

YANIV ROZNAI*

Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea†

Can a constitutional amendment be unconstitutional? Prima facie, this seems like a paradox. This vexing issue has attracted increased attention in recent years. Whereas the definition of the nature of constitutional amendment power is among the most abstract questions of constitutional theory, the question of limits on constitutional amendments is not purely of academic interest. It has practical application; the issue has already been adjudicated in numerous countries and is likely to arise, sooner or later, in other countries as well. This issue of limits is a fundamental one and much could be

* PhD Candidate, The London School of Economics & Political Science (LSE), UK; Visiting Student Research Collaborator, Princeton University; LL.M, LSE; LL.B, B.A, Interdisciplinary Center Herzliya (IDC), Israel. Email: y.roznai@lse.ac.uk. All websites were visited on Oct. 22, 2012. All references to constitutions in this Article are taken from the HeinOnline database, *World Constitutions Illustrated: Contemporary & Historical Documents & Resources*, unless stated otherwise. This Article is part of a wider project regarding limitations on the constitutional amendment power, as part of the author's PhD thesis at LSE (in progress). Sections of this Article were presented at the LSE PHD Upgrade Conference (May 13, 2011), the American Society for Comparative Law Annual Works-in-Progress Workshop (Princeton University, Feb. 11, 2012), LSE 2nd Year PhD Workshop (May 15, 2012), the Atlas Agora PhD Workshop (Bar-Ilan University, June 26, 2012), the 2012 Loyola Annual Constitutional Law Colloquium, Nov. 3, 2012), the Yale Law School's 2012 Doctoral Scholarship Conference (Nov. 30, 2012) and the 2nd American Society of Comparative Law Younger Comparativists Committee Conference (Indiana University, Mar. 19, 2013). Some ideas have appeared in Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in *JUDICIAL ACTIVISM IN INDIA—A Festschrift in Honour of Justice V. R. Krishna Iyer* 240 (Malik Lokendra ed., 2012). The author would like to express his gratitude to all of the participants in these events for invigorating discussions and comments, and especially to Kim Lane Scheppele, Gábor Halmai, Nathan Brown, Dorit Rubinstein Reiss, Ozan Varol, Jurgen Goossens, Thomaz Pereira, and Ittai Bar-Siman-Tov. The author would also like to thank Bianca Jackson and Stafanie Raker for their assistance in editing; to Grégoire Webber, Michael Wilkinson, Jan Komárek, Jacco Bomhoff, Serkan Yolcu, Avinash Govindjee and Michael Freitas Mohallem for assistance at various stages of the project; and to Mathias Reimann, the Editor-in-Chief of the *American Journal of Comparative Law* and the anonymous reviewer for their comments on an earlier draft. Finally, the author owes many thanks to Martin Loughlin and Thomas Poole for their most valuable supervision, guidance, and support, and to Suzie Navot, Hillel Sommer, Guy Seidman, Yoram Rabin, Liav Orgad and Rivka Weill for their encouragement and motivation. This Article is dedicated to Professors Aharon Barak, Amnon Rubinstein and Claude Klein, "the three tenors" of Israeli constitutional law, for their inspiration.

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gained from comparative study. This Article aims to trace the migration of limited amendment power and of judicial review of constitutional amendments through different jurisdictions and to paint a broad pattern of “constitutional behavior.” It appears that the global trend is moving towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power.

Bearing in mind the difficulties of borrowing (or transplanting) constitutional ideas from different jurisdictions into other legal cultures, this Article claims that limitations upon the amendment power is just one example of the larger phenomenon of the migration of legal ideas. At times, the notion of limited amendment power migrated intact into other jurisdictions, but on other occasions it also absorbed local content, primarily to acknowledge prior events and past experiences. The fact that this concept traveled across continents and entered different legal systems shows that borrowing a constitutional idea can be successful, even within very dissimilar legal systems. This comparative investigation into the origins and the migration of the idea of limits to the amending power will highlight the uniqueness of each legal system and unravel the conundrum of unconstitutional constitutional amendments itself.

