compromised transnational consensus, we may need to collectively reimagine and reconstruct the core tenets of constitutional democracy.

With these nuances and caveats in mind, and fully acknowledging that any external standard of judgment invites reasonable disagreement, I propose four dimensions that are, in my view, immediately relevant to guide the discourse on external legitimacy: (1) legitimacy of origin, (2) legitimacy of procedure, (3) legitimacy of content, and (4) legitimacy of justification. In other words: an amendment may be illegitimate due to (1) normative deficits of the authority or agent that brings it to life, (2) normative deficits in its process of adoption, (3) normative deficits in the substance of its provisions, or (4) because the necessity and advisability of the amendment have not been adequately justified.

The legitimacy of origin is the first dimension of external legitimacy that we might naturally invoke to assess the varying degrees of normative legitimacy in amendment practice. It concerns the agents involved and the composition of the body or bodies responsible for enacting the amendment, as well as the circumstances surrounding its adoption. As in assessing the legitimacy of constitutional assemblies, the inclusiveness of the amending body – whether in terms of gender, race, class, ethnicity, or regional representation – matters; so does whether the members are selected through rigorous electoral procedures or through flawed, possibly fraudulent procedures; and it also matters whether an amendment arises from a sincere desire to adapt the constitution to new social realities or to correct its problematic aspects, or whether it is driven by manipulative or abusive efforts to maintain power or undermine the public interest. When the amendment process involves multiple agents, issues of legitimacy of origin will inevitably arise in relation to each of them, with their effects complementing or reinforcing one another. Most of these considerations would not be relevant from an *internal* legitimacy perspective (which focuses only on the agents prescribed by the amendment formula) and would not be grounds for declaring the amendment illegal, unconstitutional, or void. However, they are central to the broader debate on when amendments lack or possess moral legitimacy. This debate is concerned with the institutional, political, and social factors that influence the consideration, adoption, or rejection of amendments.

The second dimension of external legitimacy, procedural legitimacy, concerns, as the term suggests, the decision-making process that brings an amendment to life. Elements such as the breadth and diversity of participants, voting rules, voting rounds, cooling-off periods, prior consultations, and the use of referendums all shape the quality and character of the collective deliberation. The full spectrum of criteria typically employed to assess decision-making procedures in constitutional democracies can also be applied to evaluate the legitimacy of amendment processes. In the domain of amendment scholarship, some more specific proposals have been advanced. Yaniv Roznai, for instance, has suggested that that the closer an amendment process resembles a constituent process, the more reason there is to accord it deference[46] – noting that the constituent process meets a certain threshold of deliberative and inclusive features that amendment processes should also include. However, this may not be said of non-revolutionary constitution-making, which is often marked by elite negotiation, external imposition, and narrow,

[46]Roznai, *Unconstitutional Constitutional Amendments* (n 24) 219–224.

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non-deliberative debate. The idea of deliberative and inclusive constituent processes may also not hold true for constituent processes that are *too* revolutionary: while they may be legitimate under the doctrine of sovereign constituent power, they offer little guidance for evaluating procedural quality in ordinary, non-revolutionary amendment contexts. When viewed through the far more expansive lens of external legitimacy, the challenge is not to find a single procedural model to emulate, but to articulate reasonable standards of procedural evaluation drawn from a wide and diverse range of possible institutional designs and historical experiences.

The third dimension of external legitimacy, legitimacy of content, asks whether an amendment is substantively legitimate. An amendment may be deemed illegitimate if its content conflicts with widely held ideas about how a political community should be justly organised, such as by eradicating judicial independence, criminalising political dissent, entrenching systemic inequalities, and establishing state religion. It is crucial to create space for evaluating the legitimacy of constitutional amendments from this substantive perspective – not solely through the language of rights, but by encouraging a richer and more pluralistic culture of constitutional critique. This includes engaging with diverse normative frameworks rooted in constitutionalism, democratic principles, and social transformation. An important methodological choice arises here: At what level should content-based legitimacy be assessed? One option is to adopt an 'independent' theory, which evaluates the legitimacy of each amendment in isolation. Another is to apply a 'satellite' theory, where amendments are judged based on their cumulative impact on the constitution's overall legitimacy. The latter approach reflects what Roznai and Hostovsky term 'aggregative review' – used particularly as a strategy that adapts the UCA doctrine from an internal legitimacy perspective to more effectively counter populist threats.[47]

