Modernizing Constitutions.
A comparative analysis of justifications for constitutional reforms

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"A people has always the right to review, to reform, and to amend its constitution.
One generation cannot subject to its laws the future generations".
Article 28, *Declaration of the Rights of Man and Citizen* from the French *Constitution de l'An I* (1793)

Abstract: The idea, dear to Thomas Jefferson, that a people cannot be subjected by the laws of the previous generations is in direct contrast with the intention of the constituent power to make the constitution– as opposed to ordinary legislation – last for more than one generation. One way to conciliate this paradox of constitutional theory is the possibility of amending the text of rigid constitutions if and when they become "outdated". Therefore, a very effective argument to legitimize constitutional amendments has been affirming that they serve the modernization of the constitution, making it compatible with current times without having to substitute it entirely, which could be politically impossible or undesirable. This paper critically examines the uses of the constitutional modernization argument (CMA) from a comparative perspective, by studying examples of constitutional reforms from 2000 to 2022 in various countries. The paper's contribution is firstly to unpack the structure and assumptions of CMA and to divide it into sub-arguments in order to provide a better understanding of those type of justifications. The structure analysis of CMA is tested with two clinical trials choosing some of the examples studied in the article. The paper concludes on a critique of CMA as an unjustified objectivization of constitutional reforms which can mask the changed political preferences that amendments convey and allow to avoid the necessary discussion about values.

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1. Introduction

On November 8, 2022, voters in Alabama were asked whether they approved the recompilation of the State Constitution, effectively replacing the Constitution of Alabama of 1901 with the Constitution of Alabama of 2022. The sponsors of this initiative justified[2] the proposed amendment with the need to update the language as well as the structure of the text, which contained racist language, provisions that had been repealed but never deleted, and had never been reorganized in order to reflect the various changes that had already occurred – more than 1000 constitutional amendments in the last two centuries. The argument was so compelling that all members of the State Legislature agreed to put the initiative on the ballot and that more than 76% of the voters approved the amendment[3]. This recent episode shows an effective way of presenting constitutional reforms as a response to the necessity of adapting constitutions to modern society. This paper intends to show that modernization is a common reason, frequently used to push constitutional reforms, and that this use can lead to unwanted consequences.

Rigidity is one of the main characteristics of modern constitutions. To protect fundamental values and rights, the constitution is out of reach for political majorities. Difficult amendment procedures are meant to ensure constitutional stability and to force majoritarian parties or coalitions to debate and convince at least part of the opposition and/or the voters to adopt a constitutional amendment, which makes the strategy of argumentation for constitutional reforms particularly enhanced if compared to ordinary legislation. At the same time, technological advancements, globalization, and the changing nature of democracy as well as the changing needs and values of society call for a constant update of constitutional texts, especially if they were adopted in the 18th, 19th or even the 20th centuries. To ensure that they remain relevant and effective, constitutions are modified in ways that are more or less extensive, bearing in mind the assumption that the law generally evolves with society, even though this

[2] "It is important for us to let folks know we are a 21st century Alabama, that we're not the same Alabama of 1901 that didn't want Black and white folks to get married, that didn't think that Black and white children should go to school together" (Legislative Sponsor Merika Coleman, https://www.constitutionalreform.org/2021/09/19/alabama-begins-removing-racist-language-from-its-constitution/).

[3] The Alabama Fair Ballot Commission had written the following in the ballot statement: "Alabama's voters will have the opportunity to vote on a reorganized state constitution at the November 8, 2022, general election. Alabama's current constitution has been in effect since 1901. It contains outdated language and has been amended nearly 1,000 times. If approved, the reorganized state constitution will be titled the Constitution of Alabama of 2022.".

correlation is the object of various debates[4]. In some cases, this assumption becomes normative and suggests that law *should* evolve with society, because a democratic system implies the legal norms and especially the supreme law of the land reflects the society it aims to regulate[5].

This article critically examines the use of justifications for constitutional change based on the need to update constitutions when and if they become too old and "outdated", in order to adapt them to "modernity". The scope of this paper is to identify this form of argument, that I call *constitutional modernization argument* (CMA), as a rhetorical technique that can be frequently found in the legal and political discourses as the foundation of a significant number of constitutional reforms of the 21st century. Those reforms have in common the same pattern of justification: identifying a (social, political, or technological) reality that the constitution as such is no longer able to apprehend; then use it to invoke the need for the modernization of an old and obsolete constitution (or of some of its provisions) in order to adapt it to the new reality. The underlying assumption is the presumed objectivity of this claim, in contrast with simple political preference. Understanding the justifications for constitutional amendments in terms of modernization allows to deconstruct the normative claim behind what's obsolete and what's modern in a constitution and what do those adjectives mean when applied constitutional theory.

This study originates from a contradiction that exists at the very foundation of constitutionalism. Dear to Thomas Jefferson, the idea that a people cannot be subjected by the laws of the previous generations is in direct contrast with the intention of the constituent powers of making a written constitution last for more than one generation[6] – contrary to ordinary legislation[7]. The only way to conciliate those two opposite aspects of constitutionalism is the possibility of amending the text of rigid constitutions if they become "old". After having analyzed the arguments used in a significant number of constitutional amendments during the 21st century, it appears that many have in common this justification: the need for the

[4] Watson, Alan (1981) "Society's Choice and Legal Change" Hofstra Law Review: Vol. 9: Iss. 5, Article 5.

[5] For an argument in favor of updating the language of the US Constitution, see Richard Albert, "Time to update the language of the Constitution", The Hill, 06/30/2020: "Its gendered and racist words stand in the way of true reconciliation in this divided country and have no place in any modern society. It is the Constitution's purpose to reflect America's modern values of equality and inclusion".

[6] Tremmel (Jorg), 2019, at 50-51: "By their very nature, constitutions are intergenerational documents because they are intended to place certain questions beyond the reach of simple majorities, the components of which change frequently. With few exceptions, constitutions are meant to endure for many generations" (at 50).