INTRODUCTION

In June 2008, the Turkish Constitutional Court annulled Parliament’s amendments to the Constitution regarding the right to education and the principle of equality.¹ The purpose of Parliament was to put an end to the headscarf ban that existed in universities. The Turkish Constitutional Court held that the amendments violated the protected and non-amendable principle of secularism and were therefore unconstitutional.² The idea that a constitutional amendment may be considered “unconstitutional” is fascinating. On the one hand, it seems like an inherently self-contradictory concept.³ On the other hand, imagine the scenario in which Bruce Ackerman proposes the enactment of a Constitutional Amendment to the U.S. Constitution repealing the First Amendment and establishing Christianity as

1. Turkish Constitutional Court, June 5, 2008, No. 2008/16; 2008/116.

2. See Ergun Özbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15(4) EUR. PUB. L. 533 (2009); Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment—The Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf*, 10(1) INT’L J. CONST. L. 175 (2012); Abdurrahman Saygili, *What is Behind the Headscarf Ruling of the Turkish Constitutional Court?* 11(2) TURKISH STUD. 127 (2010).

3. See, e.g., GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 34-83 (2010), who calls it a “conundrum”; WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* 169 (1993): “at first blush, the question of whether an amendment to the constitution could be unconstitutional seems to be a riddle, a paradox or an incoherency.”

the state religion.⁴ Is the constitutional amendment power sufficiently powerful as to permit any amendment whatsoever, thus potentially granting constitutional status to a provision that violates fundamental rights and principles? This is a vexing issue and has lately drawn increased scholarly attention.⁵

Defining the nature of constitutional amendment power is one of the most abstract inquiries into constitutional law;⁶ yet, the question of possible limitations on the amendment power is certainly not merely academic or theoretical. The number of proposed constitutional amendments makes this topic highly relevant on a practical level.⁷ More importantly, as we shall see, the issue has already been debated in numerous countries and is likely to arise, sooner or later, in many others.

It is argued that one of the brighter aspects of the comparative study of constitutional law is the relatively small number of fundamental problems.⁸ Even if one is unconvinced of the validity of this statement, the issue of limits upon the constitutional amendment power is surely a fundamental one and as such a worthy subject for

4. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 14-15 (1993); in the American context, Ackerman would accept such an amendment as part of the constitution.

5. See, e.g., Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?* 19(2) *CONSTELLATIONS* 182 (2012); Otto Pfersmann, *Unconstitutional Constitutional Amendments: A Normativist Approach*, 67 *ZÖR* 81 (2012); Christoph Bezemek, *Constitutional Core(s): Amendments, Entrenchments, Eternities and Beyond Prolegomena to a Theory of Normative Volatility*, *J. JURIS* 517 (2011); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 *ISR. L. REV.* 321 (2011); Sharon Weintal, *The Challenge of Reconciling Constitutional Eternity Clauses with Popular Sovereignty: Toward Three-Track Democracy in Israel as a Universal Holistic Constitutional System and Theory*, 44 *ISR. L. REV.* 449 (2011); Richard Albert, *Nonconstitutional Amendments*, 22(1) *CAN. J. L. & JUR.* 5 (2009); Vincent J. Samar, *Can a Constitutional Amendment Be Unconstitutional?* 33 *OKLA. CITY U. L. REV.* 667 (2008); Jason Mazzone, *Unamendments*, 90 *IOWA L. REV.* 1747 (2004-2005); Virgilio Afonso Da Silva, *A Fossilised Constitution?*, 17(4) *RATIO JURIS* 454 (2004); Rory O'Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4 *J.C.L.* 74 (1999); R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?* 22 *LOY. U. CHI. L.J.* 741 (1990-1991). On April 25-26, 2010, the International Association of Constitutional Law held a round table on the topic of "Unconstitutional Constitutional Amendments." The presentations are available for viewing at <http://www.youtube.com/watch?v=ktDd5P9HQM4&feature=relmfu>.