Seen through the lens of content legitimacy, an individual amendment may be considered legitimate in one context but illegitimate in another. Take, for example, mandatory retirement at a certain age: in some cases, this can be entirely unproblematic – or even beneficial – as it encourages renewal of ideas within institutions and increases equality of opportunity for groups previously under-represented or excluded. Yet, in other contexts, such measures can be deeply problematic. In countries like Poland and Hungary, for instance, forced retirements have been used strategically to purge independent judges and replace them with partisan loyalists.[48] This is where satellite theories of amendment legitimacy become particularly useful. They are well-suited to situations where the legitimacy of an amendment depends not just on its content in isolation, but on the broader pattern it forms part of – especially when a series of amendments collectively serve to advance a particular political or legal agenda.

Finally, a compelling yet largely unexplored approach to constitutional amendment legitimacy centres on justification – the idea that a constitutional amendment can only be legitimate if it is adequately justified. This perspective extends to constitutional amendments the justificatory requirements increasingly applied to ordinary exercises of public authority. As a large body of scholarship has shown, the global expansion of democratic constitutionalism – characterised by the direct judicial enforceability of rights – has precipitated a global shift from legal 'cultures of authority' to legal 'cultures of justification'. Moshe Cohen-Eliya and Iddo Porat capture this shift in a stylised contrast. As they remark, in a culture of authority 'the legality and legitimacy of government action is derived from the fact that the author is authorized to act', so that 'public law … focuses on delimiting the borders of public action and on ensuring that decisions are made only by those authorized to take them'.[49] In a culture of justification, by contrast, 'the existence of authority to act is a necessary but insufficient condition for legitimacy and legality; instead, the crucial

[47]Roznai & Hostovsky, 'Democratic Erosion' (n 30).
[48]Sadurski, *Poland's Constitutional Breakdown* (n 10); Kovács (n 10).
[49]Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press 2013) 112.

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requirement for legitimate and legal government action is that is justified in terms of cogency and persuasiveness, that is, its rationality and reasonableness'.[50]

Requiring substantive justification for constitutional amendments would mark a fundamental reorientation of constitutional politics, shifting authority from the mythologised, almost sacral realm of sovereign constituent power to the deliberative processes of ordinary democratic governance. In today's humbler constitutional landscape, the normative framework for evaluating amendment dynamics must evolve to reflect contemporary realities. As the aura of majesty fades, so too does the presumption of deference, making it all the more reasonable to require that the power to amend be exercised with clear and substantive justification. In practice, this would mean that amendments must be accompanied by explicit, public reasoning in their favour. But what kind of arguments would such justification entail? Intriguingly, a justification-based approach can serve as a standard of both external and internal legitimacy – it can be used by courts when reviewing amendments, but it can also anchor a broader public discourse beyond the courtroom. The nature of appropriate justification may differ across these contexts, but its necessity in both cannot be denied.

In the context of judicial review of legislation, the requirement of justification is typically operationalised through proportionality analysis. When applied in ordinary law, proportionality demands that public authorities or private actors demonstrate that measures infringing upon rights pursue constitutionally significant objectives, and that such measures are suitable, necessary, and appropriate. Absent this justification, such measures are not viewed as legitimate limitations of rights, but as violations of them.[51] This raises a compelling question: what would the requirement of justification entail if applied by courts to evaluate the internal legitimacy of constitutional amendments, irrespective of subject matter? What analytical parameters would guide such a review? Could proportionality be adapted to this context, obliging amending authorities to articulate a constitutionally coherent objective and to show that the reform is suitable, necessary, and strictly proportionate – without causing disproportional harm to the existing constitution relative to the goals pursued? Would this impose an unduly conservative standard for determining the legitimacy of amendments, potentially stifling constitutional evolution? How would this approach differ from the application of the basic structure doctrine? And finally, what remedy would be appropriate in cases where formal justification is provided, but proves substantively inadequate or defective?

