Constitutional Amendments

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Abstract

Constitutional amendment remains a source of ongoing academic and political contestation. Although in some cases the rigidity of formal amendment rules has produced debates over the impact of judicial interpretation as a substitute for amendment, in other cases amendments remain highly controversial or existing constitutional provisions remain unimplemented owing to continuing social, economic, or political pressures. This review both explores the continuing theoretical debates over the idea of constitutional amendment and uses the examples of historic land conflicts in South Africa and Zimbabwe to demonstrate the interaction between existing constitutional provisions, formal amendments, and ongoing demands over land and property rights. By providing both an overview of the theoretical debates as well as a contextual application, this review aims to demonstrate the importance of a contextually grounded, sociolegal understanding of the phenomena of constitutional amendment, stasis, and change.

INTRODUCTION

Constitutional amendments are most readily thought of as formal changes in the texts of written constitutions achieved through processes that are specifically designated by the text itself. However, the question of constitutional amendment has in recent years spawned an increasingly diverse literature that makes it clear that understandings of constitutional amendment involve a significant range of perspectives and approaches that go well beyond the notion of formal textual change (see Levinson 1995, Hirschl 2010). This review outlines the range of approaches represented in the literature and evaluates how these might apply to our understandings of particular historical and contextually situated cases of constitutional change. To begin, however, it is useful to identify several underlying questions that permeate nearly all of these different perspectives that frame debates over the field of constitutional amendment.

The first is to distinguish between amendments and complete constitutional breaks or replacements (see Mazzone 2005). In these situations, the existing constitutions are simply cast aside or so completely transformed that there is no continuity in the structure and principles that underlie the prior and subsequent constitutional orders. This distinction, between amendment and replacement, is of course not always cut and dried, and there remains a wide margin distinguishing amendments that are thought of as remaining within the parameters of the existing constitutional order and those that replace the original constitution. Although these latter amendments might be achieved through formal textual changes, interpretation, or practice, they nevertheless have the effect of significantly transforming the prior constitutional order, as in the case of the post–Civil War amendments or later interpretations of equality in the United States (see Goldstone 2011).

Understanding this distinction requires an appreciation of the alternative ways of understanding constitutional change and whether a specific change should be understood as an amendment or simply the creation of a completely new constitutional order. In the case of Hungary, changes made to the constitution in both 1989 and 2011 were achieved using the amending procedures of the prior constitution but amounted in fact to complete replacements of the prior constitutional order in each case (see Bánkuti et al. 2012). For the legal realist Karl Llewellyn (1934, p. 22), constitutional amendment is simply a measure of change in governmental practice; thus, he argued, "the working Constitution is amended whenever the basic ways of government are changed." At the opposite end of the spectrum is the notion that only formally adopted textual amendments meet the criteria and that any other significant change to a constitution must be understood either as illegitimate or simply as the creation of a new constitutional order. Between these polar opposites lie a range of possibilities, including Bruce Ackermann's (1991) notion of constitutional moments, in which significant changes in the constitutional order may be recognized as de facto amendments resulting from the exercise of higher-order politics, or, at a more mundane level, the understanding that judicial interpretation of a constitution results in a perpetual process of change in the constitutional order.

A second issue involves the means employed to achieve any relevant constitutional change, ranging from textually defined processes of formal amendment to a range of informal practices. Constitutions provide for a wide range of amending mechanisms involving different institutions, categories of decision-makers or voters, and a vast range of procedural mechanisms, yet it is generally accepted that changes to a constitutional order may also be the result of actions, institutions, and developments outside the formal rules provided in the constitution. Although it is often assumed that these informal processes of constitutional change are more likely in the case of rigid constitutions, where the formal processes of amendment require a level of political agreement that is impossible outside of dramatic political circumstances, the simple interpretation of the text and its application to new circumstances that are the hallmark of most constitutional jurisprudence may

also produce fundamental constitutional change. Furthermore, from a sociological perspective, it may be argued that the nature of any constitutional order is being continually reshaped by processes of political and social change as well as the practices of governmental and nongovernmental institutions that surround, and overtime encrust, formal constitutional institutions. Although we might distinguish constitutional amendment from the evolution of a constitution by requiring a deliberate or at least self-conscious intervention, we must remain cognizant of the ways in which fundamental constitutional change may come about through less deliberate or explicit processes, including "desuetude" (Albert 2014) or by "stealth" (Albert 2015).

A third approach addresses the legitimacy of any particular constitutional amendment or constitutional change that may be a consequence of either the particular process or the extent of amendment in a particular context. Even if we were to agree that any dramatic change to the constitutional order that is not achieved through the formal processes of amendment contained in a constitutional text should be considered facially illegitimate—particularly when the result of military coups or foreign interventions—the scope of change that may result from other nonformal processes of amendment remains large. Interpretation and institutional innovation, or even political capture of significant institutions, can significantly shift the norms and functioning of the constitutional order without any formal amendment or even challenge to the legitimacy of the constitution. In fact, such changes may bring the practices of the constitutional order more into line with its normative claims, as was the case with the US Supreme Court's decision in *Brown v. Board of Education* (1954). Judicial review of formal amendments to subnational constitutions, such as the states of the United States or provinces in South Africa, is implied in a system of federalism or even specified in constitutions that devolve power to subnational entities (Klug 2000a, pp. 175–76; Mate 2014); however, it is often assumed that provisions in national constitutions created by formal amendment processes have equal status with the original provisions and cannot be substantively challenged. But even formal amendments may be challenged, especially in the case of constitutional provisions or interpretations that suggest that the basic form—as implied by the basic structure doctrine articulated by the Supreme Court of India—or at least parts of the constitution, such as the founding provisions in the case of the South African constitution, have a heightened degree of entrenchment or, in the case of "forever" provisions like those found in the German Basic Law, simply can never be amended.