[7] Even though it has been proven that the longevity of written constitutions is not systematically verified, on the contrary: "National constitutions have lasted an average of only seventeen years since 1789", according to the study of Ginsburg (Thomas), Elkins (Zachary) and Melton (James), 2009, "The lifespan of written constitutions".

modernization of constitutional provisions. This type of arguments, while highly used in the current discussion on constitutional amendments, appears to be understudied: because it appears to be based on common sense (a constitutional change is necessarily more 'modern' that the original version, no matter how old that was), the modernization of constitutions does not require any explanation. In 2016, the New York State Bar Association has reunited a series of studies and reports in view of the 2017 referendum, in order to explain and encourage the creation of a constitutional convention to rewrite the Constitution of the State of New York. The resulting book was called "Making a *modern* constitution"[8], without any explanation of such title in the introduction other than the need for the voters to take this opportunity to act on the organization of their government. On the contrary, I think that despite the relatively easy understanding of what modernizing a constitution might mean, a more systematic analysis of this argument allows a better understanding of the social function of constitutions with relation to their endurance and the evolutions of society.

The choice of focusing on political and legal arguments for amendments instead of their content must be explained. It is true that justifications for constitutional reforms might be seen as merely selling arguments used by the political majority of a given time to convince their audience to vote for the reform (whether it is members of Parliament or the voters in a referendum or both); but this is not all they are. They could also be analyzed as having legal substance, that can be examined from a comparative constitutional law perspective and as such, they should be taken seriously. This paper is based on the latter standpoint and aims to reconstruct one ideal-type of argument for amending constitutions, based on pursuing their modernization. Once CMA is identified, it will be subjected to a critical scrutiny because of its presumed objective and descriptive character. Part 2 examines the scope of the research, examining the methodology, the timeframe and the selected arguments. Part 3 explores the intergenerational problem of constitutions as the theoretical background of the article. Part 4 analyses CMA: its sources, its structure, and proposes a taxonomy of the argument. Part 5 concludes with a critical assessment of the argument.

2. Scope of the research

[8] Rose Mary Bailly and Scott N. Fein (eds), *Making a modern constitution: the prospects for constitutional reform in New York*, New York State Bar Association, 2016, available at https://nysba.org/NYSBA/Publications/Books/ConstitutionalConvention/Making%20a%20Modern%20Constitution%20(4106E).pdf.

The methodology of this paper is both theoretical and comparative. Arguably, it is only possible to identify such similarities in the arguments mobilized in favor of constitutional amendments if different countries presenting different political majorities and different political situations are compared.

The chosen timeframe for the comparison of constitutional amendments is 2000 to 2022 and the research includes to both approved constitutional reforms and amendment proposals for which the procedure is sufficiently advanced (even if they have been or will likely be eventually rejected). The last 22 years are not specific in terms of the use of CMA, and a similar work could be done on previous amendments.

In order to avoid an excessively large scope of research, some precisions must be given about the related aspects that will be excluded from the study.

First of all, the paper will not focus on constitutional interpretation as an instrument of constitutional change. Constitutional changes can be schematically divided into two possible forms: changes in the constitutional text, and changes in constitutional interpretation (through so-called informal constitutional changes[9]). This second form of constitutional change can be designated with the concept of "constitutional update"[10] and is in the hands of courts, other political institutions, or in some cases the people through extraordinary mobilization[11]. Informal amendments have the functional effect of constitutional amendments, without having the formal aspect. Only the first form of formal constitutional change will be examined in the paper and will be designated with the concepts of "constitutional reform" or "constitutional amendment"[12] (those expressions are used an synonyms). This selective choice excludes from the analysis the debate on constitutional interpretation, and the opposition between originalism and living constitutionalism, which can also be seen as a debate concentrating on the possibility of modernizing constitutions, but on different (judicial) terms.

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[9] Ackerman (Bruce), 1993, *We the People*, vol. 2, *Transformations*, at 384; Altwegg-Boussac (Manon), *Les changements constitutionnels informels*, LGDJ, 2013.

[10] Dixon (Rosalind), 2010, "Updating constitutional rules", *The Supreme Court Review*, at 340: "Amending versus Updating".

[11] Ackerman (Bruce), 2014, *We the People*, vol. 3, *The Civil Rights Revolution*.

[12] Another possible distinction is the one between "ordinary change" (the result of interpretation) and amendment (a special kind of change that "requires some special kind of procedure for legitimation"), Levinson (Sanford), 1995, at 7.

Secondly, and consequently, non-written constitutions and flexible constitutions are also outside the scope of this research: to study constitutional reforms/amendments, this paper excludes cases where there is no need for a formal specific procedure in order to achieve a change in the text of the constitution. The scope of the article is limited to written rigid constitutions with specific amendment procedures, that usually require a super-majority in Parliament and/or the collaboration of more than one power (executive and legislative power; legislative power and the people by referendum, etc.). Those constitutions are designed to be more difficult to amend than ordinary legislation, requiring a consensus between opposing political forces, larger than the simple electoral majority of a certain legislature. That usually explains a more intense work on justification, especially in countries where no one party or coalition has an absolute majority in parliament.

Thirdly, the goal of the analysis of justifications for constitutional reforms is not to evaluate an amendment after it has been adopted and implemented. This research focuses more on the inputs of constitutional reforms than on their outputs: the ambition of the study is to better understand the argument of modernization that is used to legitimize constitutional reforms while they are introduced and discussed. The article will not focus on the outputs of those constitutional reforms, *i.e.* it will not evaluate whether the amended constitution actually better fits the modern world[13].

Lastly, I am not discussing exclusively constitutional amendments that actually passed. This study considers that some written constitutions are particularly difficult to change[14]: in countries such as the United States, or Australia, the constitution is "virtually impossible" to formally amend[15] by following the designated procedure. As a result, those constitutions have not been amended in recent times and especially not since 2000, when the time-frame of the paper commences. The last constitutional amendment of the US Constitution was in 1992, for the Australian Constitution it goes back to 1977. Nonetheless, examples of unsuccessful constitutional amendments should be included in the scope of the paper if those attempts were

[13] An evaluation of the outputs has been done, for example, about the 2008 constitutional reform in France by François (Bastien), 2009, *La Constitution Sarkozy*, Odile Jacob (arguing that most changes in the French Constitution made in 2008 were actually indirect ways to reinforce the presidential character of the Fifth Republic rather than the opposite, which was part of the argument of modernizing institutions).