In public, non-judicial practices of independent amendment evaluation, it is more appropriate to rely on forms of justification distinct from judicial proportionality analysis. While still demanding that amending authorities offer reasoned arguments in support of proposed constitutional changes, these justifications would likely draw on a broader array of normative and empirical considerations. They would need to demonstrate the necessity, advisability, and constitutional desirability of the amendments, and could be integrated with other strands of external assessment – origin, procedure, and content, invoked separately or in combination. In the realm of public debate, the expectation

[50]The authors contrast the two cultures along several other dimensions, such as constitutional procedure rules, conceptions of rights, the role of constitutional text, confidence in the people's ability to reason, and the conceptions of democracy aligned with them (ibid 112–122).

[51]In all cases, the analysis examines a relation between ends and means, though it varies in the level of scrutiny applied to the acts and norms at hand, ranging from exacting to more deferential. In its widely adopted four-prong form, common in Latin America and Europe, proportionality imposes a burden on public and private agents to identify constitutionally important goals whose guarantee might *prima facie* justify a limitation on the rights under analysis. They must also demonstrate that the measure is suitable, necessary, and strictly proportionate to achieving those ends. By contrast, a deferent, 'reasonability'-based approach only requires authorities (or private agents) to identify a non-illegal goal, whose compatibility with the constitution could be presumed, and to establish an instrumental link between the amendment and that goal. For further discussion on proportionality analysis, see generally Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law and Ethics of Human Rights 142; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012); Vicky Jackson & Mark Tushnet, *Proportionality: New Frontiers and Challenges* (Cambridge University Press 2017).

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that authorities offer reasons is ever-present. Sometimes, it may suffice to affirm or critique the circumstances surrounding the amendment's genesis, its procedural regularity, or its substantive content. At other times, a more encompassing debate about the concatenation of normative, empirical, and social factors may be necessary to either justify and thereby legitimise the amendments, or to expose their deficiencies and prove them illegitimate.

Expanding practices of contestation in different contexts

To foster greater accountability in contemporary constitutional amendment practices, it is essential to cultivate greater public scrutiny and collective deliberation. This requires creating and reinforcing spaces for critical engagement beyond the judiciary – such as in the media, on social networks, in citizen assemblies and town halls, political forums, and universities. In these venues, people should begin to assess amendment processes on their own terms, through independent and reasoned reflection, something we have largely lost the habit of doing, due to the pervasive and deeply embedded influence of contemporary constitutional positive normativity. In these alternative spaces, debates should flexibly consider how amendments are adopted, by whom, for what reasons, and based on what empirical evidence. Crucially, this should be done without being constrained by the rigid binary of whether a change qualifies as an 'amendment', thereby opening space for more nuanced and substantive forms of democratic evaluation.

This does not mean UCA doctrines and other judicially enforceable standards rooted in core constitutional principles no longer have a role to play. Yaniv Roznai is correct in pointing out that recent global events demonstrate that leaving these issues 'solely for the public arena without judicial involvement [ie, in the realms of law of the public rather than public law] is not always enough'.[52] Moreover, as he equally remarks, legitimacy talk, unrelated to legality talk, carries its own risks: legitimacy is inherently more subjective, varying across persons, places, and times, and as such it can potentially undermine the rule of law.[53]

Yet again, given the limitations of constitutional texts and apex courts as guardians of contemporary democracies, it may be increasingly important to move beyond the comfort zone of politically neutral constitutional arguments and *supplement* (not replace) constitutional arguments with direct moral evaluations of political and legal developments, regardless of what constitutions explicitly state. Especially as citizens and scholars, we should engage more actively in the public moral assessment of constitutional amendments. Drawing on the constitutional thought of Hannah Arendt, Agnihotri reminds us that constitutional meaning and authority are ultimately shaped and sustained through both formal and informal channels. The constitution, in this view, is a living site of contestation, continuously reshaped by the everyday political actions of ordinary citizens.[54] This is why, in her account, the legitimacy of constitutional amendments cannot be fully determined by any single institution, including the judiciary.[55] Of course, in times of populism, faith in civic participation may be fragile, and one may hold political ideals that diverge from Arendt's republican ethos. Still, civic engagement remains a crucial resource in the ongoing effort to reimagine and reconstitute democratic life. Making this engagement more visible in how we describe and interpret constitutional interactions may be a modest but meaningful first step toward realising its transformative potential.