Finally, any understanding of constitutional amendment must be rooted in the historical, political, and social context of each constitutional order. Although the scope of this review cannot do justice to the particularities of different examples, the very basis of understanding constitutional amendments requires recognition of the circumstances surrounding each case. The impact of particular circumstances may mean that even limited acts of judicial interpretation may bring significant change—such as in the interpretation of privacy—whereas in other circumstances the adoption of a completely new text or set of rights, as in the case of postwar Japan, may lead to little obvious change to legal culture outside of the formal workings of the political system.

IDENTIFYING CONSTITUTIONAL AMENDMENTS

Before we can go any further in our exploration of constitutional amendments, we must clarify the parameters of the constitution itself. To recognize any degree of change, it is important to define the scope of that which is subject to change so as to clarify the degree and consequence of any changes. The relevant scope of what may be defined as the constitution ranges from Llewellyn's notion of the "working constitution" at one end of the spectrum to the more colloquially understood notion of the constitution as the text of the written document. Although Elkins et al. (2009, pp. 36–37) argue that the text of a constitution is the appropriate baseline for their empirical study

of the question of constitutional amendment, for the purposes of this review the constitution is conceived of more broadly as a constitutional order—including all the institutions and legal rules that seek to define and control the practice of government—most particularly those rules that define the rules of the game, determining how, and by whom, power is to be exercised. Even if limiting the definition to formal textual change might help to clarify the notion of constitutional amendment, it precludes so much of the experience of constitutional change so as to be analytically misleading when exploring the idea of constitutional amendment and change.

If Llewellyn's conception is so inclusive that it provides little purchase for developing an understanding of amendments, a slight modification may provide the necessary traction to sustain a clearer understanding of changes that might be considered amendments to any existing constitutional order. By limiting the scope of relevant change to changes that result in fundamental shifts in the practice of government, we can narrow the scope of identifiable amendments but still include changes that do not reach the level of formal alterations to the text. In rare cases, even formal amendments do not necessarily produce fundamental change in the constitutional order and are better viewed as technical or ineffective amendments. Thus, instead of focusing solely on changes in the text of a constitutional document, this notion of constitutional amendment begins from the assumption that "the persistent possibility of amendment inescapably implies precisely the boundedness of the constitutional order at any time" (Harris 1993, p. 165). Even if the boundaries of what may be conceived of as a fundamental shift in practices of government remain fuzzy, the value of this approach is its inclusion of a greater range of processes that have historically led to significant shifts in the understanding and practices of particular constitutional orders.

Donald Lutz (1995, p. 237) identifies four distinct processes through which a constitution may be altered: "(1) a formal amendment process; (2) periodic replacement of the entire document; (3) judicial interpretation; and (4) legislative revision." Of these four processes, only the second, involving complete replacement, falls totally outside the realm of constitutional amendment. Even then, there are multiple examples in which a complete replacement of a constitutional document has not had a fundamental effect on the constitutional order. In other cases, the remaining three processes identified by Lutz may alter the constitution, its text, or its interpretation, but the alteration may not result in a fundamental change in the practice of government and thus may not reach, at any particular moment, the threshold of what we may recognize as a constitutional amendment. In the event that change to the constitutional order reaches the threshold of a cognizable amendment, Lutz (1995, p. 240) suggests that it is "more helpful to use 'amendment' as a description of the formal process" of textual amendment "and 'revision' to describe processes that instead use the legislature or judiciary."

We are thus left with three distinct ways of identifying a constitutional amendment and distinguishing amendments from other alterations to the text or interpretation of a constitution. First, we can distinguish between the amendment and replacement of a constitution. Second, the relevant process of alteration provides a distinction between formal "amendments" to the text and "revision" of the constitution through judicial interpretation or legislative provisions that lead to constitutional change. In the case of interpretation, Lutz (1995, p. 241) argues that "[a]s long as interpretation does not move outside a range of acceptable possibilities defined by a normal language interpretation of the constitutional provision, even if the operation of the political system is significantly changed as a consequence, there has not really been an amendment but rather a specification of a choice within a range of possibilities." Finally, whether an "amendment" or a "revision," unless the relevant process of constitutional change produces an effect on the constitutional order that produces a fundamental change to the practice of government, it may not reach the threshold of a cognizable amendment to the constitutional order.

FORMAL AMENDMENTS

Formal processes of constitutional amendment vary greatly from one constitutional text to another and include a vast range of alternative methods, including different agents and steps that must be followed to achieve a legitimate constitutional amendment. Some constitutions, such as the Canadian and South African constitutions, include multiple processes of amendment depending on the issue or degree of entrenchment provided for in the constitution. The most common amendment provisions include requirements for supermajorities, often a two-thirds majority of the relevant representative institution; specific legislative procedures; repeated votes over a specific period of time, often incorporating a plebiscite for members of the relevant institution; referenda to either confirm an amendment adopted by the legislature or make the amendment itself; and, in federal systems, separate approval of the subnational units, especially in matters impacting the federal structure of the constitutional order. It is also possible to distinguish the range of formal amendment procedures according to the degree of entrenchment the relevant procedures impose. In some cases, the degree of entrenchment, for particular provisions or of the whole constitution, may severely limit the possibility of formal amendment.