6. See Claude Klein, *Is There a Need for an Amending Power Theory?* 13 *ISR. L. REV.* 203 (1978).

7. Critics have diagnosed the unwarranted desire to amend the U.S. Constitution as "constitutional amendmentitis" Kathleen M. Sullivan, *Constitutional Amendmentitis*, *THE AMERICAN PROSPECT* (Sept. 21, 1995), http://www.prospect.org/cs/Art.s?Art.=constitutional_amendmentitis, or as "a craze for tinkering with the constitution," F. Dumont Smith, *Amending the Constitution*, 11 *CONST. REV.* 18 (1927). This phenomenon is not unique to American constitutional discourse.

8. See THIJMEN KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* 7 (2003). *But see* Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *MOD. L. REV.* 1, 17-18, 67 (1974) (arguing that compared to private law constitutional law is less influenced by "legal transplant").

comparative research.⁹ This Article, however, is not comparative in the traditional sense,¹⁰ but rather a travel report of the ideas concerning a limited amendment power and of judicial review of constitutional amendments as they migrate through different jurisdictions. The journey reveals a comprehensive pattern of “constitutional behavior.” It appears that the global trend is moving towards accepting the idea of limitations— explicit or implicit—on constitutional amendment power. Bearing in mind the difficulties of transplanting constitutional ideas from different jurisdictions into other legal cultures,¹¹ this Article will illustrate that limitations upon the amendment power is just one example of the broader phenomenon of the migration of legal ideas.¹² At times, the notion of a limited amendment power has migrated into other jurisdictions in its original form, whereas on other occasions it has absorbed local content, primarily against the backdrop of prior events and past experiences. The fact that this concept traversed continents and entered into different legal systems shows that Alan Watson was to some extent correct in claiming that “successful borrowing could be made from a very different legal system” since what is borrowed is an idea that can be absorbed into the law of a given country.¹³ This study could help “identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other,”¹⁴ by highlighting the uniqueness of each legal system. Moreover, by examining the other, as Frank Michaelman has taught us, we can learn more about ourselves.¹⁵

9. Cf. Mads Andenas, *Introduction, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS IX* (Mads Andenas ed., 2000).

10. For comparative studies, see KEMAL GÖZLER, *JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY* (2008); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4(3) INT'L. J. CONST. L. 460 (2006); MARIE-FRANCOISE RIGAUX, *LA THEORIE DES LIMITES MATERIELLES A L'EXERCICE DE LA FONCTION CONSTITUANTE* (1985); O'Connell, *supra* note 5, at 74.

11. See, e.g., Pierre Legrand, *The Impossibility of “Legal Transplants,”* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Roger Cotterrel, *Comparative Law and Legal Culture, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 710* (Mathias Reimann & Reinhard Zimmermann eds., 2006).

12. On this phenomenon, see THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); Vlad Perju, *Constitutional Transplants, Borrowing, and Migration, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304* (Michel Rosenfeld & András Sajó eds., 2012). Constitutional “borrowing” could be described as “a wider phenomenon of constitutional design and evolution.” See Barry Friedman & Cheryl Saunders, *Editors' Introduction*, 1(2) INT'L J. CONST. L. 177 (2003). The “migration” of constitutional ideas is a different—and I believe a more suitable—term than “constitutional borrowing.” See Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law, in THE MIGRATION OF CONSTITUTIONAL IDEAS 20-22* (Sujit Choudhry ed., 2006).

13. Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79 (1976).

14. See MAX WEBER, *THE AGRARIAN SOCIOLOGY OF ANCIENT CIVILIZATIONS 385* (1976).

15. See Frank I. Michaelman, *Reflection*, 82 TEX. L. REV. 1737 (2003-2004).

This Article follows along two parallel lines: a discussion of both limited constitutional amendment power and the courts which may—and often do—review constitutional amendments, even declaring them to be unconstitutional and thus void. True, it is one thing to claim that constitutional amendment power is limited, but quite another to claim that constitutional amendments ought to be subject to substantive judicial review.¹⁶ It is this author's belief, however, that these two ideas are not only strongly connected, but virtually inseparable.¹⁷

Part I of the Article reviews the origins and development of the notion of a limited constitutional amendment power and discusses the development of the idea of unconstitutional constitutional amendments. Part II describes the migration through various jurisdictions in geographical rather than chronological order to show the migration's path more effectively. Part III concludes with a summary and mentions some of the broader theoretical issues.

