Counterconstitutionalism

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Democratic constitutionalism has often erected a high barrier separating the citizen from the state. This is paradoxical because the very promise of constitutionalism is to produce precisely the opposite result: to bind the citizen to the state, and to create and cultivate a constitutional culture that is anchored in participatory democracy. The author has a name for this paradoxical state of affairs: counterconstitutionalism. In this article, the author introduces and illustrates the concept of counterconstitutionalism with reference to bills of rights in constitutional states representing civil and common law traditions on four continents.

Le constitutionnalisme démocratique a souvent érigé une haute barrière pour séparer le citoyen de l'État. C'est un paradoxe, parce que la promesse même du constitutionnalisme est diamétralement opposée à cette situation: attacher le citoyen à l'État et créer et encourager une culture constitutionnelle ancrée dans la démocratie participative. L'auteur donne un nom à cette situation paradoxale: contreconstitutionnalisme. Dans cet article, il présente et illustre le concept de contreconstitutionnalisme et fait référence aux chartes des droits dans divers États constitutionnels représentant les traditions de droit civil et de common law sur quatre continents.

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Introduction

I. The promise of constitutionalism
   1. Dimensions of democracy
   2. The core value of participation
   3. Creating participatory democracy

II. Constitutional culture
   1. Understanding constitutional culture
   2. Constitutionalism and constitutional culture

III. Constitutional design
   1. Contraconstitutionalism
      a. Discrete bills of rights
      b. Aspirational bills of rights
      c. Catalytic bills of rights
      d. Pragmatic bills of rights
      e. Constitutionalism and constitutional culture
   2. Supraconstitutionalism
      a. Unamendability
      b. Superstatutes
      c. Constitutionalism and constitutional possibilities

Conclusion

Introduction

Democratic constitutionalism has a high ambition. Its purpose is, first, to design the structures of the state that will exercise authority within a defined territory and over a group of identifiable persons and, second, to define the border separating the citizen from the state. But the promise of democratic constitutionalism is much grander than its purpose. It is to create a zone of citizenship within which the individuals who voluntarily subject themselves to the authority of the state may themselves delimit the boundaries of the terms of their citizenship in that state, and within those boundaries may pursue their twin objectives of subsistence and fulfillment.

Two implications follow from this view of democratic constitutionalism. First, the individuals who are subject to the authority of the state provisionally cede their sovereignty to those who administer the state. They may assert themselves through broad mobilizations or social movements in order to reclaim their sovereignty at any given moment. Second, those individuals may revise or rewrite the terms of their citizenship when they
so desire. This is the essence of participatory democracy. And this, in my view, is the very promise of constitutionalism. Participatory democracy is a necessary consequence of conceiving of constitutionalism as a vehicle through which individuals may set or reset the trajectory of the state, seek fulfillment within that state, and give meaning to their shared existence.

In this article, I focus on the consequences of participatory democracy for constitutional design. I draw my inspiration in part from Allan Hutchinson, who makes a compelling case that democracy is more than just about elections. It is instead a profoundly rich and substantive concept that folds into itself complementary notions of liberty, equality and opportunity. It also unabashedly defies conventional understandings of democracy that rest only on process or procedure. Democracy demands active, not passive, citizenship and it is the duty of the democrat, argues Hutchinson, to uncover, design and promote strategies to cultivate a culture of participatory democracy in the service of social progress.

On this point, I agree with Hutchinson. His view of democracy is consistent with my view of the promise of constitutionalism. I regard a constitution as both a noun and a verb, as both a thing and an activity. On the one hand, a constitutional text is, first, a noun. It is a thing—a document—that enshrines the promises that a people makes to itself and its future generations. On the other hand, a constitution is also a verb. It is an action—a doing, a becoming and a rebecoming—by which a people defines and redefines itself, and gives content to the common venture that its members have undertaken. That is precisely what it means for a people to confer upon itself a living constitution, one that is never beyond its reach and whose terms are not static but instead dynamic and receptive to change. Over time, this becomes a powerful force for both developing responsible citizens and defining a collective identity anchored in a concrete constitutional text. That is the promise of constitutionalism. That is the significance of participatory democracy.

Yet democratic constitutionalism has, in some instances, erected significant barriers to participatory democracy. This is paradoxical for

2. Ibid. at 79-80.
3. I am grateful to Grégoire Webber for introducing me to this approach to constitutionalism.
at least two reasons. First, the promise of democratic constitutionalism is to produce precisely the opposite result. Second, and perhaps more interestingly, the forms of democratic constitutionalism that actually impede participatory democracy are strangely enough anchored in a substantive conception of democracy that conceives of democracy as much more than simply a free and fair system of popularly contested elections.

I have a name for this paradoxical state of affairs: counter-constitutionalism. These forms of democratic constitutionalism achieve the very opposite of the promise of constitutionalism. Counterconstitutional designs are nonetheless consistent with the purpose of constitutionalism insofar as they fulfill the minimalist twin objectives of creating the structures of the state and setting the state-citizen boundary. It is therefore entirely accurate, though perhaps odd, to state that counterconstitutional constitutions are nevertheless constitutions.

But counterconstitutional constitutions are not consistent with the promise of democratic constitutionalism. They undermine that promise. Rather than breathing life into participatory democracy, counterconstitutionalism smothers the possibility of creating participatory democracy because counterconstitutional constitutions do not create a constitutional culture that is receptive to participatory democracy. They in fact create a constitutional culture that runs counter to participatory democracy.

In this article, I will introduce and illustrate two forms of this paradoxical type of constitutionalism, both of which are recent additions to the toolkit of constitutional statecraft. The first form of democratic constitutionalism that works a considerable harm upon the prospect of participatory democracy is *contraconstitutionalism*. Its mission is to serve the interest of a rich conception of democracy—one that extends beyond a procedural understanding of democracy and instead embraces a substantive view of democracy. However, this form of constitutionalism dooms itself to failure by relying on the constitutional text alone to create a constitutional culture that seeks to cultivate participatory democracy.

*Supraconstitutionalism* is a second form of democratic constitutionalism that runs counter to participatory democracy. Its defining practice is to hierarchize rights in such a way as to place certain rights beyond the reach of a democratically mobilized people, and effectively outside of the bounds of constitutionalism. Though its purpose is to stand in defense of fundamental rights deemed untouchable, supraconstitutionalism may actually divest those fundamental rights of their force in the process of elevating them above other rights. Both contraconstitutionalism and
supraconstitutionalism work against the establishment and development of a constitutional culture that is anchored in participatory democracy.

I will begin, in Part II, by exploring two competing notions of democracy: democracy as process and democracy as substance. I will adopt an intermediate position that regards participation as the core value of democracy. In Part III, I will suggest that democracy is possible only if the domestic constitutional culture is receptive to it. Part IV will then advance the argument that democratic constitutionalism becomes counterconstitutional when it creates a constitutional culture that undermines the promise of constitutionalism. I will introduce contraconstitutionalism and supraconstitutionalism as models of democratic constitutionalism that frustrate the creation of a constitutional culture anchored in participatory democracy. Finally, I will conclude with a few closing thoughts. 7

I. The promise of constitutionalism

The rise of constitutionalism has helped to situate the debate on the purpose of democracy. Some argue that democracy is best understood as a set of procedures that permit citizens to engage with one another. These procedures include voting in elections. In contrast, others argue that democracy entails more than this procedural dimension and demands the pursuit of certain societal objectives which paint a normative portrait of citizenship. On this view, democracy commands efforts to improve the quality of life of citizens, to distribute wealth equitably among the various segments of society, and to ensure access to such life-sustaining resources as health care, food and shelter.

In this section, I will describe these two views, after which I will embrace neither of them. I will instead adopt an intermediate position best described as an enhanced version of procedural democracy. This enhanced version is called participatory democracy, which straddles the boundary separating both constructions of democracy. I will moreover narrow my position even further by adopting one of two forms of participatory democracy—one that enhances citizenship. This will provide the backdrop against which I will argue, in the remainder of this article, that certain forms of constitutionalism fail to achieve the promise of constitutionalism.

1. Dimensions of democracy

There are two competing visions of democracy. The first is procedural, the second is substantive. Frank Michelman has studied both models, describing the former as oriented toward the lawmaking process—focused

7. Unless otherwise stated in the text, I use the term constitutionalism to refer to democratic constitutionalism.
on questions such as who makes the laws and who interprets them—and the latter concerned with the actual content of those laws. According to the procedural view, democracy is constituted by the popular political processes that aggregate and reconcile the self-interestedness of participants through collective interactions while, in contrast, the substantive view endeavours not to aggregate interests but rather to transform self-interestedness into altruism in the service of morally virtuous purposes. These alternatives—procedural and substantive—focus respectively on political practice and institutions, on the one hand, and, on the other, the ideals that democracy allows us to achieve.

Quite apart from this distinction, these two dimensions of democracy may also be distinguished by their respective sources of legitimacy. The procedural view of democracy derives its legitimacy from the actual procedures that allow citizens to mediate among their choices and also from the values that allow us to assess the adequacy of those procedures, for instance transparency, equality of access and participation, and impartiality in considering the options open to participants. In contrast, the substantive view of democracy believes that those political and participatory procedures should be deployed to achieve certain societal aims, for instance redressing inequality and assisting the disadvantaged—in this sense, substantive democracy pursues not only rule by the people but also and perhaps more importantly for the people. Substantive democracy seeks protections for individual and fundamental rights, and resists majoritarianism. Legitimacy, on this account, is anchored in morality. This leads to the piercing criticism that the procedural conception of democracy has suffered at the hands of advocates of substantive democracy, who argue that choosing the procedural over the substantive substitutes a legal, for a political, conception of rights. This is the core of the distinction between procedural and substantive notions of democracy.

Yet rather than adhering to the conventional dichotomy setting in opposition procedural and substantive dimensions of democracy, there is another way to frame the choice. First, it is important to recognize that whether one adopts either a procedural or substantive vision of democracy, democratic theorists agree that democracy serves four important values: (1) impartiality; (2) accountability; (3) transparency; and (4) deliberation. It is equally important to note that one can conceive of more than one form of procedural democracy, the first being a minimalist and the second an enhanced conception of procedural democracy. As Barber suggests, enhanced democracy refers to intense civic engagement in the service of shared public objectives whereas minimalist democracy characterizes low levels of participation compounded by, and manifested in, the pursuit of individualistic and private purposes. The enhanced version of procedural democracy is appealing because it sits between the minimalist proceduralist view of democracy and the substantive conceptions of democracy, arrogating part of the mission of each to itself.

In these pages, I adopt an enhanced conception of procedural democracy. I argue that this conception of procedural democracy corresponds to participatory democracy, which in my view reflects the very promise of constitutionalism. This construction of constitutionalism is not agnostic on the role of the state in civil society, nor is it indifferent as to the role of the citizen within the state and in relation to her fellow citizens. It presents a normative view of constitutionalism, one whose logic leads to the peculiar conclusion that some constitutions actually undermine the promise of the practice of constitutionalism. But this result is no more peculiar than what follows when constitutions are adopted in states that are un receptive to a culture of constitutionalism.

