



DISCRETIONARY REFERENDUMS IN CONSTITUTIONAL AMENDMENT

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Abstract

The unexpected results of recent referendums around the world have concealed an important similarity among many of them: the referendums were not constitutionally required. For example, the Constitution of the United Kingdom does not require a referendum to authorize Brexit nor does the Colombian Constitution require one to ratify the FARC peace pact. Yet in both cases incumbents felt compelled by political imperatives to forego the settled rules of constitutional change in order to bring their reform proposals directly to the people. This is not a rare practice: historically and recently, leaders have often had recourse to referendums by choice rather than constitutional obligation as part of a larger strategy to legitimate a major constitutional change. In this paper, I draw from various non-obligatory referendums held around the world to develop a typology of discretionary referendums in constitutional amendment. I also examine why constitutional actors use discretionary referendums to amend the constitution and I situate their use against the backdrop of an increasingly observable phenomenon in democracies: the circumvention of formal amendment rules. This occurs when constitutional actors deliberately bypass the formal rules of constitutional change to amend the constitution, with recourse not only to referendums but to other modalities of constitutional change.

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INTRODUCTION—THE CONSTITUTION AS AN INCOMPLETE CODE

Recent referendums around the world have produced surprising results. Voters in the United Kingdom decided in June 2016 to withdraw from the European Union,¹ Colombians rejected the historic peace pact with the Fuerzas Armadas Revolucionarias de Colombia (FARC) in October 2016,² Italians foiled a package of major reforms in December 2016,³ and Turkish voters ratified a significant expansion of executive power in April 2017.⁴ Referendums on questions just as controversial had been promised for France and the Netherlands. Marine Le Pen and Geert Wilders, respectively, pledged to hold votes on membership in the European Union had they won their recent elections. Both were defeated, and for now the tides of exit referendums have subsided.

The unexpected results of these recent referendums have highlighted an important similarity among many of them: the referendums were not constitutionally obligatory. What is peculiar about these cases and others historically is that a referendum is not a requirement for any part of a constitutional amendment, whether at the stage of its proposal or ratification. Constitutional actors across the globe have often felt compelled by political imperatives to forego the formal rules of constitutional change in order to bring their proposals for major constitutional change directly to the people in referendums that are not required by the constitution but that may in the view of constitutional actors legitimate the extraordinary constitutional changes they propose. This is not a rare practice: it has occurred historically and recently. Yet as Stephen Tierney has observed in what is now the definitive account of referendums, we are witnessing increasing recourse to referendums where the constitution does not mandate their use.⁵ This use of non-obligatory referendums raises foundational questions about the modalities of constitutional change, the legitimizing sources of constitutional reform, as well as the limits of codifying constitutional rules in a single master-text.

Recourse to non-obligatory referendums for entrenching constitution-level changes involves constitutional actors departing from the established rules of constitutional change in order to alter the very constitution that presumably binds them. This is not an irreconcilable tension, though, since no constitution, whether codified or not, is itself as a matter of descriptive reality an exhaustive catalogue of all official rules, nor can it reasonably purport as a matter of self-conscious understanding to be comprehensive.⁶ The tension may instead reflect the inescapable truth of

¹ Steven Erlanger, “Britain Votes to Leave E.U.; Cameron Plans to Step Down”, *The New York Times* (23 June 2016), online: https://www.nytimes.com/2016/06/25/world/europe/britain-brexiteuropean-union-referendum.html?_r=0.

² Sibylla Brodzinsky, “Colombia Referendum: Voters Reject Peace Deal with Farc Guerrillas”, *The Guardian* (3 October 2016), online: <https://www.theguardian.com/world/2016/oct/02/colombia-referendum-rejects-peace-deal-with-farc>.

³ Stephanie Kirchgaessner, “Italian PM Matteo Renzi Resigns After Referendum Defeat”, *The Guardian* (5 December 2016), online: <https://www.theguardian.com/world/2016/dec/04/matteo-renzis-future-in-the-balance-amid-high-turnout-in-italy-referendum>.

⁴ Patrick Kingsley, “Erdogan Claims Vast Powers in Turkey After Narrow Victory in Referendum”, *The New York Times* (16 April 2017), online: <https://www.nytimes.com/2017/04/16/world/europe/turkey-referendum-polls-erdogan.html>.

⁵ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 7.

⁶ See generally John Gardner, “Can there be a Written Constitution” in Leslie Green & Brian Leiter, eds, *Oxford Studies in Philosophy of Law, Volume 1* (Oxford: Oxford University Press, 2001) (probing the limits of writtenness).



constitutional change located within the interstices of constitutional time: where constitutional actors make a fundamental break with the rules of constitutional change to formally amend some part or provision of the constitution, constitutional actors do more than alter that part of the constitution they formally propose to change—they alter the nature of the constitution itself.

In this paper, I draw from non-obligatory referendums held around the world to develop a typology of discretionary referendums in constitutional amendment. I focus in Part I specifically on non-obligatory referendums in Canada (1992), Colombia (2016), France (1962) and the United Kingdom (2016). The successful French referendum on direct presidential elections illustrates the category of a *reconstructive* referendum while the Canadian referendum on the failed Charlottetown Accord is an example of what I define as an *obstructive* referendum. I classify the failed Colombian referendum on the FARC peace pact as an instance of an *inoperative* referendum while the successful Brexit referendum in the United Kingdom is an example of what I identify as a *revertive* referendum. I explain these categories and their interrelations in Part II.

I examine in Part III why leaders deploy discretionary referendums and I situate recourse to them against the backdrop of an increasingly observable phenomenon in constitutional democracies around the world: the circumvention of the recognized rules of constitutional change. This phenomenon occurs when incumbents deliberately bypass the accepted rules of constitutional change in order to amend the constitution, with recourse not only to referendums but to other modalities of constitutional change. At its weakest, a single instance of circumventing the rules of change is a non-precedential departure from the otherwise strong constitutional norms that should structure the rules of constitutional change. In contrast, the strongest form of circumventing the rules of constitutional change amounts to an informal amendment to the amendment rules themselves—and this could in some cases undermine the democratic legitimacy of the constitution.

I. FOUR DISCRETIONARY REFERENDUMS

The number of national referendums around the world has grown steadily over the past century, from fewer than 50 in 1901-10 to roughly 600 in 1991-2000, though the number dropped to about 440 in 2001-10.⁷ The constitution has sometimes required referendums for a constitutional amendment. But sometimes incumbents have exercised their discretion to hold a referendum in connection with a constitutional amendment where the constitution has not required referendums input. In a subsequent Part of this paper I will explore why constitutional actors have sometimes used discretionary referendums to validate a constitutional amendment.⁸ But first, in this Part, I illustrate four cases where constitutional actors around the world have used discretionary referendums—some successfully and others not—as a vehicle for constitutional change.

A. Two Successful Referendums

Constitutional actors have sometimes held successful discretionary referendums to change a constitution whose amendment rules do not expressly contemplate the legal validity of

⁷ Matt Qvortrup, “Conclusion” in Matt Qvortrup, ed, *Referendums Around the World* (Houndsmills, UK: Palgrave Macmillan, 2014) at 247.

⁸⁸ See *infra* Section IV.A.



referendums. But successfully passing a referendum does not inevitably mean that the amendment will pass. In some cases, as in the recent referendum on Brexit in the United Kingdom, successfully passing the referendum did not end the matter; more steps were needed before the constitutional change could take effect. In contrast, in other cases, for example the French referendum on direct presidential election in 1962, some referendums are enough by themselves to authorize a constitutional amendment even though amendment by referendum defies the Constitution's own rules of change.