There are two types of contexts in which an expanded practice of public contestation around constitutional amendments would be particularly valuable. The first involves countries where the

[52]Yaniv Roznai, 'Clownstitutionalism: Making a Joke of the Constitution by Abuse of Constituent Power' (2024) 8 Jurídica Ibero 51, 91.
[53]ibid 90.
[54]Shree Agnihotri, 'Constitutional Amendments in Arendtian Constitutional Thought' (forthcoming) 1–2, 8.
[55]ibid 2.

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amendment process remains exclusively under the control of the political branches, because courts have chosen not to exercise constitutional review over amendments – regardless of whether the constitution includes explicit limits on constitutional change, as in Norway, or does not, as in Mexico.[56] The second context arises where political actors increasingly misuse or exploit amendment mechanisms, even while formally complying with procedural and substantive requirements. These are the kinds of situations where, as Yaniv Roznai memorably puts it, the amendment 'is kosher but it stinks'.[57]

Consider Mexico as an example of the first type of case. As I mentioned in the introduction, the country is currently trapped in a swirl of unending amendment.[58] While it is not surprising that a 107-year-old constitution (which contains no unamendable clauses) requires periodic updates, the steady stream of reforms is driven less by constitutional necessity than by the political incentives of negotiating amendments, compounded by structural factors.[59] The pattern has enormous political and legal costs. Amendments are usually adopted in package with legislative proposals, negotiated behind closed doors and adopted with minimal deliberation. The result is a constantly shifting, increasingly incoherent constitutional text. This not only hampers judicial enforcement and the cultivation of a robust constitutional culture, but also fails to address underlying agency problems or provide a stable framework of reference.[60] Clearly, there is an urgent need to introduce checks on the current dynamics of constitutional amendment.

The Mexican Supreme Court, however, has declined to scrutinise the frequency of constitutional amendments, citing reasons ranging from the formal inadequacy of existing review mechanisms to appeals to the superior status of the 'permanent constitution-maker' (ie, the amendment power).[61] This reluctance is, to some extent, understandable, given the challenges such review would pose. Procedural review, while theoretically desirable, is hindered by the lack of detailed procedural requirements in the Mexican Constitution. As a result, the Court would face a difficult choice: either adopt a deferential stance that leaves entrenched political practices untouched, or take a more assertive approach that could lead to the widespread invalidation of amendments. Substantive review is arguably even more pressing, especially as new amendments increasingly introduce

[56]In Norway, the constitution provides that the spirit and principles of the constitution cannot be amended, but judges do not consider it their appropriate role to enforce this restriction. See Eivin Smith, 'Old and Protected? On the "Supra-constitutional Clause in the Constitution of Norway"' (2011) 44 Israel Law Review 369; Matti Mika-Tuomas Ojanen, 'Constitutional Unamendability in the Nordic Countries' (2019) 3 European Journal of Law Reform 385. A discussion of the case of Mexico follows later in this article. I thank Richard Albert for drawing attention to the Scandinavian context and, more broadly, for underscoring the importance of exploring the interaction of external and internal legitimacy arguments in different contexts.

[57]Roznai, 'Clownstitutionalism' (n 52) 52.

[58]The Mexican Constitution of 1917 contains no eternity clauses. The amendment formula, which appears on the surface to be demanding but has not created obstacles to amendment, has worked because it requires a two-thirds majority of the members present in each chamber of the Federal Congress, and ratification by half of the federated States. At the time of writing, eight hundred amendments – counted by the number of articles formally altered – have been passed. However, since some of the amendments affect articles with many subsections, the actual scope of constitutional change has been even more extensive than the raw number suggests.

[59]Pou Giménez & Pozas-Loyo, 'The Paradox of Mexican Constitutional Hyper-Reformism' (n 9); Mariana Velasco Rivera, 'The Political Sources of Constitutional Amendment (Non)-difficulty in Mexico', in Richard Albert, Carlos Bernal & Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019).