A compelling theory of enhanced procedural democracy must provide for at least four elements, according to Dahl. First, citizens must be able to exercise effective participation, which entails adequate and equal opportunities for participating in the discourse. Second, it should adhere to the principle of voting equality, under which any procedures for decision-making are subject to the condition that each citizen has an equal vote.

Third, those citizens must have the opportunity to understand the matters upon which they are called to deliberate so that they can express their preferences accurately and in an informed fashion. Finally, citizens must have the authority to determine which decisions they will make themselves collectively according to this procedural notion of democracy and which are to be delegated to other institutions or parties, who may in turn adopt a different notion of democracy, perhaps even a substantive one.

Henry Teune has seized upon the concept of democratic development to illuminate the relationship between the procedural and substantive dimensions of democracy. Teune has identified four stages of democratic development, each of which depends on the preceding one, meaning that the second stage is possible only where a given society has fully achieved the first, and the third follows from the second, and finally the fourth arises only if that society has satisfied the third stage. The first stage is inclusionary democracy, which contemplates political equality among individuals. The second stage is participatory democracy. This form of democratic development imagines a society where its members do more than merely vote and join civic organizations but furthermore express themselves through other formal means, including political interests groups and movements and local community-based associations. Next comes distributive democracy, where public welfare systems develop to confer the means for human and social development upon their constituents. The final step in democratic development is substantive democracy, which represents a virtuous polity in pursuit of a transparent, open and just society that empowers its members to achieve fulfillment and well-being.

This is a powerfully persuasive lens through which to view the maturation of a society. Although the objective of civil society is to reach the fourth step—substantive democracy—a society must first labour through the intervening three steps, each of which is critical to establishing the requisite stability and creating the public culture that will sustain efforts to make real the promise of democracy. Some nation-states have ambitiously endeavoured to achieve several of these cumulative stages all at once, believing that these steps are better travelled concurrently. For instance, Nicaragua has sought to create a participatory democracy by simultaneously democratizing the political process and guaranteeing social, economic, and cultural rights that were thought to establish a floor from which to

engage in popular democracy. Yet to this day, Nicaragua remains mired in instability. This indicates that Teune may be correct to suggest that a state must pursue each stage independently of the other and only once it successfully achieves the previous stage of democratic development. This means that in order for a given society to achieve substantive democracy, it must first pass through participatory democracy.

2. The core value of participation
Participatory democracy stresses civic involvement—beyond the mere act of voting or polling citizens for their views—in managing the affairs of the state. Participatory democracy does not give rise to a justiciable right but is instead a practice that the state must seek to standardize across the population. It conceives of democracy as a continuing process of self-government and self-definition and holds, as a theory, that popular participation in the political process serves as a fundamental protection for self-government. It presupposes that individuals should be directly involved in decision-making, and strives to convince citizens of the importance of their role in deciding issues which pertain directly to themselves and their surroundings.

Participation is a core value of democratic constitutionalism that reflects the Mieklejohnian model of the New England town meeting. It seeks to spur a continuing national conversation that Stephen Breyer sees as integral to citizenship. Popular discourse is the focal element of participatory democracy, just as Habermas recognized when he observed that the welfare state could not alone, without the didactic processes of

public communication, bring to life the full measure of citizenship.\textsuperscript{30} The educative effect of participation in turn cultivates within citizens an enhanced ability and interest to participate in future decision-making on matters of importance to the state. This transforms the task of governing from a top-down enterprise into a multidirectional relationship between citizen and state.\textsuperscript{31} Governance consequently becomes the task of managing conversations in which people both speak and listen, and ultimately collaborate in charting a trajectory for their shared future. Absent a culture of participatory democracy—without this foundational right of participation, the \textit{right of rights}, as Waldron describes it so effectively\textsuperscript{32}—citizenship loses the fullness of its meaning.

Participatory democracy privileges citizen involvement in shaping the institutions of civil society.\textsuperscript{33} But participation must not be geared solely toward national institutions. Participatory democracy exists only if individuals press upon disparate points of access and engagement, from community-based local sites of activity to the highest echelons of government administration.\textsuperscript{34} As Schragger writes, one goal of participatory democracy is to bring together individuals who would not otherwise come together to form a political community.\textsuperscript{35} This is the key to understanding participatory democracy.

But there is a further wrinkle to participatory democracy. It comes in at least two forms.\textsuperscript{36} The first conceives of participatory democracy as a method by which to satisfy the fullness of human potential. The second views participatory democracy as an approach that facilitates progress toward citizenship. I adopt the latter of these two theories. Participatory democracy serves the primordial aim of establishing and nourishing the connection that binds an individual to the state and to other individuals, transforming that individual from a detached member of society to an integrated citizen of the state. David Held has articulated the connection between citizenship and participation, arguing that citizenship can only be understood as “a reciprocity of rights against, and duties towards, the

\begin{thebibliography}{99}
  \bibitem{31} John Gastil et al., “There’s More than One Way to Legislate: An Integration of Representative, Direct, and Deliberative Approaches to Democratic Governance” (2001) 72 U. Colo. L. Rev. 1005 at 1012.
\end{thebibliography}
community. Citizenship has entitled membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the community."^{37}

On this view, participatory democracy has an important psychological component^{38} insofar as it creates within the citizen a belonging, connectedness and responsibility to the state. Participatory democracy nurtures this bond^{39} by crystallizing the psychological connection between the citizen and her state, the very relation to which Kelsen has alluded,^{40} solidifying the collective moral bond that Unger deemed so vital to the foundation of a legal system,^{41} and reinforcing social solidarity, which, for Durkheim, ensured the cohesion of society.^{42}

This returns us to the very origins of the term *participatory democracy*. It was coined in 1960 by philosopher Arnold Kaufman, who was concerned not with creating good social policy but instead with creating a good society in which individuals congregated in formal and informal political institutions in order to engage one another and to pursue the development of their intellect, spirit, and community.^{43} Once instilled in a people, participatory democracy counteracts alienation and apathy, and cultivates belonging and involvement.^{44} It strengthens the relationship between and among citizens because it frustrates both the rise of alienation and the onset of social detachment that is common to modern communities,^{45} and it is moreover oriented toward the communitarian goals of integration and fulfillment through interaction.^{46} As Rossi writes, participatory democracy

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39. Ibid.
44. Marion Crain, "Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment" (1990) 74 Minn. L. Rev. 953 at 969.
inculcates empathy, virtue and identity in participants.\textsuperscript{47} This accounts for at least part of the causal link between participation and the psychological bond that ties the individual to the state as well as to her fellow citizens.\textsuperscript{48}

This is not a mandarin vision of democracy,\textsuperscript{49} one that is dominated by intellectual, cultural, social or other elites to the exclusion of common citizens. Quite the contrary, it is a vision of democracy that is squarely attuned to the common class. It privileges broad popular mobilizations over elite-driven processes of social reform, regarding the former as infused with an unassailable legitimacy and the latter as guided by narrow political interests.

Let me pause to make an important distinction before proceeding any further. I am an advocate of participatory democracy, not populist democracy. Populist democracy insists that public policy reflect public opinion.\textsuperscript{50} I do not take this majoritarian position.\textsuperscript{51} I favour participatory democracy, which is instead a mode of governance in which citizens delegate their powers of decision-making to their governmental agents, retain the right to participate in a meaningful way in public discourse, but do not possess the authority to dictate outcomes.\textsuperscript{52} In this respect, I resist the Athenian model, which was a direct democracy, not a participatory democracy, a distinction that seems to have been lost on many scholars.\textsuperscript{53}

I regard participatory democracy as a complementary supplement to—and not a substitute for—liberal democracy.\textsuperscript{54} Participatory democracy does not reject the value of countermajoritarian institutions whose role

is to vindicate core civil and political rights. Indeed, judicial review is
a legitimate function in a participatory democracy precisely because it
stands in defense of the interest of the public, not necessarily the interest
of elites who, through representative democracy, control the shape and
content of the institutions of the state. My conception of participatory
democracy consequently rejects the minimalist procedural dimension of
democracy and looks favourably upon some elements of the substantive
vision of democracy. But it remains firmly committed to the proposition
that the state derives its legitimacy from citizens and their participation in
charting, but not controlling, the trajectory of the state.

3. Creating participatory democracy
Perhaps the most critical precondition to successfully erecting a structure
within which participatory democracy can take hold and flourish is to create
the conditions for informed citizenship. Another important requirement
for participatory democracy is that its participants participate honestly,
authentically, according to principle and in good faith.

But let us not overstate the virtue of participatory democracy. After
all, prominent constitutional architects like James Madison resisted
participatory democracy in favour of representative democracy. Madison feared that direct participatory democracy would render
government subject to the fickleness of the masses, a non-trivial concern
to which the psychology of group behaviour may lend some credence. The Madisonian vision of course won the day in the United States.
Nonetheless, there remain strong currents of participatory democracy

in the American constitutional tradition. For instance, Madisonianism looks very favourably upon representative democracy precisely because it reflects popular will as an expression of the public-regarding common interest and not the aggregation of private interests. And Dewey, a pragmatist, advanced a compelling vision of democracy that invited public participation in political life.

Whether one casts participatory democracy in either descriptive or normative terms, it turns out that participatory democracy confronts barriers on both counts: first, most individuals tend to be non-participants in political and deliberative processes; and second, to compel participation, rather than simply to invite it, would perhaps undermine the very basis of participatory democracy.

Nonetheless, I reject the claim that increased public participation in public discourse will lead to a decline in the quality of that discourse. Quite the contrary, I believe that participation is enriching because it inserts multiple viewpoints into the political discourse given that individuals necessarily possess different convictions in light of their differing life experiences. On this view, participatory democracy draws its legitimacy from its integrative quality and its capacity to help empower the powerless, all while serving the interest of liberty and equality.

II. Constitutional culture
Having argued that participatory democracy is the promise of constitutionalism, we must now establish how to create a participatory democracy. In this Part, I endeavour to do just that. I argue that in order to create a participatory democracy, the state must first create a constitutional culture that is receptive to the values of participatory democracy. I begin by exploring the meaning of constitutional culture. Then, I probe the relationship between constitutional culture and constitutional design. This

Part will set the stage for our subsequent discussion of constitutional designs that run counter to a constitutional culture of participatory democracy.

1. Understanding constitutional culture

The constitutional culture of a people in a particular state derives from more than the laws recorded on the books.\textsuperscript{69} It is, on one persuasive view, “a web of interpretative norms, canons, and practices which most members of a particular community accept and employ.”\textsuperscript{70} On another, it is a “network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as ‘lawmaking’ according to the legal system’s own formative criteria.”\textsuperscript{71} It has also been defined as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution.”\textsuperscript{72} Constitutional culture involves “the accepted belief that the governing charter is created by the citizenry; the knowledge that the charter is not timeless, but rather that the citizens may change it or revoke it under certain circumstances....”\textsuperscript{73} Constitutional culture may also transcend nations and become ingrained across borders.\textsuperscript{74}

These are not incompatible constructions of constitutional culture. Each highlights the role of the private citizen in legitimating the law and integrating legal norms into the social consciousness. Constitutional culture is, in Sanford Levinson’s helpful formulation, a civic religion anchored in reason not faith.\textsuperscript{75} It develops through community-wide popular discourse, collective and individual action, and political expression.\textsuperscript{76} To exist, a constitutional culture requires at least three conditions: (1) overlapping claims of authority; (2) a complex system of popular convictions; and


\textsuperscript{73} Jason Mazzone, “The Creation of a Constitutional Culture” (2005) 40 Tulsa L. Rev. 671 at 672.