Consider first the French case. The 1958 Constitution, which remains in force today, originally created an electoral college for presidential selection.⁹ The electoral college consisted of members of Parliament, mayors, some municipal councillors and other designated officials numbering almost 80,000.¹⁰ The only president to be elected by this electoral college was Charles de Gaulle, in the first election held under the new Constitution. Since then, the president has been elected by direct universal suffrage. The switch from an electoral college to a direct election was controversial because it was formalized by a national referendum described at the time as “unconstitutional”.¹¹

The rules of constitutional amendment in France are relatively straightforward. The Constitution entrenches in Article 89 detailed procedures that specify the initiation and ratification powers. Either the president or a member of Parliament may initiate an amendment,¹² after which both chambers of Parliament must pass identical versions of the amendment bill within certain time limits in order for the proposal to proceed to the next step.¹³ That next step—ratification—requires approval by national referendum.¹⁴ There is only one express exception to this procedure: an amendment proposal need not be ratified by a national referendum where the president chooses to submit a government amendment bill to Parliament convened in Congress, in which case the proposal will become official if it is approved by a three-fifths vote of parliamentarians.¹⁵

De Gaulle had in mind a major constitutional change but he not could assemble the parliamentary support required to achieve it via constitutional amendment. He therefore held a referendum in 1962 under his authority in Article 11 of the Constitution. His power as president under Article 11 appears to authorize referendums only for limited purposes unrelated to constitutional amendment, which has its own process and exception. Article 11 reads as follows:

The President of the Republic may, on a recommendation from the Government when Parliament is in session, or on a joint motion of the two Houses, published in the Journal Officiel, submit to a referendum any Government Bill which deals with the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation, and to the public services contributing thereto, or

⁹ Constitution of France, tit II, art 6 (1958) (later amended in 1962).

¹⁰ Stanley H Hoffmann, “The French Constitution of 1958: I. The Final Text and Its Prospects” (1959) 53 *American Pol Sci Rev* 332 at 342.

¹¹ See François Mitterand, *Le Coup d'État permanent* (Paris: Plon, 1964) at 113.

¹² Constitution of France, tit XVI, art 89(1).

¹³ *Ibid* at art 89(2).

¹⁴ *Ibid*.

¹⁵ *Ibid* at art 89(3).



which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions.¹⁶

Article 11 authorizes the president to petition the people directly without parliamentary authorization let alone input. De Gaulle's referendum polled the people on whether they wished to move from presidential election by electoral college to direct popular vote—a possibility Parliament feared would divest it “of its role as the sole bearer of national sovereignty.”¹⁷ De Gaulle resorted to this procedure instead of Article 89 precisely because it allowed him to bypass Parliament, which at the time would not have supported his plan to move from indirect to direct elections because election by direct universal suffrage would have eroded Parliament's power over the president and given him an independent mandate from the people.¹⁸ In the end, the referendum passed with 61.75 percent of voters in favor of the change. The Conseil Constitutionnel later heard a challenge to the amendment-by-referendum and concluded that the will of the people as expressed in the referendum had to be respected because the people are sovereign.¹⁹ The French Constitution was therefore amended—its text formally altered—as a result of this referendum.

The Brexit referendum in June 2016 was both similar to and different from the French direct election referendum. As in the French case, voters in the United Kingdom approved the referendum; but unlike it, the Brexit referendum vote was insufficient on its own to validate the change the referendum had proposed. The proposed constitutional change was of course the withdrawal of the United Kingdom from the European Union (EU). The Conservative Party had pledged to hold a referendum on membership in the EU as part of its 2015 election manifesto:

We will legislate in the first session of the next Parliament for an in-out referendum to be held on Britain's membership of the EU before the end of 2017. We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay in on this basis, or leave. We will honour the result of the referendum, whatever the outcome.²⁰

The pledge had two parts: first, to legislate a referendum law; and second, to “honour the result of the referendum, whatever the outcome.” The Conservative Party made good on the first by passing the European Union Referendum Act 2015.²¹ The law declared that “A referendum is to be held on whether the United Kingdom should remain a member of the European Union”²² and that the question to appear on the ballot is “Should the United Kingdom remain a member of the European

¹⁶ *Ibid* at art 11(1).

¹⁷ Henry W Ehrmann, “Direct Democracy in France” (1963) 57 *Am Pol Sci Rev* 883 at 883.

¹⁸ See Jean-Philippe Derosier, “The French People's Role in Amending the Constitution” in Richard Albert, Xenophon Contiades & Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart, 2017) at 321.

¹⁹ Décision no 62-20 DC, 6 novembre 1962, online: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1962/62-20-dc/decision-n-62-20-dc-du-6-novembre-1962.6398.html>.

²⁰ *The Conservative Party Manifesto 2015: Strong Leadership; A Clear Economic Plan; A Brighter, More Secure Future*, p 73 (2015) (copy on file with author).

²¹ European Union Referendum Act 2015, c 36 (Dec 17, 2015).

²² *Ibid* s 1(1).



Union or leave the European Union?”²³ The Party honoured its second pledge when, after the 52-48 Brexit referendum vote in favour of leaving the European Union, the prime minister resigned from office in order to make way for a new leader to begin exit negotiations with the EU.²⁴

Holding a referendum was not required by the Constitution of the United Kingdom, where the rule famously remains that Parliament has the power to make or unmake any law, and its laws are immune from override or repeal by another body.²⁵ The referendum was instead a choice of the prime minister of the day, who felt compelled as a political matter to promise a referendum in order to placate the strong anti-EU forces in his party and also to keep at bay the rival UK Independence Party, which at the time was growing in strength at the expense of the Conservative Party.²⁶ Facing pressure from within his party and outside of it, the prime minister conceded that “My backbenchers are unbelievably Eurosceptic and UKIP are breathing down my neck.”²⁷

The UK Supreme Court later suggested that the referendum had been not only unnecessary but ineffective. The question before the Court was whether the United Kingdom could give notice of its intention to withdraw from the EU—as required by Article 50 of the Treaty on the European Union—on the strength of a governmental declaration alone informed by the political result in the referendum, or whether the government needed the legal validation of statutory authorization. The Court held that the government needed statutory authorization in order to give notice of its intention to withdraw the United Kingdom from the EU.²⁸ The result of the judgment, then, was effectively to negate or at the very least to devalue the result of the referendum held a few months earlier. The Brexit referendum was therefore legally invalid despite its high political salience.

B. Two Failed Referendums

Constitutional actors have sometimes incorporated discretionary referendums in constitutional amendment only to see them fail. Yet the failure to pass a discretionary referendum has not always entailed the failure of the amendment itself. In some cases, the amendment effort must come to an end because the failed referendum makes it politically unpalatable for constitutional actors to proceed any further. In other cases, however, constitutional actors nonetheless proceed with their plans for constitutional amendment even in the face of a popular rejection of their amendment proposal. Consider examples of both, the former from Canada and the latter from Colombia.

In Canada, the federal government decided in 1992 to send a major package of constitutional reforms known as the Charlottetown Accord to the people for their approval despite there being

²³ *Ibid* s 1(4).

²⁴ Steven Erlanger, “Britain Votes to Leave E.U.; Cameron Plans to Step Down”, *NY Times*, June 23, 2016, online: https://www.nytimes.com/2016/06/25/world/europe/britain-brexiteuropeanunion-referendum.html?_r=0.