[14] Tremmel (Jorg), 2019, "Whose constitution? Constitutional self-determination and generational change", *Ratio Iuris*, vol. 32, n. 1, at 53.

[15] Dixon (Rosalind), 2010, at 319-320.

rejected at an advanced stage of the amendment procedure (after the first approval by the houses of Parliament, or at least by one chamber, or eventually after a precise proposal is drafted by a committee of experts, and/or after a referendum that was rejected). For example, the Equal Rights Amendment to the US Constitution has not unanimously been accepted as enacted after being approved by both houses of Congress in 1972 and since then having been ratified by 38 States by 2020. Because of the comeback of ERA in the 21st century, thanks to the recent ratification in Nevada, Illinois and Virginia[16], this amendment could be included in the scope of the article.

3. Theoretical background: the intergenerational problem

The theoretical background of this research is the so-called intergenerational problem of constitutions. It has been argued that (very) rigid constitutions pose the problem of intergenerational justice. That is mainly a democratic problem: for governance to be legitimate, the governed must give consent; if their consent is considered to have been given too long ago, it will hardly apply to the actual living people. This problem can be resolved with legal solutions such as sunset constitutions, set to "expire" in order to render the process of modernization automatic[17], or flexible constitutions, easy to amend with a simple political majority. At the same time, the rigidity of constitutions can be and often is seen as a form of guarantee for the rights of future generations of citizens that are usually contained in constitutional charters[18]. In fact, even if flexibility has been found to be one of the qualities of "enduring constitutions", because it makes them able to resist to crisis and shocks[19], most constitutions in the world are

[16] For a reasoned history of the legal and political journey of the ERA, see Julie C. Suk, *We the Women. The unstoppable mothers of the equal rights amendment*, Skyhorse Publishing, 2020.

[17] That is the case of some states' constitutions in the United States, such as the Constitution of the State of New York., which is one of the fifteen states' constitutions to be set to be revised every twenty years, if the voters approve a constitutional convention via referendum. I have explained elsewhere why voters might reject – and have in fact rejected, in New York State in 2017 – such an opportunity: Eleonora Bottini, *Who is Afraid of the Constitutional Convention? The Rejection of Constitutional Change in the State of New York*, Int'l J. Const. L. Blog, Nov. 22, 2017, at: http://www.iconnectblog.com/2017/11/who-is-afraid-of-the-constitutional-convention-the-rejection-of-constitutional-change-in-the-state-of-new-york.

[18] Gosseries (Axel P.), 2008, at 32: "Constitutions can thus constitute double-edged swords from the perspective of intergenerational justice. The tools used in a constitution to offer even stronger guarantees to the rights of future people simultaneously restrict the sovereignty of coming generations".

[19] "Durable constitutions tend to be flexible ones, in that they provide reasonable mechanisms by which to amend and interpret the text to adjust to changing conditions", Ginsburg (Thomas), Elkins (Zachary) and Melton (James), 2009, "The lifespan of written constitutions".

rigid[20], in the sense that they provide special and more difficult procedures for their amendment than those of ordinary statutes.

The intergenerational problem raised by rigid constitutionalism can be solved by constitutional reforms and amendments. The amendment solution to the intergenerational problem is an alternative to those mechanisms as well as to adopting a new constitution altogether, which is of course the most radical solution to this problem. Nonetheless, such a solution could be politically impossible or undesirable, considering the foundational and symbolic roles that constitutions have especially when they are drafted after a period of revolution, resistance, war, declaration of independence, etc. In that sense, constitutional reforms can be distinguished from constitutional revolutions, where the political system is not simply modified but entirely replaced[21]. Amending constitutions if they become "outdated" is a way of conciliating the idea that a people cannot be subjected by the laws of the previous generations with the intention of making constitutions last for more than one generation.

In this article, I do not engage with the debate about all the possible solutions to this problem, but I argue that the argument of modernization of constitutions is set in its general framework. It is in the pursue of intergenerational justice that most rigid constitutions are regularly changed or that the argument for their change is made, even when those attempts ultimately fail. This argument is ultimately based on democracy, in the sense of the acceptance of government by the governed as well as the reflection of the current people's values in the constitutional text[22]. Of course, both the consent of the people and the preservation of constitutional rights and of the structure of the state from the changing political majorities can be considered to be democratic elements in a state. The importance given to one or the other depends on the chosen definition of democracy, a vast debate that cannot be addressed by the present work.

4. The Constitutional Modernization Argument

[20] Even if it is difficult to evaluate rigidity and flexibility, because those characters can come from the text of constitutions as well as the political reality (frequency of amendments), as shown by Tom Ginsburg & James Melton, "Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty" (Coase-Sandor Institute for Law & Economics Working Paper No. 682, 2014).

[21] Jeanneney (Julien), 2018, "Le réformisme constitutionnel sous la Ve République", p. 138.

[22] Sanford Levinson, OUR UNDEMOCRATIC CONSTITUTION (2006) argues that the imperfections as well as the extreme rigidity of the US Constitution make it misaligned with modern democracy.

The goal of this article is to identify and to criticize a particular type of argument for amending constitutions. The *constitutional modernization argument* (CMA) is a particular form of political and constitutional reasoning applied to constitutional reforms, in which the reform is justified by the need of attuning the text of the Constitution to present reality. Underlying CMA is the idea that changes in the reality can be *objectively* identified and, as a result, the argument supporting the amendments is more rational than other possible justifications. This view is what distinguishes CMA from the other types of justifications of constitutional amendments, such as restoration of previous regimes or changed political preferences. CMA seems to be the opposite of the decision to alter the constitution in order to *provoke* social changes: it is the decision the change the constitution in order to *reflect* them. The ERA for example had been encouraged by Ruth Bader Ginsburg[23] as a way to force Congress to revise the US legislation on the basis of sex equality newly inserted in the Constitution. In this argument, the Amendment would serve as the propeller for social and legal change but was not justified because of it. As such, Ginsburg's argument is not a CMA, but an argument based on strong political preference: it is because of a belief in the value of gender equality that the constitution must be changed as the social pact ordering society. There is nothing inevitable or neutral about this type of justification, while on the contrary those characteristics may be found in CMA, as the analysis of the argument will show.