\textsuperscript{75} Sanford Levinson, \textit{Constitutional Faith} (Princeton, NJ: Princeton University Press, 1988) at 52; see also Frank H. Wu, “The Limits of Borders: A Moderate Proposal for Immigration Reform” (1996) 7 Stan. L. & Pol’y Rev. 35 at 53 (“In this way constitutional theory informs and contributes to political action; a civic culture is created which is also a constitutional culture.”).

(3) a vernacularized language by which to express and cultivate those convictions.\textsuperscript{77}

Constitutional culture is erected on a shifting foundation, and draws its strength from the many repositories of public and popular power that constitute its base.\textsuperscript{78} Granted, the judiciary, in deciding cases, sets forth rules that govern public and private interactions, and that more broadly articulate the values that shape the citizenry and the state.\textsuperscript{79} But crafting a constitutional culture is a shared collaborative enterprise between legal and nonlegal actors,\textsuperscript{80} politicians and citizens.\textsuperscript{81} And this, in turn, underscores the importance of constitutional culture. It infuses the spirit of a particular people and, once in place, the common constitutional culture provides the backdrop against which political disagreements can be debated and resolved on peaceful terms rather than escalating into disruptive constitutional clashes or violent revolution.\textsuperscript{82}

The product of this formula for creating and sustaining a constitutional culture resembles Durkheim's conception of a social fact. A Durkheimian social fact exerts an external constraint over an individual yet that individual feels it only slightly, if at all, because she ultimately ceases to feel its influence and instead develops habits and inner tendencies consistent with this intrinsic characteristic of social life.\textsuperscript{83} This is very similar to Hart's Practice Theory of Social Rules positing that communities adopt certain standards for the behaviour of their members—standards that ripen into obligations based on social norms that emerge from the regularity of human conduct.\textsuperscript{84} These social facts, and the social norms in which they are anchored, take root and subsequently evolve through the interactions of citizens among themselves, and those between citizens and their government agents. It is these very interactions that give rise to constitutional culture, which in turn shapes popular discourse on the

\begin{footnotesize}
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\item \textsuperscript{77} Robert L. Tsai, "Democracy's Handmaid" (2006) 86 B.U.L. Rev. 1 at 52.
\item \textsuperscript{78} Abner S. Greene, "Civil Society and Multiple Repositories of Power" (2000). 75 Chicago-Kent. L. Rev. 477 at 479.
\item \textsuperscript{79} Ashutosh Bhagwat, "Hard Cases and the (D)Evolution of Constitutional Doctrine" (1998) 30 Conn. L. Rev. 961 at 1002-03.
\item \textsuperscript{80} Paul Horwitz, "Grutter's First Amendment" (2005) 46 B.C.L. Rev. 461 at 574, 589.
\item \textsuperscript{81} Keith E. Wittington, "Herbert Wechsler's Complaint and The Revival of Grand Constitutional Theory" (2000) 34 U. Rich. L. Rev. 509 at 529.
\item \textsuperscript{82} Keith E. Whittington, "Yet Another Constitutional Crisis" (2002) 43 Wm. & Mary L. Rev. 2093 at 2145.
\end{itemize}
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constitutional text and invites what Siegel calls deliberative engagement among citizens and public officials.\textsuperscript{85}

But constitutional culture does not necessarily grow from or require a constitutional text.\textsuperscript{86} In the American constitutional tradition, constitutional culture encompasses several non-constitutional documents and speeches.\textsuperscript{87} It may also include judicial precedent, for instance transformative cases like Roe v. Wade\textsuperscript{88} or Brown v. Board of Education.\textsuperscript{89} Likewise, in the nascent eastern European constitutional traditions, it is understood that constitutional culture includes unwritten economic rights, which in those states are regarded as prerequisites for the exercise of other fundamental rights such as voting and speech.\textsuperscript{90} In some ways, a static and rigid constitutional text may inhibit the development of constitutional culture because constitutional culture is changeable and variable over time, and is therefore dynamic, contested and contestable.\textsuperscript{91}

Nonetheless, a constitutional text, one that is accessible and intelligible to the lay, is a powerful tool for triggering the entrenchment of a constitutional culture. Words are infinitely important to the creation of constitutional culture for, at bottom, creating a constitutional culture involves constitutional myth-making.\textsuperscript{92}

From the text flow both specific and general principles of public citizenship as well as broader notions of the proper administration of the state. The text may constitutionalize deeply held cultural convictions (as in the case of the American Establishment\textsuperscript{93} or Takings\textsuperscript{94} Clauses, or German property rights protections,\textsuperscript{95} or Canadian minority language

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\item \textsuperscript{85} Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the de facto ERA" (2006) 94 Cal. L. Rev. 1323 at 1325.
\item \textsuperscript{86} Larry Kramer, "Generating Constitutional Meaning" (2006) 94 Cal. L. Rev. 1439 at 1443.
\item \textsuperscript{87} Robin West, "Katrina, the Constitution, and the Legal Question Doctrine" (2006) 81 Chicago-Kent. L. Rev. 1127 at 1157-58.
\item \textsuperscript{88} See Richard H. Fallon, Jr., "If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World" (2007) 51 St. Louis L.J. 611 at 651.
\item \textsuperscript{91} David Schneideman, "Banging Constitutional Bibles: Observing Constitutional Culture in Transition" (2005) 55 U.T.L.J. 833 at 837-38.
\item \textsuperscript{93} See Abdullahi A. An-Na‘im, ed., "Roundtable Discussion on International Human Rights Standards in the United States: The Case of Religion or Belief" (1998) 12 Emory Int'l L. Rev. 973 at 983-84.
\item \textsuperscript{94} See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 at 1028 (1992).
\end{itemize}
The text may expressly set the constitution as the basis for instilling constitutional culture (consider the Eritrean model\textsuperscript{97}). The text may also help create the conditions for shaping cultural sensibilities (for example the American Fourteenth Amendment\textsuperscript{98}). Consider, for instance, that Article VI of the U.S. Constitution, which obliges federal and state officials and institutions to abide by the constitutional constructions of the United States Supreme Court, is itself one—but only one, albeit an important one—source of the American constitutional culture of the rule of law.\textsuperscript{99} Indeed, cultivating the rule of law through the constitutional text was the very intent of the American founding generation.\textsuperscript{100}

It is hard enough to understand what is meant by the term \textit{constitutional culture} but it is perhaps even harder to understand how it emerges and relates to constitutionalism. We know at a minimum that the culture of a legal rule or norm exerts a significant influence on the adoption of new rules or norms, or the establishment of new government powers.\textsuperscript{101} We also know, as a matter of historical fact, that although social changes in post-war Italy exerted a significant strain on its then-new constitutional structure, those structures were not only resilient in the face of those pressures but more importantly helped to manage them.\textsuperscript{102}

These are important historical insights. But constitutional theory may be equally helpful in illuminating our inquiry into the relationship between structure and culture. A particularly useful point of reference is the work of Ludwikowski on emerging European democracies, in which he observes

\begin{footnotesize}
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\item[97.] Constitution of Eritrea, art. 2, § 5: “This Constitution shall serve as a basis for instilling constitutional culture and for enlightening citizens to respect fundamental human rights and duties.”
\item[101.] Xavier Boissy, \textit{La séparation des pouvoirs} œuvre jurisprudentielle : sur la construction de l’État de droit postcommuniste (Bruxelles : Emile Bruyland, 2003) at 95.
\end{itemize}
\end{footnotesize}
that although these new states may possess constitutional structures and public institutions that are similar to or the same as their American counterparts, they have not yet embraced the rule of law.\footnote{103}

The rule of law is of course an elemental and elementary principle that has entered the collective consciousness of western liberal democracies in much the same way as would a Durkheimian social fact. The rule of law exists because, well, it exists, and it is virtually impossible to conceive of liberal democratic social life without the rule of law. Ludwikowski's analysis is fascinating for many reasons, but particularly because he seems to suggest that constitutional culture requires not only constitutional structures that are designed to integrate democratic concepts within the four corners of the meaning of citizenship—for instance the separation of powers, human rights protections, and civilian control of the military—\footnote{104}—but also requires that citizens first assume a posture that is receptive to, and in turn makes themselves susceptible to developing a resolute belief in, these values. Ludwikowski sees this connection as sequential, with culture driving structure.

2. Constitutionalism and constitutional culture

One illustration of the interconnection of structure and culture, according to the parliamentary theorist Dicey, is American federalism. He argues that a "spirit of legality" exists in the American people such that this reverence for the law has facilitated the creation, survival and flourishing of the federal system, with its attendant checks, balances and juricentric model of law.\footnote{105} On this view, culture is a precondition for structure. Specifically, Dicey suggests that federalism can exist in the United States only because the popular sentiment was ripe for it once upon a time and remains so today. It is important to realize that Dicey's view is peculiar to the United States. He does not believe, on my reading, that federalism could necessarily flourish in other nations as it has in the United States. It is not a constitutional structure that can be transplanted from one context to another. Instead, according to Dicey, American political culture is uniquely receptive to federalism.

There are other compelling historical arguments suggesting that structure controls culture. As Osiatynski observes with respect to eastern European nations emerging from non-democratic systems, "constitutional

\footnote{104. Ib. at 27-29.}
cultural consciousness is best built by the application of a constitution in daily life,”
adding that states should not “delay the adoption of a new constitution
until social consciousness changes.”106 This is relevant to our inquiry
because Osiatynski has sought to answer similar questions, including
whether the adoption of a constitution should await the creation of a
constitutional culture, or whether constitutional culture should first lay
the foundation for ushering in a constitutional text.107 Other examples of
structure directing culture include the recent South African Constitution,
which created certain institutional structures with an eye toward shaping
a culture of human rights in the nation and its people,108 and post-war
Germany’s new constitutional structures designed to mitigate the cultural
peculiarities that gave rise to social and political extremism.109

A fascinating counter-example—in which political culture has refused
to conform to constitutional structure—comes from Canada. The recent
Canadian Constitution Act was enacted in 1982. It is significant for several
reasons, but perhaps mostly for three new institutional mechanisms that
it introduced to the Canadian polity. First and foremost, it included the
entrenched Charter of Rights and Freedoms. Second, it ushered in a
constitutionalized power of judicial review of those entrenched rights.110
Finally, the Charter also features a clause—called the notwithstanding
clause—authorizing legislatures to suspend the application of a judicial
decision for up to five years.111 This clause is Canada’s answer to reconciling
the enduring tension between constitutionalism and democracy.