²⁵ AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan 8th ed, 1915) at 3-4.

²⁶ See Steven Erlanger & Stephen Castle, “In ‘Brexit’ Vote, David Cameron Faces Problem of His Own Making”, *NY Times*, June 21, 2016, online: <https://www.nytimes.com/2016/06/22/world/europe/david-cameron-brexiteuropeanunion.html>.

²⁷ Martin Kettle, “The Downfall of David Cameron: A European Tragedy”, *The Guardian*, June 24, 2016, online: <https://www.theguardian.com/politics/2016/jun/24/david-cameron-downfall-european-tragedy>.

²⁸ *R v Secretary of State for Exiting the European Union*, [2017] UKSC 5 (Jan 24, 2017).



no mention of referendums in the Constitution's formal amendment rules.²⁹ In order to make the discretionary referendum possible, Parliament passed the *Referendum Act* authorizing the Governor General "to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada".³⁰ The law made referendums purely consultative, not legally binding, though a majority vote for the Charlottetown Accord across the provinces would have legitimated the package of reforms and left constitutional actors with little choice as a political matter but to ratify it in the provincial assemblies according to the unanimity procedure that would have been used had the referendum passed.³¹ But the formal amendment process came to a halt when Canadians rejected the Accord by a nation-wide tally of 54.3 percent to 45.7 percent, though it was approved in New Brunswick, Newfoundland, the Northwest Territories, Prince Edward Island and Ontario.³² The outcome of the Charlottetown Accord was peremptory in that it eroded the political will across most of the country to proceed with the formal amendment process.

The choice to put the Charlottetown Accord to a referendum was driven by the failure of the Meech Lake Accord just two years prior. The Meech Lake Accord would have introduced significant changes to the Constitution of Canada, formally amending both the *Constitution Act, 1867* and the *Constitution Act, 1982*, for instance by requiring annual constitutional conferences among Canada's first ministers,³³ transferring to provinces some power of immigration,³⁴ constitutionalizing the Supreme Court,³⁵ recognizing Quebec as a "distinct society,"³⁶ and amending the Constitution's formal amendment rules themselves.³⁷ The entire package was subject to a three-year ratification deadline expiring in 1990—a deadline that constitutional actors failed to meet, leading to the defeat of the Accord and dimming the prospects for eventual reform.³⁸ As much as the content of the Meech Lake Accord drew criticism,³⁹ its design process prompted

²⁹ See Procedure for Amending Constitution of Canada, Part V of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, 1982, c 11 (UK) (hereinafter "*Constitution Act, 1982*").

³⁰ Referendum Act, s 3(1), SC 1992, c 30. In their study of the Charlottetown Accord, Richard Johnston, André Blais, Elisabeth Gidengill and Neil Nevitte explain that the referendum was indeed two separate votes: one organized by Quebec in the province; and the other organized by the federal government in the rest of the country. See Richard Johnston, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal & Kingston: McGill-Queen's University Press, 1996) at 51-60.

³¹ Part V of the *Constitution Act, 1982* entrenches five different formal amendment procedures, and each is designated to be used for amendments to an expressly identified set of provisions or principles. For a description of these procedures, see Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59 *McGill LJ* 225 at 247-51.

³² See *The 1992 Federal Referendum—A Challenge Met: Report of the Chief Electoral Officer of Canada*, Part 2, at 58, January 17, 1994, online: http://www.elections.ca/res/rep/off/1992/1992_Referendum_Part_2_E.pdf.

³³ Meeting of the First Ministers on the Constitution, *The 1987 Constitutional Accord* (Ottawa: 3 June 1987), Schedule at s 13 [Meech Lake Accord].

³⁴ *Ibid* Schedule at s 3.

³⁵ *Ibid* Schedule at s 9.

³⁶ *Ibid* Schedule at s 1.

³⁷ *Ibid* Schedule at s 9.

³⁸ See Christopher P Manfredi, "Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada" (1997) 31 *L & Soc'y Rev* 111 at 123.

³⁹ For a discussion of the major criticisms of the Meech Lake Accord, see Peter J Meekison, "The Meech Lake Accord: The End of the Beginning—or the Beginning of the End" (1990) 1 *Const Forum* 13 at 14.



what could be seen as an over-correction in the decision to rest the fate of the Charlottetown Accord in the hands of the masses in only the third nation-wide referendum in Canadian history.⁴⁰

The Meech Lake Accord had been negotiated and drafted in the paradigmatic model of executive federalism, meaning out of sight and without public input. In their post-mortem on the Accord, Bruce Elman and Anne McLellan stressed just how insular and secretive the process had been: “On the 30th of April, 1987, the eleven first ministers—gathered in a cabin by the shore of Meech Lake and, hidden from the prying eyes of aboriginal groups, women’s groups, and special interest groups of all sorts, they struck a deal on the future of Canada.”⁴¹ For Beverley Baines the drafting process might well have been called the “men’s round” both for the exclusion of explicit protections for women’s rights but also for the relative absence of women in the negotiating room.⁴² First Nations also objected to the secrecy of the process, not to mention what they saw as a lack of progress in the final text on issues of importance to them.⁴³ Even insiders have conceded that the fatal flaw of the Meech Lake Accord could well have been, as Mary Dawson describes, “that the deal had been cooked up behind closed doors by a group of men in suits.”⁴⁴

When constitutional actors tried to achieve peace in Canada with the Charlottetown Accord, the recent defeat of the Meech Lake Accord could not help but shape their strategy. Rather than negotiating the terms of agreement in secrecy, the federal and provincial governments created opportunities for public participation and consultation, both with individual citizens and groups formed around identity or interests.⁴⁵ Meeting doors were thrown open, there was frequent communication with the public through the press, and virtually everyone who wanted to give input in the proceedings could do so in the roving meetings the government held across the country.⁴⁶ But the centerpiece of the Charlottetown strategy was the referendum: Canadians across the country would be given an advisory vote on the package of reforms in a nation-wide referendum even though the Constitution’s formal amendment rules do not require referendums ratification nor even consultation in connection with a constitutional amendment. Holding a referendum for all Canadians was therefore a political choice not a legal obligation. The referendum failed to pass, and with it the prospects of formally remaking the Constitution died and have yet to be revived.

A more recent instance of a failed referendum occurred in Colombia in October 2016. We must begin with Colombia’s codified constitution in order to understand the significance of the failed referendum—a failure that ultimately did not inhibit the change proposed directly to the people. The Constitution entrenches three methods for its amendment: by legislative act, by referendum

⁴⁰ See Benoît Dostie & Ruth Dupré, “‘The People’s Will’: Canadians and the 1898 Referendum on Alcohol Prohibition” (2012) 49 *Explorations Econ Hist* 498 at 499.

⁴¹ Bruce P Elman & A Anne McLellan, “Canada After Meech” (1991) 2 *Const Forum* 63 at 64.

⁴² Beverley Baines, “An Alternative Vision of the Meech Lake Accord” (1988) 13 *Queen’s LJ* 1 at 13.

⁴³ W H McConnell, “The Meech Lake Accord: Laws or Flaws?” (1988) 52 *Saskatchewan L Rev* 115 at 119.

⁴⁴ Mary Dawson, “From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown” (2012) 57 *McGill LJ* 955 at 983. But it is important to ask whether assigning blame solely or even primarily to the process failures of the Meech Lakes Accord might not mistake effects for causes, specifically that the ultimate source of the failure of the Accord could have been Patriation itself. See Patrick J Monahan, “After Meech Lake: An Insider’s View” (1990) 22 *Ottawa L Rev* 317 at 328.