[60]Pou Giménez, 'Constitutionalism, Old, New and Unbound' (n 9). Amendment bills are presented as part of a broader package alongside other proposals of statutory decision-making. The required majorities in the two chambers are obtained (or not) based on factors largely unrelated to a thorough evaluation of the merits of the amendments. And the legislatures of the States vote on these proposals using procedures of their own choosing, following paths that best suit their negotiation leverage with the Federation.

[61]Andrea Pozas-Loyo, 'Los jueces constitucionales latinoamericanos frente al espejo: sobre la procedencia de juzgar la constitucionalidad de una reforma constitucional [Latin American Constitutional Judges in Self-Reflection: On the Propriety of Judging the Constitutionality of a Constitutional Reform]', in Adriana Luna Fabritius, Pablo Mijangos y González & Rafael Rojas (eds), *De Cádiz al Siglo XXI: Doscientos años de constitucionalismo en México e Hispanoamérica (1812–2012)* (Taurus 2012).

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provisions that conflict with human rights standards. However, attempting to define the constitution's identity or core structure – or finding a stable basis for distinguishing between reform and substitution – on the foundation of a text now laden with layers of historical amendments seems almost impossible.[62] For instance, should the core of the Mexican Constitution be identified with provisions declaring that all property belongs to the nation, or with those regulating private property?[63] Should the essentials be found in the sections of the bill of rights that embrace international human rights law, or in those that restrict freedom of expression, the presumption of innocence, voting rights, and personal liberty?[64]

In sum, the amendment dynamics in Mexico diverge radically from the idealised models found in classical constitutional theory. Attempting to assess their legitimacy strictly within the confines of the existing constitutional framework would require immense effort – and may still fail to address the root causes of dysfunction. This is especially true given that the Mexican Supreme Court does not even offer a forum for such debates in the first place. Engaging public opinion and legal analysis in a broader, more open-ended practice that demands justification for amendments and openly calls out the routine shortcomings and opportunism that characterise the contemporary amendment process would, arguably, contribute better to improving constitutional culture and accountability.

Mexico is an example where external legitimacy discourse becomes especially valuable, precisely because there is no established tradition of internal legitimacy review by the courts. Another scenario where such external scrutiny is vital arises when internal legitimacy debates do exist but fail to capture the full range of relevant developments – particularly in cases where amendments are legal but seem illegitimate, or illegal but seem legitimate. The 'legal but illegitimate' category corresponds to Roznai's concept of constitutional fraud or misuse. As he illustrates with examples drawn from recent political events in Israel and elsewhere, the examples include contain reforms that are legal in three senses: they were enacted according to the prescribed procedure; they do not violate unamendable provisions or other explicit limitations; and they respect the basic structure and identity of the constitution.[65] Nevertheless, they conceal motives that undermine the spirits of their constitutions, even if they successfully mask them.[66] On the basis of an exploration of the main purposes of modern constitutions, Roznai identifies several instances of illegitimate amendment misuse: partisan, non-consensual, or extreme majoritarian amendments; hasty and undeliberated amendments; temporary and *ad hoc* amendments; self-serving amendments enacted for private, not public interest; and amendments that undermine electoral competitiveness and fairness or dismantle individual or minority rights.[67] While Roznai identifies a few courts that have already invalidated these manipulative episodes, their efforts would be far more effective when paired with broad practices of 'external' contestation. While the general public may not always articulate arguments in judicial terms, they often recognise when an amendment is little more than a blatant power grab, an attack on political opponents, or a bid for private advantage. Public criticism and demands for justification may not always stop these episodes, but they can raise the political stakes and help safeguard constitutional integrity.

A case that may fall into the category of 'illegal but legitimate' can be found in Belgium. The country's constitutional amendment procedure is extraordinarily demanding: it requires the dissolution of Parliament after a formal decision to open certain provisions to amendment, followed by deliberation by the newly elected Parliament and a supermajority vote. Despite this demanding

[62]Pou Giménez & Pozas-Loyo, 'The Paradox of Mexican Constitutional Hyper-Reformism' (n 9).
[63]See Constitution of Mexico (ratified 5 Feb 1917), art 27.
[64]See ibid arts 1, 16, 18, 19 and 20.
[65]Roznai, 'Clownstitutionalism' (n 52).
[66]ibid 55–58.
[67]ibid 75–88.