Naming this type of argument, the "modernization argument", was prompted by a reflection on the most important constitutional reform (in quantitative terms and arguably also qualitative) that was adopted in France since the beginning of the Fifth Republic: Constitutional Law n. 2008-724 of July 23rd 2008 titled "*Modernization* of the institutions of the Fifth Republic"[24]. Studying many other constitutional reforms in other countries has shown that this idea is not limited to France. This section will detail the sources of CMA (4.1) and the tripartite structure of the argument (4.2); it will then provide a taxonomy of CMA through comparative examples (4.3) and finally will explain the two clinical trials in annex 1 and 2 (4.4).

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[23] "With the Equal Rights Amendment, we may expect Congress and the state legislatures to undertake in earnest systematically and pervasively the law revision so long deferred and in the event of legislative default the courts will have an unassailable basis for applying the bedrock principle: All men and women are created equal", Ruth Bader Ginsburg, "The Equal Rights Amendment in the way", Harvard Women's Law Journal 1(1978): 19, 26.

[24] For the legislative procedure of the reform, see https://www.assemblee-nationale.fr/13/cri/2007-2008/20080161.asp#INTER_0 . For an assessment of the reform 10 years later, see the special issue of the journal *Revue française de droit constitutionnel* for the 10 years anniversary of the 2008 reform: *Les 10 ans de la revision constitutionnelle de 2008*, *RFDC*, n° 116, december 2018/4.

4.1. The sources of CMA

Even if most constitutional reforms do not include in such exact terms the expression "modernization" as explicitly as in the French example, I still believe that by analysing the sources and structure of the justification it is possible to confront them to the ideal type, notwithstanding the different expressions that are used (such as adaptation, updating, attuning, etc.).

Justification arguments for constitutional amendments can be found in different types of sources, which complicates the identification of CMA. Being an argument that can be put forward by constitutional scholarship, politicians and judges (in cases where the constitutional amendment is deferred to a constitutional court for judicial review[25]), sources of CMA vary. They contain but are not limited to: the text of the project of a constitutional amendment (originating from the government/president (i.e. the Executive), Parliament or popular initiative, depending on the amendment procedure) and its internal reasoning; expert panels recommending the amendments (as they can unveil the intent of the amendment); public speeches presenting/defending the amendment; parliamentary debates; public interventions during a constitutional referendum campaign; secondary literature (constitutional scholarship in order to understand the context, etc.) … Public speeches should only be included in the analysis when they are referred to a specific proposal (constitutional amendment bill, *projet de loi constitutionnelle*, *disegno di legge*, …) but not when they are merely expressing general intentions of constitutional change.

4.2. The structure of MCA

CMA is characterised by the concomitant presence of the following elements:

(1) the assumption that the text of the constitution must be changed for the interpretation to change (a certain level of "fidelity to the text" is presupposed[26] and as a result updating the constitution through judicial interpretation is considered insufficient);

(2) the will to break with the obsolete provision(s), based on the persisting view that

[25] See Roznai (Yaniv), 2017, *Unconstitutional constitutional amendments*.

[26] Dixon (Rosalind), 2010, "Updating constitutional rules".

(3) one or more new aspects/events/changes of modern *reality* cause constitutions to become *objectively* obsolete.

By referring to a well-known medical metaphor[27] applied to constitutions, CMA can be explained as having a tripartite structure. The first part of the argument is the *diagnosis* of present reality outlining the causes of the obsolete character of the provision(s); this part is meant to be objective and descriptive. It motivates a recommended *therapy*, the content of the amendment, that is meant to be the normative part of the argument, to obtain a constitutional text better suited for present times. The *prognosis* is the expected outcome of the amendment; it is meant to be performative but also has again a descriptive twist that matches the diagnosis, because it is based on the view that the outcomes of legal changes can be objectively analysed.

4.3. A taxonomy for CMA

If both the diagnosis and the prognosis of CMA are descriptive claims, based on the alleged objectivity of the changes that occurred in the modern world, very different realities are covered by those parts of the argument. By looking at a substantive number of constitutional reforms in a comparative perspective, CMA appears to be divided into five categories/types, based on the allegedly objective and descriptive parts of the argument: in other words, there are five possible kinds of realities that are meant to provoke constitutional changes. This section sets forth a taxonomy to describe these five kinds of CMA: (1) tiding up the constitutional text; (2) adapting to social and technological changes; (3) adapting to new political situations; (4) reacting effectively to new threats/crisis; (5) emulating the global constitutional community. Each category includes several sub-types based on examples of constitutional amendments of the examined period (2000-2022). The five categories have been ordered in a scale from more to less objective, in the sense that the part of quantifiable change that motivates the amendment is greater in the first categories than in the last. In particular, the first category relates to previous amendment and the will to reorganize the constitution based on the pre-existing changes, which can be objectively identified, even though the decision to react to that situation is still not

[27] Cf. the "epidemiological analysis" in Ginsburg (Thomas), Elkins (Zachary) and Melton (James), 2009, "The lifespan of written constitutions".

On a similar medical metaphor for constitutional amendments: "in typical Dutch mentality, the government believes that prevention is better than cure" (about the proposed constitutional amendment for the Dutch Constitution of 2019, [27] Van Vugt (Eva), 2019, "Reforming the Dutch Constitution to ensure future readiness of its democracy", *Constitutionnet.org*.

inevitable, as debates over the place of amendments of the US Constitution show[28]. On the opposite side of the spectrum, stands the category of amendments motivated by the inspiration provided by global tendencies in constitutional law. The identification of those modern tendencies is far from self-evident and depends largely on the political views on the proponents of amendments.

(1) Tiding up the constitutional text. This type of CMA is motivated by the intention of creating a coherent constitutional text out of multiple constitutional provisions, that risk to create confusion and lack of visibility for the people.

- *Switzerland*: The Swiss Constitution has undergone a total constitutional revision in 1999 (which entered into force on January 1st, 2000), to recreate the internal consistency of the text after it had been amended 130 times from 1848 to 1995, by popular initiatives[29].
- *Finland*: The new Finnish Constitution was created in 2000, in order to incorporate all previous constitutional laws and constitutional amendments in thirteen chapters of one unique codified text[30].
- *Alabama*: Constitutional amendment 951 of November 2020 had the goal to "delete duplicative and repealed provisions, consolidate provisions regarding economic development, arrange all local amendments by county of application"[31].