⁴⁵ See Richard Albert, “The Conventions of Constitutional Amendment in Canada” (2016) 53 *Osgoode Hall LJ* 399 at 410.

⁴⁶ *Ibid.*



and by constituent assembly.⁴⁷ In addition, the Constitution creates a number of avenues for the people to participate in the elaboration of public policy, including via plebiscite,⁴⁸ whose result the Constitution makes mandatory on the president.⁴⁹ According to law, a plebiscite is a mechanism by which the people endorse or reject a decision made by the president.⁵⁰ In order for its result to be valid, the plebiscite must attract the participation of at least half of all registered voters, and a majority of voters must vote in favour.⁵¹ These are Colombia's basic rules of constitutional change.

Congress took two controversial actions in anticipation of an eventual plebiscite on a peace deal with the FARC. It passed a constitutional amendment—known as the fast-track amendment—establishing an abbreviated procedure for implementing the peace deal if the people ultimately approved the agreement in a plebiscite.⁵² It also passed a new law setting a minimum turnout of 13 percent of registered voters in order for the plebiscite to be valid.⁵³ The law was promulgated in August 2016, just one month after the Constitutional Court upheld its validity in draft form.⁵⁴ On the same day he promulgated the law, the president announced that he would hold a plebiscite on an eventual peace deal with the FARC,⁵⁵ which was finally achieved the following month.⁵⁶

The plebiscite on the peace deal failed in October by a narrow margin: 50.2 to 49.8 percent.⁵⁷ Later asked whether he would hold a second plebiscite, the president replied no.⁵⁸ Instead, he and the government agreed to terms with the FARC on another deal. But out of fear of popular rejection a second time, the parties decided not to send the new agreement to the people for their approval, contrary to what they had chosen to do for the first deal.⁵⁹ Congress endorsed this new agreement the following week,⁶⁰ and the Court approved it shortly thereafter on the theory that the public endorsement required to activate the fast-track process was reflected in the congressional ratification of the second peace deal in lieu of direct popular approval in a plebiscite.⁶¹ Since then,

⁴⁷ Constitution of Colombia, tit XIII, art 374 (1991).

⁴⁸ *Ibid* art 103.

⁴⁹ *Ibid* art 104.

⁵⁰ Law 134/1994, art 7 (May 31, 1994).

⁵¹ Law 1757/2015, art 41 (July 6, 2015).

⁵² See Gaceta de Congreso 706, at p 3 (Sept 15, 2015) (recognizing that the capacity to activate the fast-track procedure will depend on popular endorsement); Gaceta de Congreso 943, at p 7 (Nov 18, 2015) (same).

⁵³ Law 1806/2016, art 2 (August 24, 2016). This law was passed under Congress's power to regulate plebiscites and other mechanisms of popular participation. Constitution of Colombia, tit VI, ch III, arts 152-53.

⁵⁴ Constitutional Court of Colombia, Judgment C-379/2016 (July 18, 2016).

⁵⁵ “‘Todo está acordado, el texto definitivo es inmodificable’: Santos”, *El Tiempo* (Aug 25, 2016), online: <http://www.eltiempo.com/politica/proceso-de-paz/fecha-de-plebiscito-por-la-paz-sera-el-2-de-octubre-57063>.

⁵⁶ See Nicholas Casey, “Colombia Signs Peace Agreement with FARC After 5 Decades of War”, *NY Times* (Sept 26, 2016), online: https://www.nytimes.com/2016/09/27/world/americas/colombia-farc-peace-agreement.html?_r=0.

⁵⁷ Julia Symmes Cobb & Nicholas Casey, “Colombia Peace Deal is Defeated, Leaving a Nation in Shock”, *NY Times* (Oct 2, 2016), online: <https://www.nytimes.com/2016/10/03/world/colombia-peace-deal-defeat.html>.

⁵⁸ “Santos descartó otro plebiscito para avalar nuevo acuerdo con Farc”, *El Colombiano* (Nov 2, 2016), online: <http://www.elcolombiano.com/colombia/acuerdos-de-gobierno-y-farc/santos-descarta-otro-plebiscito-para-implementar-acuerdo-final-con-farc-XL5287541>.

⁵⁹ Nicholas Casey, “Colombia and FARC Sign New Peace Deal, This Time Skipping Voters”, *NY Times* (Nov 24, 2016), online: https://www.nytimes.com/2016/11/24/world/americas/colombia-juan-manuel-santos-peace-deal-farc.html?_r=0.

⁶⁰ “Refrendado el acuerdo de paz; el Día D ha llegado”, *Semana* (Nov 30, 2016), online: <http://www.semana.com/nacion/articulo/refrendado-el-nuevo-acuerdo-de-paz/507536>.

⁶¹ Constitutional Court of Colombia, Judgment C-699/2016 (Dec 13, 2016).



Congress has used the fast-track procedure to implement the peace deal. In contrast to the failed advisory referendum in Canada marking the end of the amendment effort, here in Colombia the defeat of the advisory plebiscite did not deter constitutional actors from taking action.⁶²

II. A TYPOLOGY OF DISCRETIONARY REFERENDUMS

These four referendums in Canada, Colombia, France and the United Kingdom represent four different types of discretionary referendums in constitutional amendment. In this Part, I introduce a four-part typology of discretionary referendums: the French and Canadian referendums illustrate respectively what I define as *reconstructive* and *obstructive* referendums, while the UK and Colombian votes illustrate what I identify as *revertive* and *inoperative* referendums, respectively. This typology cuts across civil and common law, as well as both codified or uncoded constitutions. It is an effort, then, to map the possibilities of discretionary referendums in constitutional amendment.

A. Mapping Discretionary Referendums

Combining two pairs of distinctions—success and failure; substitution and reinforcement—yields the four types of discretionary referendums identified above. The former is the dominant pair: whether the referendum succeeds or fails controls the second of two inquiries in mapping discretionary referendums. The second question focuses on the legal consequence of the referendum in light of whether it has succeeded or failed. Two possibilities follow: either the result of the referendum compels constitutional actors to credit the discretionary, non-obligatory referendum procedure as equally valid to—and therefore as a substitute for—the conventional procedure used for constitution amendment; or they ignore the result of the discretionary referendum and return to the conventional procedure recognized as legally valid under the constitution of the jurisdiction.

In the French case, for example, De Gaulle held a referendum in a transparent if contested effort to circumvent the formal rules of constitutional amendment. He would have failed using the ordinary path because that route required congressional approval—and it was not forthcoming. The referendum was successful, and its result was credited as equally valid to the formal rules of change. Its successful ratification therefore effectively substituted itself in place of the formal amendment rules in the Constitution, informally amending the formal rules of change. This referendum was therefore *reconstructive* in that effectively rewrote the procedures of formal constitutional change in the French Constitution. The referendum rebuilt the formal rules of change, though not without controversy since the constitutional text did not then recognize the legal validity of this new referendums procedure of a president-initiated constitutional amendment. The blessing of the high court ended the legal debate on the legitimacy of this reconstruction.

⁶² “La histórica votación a la refrendación del acuerdo en el Congreso”, *El Tiempo* (Dec 1, 2016), online: <http://www.eltiempo.com/politica/proceso-de-paz/como-fue-la-votacion-en-congreso-para-refrendar-nuevo-acuerdo-de-paz-31402>.