The notwithstanding clause was conceived as a constitutional device
to ensure legislators the last word in shaping matters of public policy.112
At the time, the bordering United States had witnessed an increasing
frequency of judicial review, perhaps best encapsulated, at least in the
minds of its critics, in Roe v. Wade.113 Canadian constitutional drafters

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267.
107. Ibid.
St. Louis L.J. 1279 at 1288.
States and Germany” (2004) 61 Wash. & Lee L. Rev. 587 at 646-47.
110. Canadian Charter of Rights and Freedoms, s. 2(a), Part I of the Constitution Act, 1987, being
Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 52 [Canadian Charter].
111. Ibid., s. 33.
bp194-e.htm>.
113. 401 U.S. 113 (1973).
were therefore motivated in part by the concern that the new power of judicial review would embolden the judiciary. But something quite extraordinary has happened in the intervening years. The clause has been invoked with diminishing frequency—only seventeen times, and not once by the federal Parliament—and is now politically radioactive, virtually relegated to desuetude. There are several reasons for this trend but the most important may be that the judiciary is more trusted as an institution than the legislature, and is more likely, according to a majority of Canadians, to reach the right answer in interpreting the Charter of Rights and Freedoms than the legislature.

What is surprising about this development is not that Canadians deem judges more competent or trustworthy than politicians, but instead that the very contrary intent of the notwithstanding clause has been overrun by political culture. This demonstrates an important point about the process of constitutionalization: it is profoundly problematic, both as a matter of theory and as a matter of civil stability, to impose a vision of constitutionalism on a people who do not share that vision. This Canadian illustration is also a curious instance of political culture resisting—and indeed erecting an impregnable barrier between itself and—constitutional structure.

It therefore seems that the relationship between constitutional structure and political culture is much more complicated than our original inquiry suggested. It does an injustice, in two ways, to the richness of the matter to ask whether culture follows from structure or whether structure follows from culture. First, it assumes a linearity to the answer when the actual answer may in fact reveal non-linear dimensions. Second, it presupposes that the relationship is unidirectional such that either culture must govern structure or that structure must govern culture, when it may more likely be the case that the relationship is multi-directional.

While it may perhaps be true that constitutional structures affect political behaviour, or alternatively that constitutional culture is a prerequisite to constitutionalism, one need not necessarily accept one and reject the other. It is a tempting, but ultimately false, dichotomy. Perhaps the better construction is to grant that the constitutional dimensions of political life are intricately interconnected with the democratic dimensions of constitutional culture. This helps explain why the adoption of a new constitutional regime in an emerging democracy does not in and of itself instill the rule of law in the people and their elected or appointed agents.

This interpretation has at least two virtues. First, it adopts a convenient intermediate position along the linear universe of options between believing, on the one hand, that constitutional structure controls political culture and, on the other, that political culture shapes constitutional structure. Second, and perhaps more importantly for answering our inquiry, this intermediate position recognizes that although the relationship between constitutional structure and political culture may have theoretical answers and implications, it is at its core an empirical question that is amenable to real answers from real people who enjoy real constitutional protections and are similarly subject to real constitutional constraints. This is a field ripe for empirical research. But at the very least we can stipulate that constitutional structure and political culture are deeply interconnected in more than one way, one of which is that the former may help shape the content of the latter and create the conditions for its development.

It seems intuitively clear, however, that in order for a national constitution to become part of the national identity, it must be regarded as legitimate in the eyes of the people and in turn must form at least part of the basis for connecting the people to the state and to each other. Though it remains unfulfilled, this is what some once hoped for the new post-Cold War Russian federation. To be sure, it is the aspiration of all democracies. In the Part to follow, I move the discussion from the general to the specific, transitioning from constitutional culture to specific examples.

Counterconstitutionalism of constitutionalism that, in my view, impede the societal progress toward a sustainable constitutional culture anchored in participatory democracy.

III. Constitutional design

Constructing participatory democracy is a daunting proposition. It must necessarily be a bottom-up invention that springs from people who engage with others in their community yet it also requires top-down direction from the state in order to lay the foundation for it to flourish.¹²⁵ Participatory democracy emerges in several ways. One of those is the design of constitutional structures that inspire or advance the possibility of a culture of participatory democracy.

For instance, federalism may facilitate the creation of participatory democracy.¹²⁶ This devolution of government authority serves the interest of civic engagement.¹²⁷ In dividing the nation-state into sub-national units, federalism increases the prospect of broad and meaningful discourse by shrinking the space within which popular discourse and deliberation occurs.¹²⁸ It does so by expanding the range of opportunities for individuals to shape their community in concert with their fellow citizens.¹²⁹ Participation at the sub-sub-national level may be preferable to participation at the sub-national level precisely for the same reasons that participation at the sub-national level may be preferable to participation at the national level.¹³⁰

Another structural constitutional design that may facilitate participatory democracy is subsidiarity. This modern structural arrangement derives

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from Catholic social thought\textsuperscript{131} and is perhaps most clearly illustrated in the Constitutional Treaty of the European Union.\textsuperscript{132} It requires that public decisions be made at the lowest level of popular association possible.\textsuperscript{133} For example, where local community groups cannot effectively resolve a question of public policy, only then should municipal or sub-national governments be tasked with addressing it, and the national government should intervene only where these lower levels of government need direction or where it could perform an important coordinating role.\textsuperscript{134}

Subsidiarity establishes a presumption in favour of public participation in the political process.\textsuperscript{135} Its animating ambition is to bring decision-making as close as possible to individuals.\textsuperscript{136} It enhances the possibilities for participation in matters of local interest.\textsuperscript{137} Subsidiary is, at its roots, a strategy deployed to decentralize decision-making.\textsuperscript{138} By reducing the space within which participation can occur, subsidiarity furthers the prospect of regular interaction among individuals on important subjects, improves popular monitoring of public officials, and gives easier access to governmental agents.\textsuperscript{139} In this way, the principle of subsidiarity reinforces self-determination and accountability,\textsuperscript{140} political autonomy at the local or...
regional level\(^\text{141}\) and makes it more likely that decisional outcomes reflect community preferences\(^\text{142}\) (although it is true that subsidiarity itself as a principle does not tell us how to determine which level of government is best equipped to resolve a question of public policy\(^\text{143}\)).

Just as there are constitutional structures that invite participation from citizens, there are constitutional design strategies that actually, though perhaps not intentionally, discourage popular participation. There are several examples of these kinds of constitutional structures in the modern constitutionalized world—structures whose theoretical underpinnings impede participatory democracy by erecting barriers of incommensurability between the citizen and the state on the one hand and, on the other, between the citizen and her fellow citizens. These constitutional designs work a severe harm on the prospect of civic engagement and moreover erode the psychological connection between the state and the citizen, the very connection from which the state derives its legitimacy. I call these constitutional designs examples of *counterconstitionalism*.

In the two Sections to follow, I will illustrate two forms of counterconstitionalism: contraconstitutionalism and supraconstitutionalism. I will introduce the concept of contraconstitutionalism in the context of constitutional bills of rights. I will argue that there are at least four types of constitutional bills of rights in the world. Of those four, one is agnostic to participatory democracy, two help achieve participatory democracy to different degrees, and one kind of bill of rights—the aspirational bill of rights—is contraconstitutional because it undermines the promise of participatory democracy.

I will also introduce the concept of supraconstitutionalism with two illustrations: unamendability clauses and superstatutes. I will argue that the former are counterconstitutional because they place the constitution beyond the reach of the people, and therefore undermine participatory democracy. And I will argue that superstatutes are not counterconstitutional, precisely because they are attentive to popular participation in the design and elaboration of constitutional commitments.

1. Contraconstitutionalism

There are four archetypes for enshrining constitutional bills of rights: (1) discrete bills of rights; (2) catalytic bills of rights; (3) aspirational bills of rights; and (4) pragmatic bills of rights. Each differs from the other in material ways, including the purpose of constitutionalism, the content and function of constitutions, and the role of the state in making real the promise of constitutionalism. In this subsection, I will introduce these four archetypes of constitutional bills of rights and argue that aspirational bills of rights are contraconstitutional.

a. Discrete bills of rights

The first archetype is a discrete bill of rights. A discrete bill of rights simply fulfills, or aims to fulfill, the elementary purpose of constitutionalism. Recall that the purpose of constitutionalism is to create the structures of the state, to delimit the boundaries of citizenship, and to define the state-citizen border. Discrete constitutions do no more than this. They state the enforceable rights and freedoms of citizens in relation to the state. They may also apply reasonable limitations to those rights and freedoms in times of war, emergency or other extraordinary circumstances. Discrete bills of rights are narrowly tailored in scope and widely accessible in language. They are simple documents that convey a simple, though nonetheless powerful, message to readers. Examples of discrete bills of rights include the French Declaration of the Rights of Man, the German Basic Law, and the Jamaican Constitution.

Let us begin with the paradigmatic model of a discrete bill of rights: the French Declaration of the Rights of Man. One need only read the preamble to discern the fundamental feature of discrete constitutionalism. The preamble asserts that the purpose of the document is to set forth, in a solemn declaration, the natural and inalienable rights of persons in order to remind those persons of their own rights against the state. The preamble also gives notice to the state that those persons have been informed of their rights and therefore directs the state to act accordingly to not contravene and instead to stand in defense of those rights. Notice-giving is the principal characteristic of discrete constitutionalism. It puts the state on notice that citizens have been informed of their rights.

A second feature of a discrete bill of rights is that the rights enshrined in the constitutional text do not venture beyond the conventional sampling of simple and non-controversial ones, for instance the rights to equality,

144. Déclaration des droits de l'homme et du citoyen, 1789, préambule.
free expression, religious freedom, as well as criminal defense rights.\textsuperscript{145} Of all constitutional rights, criminal defense rights are perhaps the most emblematic of a discrete bill of rights insofar as they embody the essence of the state-citizen boundary.

The Jamaican Constitution is another example of a discrete bill of rights. In addition to preserving fundamental rights such as the rights to expression, religious freedom, assembly and association, the Jamaican Bill of Rights takes great care to outline in exquisite detail the protections guaranteed during criminal prosecution. The provisions range from the right to be informed about the reasons for arrest or detention, to be granted a fair hearing, to be presumed innocent until proven otherwise, and not to be prosecuted pursuant to \textit{ex post facto} laws.\textsuperscript{146} These and other rights in the constitutional text are intended to accomplish one objective: to inform those subject to the authority of the state of their rights and obligations, and to have at their disposal a readily comprehensible record of those rights and obligations. The Jamaican Constitution does not aspire to achieve anything more than this. It is simply a notice-giving document that is meant to inform.

Further to these two examples, the Basic Rights in the German Basic Law may also be classified under this category. However, the German selection of constitutional rights is distinguishable from the French and Jamaican models because it both constrains and instructs the state. For instance, it constrains the state by making human rights inviolable and by erecting barriers that prevent the state from violating the sanctity of the home.\textsuperscript{147} In contrast, the Basic Law also establishes a societal vision according to which the state must govern itself. For example, the Basic Law commands that the state must support the family and, in particular, mothers.\textsuperscript{148} It also supports religious instruction in private schools.\textsuperscript{149} Yet the Basic Law remains, at its core, a discrete bill of rights because it is mostly concerned with outlining fundamental civil and political rights, including rights that attach in the criminal process.\textsuperscript{150}

b. \textit{Aspirational bills of rights}

The leading antagonist of a discrete bill of rights is an aspirational bill of rights. Contrary to a discrete bill of rights, an aspirational bill of rights

\textsuperscript{145} Déclaration des droits de l'homme et du citoyen, articles VII, VIII, IX, (1789).
\textsuperscript{146} \textit{Jamaica (Constitution) Order in Council, 1962}, C. III, arts. 22, 21, 23, 15(2), 20(1), (5), (7) respectively.
\textsuperscript{147} \textit{The Basic Law of the Federal Republic of Germany}, 1949, c. I, arts. 1(2), 13(1) \textit{[Basic Law]}.
\textsuperscript{148} \textit{Ibid.}, arts. 6(1), (4).
\textsuperscript{149} \textit{Ibid.}, art. 7.
\textsuperscript{150} \textit{Ibid.}, c. IX, arts. 101-04.
does not satisfy itself with simple statements of citizen rights and freedoms from state action. Yes, an aspirational bill of rights enshrines fundamental rights of expression, religious freedoms, equality and, among others, criminal defense protections. But it endeavours to do more than this. An aspirational bill of rights speaks broadly in ambitious language, rejects the existing limitations of contemporary society as it is, and instead reaches far into the future to envision society as it could be. As a consequence, an aspirational bill of rights articulates a commitment to delivering social and economic rights to its citizenry. Such rights include the right to social security, housing, food, health care, and a healthy environment.