(2) Adapting to social and technological changes. In this category of CMA, external changes in society, such as new challenges (climate change) or new scientific and technological inventions (the Internet), as well as new values (race equality), are invoked to include the new elements of reality to the Constitution or to eliminate aspects that are no longer considered to be appropriate or socially acceptable (such as racial discrimination).

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[28] See the debate between James Madison and Roger Sherman over the integration of constitutional amendments in the original text as opposed to leave the original text untouched and listing the amendments at the end. Sherman's position won and the bill of rights, as well as all the subsequent amendments to the US Constitution, were placed at the end as a separate list. See https://billofrightsinstitute.org/essays/the-bill-of-rights.

[29] https://www.parlament.ch/fr/%C3%BCber-das-parlament/fonctionnement-du-parlement/droit-parlementaire/constitution-federale/constitution-reforme

[30] Husa (Jaakko), 2011, The Constitution of Finland. A Contextual Analysis (Hart Publishing), at 23; Albert (Richard), 2019, Constitutional Amendments, at 326 (ebook).

[31] https://alison-file.legislature.state.al.us/pdfdocs/lsa/proposed-constitution/amd-951.pdf

i. Climate change:

- *Bolivia*: Constitutional amendment of 2002 of article 7(m), adding to the Constitution the right to a healthy environment (future generations)[32].
- *France*: Constitutional reform of 2005 that added the Charter for the environment to the Constitution of the Fifth Republic[33].

ii. The Internet:

- *Greece*: Constitutional amendment of April 6 2001 that added article 5A (2) to add new human rights created by technological progress[34].
- *Italy*: Constitutional Amendment proposal of July 10th 2014 (Senate[35]) and January 14th 2015 (Chamber of Deputies[36]) (pending), proposing to add new article 34-bis to the Constitution guaranteeing an equal right to access to the Internet.

iii. Racist language:

- *Sweden*: Constitutional amendment of 2011 when the word 'race' was taken out of the listing of protection in Chapter Two[37] as "being outdated and no longer valid in today's world".

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[32] Tremmel (Jeorg), 2009, *A theory of intergenerational justice*, Sterling, at 58-59. A previous similar amendment was approved in Norway, that remains outside the timeframe of this paper: Amendment of 1992 of article L110b, adding to the Constitution the right to a healthy environment (future generations) as well as in Germany, where article 20a of the Basic Law was added on November 15, 1994 guaranteeing the protection of the environment at the constitutional level.

[33] David Marrani & Stephen J. Turner, *The French Charter of the Environment and Standards of Environmental Protection*, *in* Environmental Rights: The Development of Standards 309–322 (Stephen J. Turner et al. eds., 2019).

[34] Passaglia (Paolo); "all persons have the right to participate in the Information society. Facilitation of access to electronically transmitted information… constitutes an obligation of the State" (Greek constitution).

[35] Disegno di legge costituzionale n. 1561 del 10 luglio 2014 al Senato della Repubblica, http://www.senato.it/service/PDF/PDFServer/BGT/00797423.pdf

[36] Proposta di legge costituzionale n. 2816 del 14 gennaio 2015 alla Camera dei Deputati, https://www.camera.it/leg17/126?tab=1&leg=17&idDocumento=2816&sede=&tipo=

[37] Carlson (Laura), 2011, "Critical race theory in a Swedish context", *Sartryck ur Juridisk Tidskrift*, 2011-12 NR 1: "A part of the discourse as to discrimination today in both the United States and Europe is the avoidance of the word "race" as being outdated and no longer valid in today's world, a reasoning that can be termed post-racialism" (at 37).

- *Australia:* Constitutional amendment proposal of 2012 by the expert panel for constitutional recognition of Indigenous Australians, to delete Section 25 of the Constitution headed "Provision as to races disqualified from voting".
- *France*: Constitutional amendment proposal of 2019 (pending) to eliminate the word "race" from the list of prohibited discriminations of Article 1 of the Constitution because "it is now considered not to be in line with the political, social and legal reality anymore" [38].
- *Alabama:* Constitutional amendment 951 approved by voters on November 3, 2020 prompted a committee, with public input, to draft a new constitution in order to remove racist language from the Constitution of 1901[39].

(3) Adapting to new political situations: In this type of CMA, it is referred to political/institutional reality *stricto sensu,* in the sense of institutions and not political values.

i. Political instability:

- *India*: 91st Constitutional amendment of 2004 establishing a rule limiting the size of national and state governments to 15% of the relevant legislature[40], in order to address the problem of instability of governments of the last decades[41].
- *Italy*: The failed Constitutional reform of 2016 (negative referendum) was intended to decrease the powers of the Senate and transform the perfect bicameralism in an imperfect bicameralism in order to ensure more stability for governmental majorities, in light of the instability of Italian governments (68 governments in 74 years).

[38] Lochak (Danièle), 1998, *La race : une catégorie juridique ?* in Actes du colloque *Sans distinction de... race (27 et 28 mars 1992)*, Presses de la FNSP, revue *Mots* n° 33 (explaining that "this phrasing was a reaction to the Nazi regime and the discrimination that followed in Europe: it was inserted in the French Constitution of 1946 in the Preamble and the exact same language was kept in 1958. It is now considered not to be in line with the political, social and legal reality anymore").

[39] https://www.cnn.com/2020/11/06/us/alabama-constitution-amendment-racist-trnd/index.html

[40] Dixon (Rosalind), 2010, "Updating constitutional rules", at 342; Guruswamy (Mohan), 91st Constitutional Amendment: not quite adequate, Hindu Business Line (July 20, 2004), https://www.thehindubusinessline.com/2004/07/20/stories/2004072000251100.htm

[41] http://legalaffairs.gov.in/sites/default/files/chapter%204.pdf

- *Turkey*: The constitutional reform of 2017 was described as a way to advance towards a more stable regime, more adapted to present times, by entrenching more powers for the President (effectively replacing the former parliamentary system with a presidential system).

ii. Partisan fragmentation

- *France*: Constitutional amendment proposal of 2019 (pending) to introduce a share of proportional vote for the election of the National Assembly in order to reflect the more pluralistic political spectrum of present times (no longer divided as it was into two parties, socialist left and Gaullist centre-right, including Macron's own party *La République en Marche*).
- *The Netherlands:* Constitutional amendment proposal of 2019 to change the electoral system for the Upper House of Parliament, in order to react to the "increasing political fragmentation"[42] that makes it difficult to governments to have a majority in both houses since 2010. In order to avoid internal friction among the houses and to encourage the Upper House to rise above party politics, the amendment proposal is to have a longer term (six years instead of four) and a renewal of half of the seats every three years for the Upper House.