In the UK, the successful Brexit referendum did not exert the same transformative legal effect on the Constitution that the French referendum had on its own. In the French case, the unconventional procedure used to change the Constitution ultimately proved legally valid, as the domestic high court refused to call its use into question and indeed interpreted the popular support for the change as legitimately overriding the legal constraints on constitutional amendment. But the constitutional culture of popular sovereignty in France made the referendum result too compelling to ignore. In contrast, the Brexit referendum itself did not end the matter. Although the referendum passed and the government of the day was prepared to proceed on the basis of its outcome alone, the UK Supreme court did not credit the referendum result as an expression of popular sovereignty and instead focused on the procedural question. Denying the legal sufficiency of the outcome of the referendum alone as the basis for issuing notice under Article 50, the principle of popular sovereignty that had so animated the Conseil Constitutionnel did not have the same moral force in the UK. What mattered for the court was instead legal validity, and that could not come without parliamentary consent. The referendum was *revertive*: it pressed actors to return to the conventional process of constitutional change in order to legally break the link to the EU.

The Canadian and Colombian cases are examples of failed referendums in which we see different illustrations of substitution and reinforcement, respectively. In Canada, the failure of the Charlottetown referendum put an end to the constitutional amendment process. The definitive vote against the major package of constitutional reforms prevented actors from engaging the formal process of constitutional change ordinarily required. The failed referendum did not create a legal impediment to proceeding with the formal amendment process; as a matter of constitutional law, actors could still have tried to pass the amendment package using the formal procedures of change. But they chose against going any further. Their refusal to proceed suggests that the failure of the referendum raised a political barrier to trying to pass the amendment package using the ordinary rules of constitutional change. We can therefore understand the Charlottetown referendum as an *obstructive* referendum: the referendum substituted for the ordinary procedure of constitutional amendment, and it was credited as a valid replacement for what the constitutional text required. The referendum ended further action on the Accord since it had failed in a politically valid process.

In Colombia, in contrast, the referendum on the peace pact might as well not been held because it was credited as neither legally nor politically valid. It was an *inoperative* referendum. Though voters rejected the peace deal in the referendum, actors nonetheless proceeded to ratify it in modified form, ignoring the referendum result despite the president's earlier commitment that he would respect the voice of the people. Politically, then, the referendum was treated as invalid. The Constitutional Court subsequently ruled the referendum legally unnecessary. In the Court's view, as long as there was some measure of popular consent for the deal, actors could legally proceed with its ratification and ultimate formalization under the fast-track procedure. In the end, the Court credited congressional support for the deal as satisfying this requirement of popular consent.

Each of the types of referendums described above—reconstructive in France, revertive in the UK, obstructive in Canada and inoperative in Colombia—is depicted in a typology below.



	<i>Successful Referendum</i>	<i>Failed Referendum</i>
<i>Substitution</i>	France (1962) Reconstructive Referendum	Canada (1992) Obstructive Referendum
<i>Reinforcement</i>	United Kingdom (2016) Revertive Referendum	Colombia (2016) Inoperative Referendum

Table I: A Typology of Discretionary Referendums

B. The Supremacy of the People?

These four types of discretionary referendums suggest that the people are not always supreme. They are supreme in France; even the Conseil Constitutionnel accepts that its own reading of the French Constitution is inferior as a legal and political matter to the people's own. The answer is more complicated in Canada, where constitutional actors recognized the political supremacy of the will of the people though the legal basis for that position is unclear. If confronted with the same question before the French Conseil Constitutionnel—was the referendum constitutional?—the Canadian Supreme Court could well return to its judgment in the *Secession Reference*, which made clear that “the results of a referendum have no direct role or legal effect in our constitutional scheme.”⁶³ The Court could alternatively recognize that the Charlottetown referendum set a precedent that has since matured into a convention, following its reasoning in the *Patriation Reference* to hold that any major constitutional change must now be put to an advisory referendum.⁶⁴ The UK and Colombian referendums are unequivocal both in their implications and in the contrasts they raise with France and Canada: in those cases, the people are not supreme.

And yet in the conventional theory of constitutional change, there is no greater source of legitimacy than the people themselves. The Lockean formation of constitutional consensus to legitimate a new constitution or a major change to it emerges most directly, though not necessarily

⁶³ Reference re Secession of Quebec, [1998] 2 SCR 217 at para 87. One would be right to ask whether this is the proper role for a Court. Its involvement in this dispute on the political future of a subnational entity has been described in the global context as “unprecedented.” See Ran Hirschl, “The Judicialization of Mega-Politics and the Rise of Political Courts” (2008) 11 *Ann Rev Pol Sci* 93 at 103.

⁶⁴ Albert, *supra* note 45, at 419-33.



most representatively, from popular appeals to the people.⁶⁵ Whether it is real or merely perceived, the consent of the people to a constitutional event insulates constitutional actors against charges of misuse of the modalities of constitutional change. There are, then, both instrumental and intrinsic reasons for holding referendums in particular, or more generally some method of collective decision-making, to whose outcome constitutional actors can point as reflecting the will of the people.

The constituent power theory is the source of the conventional views on constitutional change. Drawn from French revolutionary theorist Emmanuel Joseph Sieyès, the theory posits a division of labor between the people as principals and their agent representatives in government.⁶⁶ Only with the approval of the principals may the agents transform the constitution or write a new one altogether; without it, the agents may alter the constitution but only if the content or form of the change remains consistent with the constitution's existing values or architecture.⁶⁷ The people are supreme; they are the constituent power, which by its approval of or acquiescence to the creation of a constitution constitutes the constituted powers of government, namely the institutions the constitution establishes to perform the specific tasks assigned to them by the constituent power.⁶⁸ At its base, constituent power theory reflects a hierarchical relationship: the people as constituent power representing the highest source of legitimating authority, and the institutions of government as the inferior constituted power at least notionally bound by the commands of the people.

We can also understand the relationship between the constituent and constituted powers in topographical terms, which is to say how and where the constituent and constituted powers are located relative to the constitution. If we imagine a constitution represented by a circle, the constituent power stands above and outside of it, the positioning reflecting the derivative quality of the constitution with respect to the will of the people. The constituted power, in turn, sits below the constituent powers directly inside the circle. The institutions and actors that we identify as the constituted powers are part of what the constituent power—the people—create when they converge in their agreement to found a new constitution. As the constituted powers carry out their constitutional duties and as they exercise their delegated discretion, they must remain within boundaries of the circle representing the constitution. Any change to the boundaries of the constitution must be authorized by the constituent power, which stands on watch above the constitution to police how the constituted powers exercise their limited delegated authority.

Delegation offers another way to understand the relationship. The constituent power creates a constitution, which in turn authorizes the constituted power created by the constitution to act in the people's name consistent with the constitution. The constituted power is authorized to alter the constitution provided that any alteration to it does not undermine the constitution as constructed

⁶⁵ John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Co, CB MacPherson ed 1980) at 47-48 (§89).

⁶⁶ Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers état?* (Paris: Éditions du Boucher, 2002) (originally published in 1789).

⁶⁷ For a discussion and critique of constituent power theory, see Joel Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Abingdon: Routledge, 2012); Mattias Kumm, "Constituent Power, Cosmopolitan Constitutionalism, and Post-Positivist Law" (2016) 14 *Int'l J Const L* 697; Richard Stacey, "Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-Making Process" (2011) 9 *Int'l J Const L* 587.

⁶⁸ Sieyès, *supra* note 66, at 53.



by the constituent power. Only the constituent power has the competence to write a new constitution that departs in a material way from what the old constitution has established as law. The constituent power is therefore a pre-constitutional power that controls both how a constitution is made in the first place and also how the constituted power exercises its limited delegated authority to change the constitution in the name of the people.