Article V of the United States Constitution requires an amendment to be passed by a two-thirds vote of both houses of Congress and then to be adopted by three-quarters of the 50 states of the Union. Although all of the 27 successful amendments to the United States Constitution have followed this path, Article V also provides an alternative path in which two-thirds of the legislatures of the states may call a constitutional convention, with three-quarters of the states then agreeing to adopt the resulting amendment. This formal route to creating a constitutional convention has, however, never been invoked. Also, in most cases, regular constitutional amendments may be adopted by national legislatures by a supermajority vote, usually two-thirds. At the extreme, the German Basic Law contains several forever clauses that were designed to prevent a repeat of the "constitutional" route to fascism that the Nazis followed under the Weimer Constitution, which allowed any subsequent parliamentary legislation to amend the constitution. Although forever clauses are fairly unique, the idea that a constitution guarantees a basic form of governance is reflected in several different ways in which processes of formal or substantive amendment are effectively restricted (see Roznai & Yolcu 2012, Albert 2009). The difficulty of achieving formal constitutional amendment has provided support to those who argue for the legitimacy of constitutional change through judicial interpretation (Weis 2014) but has led also to claims that constitutional amendment provisions, especially in the case of Article V of the US Constitution, are irrelevant (Strauss 2001).

CONSTITUTIONAL AMENDMENT AS CONSTITUTIONAL CHANGE

Although we might distinguish constitutional amendments from replacements, it is important to recognize that the question of constitutional amendment is intimately related to one of the earliest debates that accompanied the emergence of written constitutions—the issue of whether a constitution should be for all time or whether it should be subject to regular change. This issue was explicitly debated by Thomas Jefferson and James Madison, and in a recent contribution to the literature on constitutional amendment, Elkins et al. (2009) argued that despite the longevity of the first written national constitution—that of the United States—in effect, and especially when other constitutional experiences are taken into consideration, it is the Jeffersonian view of regular constitutional change that has predominated. At the same time, they recognized that the significance of the Madisonian perspective lies less in the concern to bind the future than

in the need for institutional depth and certainty, reducing the debate "to the perennial tension between flexibility and commitment" (Elkins et al. 2009, p. 22). In his book *A Constitution of Many Minds*, Cass Sunstein (2009, p. 1) describes the debate between Madison and Jefferson as offering "radically different views about the nature of constitutionalism."

Sunstein (2009, p. 1) argues that Madison, in insisting "that the Constitution should be relatively fixed," saw the constitution as providing a stable, accepted background against which the citizenry "engages in the project of self-government," creating a "system in which the constitutional essentials were placed well beyond the easy reach of succeeding generations." This approach does not preclude constitutional amendment but creates a boundary between the daily experimentation and creativity that should be the essence of self-government and the Madisonian guarantee that self-government will be preserved even in the face of popular passions that might arise in the context of any particular political crisis. This Madisonian perspective stands in stark contrast to Jefferson's argument that the aspirations of the American Revolution meant that each generation should be free to reconceive self-government in light of changing circumstances and that "past generations should not be permitted to bind the present" (Sunstein 2009, p. 2).

Although the persistence of the bulk of the original terms of the United States Constitution, as ratified in 1787, may imply that Madison's vision has endured, Sunstein (2009, p. 3) points out that "[i]n crucial ways, however, the tale of constitutional stability is a myth. Jefferson has had his revenge—not through formal amendments, but through social practices and interpretations," which have together fundamentally and consistently changed the Constitution. In addition to formal amendments and Supreme Court interpretation, Sunstein (2009, p. 3) highlights "the extent to which changes in constitutional arrangements and understandings [are] . . . a product of ordinary democratic processes, producing adjustments in constitutional understandings over time." From this perspective, self-government, rather than judicial innovation, has been the predominant source of constitutional change.

If we take Sunstein's invitation and look beyond formal amendment and judicial interpretation to understand constitutional amendment or change, we immediately face, once again, the difficulty of defining the nature of the change we recognize as relevant to our analysis. One solution is to begin by adopting Mark Tushnet's conception of changing constitutional orders. In exploring this idea, Tushnet advanced what amounted to a theory of constitutional evolutionism in which changing political and social conditions give rise over time to more fundamental changes in the underlying constitutional order. Thus, instead of the dominant view that the Constitution simply establishes the architecture of government and guarantees rights, Tushnet (2010, pp. 132–39) argues that the constitution matters because it structures politics, and it is change in the politics of a society that in turn shapes the principles and institutions that form the basis of each new constitutional regime.

The idea of a constitutional order or regime is particularly important in the effort to identify issues and conflicts that might shape the trajectory of change from one regime to the next. In contrast to Bruce Ackerman's (1991) notion of constitutional moments, which views the founding, the post–Civil War amendments, and the New Deal as periods of constitutional change outside of "normal politics," Tushnet's (2003, p. 2) idea of a constitutional order, constituted by a "dominant set of institutions and principles," allows for an understanding of constitutional change through processes of gradual construction and transformation. Instead of being imbued with moments of higher politics or revolutionary transformation, Tushnet (2003, p. 3) introduces a more dynamic notion of constitutional development in the United States. Furthermore, he rejects a purely court-focused approach and instead adopts an inclusive institutional perspective, viewing political parties and other branches of the national government as part of a constitutional order. Key to his conception of a constitutional order as opposed to a "mere political order" was the idea that

the constitutional order is the "combination of institutions and principles" (Tushnet 2003, p. 1), in which the principles of governance guaranteed in the constitution are as significant as the corresponding institutions established in the constitution.