Models of aspirational constitutionalism include the *Constitution of the Republic of Poland*,¹⁵¹ the *Constitution of the Republic of Uzbekistan*,¹⁵² and the *Constitution of the Republic of Belarus*.¹⁵³ Consider first the Polish constitution. It safeguards the conventional protections, including assembly, association, expression, equality, religious belief, freedom of the press, freedom from torture, and, among others, criminal defence protections, freedom of the press.¹⁵⁴ Yet the Polish constitution also protects these following social and economic rights: (1) the right to a minimum wage; (2) employment; (3) paid holiday and vacation; (4) social security; (5) health care; (6) education; (7) a healthy environment; and among others (8) housing.¹⁵⁵

The *Constitution of the Republic of Uzbekistan* is similar. It protects the rights to equality, speech, conscience and religion, criminal defence safeguards and, among others, association.¹⁵⁶ Yet it ventures beyond this conventional list to also enshrine the rights to employment, paid vacations, social security, health care and education,¹⁵⁷ and others.

As a final example of the second archetype of constitutional bills of rights—an aspirational bill of rights—consider the *Constitution of the Republic of Belarus*. The state pledges to guarantee a bundle of rights, including the right to equality, free expression, free movement, assembly, association, and criminal defense protections.¹⁵⁸ Belarus also pledges to guarantee the right to food, clothing, housing, a steadily improving standard of life, full employment of the citizenry, minimum wage, paid

¹⁵². 1992 [Constitution of Uzbekistan].
¹⁵³. 1996 [Constitution of Belarus].
¹⁵⁵. Ibid., c. II, arts. 65(4), (1), 66(2), 67, 68(1)-(3), 70, 74(2), 75 respectively.
¹⁵⁶. Constitution of Uzbekistan, c. 5, art. 18; c. 7, arts. 29, 31, 25-26; and c. 8, art. 34 respectively.
¹⁵⁷. Ibid., c. 9, arts. 37-41.
vacation, property, free health care, a healthy environment and, among others, free elementary, secondary and vocational education.\textsuperscript{159}

c. \textit{Catalytic bills of rights}

The third archetype is a catalytic bill of rights. A catalytic bill of rights privileges the political process and intends to pull the citizen into that process. It therefore goes beyond merely fulfilling the simple purpose of constitutionalism. In addition to creating the structures of the state, delimiting the boundaries of citizenship and defining the state-citizen border, a catalytic bill of rights seeks to trigger civic engagement by inviting citizens to be active participants in the process of self-definition that constitutionalism entails. A catalytic bill of rights therefore deploys a targeted strategy to achieve the promise of constitutionalism. That strategy is to prompt popular participation in giving content and meaning to the freedoms and protections enshrined in its bill of rights.

Two contemporary exemplars of catalytic bills of rights are the United Kingdom \textit{Human Rights Act} and the \textit{Canadian Charter of Rights and Freedoms}. The \textit{Human Rights Act}\textsuperscript{160} came into force in 2000 and directly incorporated the rights and freedoms enshrined in the \textit{European Convention on Human Rights}\textsuperscript{161} into the law of the United Kingdom.\textsuperscript{162} Its enactment was partly the culmination of a campaign against the unwritten nature of rights in United Kingdom.\textsuperscript{163} It was received as a momentous document that heralded a new era of constitutionalism for the United Kingdom.\textsuperscript{164}

The \textit{Human Rights Act} is like most other bills of rights in that it preserves conventional civil and political rights, namely expression, religious freedom, assembly, equality, and criminal defense protections.\textsuperscript{165} But it departs from typical bills of rights by requiring courts to interpret legislation in a way that is compatible with the rights it enshrines.\textsuperscript{166} This effectively requires courts to interpret legislative enactments in way that permits them to withstand judicial scrutiny. But where a court determines

\begin{itemize}
\item \textsuperscript{159} \textit{Ibid.}, arts. 21, 41, 43-46, 49 respectively.
\item \textsuperscript{160} \textit{Human Rights Act 1998} (U.K.), 1998, c. 42 [\textit{Human Rights Act}].
\item \textsuperscript{165} \textit{Human Rights Act,} s. 1(a).
\item \textsuperscript{166} \textit{Ibid.}, s. 3(1): "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
\end{itemize}
that it is not possible to read a given statute in a way that is consistent with the civil and political rights guaranteed in the *Human Rights Act*, that court may then issue what the Act calls a declaration of incompatibility. 167 This is similar to invalidating a law as unconstitutional. Yet it is only similar to judicial invalidation—and not quite exactly that—because the *Human Rights Act* makes declarations of incompatibility only advisory insofar as they do not compel Parliament to revise the law into conformity with the judicial determination. 168 Instead, Parliament may take the judicial decision into consideration and weigh the choice whether to ignore the judicial declaration of incompatibility or to amend the legislation. 169 The ultimate decision of Parliament is very likely to correspond to public opinion.

Another example of a catalytic bill of rights is the *Canadian Charter of Rights and Freedoms*. Adopted in 1982, the *Charter* confers freedoms of conscience and religion, expression, assembly, association, the right to equality, and criminal defense protections, 170 among others. But it contains two provisions that classify the *Charter* as a catalytic bill of rights. First, the *Charter* contains a limitations clause pursuant to which Parliament or a provincial legislature may engage in a dialogic exchange with a court about the permissible scope of a *Charter* right or freedom. 171 Second, the *Charter* contains a clause that authorizes Parliament or a provincial legislature to suspend for up to five years the application of a judicial decision that interprets a *Charter* right or freedom. 172 This power allows a legislature to effectively overrule a court judgment on the meaning of a right or freedom contained in the *Charter*. It is very unlikely that a legislature would invoke the clause if doing so would run counter to public opinion.

d. *Pragmatic bills of rights*

The fourth model is a pragmatic bill of rights, which Cass Sunstein has described in his study of constitutional texts. 173 A pragmatic bill of rights

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167. *Ibid.*, s. 4(2): “If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”
168. *Ibid.*, s. 6(a).
171. *Ibid.*, s. 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
172. *Ibid.*, s. 33(1): “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”
173. Cass R. Sunstein, “American Advice and New Constitutions” (2000) 1 Chicago J. Int’l L. 173 at 180, 186-87. Sunstein’s body of scholarship on constitutionalism has been exceedingly influential on my analysis about these categories of constitutionalism and in conceptualizing the promise of constitutionalism.
Counterconstitutionalism

recognizes that the state has an important role to discharge in improving the life of its constituents. But it acknowledges both that the state may not always have at its disposal the necessary public resources to fulfill this mandate and that the allocation of finite public funds may be a non-justiciable political matter. Pragmatic constitutionalism therefore requires the state to do what is within its economic capacity and available resources in order to move progressively toward such objectives as delivering social security, housing, food, health care and a clean environment to its citizenry. Models of pragmatic constitutionalism include the Irish, Indian and South African constitutions.

Consider first the Constitution of Ireland. The text of the Irish constitution enshrines several rights and privileges that venture beyond conventional civil and political rights, including those ensuring adequate means of livelihood, protecting the weaker segments of the population, working toward an equitable distribution of material wealth among private individuals and social classes, pledging economic security for families, and finding suitable employment for individuals. These are all paradigmatic examples of constitutionalizing social and economic aspirations that the state has for its people. Yet these aspirations are also constrained in very important ways by the constitutional text itself. These rights and privileges are bounded by a clause that expressly makes them unenforceable and non-justiciable, and identifies them as forward-looking directives of social policy that should only guide, but not bind, the national legislature, which is called the Oireachtas.

Now let us turn to the Indian constitution. Like the Irish constitution, the Indian constitution preserves a number of aspirational rights and privileges. The principal difference is that the Indian menu is more far-reaching than the Irish one. The Indian constitution declares that citizens should

174. *Constitution of Ireland* 1937. Art. 45(2)(i): “That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making the reasonable provision for their domestic needs”; art. 45(4)(i): “The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”; art. 45(2)(ii): “That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good”; art. 45(2)(v): “That there may be established on the land in economic security as many families as in the circumstances shall be practicable”; art. 45(4)(ii): “The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.”

175. *Ibid.,* art. 45: “Directive Principles of Social Policy. The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”
have an ever-increasing standard of living and public health conditions, a clean environment, leisure as well social and cultural opportunities, the right to education and to work, suitable employment, humane work conditions, an adequate means of livelihood, healthy conditions in which to develop, free legal assistance, and modernized agriculture. The state is also constitutionally directed to address various forms of economic and social inequality.176

This is an ambitious range of social, cultural and economic rights. Were any state capable of fulfilling them in their entirety, one could be forgiven for mistaking that state as utopian. Indeed, in order for any state to achieve these conditions for its citizenry, the state must devote significant financial and human resources that it may not have at its disposal. That is precisely why the Indian constitution makes these and other aspirational rights in the constitution contingent on the economic capacity of the state. Specifically, the Indian state is required only to consider these objectives as directive principles in its formulation of state policy. The Indian constitution

176. Constitution of India, 1950, art. 47: “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health”; art. 48A: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”; art. 43: “The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas”; art. 41: “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want”; art. 39(a): “The State shall, in particular, direct its policy towards securing that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength”; art. 42: “The State shall make provision for securing just and humane conditions of work and for maternity relief”; art. 39(a): “The State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood”; art. 39(f): “The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment”; art. 39A: “The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”; art. 48: “The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle”; art. 38(2): “The State shall, in particular, strive to minimise the inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”
Counterconstitutionalism consequently removes these aspirational rights from the purview of the judiciary and thus renders them unenforceable as a matter of law.\textsuperscript{177}

A more recent example of pragmatic constitutionalism is the South African constitution of 1996. The text includes provisions that are common to both the Irish and Indian constitutions. For instance, the document declares that citizens have the right to a clean environment.\textsuperscript{178} It enshrines the right to adequate housing, health care, food and water, social assistance, education, and legal assistance. It also seeks to promote a concretized right to property ownership.\textsuperscript{179} Just as in the Irish and Indian constitutions, these aspirational rights are qualified by an important proviso that recognizes that the state may not have the necessary resources to actually satisfy these constitutional promises, which is why the South African constitution conditions these rights on available resources and instead only encourages the state to work toward the progressive realization of those rights.\textsuperscript{180} The South African constitution also includes another significant qualifier to this grand vision of citizenship. This interesting tool is a limitations clause that permits the state to derogate from rights where it may be justifiable or defensible to do so in light of particular circumstances.\textsuperscript{181}

e. Constitutionalism and constitutional culture

When measured against the promise of constitutionalism, these four archetypes for enshrining constitutional bills of rights exhibit different strengths and weaknesses. Some of them satisfy the promise of constitutionalism and others may actually undermine it. In this subsection,

\begin{itemize}
\item \textsuperscript{177} Ibid., art. 37: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."
\item \textsuperscript{178} Constitution of the Republic of South Africa, No. 108 of 1996, c. 2, s. 24 reads: "Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (ii) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."
\item \textsuperscript{179} Ibid., ss. 26(1), 27(1), 29, 35(3)(g), 25(5) respectively. "The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."
\item \textsuperscript{180} See e.g. ibid., ss. 26(2), 27(2), 29(1)(b) which state that the state must take measures "within its available resources" to achieve the "progressive realization" of these rights or that the state must take measures to make them "progressively available and accessible."
\item \textsuperscript{181} Ibid., s. 36(1): "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."
\end{itemize}
I will advance three arguments. First, I will argue that a discrete bill of rights is agnostic on participatory democracy. Second, I will contend that an aspirational bill of rights paradoxically works a significant harm upon participatory democracy. Finally, I will also argue that both catalytic and pragmatic bills of rights enhance the prospect of cultivating participatory democracy. Let me begin with discrete constitutionalism.