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process, there have been instances of questionable legality.[68] As Toon Moonen recounts, for a period, the Belgian Parliament resorted to the practice of 'implicit' amendments – indirect alterations to the meaning of certain constitutional provisions through changes made to others.[69] Although this practice was eventually discontinued following the 1993 Fourth State Reform, and many voices criticised it as dangerous and unconstitutional, Moonen notes that the political response remained ambivalent. The practice was not openly endorsed, but neither was it clearly condemned – suggesting that its perceived legitimacy, at least from a political standpoint, remained intact.

A comparable dynamic unfolded with the emergence of a second phenomenon: the 'temporary amendment procedure' introduced during Belgium's Sixth State reform in 2012. This time, the amendment formula itself (Article 195) was listed among the provisions to be amended. The newly elected Parliament introduced a one-time, temporary provision that opened the door for the amendment of numerous additional articles that had not been formally opened to revision.[70] While Moonen categorises this episode as an example of a 'legal but illegitimate' amendment, what stands out, in my view, is the sheer difficulty of applying any definitive label. On one hand, although Article 195 was properly opened for amendment, the change it underwent appears to subvert the spirit of the amendment rules: it was tailored to facilitate a specific reform episode and introduced sunset provisions, which runs counter to the idea that amendment rules constitute a stable, durable framework, to be revised only sparingly and prospectively. On the other hand, many of the articles forming the core of the Sixth State Reform had not been formally opened to amendment, seemingly violating procedural requirements. Yet the reforms were broadly seen as necessary and legitimate by key actors – including the government, political elites, the Venice Commission (an independent advisory body of the Council of Europe on constitutional matters), Constitutional Court judges, significant segments of the legal academy, and arguably, the wider public.[71] All of them could have arguably grounded their support for the amendments in normative, ultimately moral, arguments regarding the substantive value and corrective nature of the reforms.

The Belgian case suggests that a strengthened practice of contestation, based on considerations that go beyond the parameters set by amendment procedures or explicit and implicit limits, does not always dilute the social legitimacy or acceptance of amendments (in a Weberian sense) and can contribute to outcomes that are normatively defensible and broadly accepted. This more holistic form of public debate can cut both ways: it can delegitimise amendment efforts that would otherwise pass unchallenged, and it can bolster the social acceptance of reforms that might appear procedurally questionable but substantively justifiable. But more importantly, if it is reasonably inclusive – plural and unmanipulated – it can enrich judicial reasoning where courts are active, or provide an essential forum for constitutional reflection in jurisdictions where judicial review is weak or absent.

Conclusion

The distinction between legality and legitimacy[72] – between reasoning grounded in the values inherent in the law and reasoning grounded in external moral principles – varies in salience across historical periods. After nearly a century of relative obscurity, this distinction is reemerging amid contemporary political and legal developments around the world.

[68]Toon Moonen, 'The Legality-Legitimacy Bifurcation in the Analysis of Constitutional Amendments: A Case Study of Belgium's State Reforms' (2024) 19 Asian Journal of Comparative Law 457.

[69]ibid 463–465.

[70]ibid 466–469.

[71]ibid 467–468 (documenting reactions to the adoption of the Sixth State Reform through the temporary amendment procedure).

[72]David Dyzenhaus, *Legality and Legitimacy* (Oxford University Press 1997).

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This article puts forward three central arguments. First, it calls for a realistic approach to the legitimacy of constitutional amendments – one that recognises how modern constitutional practices have grown increasingly detached from the idealised world of grand constituent powers (to the extent such a world ever truly existed) and now closely resemble the deliberative processes of the realm of ordinary politics.

Second, the article critiques the tendency to assume that all problematic amendments must be implicitly or explicitly unconstitutional and argues instead that a new stage of discourse be reached progressively – one in which more amendments are acknowledged as formally valid but nevertheless recognised as normatively deficient and openly criticised as such, outside the confines of judicial review.

And third, this article argues for the development of a broader language of amendment legitimacy, one that draws on various forms of public reason. This language would be most effective if grounded in the expectation that any legitimate amendment must be accompanied by explicit, well-reasoned justifications that address its necessity, suitability, and desirability.

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