(4) Reacting effectively to new threats/crisis. This type of CMA justifies constitutional reforms with the necessary reaction to catastrophic or dangerous events, with the intention of having a constitution that is ready to face new similar threats in the future. Climate change, which has been considered as a scientific discovery that constitutions have to take into account, could also be a part of this category as one of the most fundamental challenges of current times.

i. Global financial crisis:

[42] Van Vugt (Eva), 2019, "Reforming the Dutch Constitution to ensure future readiness of its democracy", Constitutionnet, http://constitutionnet.org/news/reforming-dutch-constitution-ensure-future-readiness-its-democracy. See also the Final report of the State commission on the Parliamentary system in the Netherlands, "Democracy and the rule of law in equilibrium", July 2019, file:///C:/Users/EBOTTINI/Downloads/Integrale+vertaling%20(1).pdf.

- *Germany*: Constitutional amendment for the introduction of the "golden rule" of financial stability in 2009 to react to the financial crisis of 2008.
- *Spain:* Constitutional amendment introducing the "golden rule" in 2011 anticipating the obligation under the 2012 EU Fiscal Compact Treaty in order to "allegedly reassuring the financial markets through Parliament"[43].

ii. Global terrorism:

- *France:* failed Constitutional amendment of 2015 (in the aftermath of the terrorist attacks in Paris and Saint Denis), to react to the global terrorist threat by adding to the Constitution the possibility of stripping French citizenship to convicted terrorists as punishment for particularly heinous acts. The amendment has been abandoned by President François Holland after an internal opposition inside the Government because of the risk of violating international agreements that France is a part of. Those internal disagreements lent to the resignation of the Minister of Justice, Christiane Taubira.
- *Hungary*: Constitutional amendment of June 14th, 2016 (Sixth Amendment to the Fundamental Law) to adapt the constitution to the *modern* threat of terrorism, with the immediate consequence of giving to the Executive the possibility of deploying the army inside the territory of the State in order to deal with the migrant crisis[44].

(5) Emulating the global constitutional community. This type of CMA responds to the international context. Frequently, the diagnosis of outdated constitutions is based on an abstract foreign model in order to denounce local institutions, or lack thereof.

i. Development of constitutional review[45]:

- *France*: The constitutional revision of 2008 added a new form of constitutional review of legislation *ex post* ("*question prioritaire de constitutionnalité*", article 61-1 of the Constitution). Before the reform, France

[43] Fabbrini (Federico), 2013, at 12.

[44] Trinoczi, T. – Mohay A., "Irregular migration as a challenge for democracy", Cambridge: Intersentia, 2018. p. 97-112; https://www.kormany.hu/download/f/3e/61000/TheFundamentalLawofHungary_20180629_FIN.pdf.

[45] M. Tushnet, "Marbury v. Madison around the world".

remained one of the few European countries without any form of judicial review of legislation once statutes entered into force. This reform was therefore largely justified as a way for France to enter the modern conception of constitutionalism, allowing French citizens to challenge the constitutionality of an existing statute.

ii. Development of international law:

I intend to exclude from this sub-category the simple application of international or regional treaties, if the constitutional reforms are adopted either for allowing the ratification or the compliance to the treaty. In that case, the external constraints are too important to allow to study the argument for the amendments from an internal point of view. What should remain in this subcategory, are amendments justified by the need to react to the increasing development of international law.

4.4 Presenting clinical trials for CMA

In order to test the presented thesis, I have tried to implement two clinical trials: one for the tripartite structure of CMA and one for the taxonomy. Of course, more could be done, but those give an idea of how the given examples could prove the two main parts of the thesis.

For the structure of the argument, I have chosen to analyse subcategories (2)(iii), amendments eliminating the word 'race' from the constitution. For each of the four examples, I identify the diagnosis, the therapy, and the prognosis of the amendment, by looking at arguments in the amendment itself, in the debates about the amendment and in literature analysing the proposal.

For the taxonomy, I have confronted the five categories of CMA with all constitutional amendments approved or pending in France since 2000 and I did not find any amendment which justification fits the ideal type of CMA and that would need another category. Of course, this trial can be applied to another country or even to all the examples used in this article, and possibly even to other timeframes.

After having offered an analytical perspective on CMA, the conclusive part will concentrate on a critique of the use of this argument in contemporary legal politics.

5. Critical assessments of CMA

Despite the view that is inscribed in its particular structure - the alleged objectivity of the evolution in the reality surrounding the constitutional amendment - CMA is always normative, sometimes performative, but never descriptive. The only part of CMA that does not have descriptive pretentions is the *therapy* – the part of the argument that is only normative but does not have a justification purpose. The assessment of what is the reality of the present of the constitution (old and outdated) – the *diagnosis* – does not stand on purely objective grounds. It depends on the political will of changing certain constitutional provisions and not others, based on certain changes in society and not others.

Still, by looking at the taxonomy of CMA, it is possible to evaluate the descriptive pretentions of the argument depending on which category is under scrutiny. Some diagnosis might be more objectively justified than others. Arguably, it is because in some cases changes in reality are somewhat objective, that CMA is so effective in other cases when they are not: the idea of modernization that sometimes is undeniable, has often been distorted in order to be applied to political preferences.

Many scholars have used expressions such as "error costs"[46] and "imperfections"[47] to discuss outdated constitutional provisions. I tend to disagree with those assessments. For Sanford Levinson, the question of the substantive criteria by which one in fact defines imperfection is a descriptive one; the only normative question is the procedural means by which one responds to any such recognition[48]. Those expressions used in scholarship contribute to envisage the need for modernization as an objective justification for amendments.