I. A LIMITED CONSTITUTIONAL AMENDMENT POWER?

A. *Explicit Limits on the Constitutional Amendment Power*

1. The American and French Origins

The year 1789 marks a crucial moment for the modern idea of constitutionalism: in France, the Revolution began and the Declaration of the Rights of Man and of the Citizen was adopted, while in the United States the Constitution came into effect.¹⁸ The United States and France were also the countries in which the modern idea of expressed limits on the amendment power emerged.¹⁹

16. See Susan Wright, *The Constitutional implications in France of the Maastricht Treaty*, 9 TUL. EUR. & CIV. L. F. 35, 72 (1994); *Report on Constitutional Amendment*, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), adopted by the Venice Commission at its 81st Plenary Session, para. 225 (Venice, Dec. 11-12, 2009), [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.asp?PrintVersion=True&L=E#P768_153923](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.asp?PrintVersion=True&L=E#P768_153923).

17. Cf. Claude Klein, *A propos Constituent Power: Some General Views in a Modern Context*, in NATIONAL CONSTITUTIONS IN THE ERA OF INTEGRATION 31, 40 (Antero Jyränki ed., 1999).

18. Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023 (1988-1989).

19. The term "modern idea" is used because the idea of entrenching legal rules is not novel at all. Ancient Athenians entrenched certain financial decrees, treaties, and alliances in order to enhance their credibility in the eyes of potential allies. See MELISSA SCHWARTZBERG, *DEMOCRACY AND LEGAL CHANGE* 31-70 (2009). Even the Cromwellian Constitution of 1653 recognized fundamental and unchangeable laws. See A.V. DICEY, *GENERAL CHARACTERISTICS OF ENGLISH CONSTITUTIONALISM: SIX UNPUBLISHED LECTURES* 103 (Peter Raina ed., 2009); CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY—THEORY AND PRACTICE IN EUROPE AND AMERICA* 136 (4th ed. 1968). In Hungary, the Act VIII of 1741 on the liberties and privileges of noblemen was declared to be unamendable. See Zoltán Szente, *The Historic Origins of the National Assembly in Hungary*, 8 HISTORIA CONSTITUTIONAL 227, 239 (2007).

In America, the first State Constitution, Virginia, did not include any amendment provisions. Between the years 1776 and 1783, however, great advances occurred in constitutionalism as state constitutions provided special amendment procedures.²⁰ Simultaneously the idea of explicitly limiting the amendment power appeared. According to the Constitution of New Jersey (1776), members of the Legislative Council, or House of Assembly, had to take an oath not to “annul or repeal” the provisions for annual elections, the articles opposing church establishment and conferring equal civil rights on all Protestants, and trial by jury (Article 23). The Delaware Constitution (1776) prohibited amendments to the Declaration of Rights, the articles establishing the state’s name, the bicameral legislature, the legislature’s power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect (Article 30).²¹

Later, the U.S. Federal Constitution used the amendment provision to explicitly limit the amendment power. Article V originally forbade the abolition of the African slave trade until 1808, and without time limits, prohibits the deprivation of a state of equal representation in the Senate without its consent.²² These entrenched principles hardly resemble the fundamental values of the American constitutional order.²³ Indeed, in contrast with the French immutable provision,²⁴ Article V did not protect grandiose values, but rather reflected deep compromises that the society deemed necessary under

20. MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 280-81 (2010).

21. The Text of the Constitution of New Jersey is *available at* <http://www.state.nj.us/njfacts/njdoc10a.htm>; the text of the Constitution of Delaware is available at: http://avalon.law.yale.edu/18th_century/de02.asp; *See also* MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION-MAKING IN REVOLUTIONARY AMERICA 56 (1999). For a useful study, see WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1999) (1910).