Still another way to understand the relationship is the language of rights. Two pairs of ideas are useful here: inherent and delegated; and negative and positive. While the constitution-making power inheres in the constituent power, the constitution-changing power is held in trust by the constituted power and it may be exercised as a delegated power subject to the restrictions placed upon its exercise by the inherent right holder, here the constituent power. In the end is that the constituent power holds both negative and positive rights: it possesses the inherent positive right to make a constitution but it also has the negative right to be free from intrusions on its constitution-making power by an overreaching constituted power. On this view, the constituted power holds only a narrow positive right to make ordinary laws and constitution-level changes within the delimited constitutional boundaries originally set by the constituent power when it authorized the creation of the constitution. These four renderings of constituent power theory—hierarchy, topography, delegation and rights—concretize the basic idea that the people are supreme.

III. STASIS AND CATALYSIS IN CONSTITUTIONAL CHANGE

It is of course a legal fiction that the people are always supreme. Sometimes they are supreme in both constitutional law and politics, as in the French referendum of 1962, and sometimes they are supreme in constitutional politics alone, as in the Canadian referendum of 1992. But the choices of the people are perhaps more often than not inferior to the choices of the constituted branches of government, both in constitutional law and politics, as in the Colombian referendum of 2016, or in constitutional law, as in the UK referendum of 2016. In this Part, I explore the motivations driving discretionary referendums from a higher level of abstraction, informed by but detached from the particular experiences of Canada, Colombia, France and the United Kingdom, and I consider why constitutional actors might find it necessary or expedient to appeal directly to the people.

A. Why Discretionary Referendums?

The answer to the question “why discretionary referendums?” must begin with Tierney’s analysis of what he labels “executive-led, extra-constitutional referendums” in reference to the 1962 French referendum on direct presidential election.⁶⁹ He suggests that constitutional actors might hold a discretionary referendum like this one in times of “crisis or of impasse, where constitutional change is difficult to achieve, where the temptation to surmount constitutional impediments can be great, and crucially where the constitutional culture pays homage—at least symbolically—to the resilience of a popular *pouvoir constituant* even within a formally entrenched constitutional structure.”⁷⁰ Each of these conditions characterizes the French legal-political context in 1962. Each condition could on its own be sufficient to persuade constitutional actors to

⁶⁹ Tierney, *supra* note 5, at 131.

⁷⁰ *Ibid* at 131.



circumvent the ordinary rules of constitutional change in pursuit of an objective they thought worth the illegality. We can also identify other reasons beyond these why one might hold a discretionary referendum.

Of course, the difficulty of satisfying the rules of constitutional change is a major motivation to hold a discretionary referendum, as Tierney identifies.⁷¹ Where the procedures of change are too onerous, or perceived to be too difficult to satisfy, constitutional actors look for other ways to achieve their preferred policy objectives. We should therefore expect to see recourse to discretionary referendums or other non-obligatory procedures of change in jurisdictions with rigid constitutions. And indeed we can confirm our hypothesis with reference the world's most rigid constitutions—the Constitutions of the United States, Switzerland and Venezuela—as ranked in a leading study of amendment difficulty.⁷² There have been no constitutional referendums in the United States but the Constitution changes routinely without textual alteration, for example as a result of “constitutional moments”,⁷³ super-statutes,⁷⁴ or authoritative interpretations.⁷⁵ Switzerland has long been a “referendums democracy”,⁷⁶ and for its part Venezuela recently embarked on an unconventional process to create the 27th constitution in its 205 year history.⁷⁷

And yet the French Constitution is not particularly rigid. A second reason why constitutional actors might have recourse to discretionary referendums may be to overcome political resistance. Quite apart from the difficulty of constitutional amendment as a result of a high threshold for initiation, proposal or ratification, a constitution may be hard to change because of the unwillingness of constitutional actors to consent to the reform, even where the rules of change are relatively easy. Here, then, actors might invoke the idea of a referendum as a threat for going over the heads of their opponents, or they might in fact hold a referendum in order to break the stalemate either in favour of the change-seeker in the event of a referendums victory or in favour of the status quo in the event of a loss in the vote. Whether merely threatened or actually deployed, then, a discretionary referendum can be an effective offensive strategy to break down political barriers.

Nor is the Colombian Constitution entrenched under especially onerous formal amendment rules. The local circumstances around the peace pact referendum suggest a third reason for holding a discretionary referendum: as a defensive strategy to give constitutional actors political cover for an important or controversial choice. The use of a discretionary referendum can depoliticize a decidedly political choice by transforming the decision from a political one to a popular one. Where popular consent forms behind a choice, any negative consequences associated with the choice can become less pronounced as ownership for the choice is transferred from the

⁷¹ *Ibid.*

⁷² Donald S. Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006), at 170.

⁷³ Bruce Ackerman, *We the People—Volume 2: Transformations* (Cambridge: Harvard University Press, 1998) at 15-26.

⁷⁴ William N Eskridge, Jr, & John Ferejohn, “Super-Statutes” (2001) 50 *Duke LJ* 1215 at 1230-31.

⁷⁵ Walter F Murphy, “Constitutions, Constitutionalism, and Democracy” in Douglas Greenberg et al, eds, *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993) 3 at 13.

⁷⁶ Sir John A R Marriott, *The Mechanism of the Modern State* (Oxford: Clarendon Press, 1927) at 75.

⁷⁷ Nathan Crooks & Fabiola Zerpa, “Why Venezuela May Change its Constitution for the 27th Time”, *Bloomberg*, May 9, 2017, online: <https://www.bloomberg.com/news/articles/2017-05-09/why-venezuela-may-get-its-27th-constitution-quicktake-q-a>.



constitutional actors who have made it to the people themselves in the case of a referendum victory. There is a non-trivial risk, however, in putting a choice before the people where the choice has already been made internally by the constitutional actors who decide to hold the referendum. Here the risk of popular repudiation of the choice can have serious consequences for constitutional actors who miscalculate their odds of winning the discretionary referendum.

The Canadian Constitution is also extraordinarily difficult to amend for major reforms, perhaps even more difficult than the United States Constitution.⁷⁸ Nonetheless, the Charlottetown referendum does not appear to have been motivated by amendment difficulty. This may suggest a fourth reason why constitutional actors might hold a discretionary referendum: quite simply to gather popular approval for a major constitutional change. There is sometimes authentic interest in taking the pulse of the people on a matter of importance or controversy, though of course that interest may be payment for a debt incurred from a track record of insularity and lack of public consultation on similar prior policy choices. Seeking the views of the people may therefore be motivated by intrinsic or instrumental purposes: intrinsic where there is genuine interest in gauging where the people stand; and instrumental where the interest springs from an effort to right an earlier wrong, in which case we may fairly characterize the referendum as motivated by self-interest.

We can posit three other reasons why constitutional actors might hold discretionary referendums in connection with a constitutional change. For one, they might feel compelled to adhere to a custom of popular consultation, what to constitutional actors might feel like a convention that is politically binding though not legally required. The non-obligatory referendums on accession to and integration into the European Union may owe their frequency to this phenomenon.⁷⁹ Constitutional actors might also organize a discretionary referendum in order to entrench a choice more strongly than could be achievable using the ordinary rules of change. In this case, a referendum victory could reinforce the change and give it a greater measure of political durability since instead of its validation by constitutional actors alone—assuming there were no direct involvement of voters in making the change—it would now be bolstered by direct popular approval. An additional motivation for holding a discretionary referendum in constitutional amendment could conceivably be driven by a larger strategy to move the state toward a more popular consent-based regime. Prioritizing popular choice in this way could reveal or more cynically conceal an effort to transform the ultimate source of legitimation in a given jurisdiction from an institutional, elite, divine or hereditary source of authority to a more democratic basis of sovereignty and legitimacy.