Following the same idea, there is always a moral or political value judgment in the *prognosis* of CMA, where change is seen as progress, while there is no objective justification for saying that modernization is a change for the better. To the point that we might ask if CMA could be a form of "constitutional modernism", originating in a critique of the current constitution and the normative wish for a renewed text.

Another critical aspect of CMA is the time sensitive problem of the acceleration of constitutional reforms. In subcategory (4) for example, modernization is presented as the

[46] "Not only do changes in social circumstances and understandings over time mean that, from a contemporary perspective, a number of core constitutional rules are now no longer optimal. Because such rules often prescribe structures or procedures that affect a variety of substantive legal outcomes, in many cases the error costs involved are also quite significant", Dixon (Rosalind), 2010, "Updating constitutional rules" at 321.

[47] Levinson (Sanford), 1995, *Responding to imperfection. The theory and practice of constitutional amendment*, Princeton University Press.

[48] Ibid. at 4.

reaction to an urgent international or national political situation that requires immediate reaction – global terrorism or the financial crisis – and as such it can be misused to hastily pass anti-liberal constitutional amendments to the point of changing the political regime. In those cases, CMA can be an accelerator for constitutional reforms, by arguing the urgency of the change in order to react quickly to a challenging situation. In this sense, CMA does hot help to be vigilant about changes that might represent steps back in terms of fundamental rights or significant modifications of the constitutional structure of separation of powers.

To refer to one of the aforementioned examples, after the 2015 terrorist attacks in Paris and Seine-Saint-Denis, French President François Hollande suggested in front of the two chambers of Parliament reunited in Congress to add to the Constitution the loss of citizenship for terrorists who had dual citizenship. The declared intention of this amendment was to "make our Constitution *evolve in order to allow public powers to act, in conformity with the rule of law, against terrorism*. Today, our text includes two specific regimes that are no longer adapted to the situation that we encounter…"[49]. This proposed amendment would have put France in contradiction with several international treaties that are part of French law, such as the UN Convention relating of the Status of Stateless Persons of 1954. The proposed amendment was ultimately abandoned based on the critique that it would have been a serious set-back in terms of fundamental rights. But we should question the justification of such an attempted amendment, with which an anti-terrorism measure presented as a way to adapt the constitution to an objective situation – global terrorism – for which the old version of the constitution is no longer a good fit?

Because of its specific structure, CMA has had a deflationary effect on constitutional amendments of the last 20 years. Since the beginning of the 21st century, several calls for modernization have served as a powerful accelerator for changing constitutions and their bringing "up to date". The risk of CMA is the safe neutrality that is implied in it, leading to potential misuses of constitutional amendments. This does not mean that the amendment will necessarily be misused but that if it is, CMA can contribute to weaken the opposition or simply to shorten the discussion. By arguing that the constitution should react to new dangers of the modern world, constitutional amendments have led to forms of abusive constitutionalism, in Hungary (2016) and Turkey (2017), where important changes in the political regime have been

[49] Constitutional Law Project for "the protection of the Nation", December 23rd 2015, presented to the Congress by the President in http://discours.vie-publique.fr/notices/157002982.html

justified as protections against modern terrorism. The swift reaction to a financial crisis such as that of 2008 has justified the entrenchment of the "golden rule" of financial stability in the Constitutions in Germany (2009) and Spain (2011), effectively elevating to the constitutional level the politics of austerity of the European Union.

CMA and its descriptive claim can also conceal the ideological weight of some constitutional amendments, presented as widely consensual, such as the deletion of the word "race" from constitutions in Sweden (2011), Australia (amendment proposal of 2012), France (2019, pending) and Alabama (2020).

Provided that every constitutional amendment is a (partial) renegotiation of the political contract, CMA masks its importance with the "simple" adaptation to a new set of facts, objectively identifiable and on which everyone can agree.

As a matter of fact, the French Constitution in not more or less objectively modern today than in was before the constitutional reform modernizing the institutions of the Fifth Republic: the new institutional balance that was found after July 23 2008 is a political decision based on fifty years of experience and on political revendications (for example in the case of the revalorization of Parliament or the rights of the opposition), or on changed legal philosophy and values (in the case of ex post constitutional review).

This paper intended to show that we should be wary of using CMA to argue for constitutional amendments as it could have a numbing effect on the evaluation of political preferences, and it could reduce the constitution as a simple reflection of reality instead of an intrinsically political document.

As a conclusion, we should note that structuring the arguments in terms of modernization is not inevitable when a constitutional amendment is proposed in modern times. In 2019, Catherine MacKinnon and Kimberlé Crenshaw proposed in the Yale Law Journal an equality amendment to the US Constitution and have provided a full argumentation in its favor[50]. Their justification of the amendment does not follow the pattern of CMA, where modern reality justifies the need for a constitutional update, on the contrary, they argue that it is for the amendment to change the social and legal inequalities of the modern US society:

"The Equality Amendment has been needed all along. But it is needed now as much or more than ever. Without equality, democracy is in peril: real equality provides the voting power to break the glass ceiling, guaranteed rights that raise the floor for all citizens, and recognition of the reality that inequalities intersect

[50] Catherine A. MacKinnon & Kimberlé W. Crenshaw, Reconstituting the Future: An Equality Amendment, 129 YALE L. J. F. 343 (2019). Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3185.

and overlap, making it impossible to rectify one alone. All Americans deserve equality guarantees that cannot be taken away or disregarded. And in a true democracy, each citizen should have an equal right to vote and have their vote count equally. Only the Constitution can provide this power and protection".

The desire for making a constitutional reform acceptable should not override its intrinsic political quality: when an amendment is presented as a simple adaptation to an objective change in reality, the constitutional debate is deprived of value-based arguments, which are its most natural foundations.