Discrete bills of rights do not take a position on the merits of participatory constitutionalism. They take a reductionist view of constitutionalism, believing that the constitutional text should set forth no more than is necessary to satisfy the very basic purpose of constitutionalism. Discrete bills of rights neither promote nor obstruct participatory democracy. In comparison to other kinds of bills of rights, they take no affirmative steps to seal or intensify the bond between the citizen and her state nor do they create any distance between the citizen and her state. Admittedly, even a dispassionate form of constitutionalism contributes to the state-citizen relationship insofar as the constitutional text is often part of a series of strategies deployed by the state and its leaders to create a constitutional culture that respects the rule of law. Nonetheless, a discrete bill of rights cannot be said to serve participatory democracy precisely because it adopts a detached posture in relation to it.

On the other hand, a catalytic bill of rights does indeed enhance the prospect of participatory democracy. It brings the citizen squarely and immediately into the constitutional fold, enabling her to ascertain her rights and freedoms, discern the line that the state may not cross, and identify the ways in which she may engage her fellow citizens to change the terms of state-citizen boundary. Catalytic bills of rights invite citizens to participate in public constitutional discourse in tangible ways that may have very real consequences. For example, the United Kingdom Human Rights Act contemplates that public pressure may play an important role in persuading Parliament to conform to judicial declarations of incompatibility. Similarly, the notwithstanding clause in the Canadian Charter of Rights and Freedoms likewise advances participation because it authorizes legislatures to stand in defense of public choice in the face of a disagreeing court. Legislators will not use the clause without measuring public feeling on the matter, which encourages civic engagement on important issues of the day. In this way, both bills of rights are catalytic insofar as they are designed to spur participation in the public discourse. They both open the legislative and political processes to citizens should they wish to change the meaning and content of their rights. This kind of collective action is possible under a catalytic bill of rights because it encourages citizens to become civically engaged. Catalytic bills of rights establish a baseline—not
Counterconstitutionalism

a ceiling—from which citizens can envision a fuller conception of rights that can be changed by participating in the political process.

In contrast, aspirational bills of rights—which enshrine social, economic and cultural rights in addition to the conventional menu of civil and political rights—do not enhance participatory democracy. An aspirational bill of rights may sometimes be nothing but a list of unrealistic promises. For instance, if an aspirational bill of rights enshrines the right to a healthy environment but the state does not possess the necessary public funds to undertake environmental cleaning projects and to pursue environmental sustainability strategies, that particular constitutional promise becomes unenforceable.

This runs the very real risk of evaporating from the text of the aspirational bill of rights all substantive force, and with it the hope for cultivating a citizenry that abides by and moreover respects the law. For if the constitutional text promises a clean environment yet people witness their neighbours stricken by illnesses caused by the polluted air they breathe, the impure water they drink or the contaminated food they eat, citizens will come to no other conclusion but that the constitution does not mean what it says. The consequences will be dire for the rule of law, the future of constitutionalism in that troubled jurisdiction, and the prospect of participatory democracy because citizens will lose faith in the institutions of the state, and in the capacity of the state to improve their lives. ¹⁸²

The final model for constitutionalizing rights is the pragmatic bill of rights. Recall that the pragmatic bill of rights embraces the view that the state has important positive duties toward citizens, for instance the enduring task of improving their quality of life. But a pragmatic bill of rights acknowledges that the state may not always be capable of fulfilling those duties because of financial constraints. Like the catalytic bill of rights, a pragmatic bill of rights favours the participatory element of constitutionalism by encouraging citizens to develop and sustain their own constitutional culture.

The Indian judgment in Tellis¹⁸³ is a vivid example of pragmatic constitutionalism at work. The Tellis Court ruled in favor of a group of women and men who argued that the right to life is illusory without the means of livelihood. In issuing its ruling, the Court acknowledged that the social and economic rights guaranteed by the Indian constitution are

subject to legislative discretion insofar as the state's ability to fulfill those rights must be considered within the limits of its economic capacity. The Court therefore drew an important balance between satisfying the enshrined rights of citizens and recognizing the constraints that finite resources bring to bear on the ability of the state to fully satisfy those rights.

The South African constitution also offered a similar escape allowing the state to avoid a potential quagmire when a suit was filed requesting a judicial order to provide a medical service that the state did not have the funds to provide. The Soobramoney Court dismissed a claim demanding renal dialysis from a hospital whose budget simply could not afford it. The Court acknowledged that the South African Constitution guarantees medical treatment but neutralized this right by reference to a related provision that conditioned the right to medical treatment on the state's available resources. This is an example of a constitution enshrining aspirational rights but expressly limiting them to the realm of practicality.

The virtue of pragmatic constitutionalism is that it does not defer blindly to legislative choice. Quite the contrary: it calls upon the judiciary to probe the reasoning given by the state as to why it is unable to fulfill a socio-economic right guaranteed in the constitution. The South African Constitutional Court performed this important duty in a recent case in which it concluded that the impugned state agency had failed to make reasonable provision within its available resources for claimants seeking adequate housing. In this case, the Court vindicated the aspirational right to adequate housing that is enshrined in South Africa's pragmatic bill of rights. This is an example of the critical supervisory function that the Court can discharge only if it is regarded in the national consciousness as a legitimate authority. The judiciary must also have the requisite political capital to compel state remedial action in response to one of its judgments.

This model of constitutionalizing rights captures the most laudable elements of other categories of bills of rights. First, it privileges legislative choice and popular will. Second, it paints a vision of rights that is aspirational and that inspires hope among citizens that the nation will one day reach its full promise of liberty and social progress. But, third, it moderates those aspirational rights with a clause that limits the fulfillment of those rights within the scope of the possible and readily achievable. The result

Counterconstitutinalism is salutary for citizenship because—unlike constitutional models that fail to see a constitution as a vehicle for improving the lives of the citizenry, and unlike constitutional models that are not grounded in practicality—the pragmatic model creates manageable expectations of rights within the rule of law, all the while cultivating a sustainable constitutional culture of participatory democracy.

2. **Supraconstitutionalism**

Having argued that there are four archetypes of constitutional bills of rights—one of which is contraconstitutional and therefore undermines the promise of constitutionalism—I now turn to the notion of supraconstitutionalism. This section will argue that unamendability clauses are supraconstitutional elements that frustrate the possibility of participatory democracy because they make certain constitutional guarantees unchangeable. Although they do so in the service of important principles of personhood and community, these supraconstitutional provisions are nonetheless counterconstitutional. I will subsequently use unamendability clauses as a foil to argue that superstatutes are not supraconstitutional. Quite the contrary, as I will demonstrate, superstatutes capture the very essence of participatory democracy.

a. **Unamendability**

The term unamendability describes a constitutional provision that is impervious to amendment. Its resistance to any attempt to amend it—this special quality of unamendability—derives from an express statement of unamendability in the constitutional text. Unamendable provisions are
also called eternity, perpetuity, entrenchment, or nonamendable clauses. Unamendability also includes judicially-construed doctrines pursuant to which the judiciary proclaims that some part or provision of the constitution is unamendable. For our purposes, I will refer to all of these forms of unamendability as unamendable or unamendability clauses.

It is critical to distinguish my understanding of unamendability clauses from competing conceptions of these clauses. First, I regard unamendability clauses as different from constitutional provisions that simply lack an amendment formula or procedure, as in the Concluding and Interim Provisions of the Russian constitution. These are not unamendability clauses for they remain amendable by some procedure even though that particular procedure may not be outlined in the constitutional text. I also wish to distinguish unamendability clauses from those constitutional clauses that simply establish supermajorities for revising or repealing


190. See e.g. Upendra Baxi, “Universal Rights and Cultural Pluralism: Constitutionalism as a Site of State Formative Practices” (2000) 21 Cardozo L. Rev. 1183 at 1205, which states that the Supreme Court of India has designated the basic structure of the Indian constitution as unamendable.

them. Such clauses may be unamendable in practice if they establish seemingly unattainable supermajorities for amendment. Yet they still remain amendable in theory. This is a terribly important distinction that I will elaborate in the pages to follow. Similarly, I do not take unamendability clauses to include entrenched provisions that are subject to special legislative, parliamentary or popular procedures for revision or repeal. Finally, I also distinguish unamendability clauses from those that are widely regarded as virtually unamendable because of onerous or ostensibly unachievable standards for successful amendment.

There are several examples of unamendability across the global community of constitutional states. Perhaps the most prominent example springs from the German Basic Law. This constitutional text makes several constitutional provisions unamendable, meaning that those provisions are eternally enshrined in the Basic Law and cannot legitimately be revised or repealed. The German constitutional prohibition against amendment reads as follows: "Amendments to this Basic Law affecting the division


193. See e.g. Constitution of the Republic of Ghana, 1996, c. 25, art. 290:

2. A bill for the amendment of an entrenched provision shall, before Parliament proceeds to consider it, be referred by the Speaker to the Council of State for its advice and the Council of State shall render advice on the bill within thirty days after receiving it.

3. The bill shall be published in the Gazette but shall not be introduced into Parliament until the expiry of six months after the publication in the Gazette under this clause.

4. After the bill has been read the first time in Parliament it shall not be proceeded with further unless it has been submitted to a referendum held throughout Ghana and at least forty percent of the persons entitled to vote, voted at the referendum and at least seventy-five percent of the persons who voted cast their votes in favour of the passing of the bill.

5. Where the bill is approved at the referendum, Parliament shall pass it.

6. Where a bill for the amendment of an entrenched provision has been passed by Parliament in accordance with this article, the President shall assent to it.

of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."195 Although the term unamendable or unamendability does not figure in this constitutional provision, it is nonetheless an unamendability clause because it renders ineffective any attempt to amend certain designated constitutional provisions.