B. A Critique of the Hydraulics Theory of Constitutional Amendment

There is a universal truth beneath the recourse to discretionary referendums whose outcome is taken as legally or politically valid despite their not being authorized by the ordinary rules of change in the constitution they alter: no codified constitution is a complete code. Constitutional designers may intend their entrenchment of formal amendment rules to cover the universe of possible forms and results of constitutional change but moments, forces and personalities intervene

⁷⁸ See Richard Albert, “The Difficulty of Constitutional Amendment in Canada” (2015) 39 *Alberta L Rev* 85 at 93-105.

⁷⁹ See Laurence Morel, “The Rise of ‘Politically Obligatory’ Referendums: The 2005 French Referendum in Comparative Perspective” (2007) 30 *W Euro Pol* 1041 at 1055-57.



to modify by conduct the range of permissible action even if it creates a tension or outright disjunction with the constitutional text. The judge-made doctrines of the “basic structure” in India and the “substitution of the constitution” in Colombia both sit uneasily with the constitutions in which they are rooted since neither text contemplates the possibility that the substance of a constitutional amendment can depart so widely from the constitution as to be unconstitutional.⁸⁰ And yet the idea of an unconstitutional constitutional amendment has migrated across the globe.⁸¹ There is evidence, then, of codified constitutions resembling uncoded constitutions insofar as the former are susceptible to changes we see in the latter by practice that mature into convention.⁸²

One of the more compelling explanations for this phenomenon is the hydraulics theory of constitutional change advanced by Heather Gerken in the American context.⁸³ Perhaps the most difficult in the world to amend formally,⁸⁴ the United States Constitution has often been informally amended, its meaning having changed without a corresponding textual alteration. Gerken argues that where the path to formal amendment is blocked as a result of its difficulty, constitutional actors can nonetheless make significant changes to the Constitution, though without engaging the process of formal change. Instead, the Constitution “effectively redirects those constitutional energies into different, potentially more productive channels”⁸⁵, for instance judicial interpretation, legislation and political practice. The predicate for this hydraulics theory is what Gerken regards as an causal connection between formal amendment difficulty and informal constitutional change: “[a]n informal amendment process exists because formal amendment is so difficult”.⁸⁶ Hydraulics theory has applications all over the world, including also in Canada, where the rigid Constitution has pushed actors to rely on sub-constitutional methods to make constitution-level changes.⁸⁷

Yet hydraulics theory does not explain why constitutional actors choose the path of informal amendment where the constitution is relatively easy to amend, whether because the constitution itself is flexible or the governing party commands the necessary votes to push through the change.⁸⁸ Indeed, hydraulics theory denies that possibility since it holds that informal amendment occurs because of formal amendment difficulty. Nor does hydraulics theory explain the use of discretionary referendums to formally amend the constitution in cases where the constitution is either easy or hard to amend. We could resolve the matter by stating quite simply that the hydraulics theory applies only to informal constitutional changes. Yet the use of discretionary referendums reflects precisely what hydraulics theory predicts: it is a redirection of constitutional

⁸⁰ For the best works on these doctrines, respectively, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (New Delhi: Oxford University Press, 2009); Carlos Bernal, “Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine” (2013) 11 *Int'l J Const L* 339.

⁸¹ See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017).

⁸² See Richard Albert, “How Unwritten Constitutional Norms Change Written Constitutions” (2015) 38 *Dublin U LJ* 387.

⁸³ Heather K. Gerken, “The Hydraulics of Constitutional Reform: A Skeptical Response to *Our Undemocratic Constitution*” (2007) 55 *Drake L Rev* 925.

⁸⁴ See Lutz, *supra* note 72 (ranking the United States Constitution as the most rigid in his study sample).

⁸⁵ Gerken, *supra* note 83, at 927.

⁸⁶ *Ibid* at 933.

⁸⁷ See Richard Albert, “Quasi-Constitutional Amendments” (2017) 65 *Buffalo L Rev* 739.

⁸⁸ For a discussion of informal amendment in easy-to-amend state constitutions, see Michael Besso, “Constitutional Amendment Procedures and the Informal Political Construction of Constitutions” (2005) 67 *J Pol* 69 at 75.



energies into other channels. As discussed in the previous Section, constitutional actors deploy discretionary referendums when they believe them to be potentially more productive than the ordinary rules of constitutional change, whether due to constitutional rigidity, as an offensive or defensive strategy to break a political stalemate or to create political cover for an important or controversial choice, in order to assemble popular support for a major constitutional reform, to adhere to a custom, to more strongly entrench a policy choice, or to transform the source of legitimacy in a regime.⁸⁹

The use of discretionary referendums in constitutional amendment suggests that we should amend the hydraulics theory of constitutional change both to narrow it and to expand it. These refinements cluster around three themes we can describe as irregularity, political expediency and legitimacy. First, the four cases of discretionary referendums and others highlight a broader trend in constitutional amendment: that constitutional actors do not always regard formal amendment rules as the only permissible route to constitutional change. They sometimes engage extra-constitutional procedures to alter the constitution; these procedures may be uncodified in the case of codified constitutions or unconventional in the case of uncodified constitution but in either case they are irregular tools.

Second, in the case of discretionary referendums, constitutional actors have recourse to this irregular tool for reasons that may or may not be driven by constitutional rigidity. The constitution may in fact be relatively easy to amend using the formal procedures but the use of the referendum can yield important political returns that constitutional actors see as warranting a departure from the conventional rules of change. Therefore the hydraulic pressure building in a constitutional regime behind recourse to extra-constitutional procedures of change may derive from both the practical impossibility of satisfying the legal requirements of constitutional change and also from the political expediency of amending the constitution outside of the ordinary rules of change. And, third, the major driver of extra-constitutional change, certainly in the case of discretionary referendums, may be that the balance of authorities weighs in favor of engaging in formally illegal conduct where constitutional actors can claim their actions are nonetheless clothed in the superior democratic legitimacy of a referendumsl change over an amendment achieved by legislative actors.

CONCLUSION—APPEALING TO THE PEOPLE: EARLY AND MODERN APPLICATIONS

Appealing directly to the people in departure from the formal rules of amendment is nothing new. The United States Constitution was itself born of a formally unconstitutional though nonetheless democratically legitimate circumvention of the exceptionally onerous rules of change in the Articles of Confederation.⁹⁰ The Articles required the consent of Congress and each of the thirteen state legislatures for an amendment to become valid,⁹¹ quite literally an impossible threshold to satisfy as no amendment to the Articles was ever adopted.⁹² When the Philadelphia Convention gathered “for the sole and express purpose of revising” the Articles,⁹³ the Convention

⁸⁹ See *supra* Section IV.A.

⁹⁰ See Richard Albert, “Four Unconstitutional Constitutions and their Democratic Foundations” (2017) 50 *Cornell Int’l LJ* 169.

⁹¹ Articles of Confederation, art XIII (1781).

⁹² Benjamin Fletcher Wright, “Consensus and Continuity—1776-1878” (1958) 38 *Boston U L Rev* 1 at 19.