This inclusive perspective was not limited to Tushnet's analysis of what constitutes a constitutional order. It was also extended to include the idea that the guiding constitutional principles of any particular constitutional order are reflected not only in the legal and philosophical principles articulated in judicial opinions but also in the statutes and policies adopted and pronounced by the legislature and executive branch, respectively (Tushnet 2003, p. 4). Thus, he identifies Franklin D. Roosevelt's State of the Union message in 1944, as well as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Medicare, as defining the "guiding principles of the New Deal-Great Society constitutional order" that he argues prevailed in the United States from the 1930s to the 1980s (Tushnet 2003, p. 1). In his discussion in *Why the Constitution Matters*, Tushnet takes this understanding of a constitutional order to its logical conclusion by arguing that the Constitution itself matters "because it provides a structure for our politics" (Tushnet 2010, p. 1) and not because the Supreme Court has the last word on interpretation or because the most fundamental rights and policies upon which most American citizens rely either are guaranteed by the Constitution or are the product of the Supreme Court's interpretation of the Constitution (Tushnet 2010, pp. 1–17).

Although Tushnet makes a convincing argument for viewing the constitutional history of the United States as a dynamic process of change in which succeeding constitutional orders represented by different combinations of institutions and guiding principles may be identified, he also acknowledges that it is more difficult to pin down the exact elements of any new order. In his 2003 book, Tushnet identified four possible constitutional regimes over the course of the twentieth century: Two of these were historical, the pre–New Deal order and the New Deal–Great Society order, and the remaining two represent what Tushnet identified as the constitutional order of the "present" time and a potential future order. The identification of two new orders, present and future, provided a fascinating perspective on what at times seemed to be Tushnet's own internal debate over whether the "present" represented a consolidated constitutional order or a transitional period between the most recent past order—the New Deal–Great Society order—and a future order, which he characterized as the Reagan-Gingrich-Bush order. Tushnet resolved this question, at the time, by arguing that the "present" may be identified as a specific constitutional order characterized institutionally by a political structure centered "on a government divided between two ideologically opposed but internally unified parties," and governing principles that "are chastened versions of the principles of the New Deal–Great Society constitutional order" (Tushnet 2003, p. 111). Whereas the challenge for Tushnet was to identify the particular mix of institutions and guiding principles that together constitute each particular constitutional order, the idea of successive constitutional regimes requires us to focus on the specific mechanisms of change that might drive these shifts.

Focusing on how to resolve the problem of identifying a specific constitutional order, or each new constitutional order, Tushnet argued that it depended on the idea of consolidation. He noted at the time that by his own definition, constitutional orders "have to be reasonably stable" (Tushnet 2003, p. 96) and that determining that a new order has come into being requires the identification of a combination of "novel guiding principles with distinctive institutional arrangements" (p. 8). Yet he also acknowledged that at any moment in time different elements of past, present, and future orders are likely to coexist. Most of the 2003 book is focused on resolving this tension, with Tushnet considering and distinguishing, to varying degrees, different theories and arguments suggesting either that a revolutionary change had taken place—in the form of a Reaganite revolution—or that the "present" represented a continuing yet unspecified transition, in which it was possible to identify both distinctive institutional characteristics and particular guiding principles, which

together would make it possible to characterize the present as a distinctive constitutional order. Overcoming this inherent conceptual difficulty, however, requires us not only to identify specific markers—institutions and principles—but also to grapple with the question of change itself.

In Tushnet's (2003) argument, change flows from shifting social, economic, and political conditions, which is surely true but is also in tension with his more recent argument that the constitution matters because it provides a structure for politics. If constitutional regimes change as a consequence of changing conditions and yet simultaneously structure politics—the very agency of changing social and economic conditions—then understanding the mechanisms of change from one constitutional regime to another becomes a challenge of central importance. It is this challenge that is taken up by Gary Jacobsohn (2010, p. 33) in his book *Constitutional Identity*, in which he seeks to "clarify and elaborate the concept of constitutional identity," which he sees as the central challenge of constitutional theory. The reason to take up this challenge is that it provides, in Jacobsohn's hands, a fascinating and highly sophisticated means of addressing the central question of constitutional theory: How do constitutional systems come into being and change over time? Aside from moments of constitution-making or formal amendment, questions of constitutional identity and change often focus exclusively on the role of the judiciary in interpreting the meaning of the constitution in the process of deciding individual cases. Although judicial decisions remain at the core of Jacobsohn's (2010, p. 2) empirical analysis, it is his focus on the broader constitutional order that produces a deeper understanding of the "unique legal and political phenomenon" that a constitution represents. To achieve this, Jacobsohn follows Tushnet's earlier trajectory and makes an initial and, I would argue, essential distinction between a constitutional text and "a nation's constitution," which is a much broader realm, including the text, institutions, and historical understandings that together constitute a particular society's constitutional order.