This German unamendability clause is rich in both content and meaning. First, it declares that Germany must remain permanently organized as a federal state. This cannot ever change under the existing constitutional order. Moreover, the sub-national bodies, called Länder, must retain a voice in the legislative process in order to give effect to the federal structure of Germany. This, too, is unamendable. Third, the unamendability clause refers to both Articles 1 and 20 of the Basic Law, both of which are themselves just as rich in substance. Article 1 of the Basic Law preserves the right to human dignity and compels all organs of the state to respect and protect this right.196 While Article 1 concerns a constitutional right, Article 20 concerns constitutional and political structure. It proclaims that Germany is a democratic federal state that derives its authority from the freely expressed popular will of the people through periodic elections.197 Sanford Levinson suggests that judicial constructions of these unamendable German constitutional provisions are presumably unamendable too.198

German constitutionalism perceives democracy as rooted in core, substantive principles that are so deeply elemental to the organization of

195. Basic Law, supra note 147, c. VII, art. 79(3).
196. Ibid., c. I, art. 1:
   (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
   (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
   (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.
197. Ibid., c. II, art. 20:
   (1) The Federal Republic of Germany is a democratic and social federal state.
   (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.
   (3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
   (4) All Germans shall have the right to resist any persons seeking to abolish this constitutional order, if no other remedy is available.
Counterconstitutionalism

civil society that they arise prior to procedural notions of democracy.\(^{199}\) There is a historical basis for this view of constitutionalism. The strategy to entrench federalism in Germany was deployed to mitigate the dangers of centralism that were made plain not only in the nation but throughout the world during the period between the first and second world wars.\(^{200}\) Unamendability in the German context was an innovation of the American constitutional designers who were tasked with helping Germany chart a new course.\(^{201}\) Their operating premise was that no German movement should be permitted to alter certain constitutional provisions—even if that movement could muster the requisite majorities or supermajorities to change the terms of its Basic Law.\(^{202}\) As one scholar has argued, this form of entrenchment was a direct result of—and a necessary response to—the constitutional and governmental failures that had befallen Germany\(^{203}\) under the previous Weimar Constitution.

In addition to this leading example of unamendability, there exist others, though they are perhaps not as well known. For example, the United States has two unamendability clauses in its founding text.\(^{205}\) The first deals with slavery—providing that no amendment may be made until

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a certain period has elapsed—and the second with the organization of the Senate—holding that each state is guaranteed equal voting power in the upper chamber. The Equal Voting Power Clause was based on the states’ insistence on equality and was moreover intended to cement the Connecticut Compromise.

Likewise, the Italian constitution prohibits any constitutional amendment to the republican structure of the state. Turkey also has an unamendability clause. The clause deems irrevocable Turkish republicanism, in addition to the state’s democratic and secular nature as well as certain concepts that Turkey regards as central to governance. The Turkish unamendability clause also prevents amendments to the territory and official language of the state, and its designated flag, national anthem and capital.

Several African states have also enshrined unamendability clauses. For instance, Namibia makes all of its civil and political rights

206. U.S. Const. art. V: “Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article”; see also ibid., art. I, § 9, cl. 1: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person”; ibid., art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”

207. Ibid., art. V: “Provided ... that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”


211. Constitution of the Republic of Turkey, 1982, Part I, art. 4: “The provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provisions of Article 3 can not be amended, nor can their amendment be proposed.”

212. Ibid., art. 1: “The Turkish State is a Republic”; art. 2: “The Republic of Turkey is a democratic, secular and social State governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble.”

213. Ibid., art. 3.

unamendable.\textsuperscript{215} None of them is subject to revision or repeal in any way. Those unamendable rights include human dignity, equality, privacy, speech, religious freedom, assembly, association, free movement, education, the right to due process and a fair trial and, among others, the rights against capital punishment, arbitrary arrest or detention and involuntary servitude.\textsuperscript{216}

The Republic of the Congo has adopted a similar entrenchment approach. The Constitution of the Congo states that the territorial integrity of the state is unamendable, as are republicanism and secularism and presidential tenure, in addition to the state’s entire inventory of civil and political rights.\textsuperscript{217} The Congolese rights are more extensive than the Namibian ones. Entrenched Congolese rights include the right to life, equality, due process, access to government, free movement, religious freedom, expression, assembly, employment, rest and leisure, cultural identity, education and, among others, the right to a clean environment.\textsuperscript{218} They also include the presumption of innocence, and rights against torture or inhumane treatment, unreasonable search and forced labour.\textsuperscript{219}

While Namibia and the Congo are two of the most enthusiastic proponents of unamendability, other African states have been more restrained in constitutionally enshrining unamendability clauses. For example, Cameroon has made unamendable only its republican form of government and national borders.\textsuperscript{220} In addition to republicanism, the Gabon Constitution has shielded the pluralist character of its democracy

\textsuperscript{215} Constitution of the Republic of Namibia, 1990, as amended to 1998, c. XIX, art. 131: “No repeal or amendment of any of the provisions of Chapter 3, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.”

\textsuperscript{216} Ibid., arts. 8, 10, 13, 21(1)(a), (c)-(e), (g), 20(1), 7, 12, 6, 11, respectively.

\textsuperscript{217} Constitution de la République du Congo, Titre XVIII, art. 185(2) (2002): “Aucune procédure de révision ne peut être engagée ou poursuivie lorsqu’il est porté atteinte à l’intégrité du territoire”; art. 185(3): “La forme républicaine, le caractère laïc de l’État, le nombre de mandats du Président de la République ainsi que les droits énoncés aux titres I et II ne peuvent faire l’objet de révision.”

\textsuperscript{218} Ibid., arts. 178(4): “No procedure of amendment shall be engaged in or followed when it attempts to touch the integrity of the territory.”; 178(5): “The republican form, the secularity of the State, and the number of mandates of the President of the Republic shall not be the object of any amendment.”; 178(6): “Amendment shall not have the object of the reduction or the abolition of fundamental rights and liberties enunciated in Title II.”; Title II, arts. 10-11, 13, 18, 22, 26-27, 29, 33-34, 37, 46, respectively.

\textsuperscript{219} Ibid., Title II, arts. 12, 16, 23, 31.

\textsuperscript{220} Constitution of the Republic of Cameroon, being Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972, 1972, as amended by 1996, Part XI, art. 64 “No procedure for the amendment of the Constitution affecting the republican form, unity and territorial integrity of the State and the democratic principles which govern the Republic shall be accepted.”
from amendment. In Mali, neither territorial borders, republicanism, secularism, nor political pluralism is subject to amendment. Mauritania does something similar, removing territorial integrity, republicanism and pluralist democracy from amendability. Niger also falls under this category insofar as it screens from revision or repeal the following: (1) the territorial integrity of the nation; (2) republicanism; (3) political pluralism; (4) secularism; (5) the rules governing presidential election; and (6) constitutional amnesty afforded to those responsible for two designated coups d'etat.

b. Superstatutes
In an influential article, Eskridge and Ferejohn illuminate the concept of a superstatute. A superstatute is a statute that has achieved quasi-constitutional status because: (1) it is important in some salient respect; and (2) it becomes synonymous in the public imagination with the privileges or duties of citizenship. Although in theory a superstatute remains a conventional statute—meaning that it remains subject to repeal by the legislature through the normal course of the legislative process—it

223. *The Constitution of the Islamic Republic of Mauritania*, 1991, as amended to 2006: "No procedure for the amendment of the Constitution may be initiated if it calls into question the existence of the State or infringes the integrity of the territory, the republican form of the institutions, or the pluralist character of Mauritanian democracy."
Counterconstitutionalism

is unlikely to be repealed precisely because of the distinctive position it occupies in the constitutional architecture of a given state.226

Eskridge and Ferejohn enumerate three characteristics that define superstatutes: (1) they endeavour to establish a new framework for public policy; (2) they develop, over time, some resonance in the public consciousness; and (3) they have a corresponding effect on the law.227 Three paradigmatic examples of superstatutes are the Sherman Act, the Civil Rights Act of 1964 and the Endangered Species Act of 1973.228 Some have argued that other American statutes may have achieved the status of superstatute, including the Medicare Act,229 the Voting Rights Act,230 the Administrative Procedure Act,231 the National Environmental Policy Act,232 the Americans with Disabilities Act,233 the Religious Freedom Restoration


228. 16 U.S.C. §§1531-1544 (1973); see also ibid. at 1231-46.


We can trace the notion of a superstatute through several iterations, beginning perhaps as early as 1368 under the reign of Edward III, through the fundamental law for West New Jersey in 1676, to the modern theory of statutory constitutionalism. What brings unity to the concept of a superstatute across the ages is that superstatutes create a new statutory setting that constrains government action. Superstatutes may also form the basis or justification for further legislation. Superstatutes announce or proclaim a fundamental political principle that makes them seem more like constitutions than like statutes. They are consequently treated like constitutional provisions. Courts may freely interpret superstatutes just as they would conventional statutes, that is by reading them either broadly or narrowly and by either upholding or invalidating them. In practice, courts deem superstatutes as controlling legislation to which conventional statutes must conform.

Some superstatutes may be repealed only by popular vote. Certain American states regard statutes created through the initiative process as superstatutes that are amendable only by a subsequent initiative. Some

have deployed the theory of superstatutes in very interesting ways. For instance, one scholar has argued that certain treaties should be regarded as superstatutes.\textsuperscript{248} Another has analogized superstatutes to quasi-global social norms.\textsuperscript{249} Yet another has explored the implications of superstatute theory in the context of unwritten constitutions.\textsuperscript{250}

Ackerman calls superstatutes \textit{amendment-analogues}, suggesting that they have had the effect of amending the constitution though they have not in fact amended it.\textsuperscript{251} He furthermore distinguishes superstatutes from transformative constitutional amendments on the basis that the former are narrow albeit important commands and the latter reshape an area of constitutional law in substantial ways.\textsuperscript{252} Ackerman has recently explained that he regards his constitutional moments project as complementary to, and not in tension with, the theory of superstatutes, noting that his project is concerned with statutes that warrant full constitutional status whereas superstatutes are only quasi-constitutional.\textsuperscript{253}

c. \textit{Constitutionalism and constitutional possibilities}

Having introduced both unamendability clauses and superstatutes, let me turn to assessing them against the backdrop of the promise of constitutionalism. I will argue that the former are inconsistent, while the latter are consistent, with democratic constitutionalism. I begin first with unamendability clauses.

My discomfort with unamendability derives from the theory of participatory democracy. Unamendability clauses undermine the prospect of instilling in citizens a sense of investment in and ownership of their state. Unamendability clauses are objectionable as a matter of theory because they chill constitutional discourse and prevent reconsideration of the constitutional text, the very document that is the embodiment of a people’s nationhood and their vision for themselves and their state. In contrast, superstatutes, insofar as they are just statutes that are subject to

\textsuperscript{252} See Bruce Ackerman, “Taxation and the Constitution” (1999) 99 Colum. L. Rev. 1 at 39; Bruce Ackerman, “Constitutional Politics/Constitutional Law” (1989) 99 Yale L.J. 453 at 521-22; see also Steven D. Smith, “Reductionism in Legal Thought” (1991) 91 Colum. L. Rev. 68 at 75, n. 32 (“Ackerman contrasts ‘transformative’ amendments with others, which he calls ‘superstatutes,’ that ‘do not seek to revise any of the deeper principles organizing our higher law’”).
\textsuperscript{253} Bruce Ackerman, “The Living Constitution” (2007) 120 Harv. L. Rev. 1737 at 1753, n. 38.
repeal, reflect the fluidity that participatory democracy invites. Of these two, only unamendability clauses are supraconstitutional because only they limit the universe of constitutional possibilities that are open to the people.