22. U.S. Constitution, art. V:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

23. James E. Fleming, *We the Exceptional American People*, 11 CONST. COMMENT 355, 362-63 (1994-1995) (reprinted in CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 91 (Sotirios A. Barber & Robert P. George eds., 2001)).

24. *See infra* note 33.

the circumstances.²⁵ As Stephen Holmes explains, “by tying our tongues about a sensitive question, we can secure forms of co-operation and fellowship otherwise beyond reach.”²⁶ This temporary entrenchment regarding slavery was just such a “tongue tying” mechanism. The fixed entrenchment regarding equal representation was also a compromise in response to the fear small states felt of being overrun by larger states, which secured their equality in the Senate.²⁷

In France, the 1791 Constitution’s Preamble stated that the National Assembly “abolishes irrevocably the institutions which were injurious to liberty and equality of rights.” Moreover, Title VII, section 7 stipulated that the members of the Assembly of Revision individually take oaths to uphold, with all their power, the Constitution. The terminology of irrevocability and adherence implies eternity. Ironically, such terminology was repeated in the Constitution of 1793.²⁸ In 1798, the Constitution of the Swiss Helvetic Republic, which was imposed by the French and was based on the French revolutionary model,²⁹ declared that “the form of government, whatever modifications it may undergo, shall at all times be a representative democracy” (Article 2).³⁰ Yet, it was in 1884 when the idea first appeared in a French Constitution that amendment power should be substantially and explicitly limited. On August 14th of that year, the French Parliament met as a National Assembly in order to revise the Constitutional Law of 1875, which represented the Third Republic. The Third Republic marked the end of monarchism and Bonapartism,³¹ and, as Claude Klein notes, by 1884 it was crystal clear that France desired a republican form of government.³² Adding the following limitation to paragraph 3 of Article 8 amended the Constitutional Law of 1875: “The republican form of government cannot be

25. Fleming, *supra* note 23, see also GIDEON SAPIR, *THE CONSTITUTIONAL REVOLUTION—PAST, PRESENT AND FUTURE* 224 (2010) [in Hebrew].

26. Stephen Holmes, *Gag Rules or the Politics of Omission*, in *CONSTITUTIONALISM AND DEMOCRACY* 19 (Jon Elster & Rune Slagstad eds., 1988).

27. For a description of the process behind both entrenchments, see SCHWARTZBERG, *supra* note 19, at 139-43.

28. See art. 1: “The French Republic is one and indivisible”; art. 39: “The legislative body is one, indivisible and continual.”

29. MARKKU SUKSI, *BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM* 47 (1993); Marc H. Lerner, *The Helvetic Republic: An Ambivalent Reception of French Revolutionary Liberty*, 18(1) *FRENCH HISTORY* 50 (2004).

30. Robert Roswell Palmer, *Note on the Use of the Word “Democracy” 1789-1799*, 68(2) *POL. SCI. Q.* 203, 219 (1953); ROBERT ROSWELL PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800*, VOL. I 18 (3d ed. 1969).

31. David Bates, *Political Unity and the Spirit of Law: Juridical Concepts of the State in the Late Third Republic*, 28(1) *FRENCH HISTORICAL STUDIES* 69 (2005).

32. Claude Klein, *On the Eternal Constitution: Contrasting Kelsen and Schmitt*, in *HANS KELSEN AND CARL SCHMITT: A JUXTAPOSITION* 61 (Dan Diner & Michael Stolleis eds., 1999).

made the subject of a proposition for revision."³³ This amendment marked the triumph of the Republicans over the Monarchists,³⁴ and the goal was to "prevent the destruction of the Republic by constitutional means."³⁵ This formulation is repeated in Article 95 of the Constitution of 1946,³⁶ and it appears in Article 89 of the Constitution of 1958 with slightly different wording: "The republican form of government shall not be the object of any amendment."