⁹³ *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789*, Feb 21, 1787 at 74 (Washington C. Ford et al, 1904–37).



broke from the Articles and proposed an altogether new constitution that would become valid when ratified by nine out of the thirteen states—creating a much lower threshold for constitutional creation than for constitutional amendment under the Articles.⁹⁴ The Constitution was ultimately approved in extraordinary conventions in the several states. These were popular assemblies convened for two purposes: to express the choice of the voting peoples and to root the constitution, if a new one were to be adopted, in the consent of the governed, the highest authority possible.⁹⁵ The conventions were not referendums—there were closer to “deliberative plebiscites”⁹⁶—but they were a forum for popular choice, much like referendums, though mediated through representatives.

This founding precedent may offer a model for the United States in the present moment. It is not uncommon to read today that Constitution is broken and in need of a serious makeover, whether by major amendment or replacement altogether.⁹⁷ In many cases these broken features—the Electoral College and the Senate’s equal suffrage rule, to name only two—are “hard-wired” into the Constitution, meaning that they are resistant to change by informal amendment.⁹⁸ This raises a question: what progress is possible given that the formal path to constitutional amendment runs through Congress? Article V creates two pairs of procedures to amend the Constitution, but both require the consent of Congress. Both houses of Congress propose an amendment, by a two-thirds vote, which must then be ratified by three-quarters of the states either in legislative votes or conventions in order to be valid; or two-thirds of the states may petition Congress to call a convention of states and the amendments proposed in Convention must be ratified by three-quarters of state legislatures or conventions in order to be valid, the choice of ratification procedure in both procedures being up to Congress.⁹⁹ Congress is today effectively paralyzed from partisan division so it seems unlikely that it could reach two-thirds agreement on much of anything let alone something like an amendment—not to mention that Congress is unlikely to endorse any substantial changes to its composition, for instance the admission of a new state. Congress has an obvious conflict when it convenes to vote on constitutional amendments that implicate its own powers.

Return now to 2010. In his first State of the Union Address,¹⁰⁰ then-president Barack Obama urged Congress to take action to reverse the Supreme Court’s judgment in *Citizens United*, a case holding in relevant part that corporations are not restricted in how much they can lawfully spend independently in federal elections.¹⁰¹ The president later pressed for a constitutional amendment.¹⁰² Many amendments were proposed in Congress—most driven not by an honest

⁹⁴ Constitution of the United States, art VII (“The ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

⁹⁵ Richard S Kay, “The Illegality of the Constitution” (1987) 4 CONST COMMENT 57 AT 75.

⁹⁶ Bruce Ackerman & Neal Katyal, “Our Unconventional Founding” (1995) 62 *U Chicago L Rev* 475 at 562.

⁹⁷ See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006).

⁹⁸ *Ibid* at 29.

⁹⁹ Constitution of the United States, art V.

¹⁰⁰ Barack Obama, “The 2010 State of the Union Address”, *The Obama White House Archives*, Jan 27, 2010, online: <https://obamawhitehouse.archives.gov/photos-and-video/video/2010-state-union-address#transcript>.

¹⁰¹ *Citizens United v Fed Election Comm’n*, 558 US 2010 (2010).

¹⁰² See Fredreka Schouten, “President Obama Wants to Reverse Citizens United”, *USA Today*, Feb 9, 2015, online: <https://www.usatoday.com/story/news/politics/onpolitics/2015/02/09/president-obama-wants-to-reverse-citizens-united/81582308>.



effort to actually reform the constitution but rather reflecting narrow parochial interests like position taking, credit claiming and advertising¹⁰³—but unsurprisingly none of them succeeded.¹⁰⁴ Neither Congress as an institution nor most of its members have an interest in reversing the ruling in *Citizens United*. The path to formal amendment through Article V was therefore closed from the beginning. What, then, could the president have done then, or could a president do now, to pass an amendment overturning *Citizens United* in the face of congressional resistance or inaction?

The founding precedent suggests that the tradition of American popular sovereignty credits expressions of popular will as legally valid but more importantly politically binding where the views of the people are clear. An American president, then, could perhaps legitimately make an end-run around the strictures of Article V—much like the Philadelphia Convention circumvented the rule of unanimity in the Articles of Confederation—to hold a referendum inviting all eligible voters to answer a yes/no question on whether an amendment should be passed reversing *Citizens United*. There would of course be important details to work out including how the question would be phrased, where the vote would be held, and who would tabulate the ballots since elections are ordinarily conducted by state officials, and here in light of the Supreme Court’s federalism case law the federal government could not commandeer the states to run a nationwide referendum.¹⁰⁵

A failed referendum on *Citizens United* would put an end to the question in the near- to the mid-term. But were the referendum to return a convincing vote in favor of reversal, it could have the effect of a reconstructive referendum as in the French referendum of 1962—in which case the Constitution would be declared formally amended even though the process had not conformed to the textually entrenched rules of change—or a revertive referendum in the spirit of the UK referendum on Brexit, compelling Congress to act in deference to expressed popular will, with the ratifying states soon to follow. Nothing in Article V, after all, purports to prescribe an exclusive method of formal constitutional change, as Akhil Amar has theorized in his work on referendums.¹⁰⁶

The late Walter Murphy was right: “to think that words can constrain power seems foolish.”¹⁰⁷ The rules of formal amendment cannot on their own withstand claims that they are suppressing the will of the people or that the popular will has expressed in another form—whether legally valid or not but in either case with democratic legitimacy—its preferences for how to reallocate powers, rebalance rights or redesign institutions of government. Appeals to the people resonate with us because for now the consent of the governed remains today an important determinant in both constitutional law and politics. Yet it is less clear whether the consent of the governed will remain tomorrow, as it was when James Madison wrote at the founding, “the only legitimate fountain of power.”¹⁰⁸ The national model of American constitutionalism is on the decline around

¹⁰³ See David R Mayhew, *Congress: The Electoral Connection* (New Haven: Yale University Press, 1974) 73.

¹⁰⁴ See Richard Albert, “The Unamendable Core of the United States Constitution” in András Koltay, ed, *Comparative Perspectives on the Fundamental Freedom of Expression* (Budapest: Wolters Kluwer, 2015) 13 at 37.

¹⁰⁵ See *Printz v. US*, 521 US 898 (1997).

¹⁰⁶ Akhil Reed Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V” (1988) 55 *U Chicago L Rev* 1043.

¹⁰⁷ Walter F Murphy, “Constitutions, Constitutionalism, and Democracy” in Douglas Greenberg et al, eds, *Constitutionalism and Democracy* (New York: Oxford University Press, 1993) 3 at 7.

¹⁰⁸ Jacob E Cooke, ed, *The Federalist* No 49 (Middleton: Wesleyan University Press, 1961) 339.



the world,¹⁰⁹ and other sources of legitimacy may soon gain primacy, no longer rooting legitimacy in majoritarian democratic politics but rather in moral values, contested though they inevitably are.

In this paper, I have developed a typology of discretionary referendums in constitutional amendment. Drawing from non-obligatory referendums in Canada (1992), Colombia (2016), France (1962) and the United Kingdom (2016), I have suggested for categories of discretionary referendums in constitutional amendment: reconstructive, obstructive, revertive and inoperative referendums. I have also explored why constitutional might choose to deploy discretionary referendums in circumvention of the established rules of change. This paper reinforces a truth we have long known to be true but that is worth highlighting: no constitution is a complete code of its own rules, and even in the case of uncodified constitutions many of its own rules are in state of constant evolution.

¹⁰⁹ David Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87 *NYU L Rev* 762 at 854.