Rejecting the argument that constitutional identity "cannot be objectively deduced or passively discerned in a viewpoint-free way," Jacobson (2010, p. 3) argues that the key to understanding the evolving identity of a constitution is the concept of constitutional disharmony, which allows us to explore the "identifiable continuities of meaning within which dissonance and contradiction play out in the development of constitutional identity" (p. 4). From his perspective, constitutional identity "emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past" (p. 7, emphasis in original). Noting that a "dialogical path may require reconsideration of the juri-centric model that has dominated contemporary constitutional theorizing," Jacobsohn (2010, p. 109) fleshes out two other sources of disharmony that may fuel the continuing transformation of constitutional identities. On the one hand, he points to the tensions that are present within the constitutional text or structure itself: whether it is the relationship between different levels of government implicit in federalism; inherent in the compromises made by constitution-makers; or, through changing conceptions of specific elements, such as the idea of constitutional rights themselves. On the other hand, he concludes his chapter on "The Quest for a Compelling Unity" by exploring the "second dimension of contestation—confrontation between constitution and social order" (Jacobsohn 2010, p. 134). As a result, he postulates that whether it is contradictory aspirations or tensions between the evolving social structure and the framework of the constitution, "constitutional identity will be fashioned—and refashioned—through the struggle over constitutional identity" (p. 135).

To understand this dynamic, Jacobsohn points to a distinction between what he terms preservationist and militant orientations inherent within constitutional texts. These orientations reflect, he argues, the "preservative and transformative elements" that are inherent within all constitutional orders, in some cases constraining social change while in others providing a challenge to the existing social structure. Even the idea of continuity inherent in the preservationist or prescriptive

form embodies "an adversarial component—'continuities of conflict'—that connects it to the historical narrative within which it unfolds while preserving it from becoming moribund" (Jacobsohn 2010, p. 19). Thus, for example, Jacobsohn (2010, p. 214) discusses the evolution of constitutional identity in Ireland and argues that the changing status of religion in the constitutional order is a product of the "disharmonic tension" between these preservationist and transformative elements. Using examples from Irish and Indian jurisprudence, Jacobsohn also explores the question of constitutional amendments and demonstrates how underlying political principles and the character of each constitution, as well as the particular conflicts, frame the relationship between continuity and change.

Constitutional amendment from this perspective involves a complex process of change at multiple levels that simultaneously achieves both a fundamental change in the processes of governance and a shift in the very identity of the constitutional order. Demonstrating this understanding of constitutional amendment requires a contextual approach in which continuity and change may be assessed from the perspective not only of the constitutional documents, institutions, and interpretations but also within a broader social and political context. To demonstrate the contribution such an approach can make to our understanding of constitutional amendment, this review concludes with an exploration of processes of constitutional amendment and nonamendment in postcolonial Zimbabwe and South Africa, where the constitutional status of land remains a source of intense political and constitutional contestation. Demonstrating the interaction between formal amendment and fundamental change in processes of governance and constitutional identity requires a deeply contextual approach—described by Kim Lane Scheppele (2004) as constitutional ethnography—which will take us from the heretofore abstract analysis to a rather concrete perspective on constitutional amendment and change.

CONSTITUTIONAL CHANGE IN CONTEXT: LAND, PROPERTY, AND CONSTITUTIONAL AMENDMENTS IN SOUTHERN AFRICA

South Africa and Zimbabwe have undergone dramatic constitutional change over the last thirty years. In both cases the problem of access to land, a legacy of colonialism and apartheid, remains a central social and economic problem specifically addressed in the constitutions of both countries. Although the original postcolonial constitutions of the two countries (Zimbabwe's 1980 Constitution and South Africa's 1993 Constitution) contained provisions addressing land reform, these provisions were premised on unsustainable compromises not unlike the original provisions in the US Constitution that addressed slavery. It is the continuing conflicts over these property provisions in South Africa and Zimbabwe that provide a context in which to explore the idea of constitutional amendment. Furthermore, not unlike the slave trade in the late eighteenth and nineteenth century, the issue of constitutional property rights in the late–twentieth century period of neoliberal economic globalization became a global issue that constitution-makers could not ignore. Although there is no single formula for the constitutional protection of property, the ideological power of market fundamentalism in the post–Cold War era required constitution-makers to protect property rights regardless of the local circumstances that might have made other options more sustainable.

Access to land and the regulation of land use have been a major source of conflict over the course of Southern African history (Moyo 2007). In Zimbabwe, the war for independence from colonial rule was rooted in the struggle over land (Martin & Johnson 1981), whereas in South Africa, the 1913 Land Act had denied the land rights of black South Africans and established the spatial distribution of land use that became the basis of the apartheid system, in which the human dignity of the majority of South Africans was denied. It has been "estimated that some 3.5 million

black South Africans [were] uprooted from their homes and relocated in furtherance . . . of the apartheid agenda between 1960 and 1982" alone (Walker 2008, p. 2). With the fall of apartheid and the emergence of a democratic South Africa in 1994, the question of land and property rights became a central theme in the constitution-making process. Although important steps were taken with the recognition of a right to restitution for those who had been dispossessed of their lands through the operation of racially discriminatory laws, as well as the adoption of a constitutional commitment to land reform more generally, progress toward a more equitable distribution of land rights has been slow, and the regulation of land use has remained fragmented.