The theoretical basis for these explicit limits was the limited notion as such of the amendment power.³⁷ First, a distinction was drawn between constituent power and constituted power, emphasized by the greatest political theorist of the constituent power Emmanuel Joseph Sieyès, who declared before the National Assembly in 1789: "*Une Constitution suppose avant tout un pouvoir constituant.*"³⁸ According to Sieyès, "in each of its parts a constitution is not the work of a constituted power but a constituent power."³⁹ *Constituent power* is the extraordinary power to establish the constitutional order of a nation. It is the immediate expression of the nation and thus its representative. *Constituted power* is the power created by the constitution, an ordinary power that the nation grants through positive law.⁴⁰ These two powers exist on different planes: *constituted power* exists only in the state, inseparable from a pre-established constitutional order, while *constituent power* is situated outside the state and exists without it.⁴¹

The distinction between the constituent and constituted power was complemented by another theory developed during the debates of the French National Assembly on the 1791 Constitution,⁴² according to which, one has to formally distinguish between the original con-

33. See article 2 of the amendment in *English text amending Arts. 5 and 8 of the Constitutional Law of 25 February 1875*, in FRANK MALOY ANDERSON, *THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE 1789-1907* 640 (1908).

34. ROBERT VALEUR, *FRENCH GOVERNMENT AND POLITICS* 281 (1938).

35. A. LAWRENCE LOWELL, *GREATER EUROPEAN GOVERNMENTS* 103 (1918).

36. AMOS J. PEASLEE, *CONSTITUTIONS OF NATIONS* 20 (1950).

37. For a useful examination of the constituent power in post-revolutionary France, see Lucien Jaume, *Constituent Power in France: The Revolution and its Consequences*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 67 (Martin Loughlin & Neil Walker eds., 2007).

38. Emmanuel Joseph Sieyès, *Préliminaires de la Constitution—Reconnaissance et exposition raisonnée des droits de l'homme et du citoyen*, 20 ET 21 JUILLET 1789, COMITÉ DE CONSTITUTION, <http://www.unice.fr/ILF-CNRS/politext/Sieyes/sieyesTextes.html>.

39. EMMANUEL JOSEPH SIEYES, *POLITICAL WRITINGS* 136 (2003).

40. *Id.* at 134-37; see ANTONIO NEGRI, *INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE* 216-17 (1999).

41. GEORGES BURDEAU, *TRAITÉ DE SCIENCE POLITIQUE* 173 (3d ed. 1983), cited in GIORGIO AGAMBEN, *HOMO SACER—SOVEREIGN POWER AND BARE LIFE* 39 (1998).

42. See Arnaud Le Pillouer, *Pouvoir constituant originaire et pouvoir constituant dérivé: à propos de l'émergence d'une distinction conceptuelle*, 25-26 *REVUE D'HISTOIRE DES FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE* 123 (2005-2006).

stituent power and the amendment power (derived constituent power).⁴³ The original constituent power is exercised in revolutionary circumstances, outside the laws established by the constitution, whereas the amendment power is exercised under peaceful and legal circumstances according to rules established by the constitution.⁴⁴ The explicit limitation on constitutional amendments reflects the theory that any exercise of the amendment power—established by the constitution and deriving from it—must abide by the rules and prohibitions stipulated in the constitution. These prohibitions can include substantive limits.⁴⁵

It is important to note that while France was one of the originators of the idea to explicitly limit amending power, contrary to other countries in which the development of this idea led to judicial review of constitutional amendments, the French system took a rather restrained position, rejecting such judicial review.⁴⁶

2. The Success of a Constitutional Idea

The wish to shield certain principles or institutions from constitutional amendment power gained increasing popularity, both in America and in Europe.⁴⁷ During the first half of the nineteenth century—even before the French explicit prohibition on amending the republican form of government—Latin American states were influenced by ideas from the U.S. Constitution and the French Revolution and widely used unamendable provisions in order to protect certain principles, tailoring them to local contexts.