Before proceeding, let me raise an aside. One scholar refers to unamendability clauses as a superconstitutional feature. I disagree with this construction. I believe they are an example of supraconstitutionalism. On my reading, super as a prefix suggests an excess or superiority with respect to size, degree or intensity. In words that include the prefix super, the term super qualifies the concept that follows it. For example, the term supersonic refers to a speed that surpasses the speed of sound. Here, super is used to indicate superiority in the intensity of speed. Likewise, the term supercomputer refers a computer that is the mainframe of a network of computers and, as the mainframe, is larger and more powerful than other computers in the network. Here, super is deployed to suggest superiority with respect to size. One final example is the term superfluous, in which the prefix super points to an excess or extra flow or an overabundance of flow. Thus, to identify something as superconstitutional would be to suggest that a certain constitution or constitutional provision is superior in size or degree or intensity to another constitution or constitutional provision.

In our particular context of unamendability clauses, to identify unamendability as superconstitutional would be to suggest that unamendability clauses in constitutions are superior in size, degree or intensity to other constitutional provisions. Yet that is precisely where I depart from those who would call unamendability clauses superconstitutional provisions. Unamendability clauses are not constitutional provisions. Yes, technically, unamendability clauses are indeed located within the constitutional texts. But conceptually, they effectively detach themselves from the constitution.

The prefix supra refers something that stands above, over, or beyond the term it qualifies. Thus, a supranational organization like the United Nations is above or beyond the nation-state. The United Nations as an institution is of course conceptually related to a nation-state but a schematic diagram portraying the relationship between the two would display the United Nations above the nation-state. In the same way, unamendability clauses are supraconstitutional provisions: they are located above or outside the constitutional text because they are not subject to the same rules, they are invulnerable to revision or repeal, and they are beyond the control of

constitutional amendment procedures within that text. That is why I call unamendability clauses supraconstitutional, not superconstitutional.

The theory of unamendability derives from the conviction of constitutional designers that certain principles or structures are so profoundly pivotal to the meaning of constitutionalism as to warrant enshrining a constitutional prohibition against their revision or repeal.255 This is a compelling theory, one that has persuaded leading constitutional thinkers to endorse unamendability in some form. For instance, Cass Sunstein has advised emerging democracies to make certain constitutional rights unamendable.256 Bruce Ackerman has also suggested that the United States should entrench unamendable rights,257 even as some have queried whether the United States could constitutionally add an unamendable amendment to its present Constitution.258 Another has argued that human rights considerations might require an unamendable constitution.259

I disagree. The strongest criticism of unamendability is that it privileges substantive norms over popular sovereignty.260 As some have suggested, unamendability runs counter to fundamental principles of democracy.261 Others have argued that unamendability is in fact unconstitutional.262 Another has observed that such unamendability clauses are essentially, and merely, symbolic.263 Each of these is partly correct but they do not fully explain why unamendability is inconsistent with the promise of constitutionalism.

The doctrine of unamendability does not actually contemplate that a state may adopt a written constitution that forecloses any organ of the state

256. Sunstein, supra note 173 at 185.
from undoing what the constitution provides, as one scholar suggests.\textsuperscript{264} Nor does the theory of unamendability provide only that unamendability clauses cannot be set aside by the legislature, as another scholar posits.\textsuperscript{265} Rather, on my construction, unamendability constrains more than simply the state or an organ of the state such as the legislature. Unamendability constrains the people. It does this in a manner that is qualitatively different from countermajoritarian institutions like judicial review. Although judicial review does indeed constrain popular majoritarian decision-making, the people nonetheless retain access to amendment mechanisms that authorize them, at least theoretically, to adjust judicial decisions. The people may also inform, either directly or indirectly, the judicial selection and appointment mechanisms.

But unamendability conveys a different message to the people. It is counterconstitutional because it conveys a debilitating and enfeebling message to citizens. It tells them that they no longer have the capacity to chart their own course, to define themselves through the practice of constitutionalism and constitutional adjudication. Unamendability tells citizens that, under no circumstances and irrespective of the intensity of public opinion, certain constitutional provisions are unchangeable, not only today but for all times. That is a disempowering thought that expresses the very contrary vision of participatory democracy.

Unamendability compromises popular sovereignty by also creating a cross-temporal binding effect that authorizes one particular people to constrain a future people.\textsuperscript{266} Specifically, the ability of a people at Time 1 to bind a different people at Time 2 raises a much more complex problem than simply treading upon popular sovereignty. It is a question about whether we may today be bound by yesterday's majorities, or likewise whether our present majorities may bind future peoples.\textsuperscript{267} Walter Dellinger captures the point powerfully, stating that "an unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed."\textsuperscript{268}

\textsuperscript{264} Kent Greenawalt, "Separation and Schools" (2000) 21 Cardozo L. Rev. 1285 at 1286.
\textsuperscript{266} Michael J. Klarman, "Majoritarian Judicial Review: The Entrenchment Problem" (1997) 85 Geo. L.J. 491 at 508-09.
\textsuperscript{268} Walter Dellinger, "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" (1983) 97 Harv. L. Rev. 386 at 387.
Counterconstitutionalism

The result is to freeze history, which, incidentally, is what Kommers argues was the intention of the German constitutional framers. This exacts a terrible price upon civil society, for, as Hutchinson cautions, a democratic state should not freeze its own structures because that is merely a form of institutionalized control, which is the very antithesis of participatory democracy. As a result, when constitutional texts entrench unamendable clauses, they do so on the basis of a constitutional authority that presumably resides not in the people but elsewhere. Yet there can be no other superseding source of legitimacy than the people themselves. Any other source is only second-best in the context of participatory democracy.

Unamendability therefore prevents constitutional change within the confines of the existing constitutional regime. It does so in the interest of the prevailing constitutional architecture that enshrined the given unamendability clause. Whereas participatory democracy would permit popular majorities that possess the requisite force and legitimacy to shape the constitution as it wishes, unamendability forces the constitutional discussion outside of the constitution and into extraconstitutionality. This paves the way to unconstitutional revolutionary change. Granted, revolution is not necessarily a normatively bad result but it does create instability, which is itself neither a constructive nor an appealing state of constitutional affairs.

Let us now turn to superstatutes, which, in my view, enhance democratic constitutionalism. Before arguing in favour of superstatutes, let me first outline the quite powerful argument that superstatutes are indeed supraconstitutional, much like unamendability clauses.

The claim against superstatutes is that they undermine participatory democracy by restricting the universe of constitutional possibilities—and they do so in a way that is similar to the way in which unamendability clauses also limit these possibilities. As quasi-constitutional statutes, superstatutes find themselves located in the constitutional equivalent of purgatory. They are not mere statutes yet they are also not quite constitutional. This

creates ambiguity precisely where clarity is needed. Superstatutes become constitutionally and politically virtually unrepealable despite being nothing more than simple statutes. This leads to uncertainty insofar as it is unclear how citizens are to express their wish to replace superstatutes or to remove them entirely from their privileged quasi-constitutional status because courts and legislatures come to regard these superstatutes as imbued with special meaning. But the result is that these statutes—they are, after all, just statutes—become unrepealable, even though these superstatutes have not in fact been officially entrenched in the constitution.

The argument against superstatutes might also note that superstatutes are not only unrepealable but they may also be unamendable. According to Eskridge, superstatutes are informal amendments to the constitution. Superstatutes are therefore an effective substitute for constitutional amendments, which have become virtually impossible to adopt in the United States. In light of their status as informal amendments, courts and legislatures treat superstatutes as special statutes that demand special protections from repeal or revision. Unless these superstatutes outline in their text the acceptable ways to amend or revise them, superstatutes effectively become unamendable, which makes superstatutes look and feel very similar to unamendability clauses. As I have argued above, unamendability clauses undermine the prospects for participatory democracy, and so do superstatutes when assessed through this lens. This would be the claim against superstatutes. It is strong. But it is insufficient to undermine the redeeming popular and participatory virtues of superstatutes.

One can trace the virtue of a superstatute directly to its origins. Specifically, whether a statute becomes a superstatute is not entirely up to the legislature. It is not a congressional prerogative to convert a statute into a superstatute. It is instead a dialogic process that includes the people and their government agents in the branches of government. This kind of exchange between citizens and their representatives promotes salutary and valuable benefits for citizenship and for integrating citizens into a culture of civic engagement and participation. On this view, superstatutes embody the very core of participatory democracy because they concretize only when legislative choices converge in a potent way with popular preferences.

275. Ibid.
Superstatutes derive their legitimacy from the citizenry. They are unusually broad statutes that emerge from the efforts of social movements, to which courts and legislatures acquiesce or respond with approval. The immediate result of superstatutes is to induce a constructive exchange among citizens, the legislature and the judiciary about the range of the rights, protections or terms articulated in the statutory text. The ultimate result of superstatutes is to shape constitutional meaning by influencing the evolution of constitutional law.

When we weigh the merits and demerits of superstatutes, the balance of popular authority tips in favour of viewing superstatutes favorably. Superstatutes celebrate, and do not undermine, participatory democracy. They encourage citizens to participate in drawing the boundary separating themselves from their state. They invite broad mobilizations or social movements to speak to important public matters of the day. Superstatutes also conceive of constitutionalism as a vehicle through which citizens may set the trajectory of the state. Perhaps most notably, the process by which citizens and the state collaborate to create superstatutes reflects the ultimate triumph of active citizenship. For these reasons, superstatutes are not supraconstitutional. They are instead altogether consistent with the promise of constitutionalism.

Conclusion

Let me restate the paradox of democratic constitutionalism. On the one hand, the promise of constitutionalism is participatory democracy. Yet, on the other, some democratic constitutions actually undermine this promise by enshrining counterconstitutional constitutional provisions. I have introduced and illustrated two forms of counterconstitutionalism: (1) contraconstitutionalism, which I associate with aspirational bills of rights; and (2) supraconstitutionalism, of which unamendability clauses are an illuminating example. Both of these types of constitutional provisions run counter to the project of creating and cultivating a constitutional culture that is anchored in participatory democracy. Both run counter to the promise of constitutionalism.

277. Hawkins, supra note 69 at 100.
Despite their counterconstitutional quality, aspirational bills of rights and unamendability clauses both often embody laudable social objectives. Indeed, they generally strive to express the very best of intentions for designing a just, fair and prosperous state to which citizens can develop a meaningful attachment and an abiding loyalty. Nevertheless, as they are currently designed, aspirational bills of rights and unamendability clauses fall short of achieving the participatory purposes of democratic constitutionalism. This poses a pressing problem for the theory and design of constitutions—a puzzle that constitutional theorists must solve if constitutionalism is to fulfill its promise of creating and sustaining participatory democracy.