The framework of land law that was inherited by postapartheid South Africa was characterized by several elements that undermined its legitimacy and have had profound consequences for the establishment of a functional system of land law. These elements included a hierarchy of land tenures in which freehold title was privileged; the fragmentation of land law in different parts of the country; the lack of an adequate system for recording all land rights; the prevalence of bureaucratic discretion over the land rights of many land holders (particularly in the former *bantustans* or African reserves); and the need to establish new laws and forms of regulation to address this history. The inclusion of a right to restitution in the 1993 Constitution and its inclusion in the property clause of the final 1996 Constitution sought to address these needs. Indeed, the period since 1994 has seen major efforts aimed at addressing this legacy. The process of land restitution has seen over 80,000 claims (mostly to urban land) received by regional land claims commissions and adjudicated in some cases by a land claims court, a system specifically designed to implement the constitutionally mandated process of restitution. As a result, and with the addition of processes of land redistribution and land tenure reform, over 3.4 million hectares have been redistributed, although this remains far short of the 30% target—of 82 million hectares of white-owned farmland—initially set by the new government in 1994. At the same time, attempts to create a unified system of land-use control have also faltered, and although a new policy of land management was introduced in 2001, it remains, along with several other land-related bills, tied up in the legislative process and related constitutional challenges.

The pace of change in land rights has been slow in South Africa, but in Zimbabwe it was initially frozen by the 1979 Lancaster House Agreement, which included the text of Zimbabwe's first postindependence constitution and provided that there could be no amendment to specific clauses for the first ten years of majority rule. Together with the guarantee of a specific number of white seats in the new Parliament was the inclusion of a clause that protected existing property rights and specified that land could be obtained by the new government for purposes of land reform only on the basis of the "willing buyer, willing seller" principle. In this context, the phrase through constitutional incorporation retained its reference to the market but now included a limitation on the ability of the new government to exercise its power of eminent domain, and not merely by defining the measure of compensation that would be due. This settlement was, however, effectively limited to ten years because the new government of Zimbabwe held a two-thirds majority necessary to amend the constitution in the legislature.

Despite this constitutional agreement, conflict over land policy after the end of the ten-year constitutional hiatus produced a dramatic economic crisis in the first decade of the twenty-first century. The resulting political instability, including contested and violent elections and a draconian clampdown on civil liberties, eventually led to the replacement of the constitution but not the end of the political and social crisis that precipitated this constitutional change.

Although it is hardly surprising that land was at the center of anticolonial struggles in the settler colonies of Southern Africa—including Mozambique, Namibia, South Africa, and Zimbabwe—there has been little consideration of the impact this past, and the ways it has been addressed in the postcolonial era, is having on debates over constitutional change in the region. It is often recognized

that political events in one country have direct impacts on neighboring countries, yet discussions over constitutional amendment and change treat the processes and issues as essentially "legal" and therefore located within the confines of each country's legislative and political system. Even when it is recognized that constitution-makers and those engaged in amending their constitutions might be influenced by foreign models and antimodels (Klug 2000b), it is rarely acknowledged that the terms of a constitutional debate often take place within the shadow of neighboring experiences. In the case of the constitutional status of property in both South Africa and Zimbabwe, there is a continuing interaction with and impact on the process of constitutional change—including amendments and judicial interpretation—that flows across their borders. Given its absolute majority in the legislature, the Zimbabwean government repeatedly engaged in formal constitutional amendments as it sought to overcome the strictures of the Lancaster House Agreement, including its requirement that the state's ability to engage in land reform be limited by the stipulation that its power of eminent domain be subject to the principle of willing buyer, willing seller. Although the white minority were unable to prevent amendments to the constitution after 1990, they and the international community, in the form of the World Bank and the British government, continued to insist that the principle should apply as an incident of the right to property. In an attempt to retain domestic political support, the Mugabe government in Zimbabwe adopted an increasingly radical rhetoric—including support for land invasions—and within a month of the 2000 elections amended the constitution to limit compensation to the value of any improvements on the land, rather than market value (Scoones et al. 2010, pp. 14–24).

These events and their historical origins provide the context in which the meaning of constitutional provisions and their implementation are understood and contested. In the case of land, the impact of the willing buyer, willing seller formula, once articulated as a definition of a market-based compensation standard in apartheid South Africa's 1975 Expropriation Act, became a core element of the strategy to protect colonial property holdings in the 1979 Lancaster House Agreement that ended the war and led to democratic elections in Zimbabwe. This inclusion of a particular formulation of property rights designed to constrain if not block land reform laid the seeds of further political strife and constitutional change—first in the form of amendments and finally, after more violence and economic collapse, in the form of constitutional replacement. Although the conditions that led to economic collapse are multiple and complex, blame is often laid on the adoption of constitutional amendments that revoked the duty to pay compensation altogether by tying it to the willingness of the former colonial power to offer financial aid to cover the costs of compensation. Significantly, these constitutional amendments denying the duty to pay compensation to former landowners were incorporated into the new Zimbabwe Constitution adopted by a national referendum in March 2013 and remain a central point of political and constitutional contestation. South Africa's constitutional provisions governing land have evolved in the shadow of Zimbabwe's experience.

Amending the South African Constitution

The property clause of the South African Constitution not only guarantees the restitution of land taken after 1913 [S. Afr. Const. section 25(7)] and a right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws or practices [section 25(6)] but also includes an obligation for the state to enable citizens to gain access to land on an equitable basis [section 25(5)]. Furthermore, the state is granted a limited exemption from the protective provisions of the property clause so as to empower it to take "legislative and other measures to achieve land, water and related reform, to redress the results of past racial discrimination" [section 25(8)]. At the same time, it does protect the rights of property holders, stating in section

25(1) that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Although the clause does recognize the state's power to expropriate property for "a public purpose or in the public interest," and "subject to compensation," there is a clear attempt both to protect land reform from constitutional challenge and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property [section 25(2–4)].