ANNEX 1. Clinical Trial 1 for the tripartite structure of the CMA. Constitutional reforms eliminating the word "race" from the Constitution (Type 1 - Adapting to social and technological changes)

Country	Constitutional amendment	Diagnosis	Therapy	Prognosis
FRANCE	Constitutional Reform Bill "for a more representative, accountable and efficient democracy" – May 9th 2018 (pending) – Additional Article 1	Presenting race as a legal category[51] legitimize it by giving it an official positive status, even though it is in order to prohibit its use. Envisaging the possibility that discrimination can be based on race could mean assuming that those discrimination are indeed possible; thus, that races do exist. Because race has no scientific basis as a concept, it should no longer be given this legitimacy in the highest legal text in the country.	Deleting the word "race" from the French Constitution	The text of the Constitution will be in line with the scientific and social perception of the existence of "races". Origin, religion will still be prohibited basis for discrimination. The same Bill proposed to add gender as one of the prohibited discriminations.
SWEDEN	Amendment of Chapter II of the Instrument of Government Act of 1974 – Government Bill "A reformed Constitution" 2009/10:80, entered into force on January 1 2011	"There is no scientific basis for dividing human beings into different races and from a biological perspective, consequently is there neither any reason to use the word race with respect to human beings"[52].	Adopting a "post-race perspective" and avoid as much as possible, in the Swedish official text, the word race. Only the occurrence of the word race when based on international texts is accepted, and an alternative term is to be suggested.	Any discrimination is prohibited towards people "because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation" (chapter 2, article 12).
AUSTRALIA	Proposals for the suppression of Section 25 of the Constitution – Expert Panel on Constitutional Recognition of Indigenous Australians – Report of January 16th 2012	"The consultations the Panel undertook were a reminder of how far Australia has come since the nation's legal and political foundations were laid down in the late nineteenth century. Then, in line with the values of the times, Aboriginal and Torres Strait Islander peoples were excluded from the deliberations that led to the adoption of the Constitution. The text of the Constitution excluded them. It was not until two-thirds of the way through the nation's first century that the exclusion was removed and the Constitution shifted closer to a position of neutrality. The logical next step is to achieve full inclusion of Aboriginal and Torres Strait Islander peoples in the Constitution by recognising their	Removing the notion of "race" from the Constitution	Creating the foundations for the constitutional recognition of indigenous Australians ("the symbolic importance of form"[54])

[51] Lochak (Danièle), *La race : une catégorie juridique ?* in Actes du colloque *Sans distinction de... race* (27 et 28 mars 1992), Presses de la FNSP, *Mots* n° 33.

[52] Legislative Bill 2007/08:95 at 119 (for the Discrimination Act of 2008).

[54] Lino (Dylan), 2018, Constitutional recognition, at 116.

		continuing cultures, languages and heritage as an important part of our nation and by removing the outdated notion of race"[53]. Race does not fit into "modern Australian values".		
ALABAMA	Constitutional amendment 951 approved by voters on November 3, 2020	Speaking about the motivation behind adopting a new state constitution, legislative sponsor Merika Coleman (D) said it would send "a message out about who we are. It is important for us to let folks know we are a 21st century Alabama, that we're not the same Alabama of 1901 that didn't want Black and white folks to get married, that didn't think that Black and white children should go to school together. On the economic development side, we also want folks to know we're open for business. We want people to come to the state of Alabama, spend your tax dollars, and that we again are a state that is this 21st century state, all kinds of different people, all kinds of different cultures, and we do not reflect what was in that 1901 constitution"[55]. The Alabama Fair Ballot Commission's statement: "Alabama's voters will have the opportunity to vote on a reorganized state constitution at the November 8, 2022, general election. Alabama's current constitution has been in effect since 1901. It contains outdated language and has been amended nearly 1,000 times. If approved, the reorganized state constitution will be titled the Constitution of Alabama of 2022".	The language ", otherwise than for the punishment of crime, of which the party shall have been duly convicted" has been removed from article I, section 32. The language ", to require or impose conditions or procedures deemed necessary to the preservation of peace and order" has been deleted from article XVI, section 256. The entire third paragraph relating to schools provided by race has been deleted from article XVI, section 256. Section 259, article XVI has been repealed in its entirety.	House Speaker Mac McCutcheon (R): "For several years, we've been working on cleaning up the Constitution and the wording in it, and this will move us forward with helping to accomplish that. There is some racist terminology in there and this is going to address some of that". State Rep. Danny Garrett: "I think words matter. And I think we need to just clean the constitution up, make it a document that is relevant today. We have a history that we're trying to address. And we're trying to move from the past to the future. And I think this is an obstacle in many ways. I think it's important that as a state with our history that we acknowledge where we want to go. And where we want to go is not where we've been necessarily."

[53] Expert Panel on Constitutional recognition of indigenous Australians, Report "Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution", 2012, at V.

[55] https://ballotpedia.org/Alabama_Recompiled_Constitution_Ratification_Question_(2022)

ANNEX 2. Clinical Trial 2 for the taxonomy of the CMA. Constitutional reforms of the French Constitution of the 5th Republic since 2000

	1. Tiding up the constitutional text	2. Adapting to social and technological changes	3. Adapting to new political situations	4. Reacting to new threats/crisis	5. Emulating the global constitutional community	Outside of the scope of CMA
October 2 2000 – Presidential term of 5 years instead of 7			X Avoid political cohabitations and make the President effectively the head of the majority			
March 25 2003 – **E**uropean arrest warrant						X Integration of a EU provision/treaty
March 28 2003 - decentralized organization of the Republic		X Creating new forms of local referendum (enhance direct democracy)	X Constitutionalize the existence of regions			
March 1 2005 – possibility of the ratification of the European Constitution						X Integration of a EU provision/treaty
March 1 2005 –Charter for the environment is included in the Constitution		X Updating the Preamble of the Constitution (rights) to reflect the challenges of climate change				
February 23 2007 – modification of the electoral body of New Caledonia		X Answering to the demands in independence movements	X Avoid the sanction of the Constitutional Council			
February 23 2007 – the procedure for accountability of the President is modified		X Updating the obsolete concept of “high treason"				
February 23 2007 – prohibition of the death penalty		X Solemnly inscribing the Law of 1981 in the Constitution				X Ratification of Protocol of 1989 to the UN International Covenant on Civil and Political Rights
February 4 2008 – possibility of the adoption of the EU Lisbon Treaty						X Integration of a EU provision/treaty
July 23 2008 – modernization of the institutions of the Republic					X	

					Creating an individual access to constitutional review	