In the first major case challenging the failure of government to protect the rights of a landowner who had obtained an eviction order against thousands of settlers on his land, the constitutional court held that the state was under an obligation to either enforce the court-ordered eviction or else expropriate the land and grant compensation to the landowner [*President v. Modderklip* (2005)]. In a second case, the constitutional court was asked to decide whether the enforcement of a tax lien against an individual through the seizing of two vehicles amounted to a taking of the property of the bank who financed the purchase of the vehicles. In this context, the constitutional court laid out an elaborate scheme for deciding whether there had been an expropriation of property (*First National Bank v. Commissioner, South African Revenue Services*, para. 46). First, the court asked whether what was taken was recognized as property for the purposes of the constitutional protection of property. Second, if it was protected property, did the actions of the government amount to a deprivation of that property? Third, if a deprivation was found, was it consistent with the constitution's requirement in section 25(1) that it be "in terms of a law of general application" and "not arbitrary"? Fourth, if the court found there had been a deprivation but that it was not done in a manner consistent with section 25(1), was such a deprivation justified as a limitation of rights provided for in section 36 of the constitution? Fifth, if the deprivation was consistent with section 25(1), was the property expropriated under a law of general application, as required by section 25(2)? Sixth, if so, then was the expropriation "for a public purpose or in the public interest," and was compensation, in which the amount, time, and manner of payment was either "agreed to by those affected or decided or approved by a Court," provided? Finally, if the expropriation did not comply with the requirements of section 25(2)(a,b), could it nevertheless have been justified as a limitation of rights, as provided for in section 36?

Despite this elaborate schema for determining the constitutionality of any deprivation of property, the practice of expropriation continues to be governed by the predemocratic statutory law of expropriation. Although no expropriation may be carried out in violation of the constitution, the question is whether the statutory framework created by the Expropriation Act of 1975 does not in fact place higher burdens upon the state than required by the constitution. Under the 1975 statute, an expropriation must be "for a public purpose" [Act 63 of 1975, section 2(1)], and compensation is determined by the "amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer," plus an "amount to make good any actual financial loss or inconvenience caused by the expropriation" [section 12(1)(a)(i, ii)]. However, public purpose is defined quite broadly in the act as "including any purposes connected with the administration of the provisions of any law by an organ of state" (section 1, definitions, "public purposes"). The net effect, however, is that in the case of both the reason for the expropriation and the standard of compensation that should be awarded, the statute privileges the existing holders of freehold title against both the state and the constitution's imperative to address past dispossession by providing the state with greater latitude and taking into consideration the benefits previous owner may have accrued in a market, access to which was racially restricted and in which the state often provided subsidies and other benefits to white landowners. The most important impact this continuance of past law has had on postapartheid land law and policy has been the continued embrace of the notion of willing seller, willing buyer, which neither is required by the constitution nor has been helpful in furthering the process of restitution—whether in its impact on the actual

bargaining power of existing title deed holders or as a matter of perception among those who feel that the process of restitution and land reform has been unacceptably glacial.

In an attempt to address this inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the government introduced a bill to reform the law of expropriation in April 2008. In its explanation for the bill, the government argued that the new law would create a "framework to give effect to the Constitution" and in particular the state's "constitutional obligation to 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" (*Government Gazette* 2008, p. 3). The new statute would also require the recognition of unregistered rights (Expropriation Bill 16–2008, chapter 4, section 10) as well as provide new institutional mechanisms to regulate expropriations (chapter 3, section 6). Significantly the draft law also revised the standards for compensation, including in the bill for the first time the range of factors that had been negotiated for during the democratic transition. Reaction to the new bill was vociferous, particularly from those who had fought so hard to protect their property interests during the transition from apartheid (Booysen 2008, *Mail & Guardian* 2008).

Responding to the introduction of the new expropriation bill in the South African Parliament in 2008, former South African President F.W. de Klerk told the Cape Town Press Club that the bill was unconstitutional and struck at the heart of property rights. He argued that the proposed statute "would allow any property to be expropriated in what the minister of land affairs construed to be "the public interest," including shares in the stock market. He went on to warn that the bill would have very serious consequences for the economy, and the degree to which compensation fell short of perceived market value—a determination that the courts would be barred from changing—would be seen by markets as unfair deprivation of property. According to de Klerk (*Mail & Guardian* 2008), "The consequent perception of arbitrary deprivation of property . . . will have a very negative impact on national and international investor confidence, and will seriously damage South Africa's international credibility . . . . At a stroke most of the excellent work that the government has done over the past 14 years to establish South Africa's creditworthiness could be undone."

De Klerk described section 25 of the constitution, which deals with property, as having been a sincere effort to achieve a delicate balance between protection of vested property rights and the need for land reform. He then went on to warn that "[i]f this balance is disturbed then the whole essence and the spirit of the agreement which was reached around section 25 will be undermined . . . . My contention is, and I feel very strongly about it, that this Bill in its present form disturbs that balance in a very serious way" (*Mail & Guardian* 2008). Although many of these objections to the proposed legal reforms mirrored those that had been rejected by the constitutional assembly, the government nevertheless withdrew the bill, and political tensions continued to rise around criticisms over the slow pace of land reform as well as demands to reject the policy and practice of willing seller, willing buyer, which is rhetorically blamed for the failures of the state and market to address continuing racial inequalities in landownership.

As the African National Congress (ANC)—the ruling party in South Africa—moved toward its National Conference at the end of 2012, there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization's mid-year policy conference, which produced a draft policy document for the National Conference, there were repeated calls from various ANC constituencies, the youth league and trade unions (Letsoalo 2012) in particular, for a constitutional amendment to remove what they understood to be a constitutional requirement of willing buyer, willing seller, which they blamed for the slow pace of economic transformation and land reform. In response to these calls, the official opposition, the Democratic Alliance, issued a press statement warning that the ANC government was "contemplating dramatic changes to the Constitution . . . which threatens the very foundation

of our constitutional state" (Smuts 2012). Responding to these demands and concerns, the Minister of Rural Development and Land Reform, Gugile Nkwinti, said the debate about changing the constitution might be irrelevant, as "the ANC had come up with four proposals to transform landownership in South Africa without changing the Constitution" (SAPA 2012). But at the same time, the ANC Youth League called for "changing of the Constitution to do away with land expropriation with compensation" (SAPA 2012).

Demands for constitutional amendments and threats that such amendments will undermine South Africa's constitutional democracy are on one level easily understood as the product of continuing contestation over the distribution of economic resources in postapartheid South Africa. Less understandable is the focus on willing buyer, willing seller as the target of vilification by those who feel that land reform has been hampered by the constitutional protection of property rights and as a marker of constitutional right by those who claim that the protection of property fundamentally underpins the country's constitutional democracy. The fact that the constitution makes no reference to the willing buyer, willing seller standard is reflected in the argument by Nkwinti, who acknowledges that a lot more can be done by the government within the confines of the constitution to advance the goals of land redistribution. But the government's own claims are subject to interrogation because the process of land restitution and redistribution has until now been largely carried out within the confines of a willing buyer, willing seller policy approach. The puzzle then is to understand the persistence of this approach and the strength of the rhetoric that has until now undermined attempts, including legislative efforts, to shift toward a more aggressive use of state power, including the power of eminent domain, to achieve the government's stated goals and constitutional imperative of agrarian reform.

However, once attention shifts to the question of expropriation, the focus on willing buyer, willing seller becomes more understandable. Although the constitution may not include a willing buyer, willing seller standard, the apartheid-era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation. Although the constitution is supreme in South Africa and explicitly provides a set of criteria for determining compensation in the event of expropriation, in application the state may exercise its power of eminent domain only within the terms granted by the legislature in the Expropriation Act. This explains in part why the willing buyer, willing seller standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, which includes an understanding of the conflict over land in the Southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and the possibility of constitutional amendment most specifically. Only once the history of the struggle over land in Zimbabwe, as well as the pattern of constitutional amendment and crisis in Zimbabwe, is taken into account does it become clear why the willing buyer, willing seller language has such power and relevance. In this context, the possibility of constitutional amendment may be linked as much to domestic law and politics as to broader international and regional conditions that shape the ways in which constitutional options might be understood and contested.

During its 2014 election campaign and following its victory in national elections, the ANC has once again responded to these popular concerns by resurrecting its 2012 land-related policy proposals, including replacing willing buyer, willing seller with the "just and equitable" principle in the constitution where the state is acquiring land for land reform purposes; expropriating without compensation land acquired through unlawful means or used for illegal purposes; and keeping nationalization as an option (Afr. Natl. Congr. 2012, p. 37). At the same time, however, there continues to be more strident demands for a constitutional amendment to remove the willing buyer, willing seller principle or even abolish the requirement that the government pay compensation for land taken in the name of redistribution. Although it seems highly unlikely

that the ANC will be able to amend the constitution so as to change any portion of the Bill of Rights, which requires an even higher degree of legislative support than ordinary constitutional amendments, fundamental constitutional change seems inevitable, at least with respect to the settled expectations of some. Although transformative change that recognizes the constitutional hopes of the majority of South Africans is clearly provided for within the present constitutional provisions for property and land reform, the full implementation of these provisions will produce a significant shift in the country's constitutional identity, at least to the degree that these changes have until now been foreclosed or denied by the government's postapartheid land policies. For some this shift will be seen as a de facto constitutional amendment, whereas others will feel that it is merely implementing the existing constitutional provisions, highlighting the inherent ambiguity that exists within any constitutional order and is implied in the ongoing interpretation of constitutional provisions.

Formal constitutional amendment and finally constitutional replacement in Zimbabwe have thus far failed to resolve the political and economic crisis that was set in motion by the constitutional limits on land reform included in its independence constitution; however, the same crisis has thrown a long shadow over South Africa's constitutional attempts to address the history of colonial land policies. If formal legal constitutional amendments have been unable to resolve Zimbabwe's land question, the threat of crisis seems to have prevented the South African government from making even statutory changes that are perfectly in accordance with the existing constitutional provisions. Instead, South Africa faces increasing calls for constitutional amendment—which given the two-thirds voting requirement in the National Assembly is now highly unlikely—and Zimbabwe will continue to face international isolation and political instability until it manages to negotiate a new constitutional settlement to provide at least some compensation to those whose land has been confiscated. Whether through formal amendment or interpretation and statutory change, the constitutional identities of both South Africa and Zimbabwe are dependent on the emergence of a postcolonial constitutional order that adequately addresses the history of colonial land dispossession. Constitutional amendment from this perspective is both rooted in the text and identity of the "working constitution" and bounded by the overall context that is the constitutional order.

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