43. For an analysis of the formal and substantive distinctions between the original and derived constituent power, see KEMAL GÖZLER, *LE POUVOIR DE RÉVISION CONSTITUTIONNELLE* 12-32 (1995); KEMAL GÖZLER, *POUVOIR CONSTITUANT* 10-28 (1999) [hereinafter GÖZLER 1999].

44. RAYMOND CARRÉ DE MALBERG, *CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT* 489-500 (CNRS 1962) (1922). See also GEORGES BURDEAU, *ESSAI D'UNE THÉORIE DE LA RÉVISION DES LOIS CONSTITUTIONNELLES EN DROIT FRANÇAIS* 78-83 (1930) (distinguishing between constituent power in a strict sense, which is the establishment of the very first constitution outside the law, and the revision power, which is the power invested in a statutory body to modify the constitutional rules through the legal system); Roger Bonnard, *Les actes constitutionnels de 1940*, *REVUE DU DROIT PUBLIC* 46, 48-49 (1942) (original constituent power exists outside of any constitutional authority, whereas the amendment power—*pouvoir institué*—requires a constitution in force for its exercise); see generally GÖZLER 1999, *supra* note 43, at 10-28.

45. See Michel Troper, *Constitutional Law*, in *INTRODUCTION TO FRENCH LAW* 1, 11 (George A. Bermann & Étienne Picard eds., 2008).

46. In France, it was held that judicial review of constitutional amendments is not considered within the *Conseil Constitutionnel's* competence. See French Constitutional Council No. 1962-20 DC, Nov. 6, 1962; French Constitutional Council No. 2003-469DC, Mar. 26, 2003. See also Susan Wright, *The Self-Restraint of the French Conseil Constitutionnel in 2003 and 2004*, 11(4) *EUR. PUB. L.* 495 (2005); Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof)*, 44 *ISRAEL L. REV.* 389 (2011).

47. See Klein, *supra* note 32, at 61.

The Mexican Constitution of 1824 stated that “the Religion of the Mexican Nation is, and shall be perpetually, the Apostolical Roman Catholic,”⁴⁸ and that “the Articles of this Constitution, and of the Constituent Act, which establish the Liberty and Independence of the Mexican Nation, its Religion, Form of Government, Liberty of the Press, and Division of the Supreme Power of the Confederation, and of the States, shall never be reformed.”⁴⁹ It was suggested that this provision was inserted into the Constitution by the framers in order to guard against “popular levity and legislative caprice.”⁵⁰ While the original basis for the Mexican Constitution was the Spanish Constitution of 1812,⁵¹ Mexico departed from the Spanish model because of its adoption of a federal republican form of government and the strong influence of the U.S. Constitution,⁵² albeit with evident distinctions.⁵³

Later, the Venezuelan Constitution of 1830, influenced by American and French ideas,⁵⁴ stipulated that “the authority possessed by Congress to modify the Constitution does not extend to the Form of Government, which shall always continue to be republican, popular, representative, responsible, and alternate.”⁵⁵ The Peruvian Constitution of 1839 stated that “The form of a popular Representative Government consolidated in unity, responsible, and alternative; and the division and independence of the Legislative, Executive, and Judicial Powers is unalterable.”⁵⁶ Ecuador’s Constitution of 1843 protected the form of government from amendments,⁵⁷ a protection that was extended in the Constitution of 1851 to the State’s religion.⁵⁸ Ecuador repeated a similar list of unamendable provisions in several of its subsequent constitutions,⁵⁹ with the present Constitution of 2008 prohibiting amendments from altering the “fundamental structure or the nature and constituent elements of the State” and

48. Mexico Const. (1824), art. 3.

49. Mexico Const. (1824), art. 171.

50. WILLIAM KENNEDY, *TEXAS: THE RISE, PROGRESS, AND PROSPECTS OF THE REPUBLIC OF TEXAS*, VOL I 307 (1841).

51. James Q. Dealey, *The Spanish Source of the Mexican Constitution of 1824*, 3(3) *THE QUARTERLY OF THE TEXAS STATE HISTORICAL ASSOCIATION* 161, 168 (1900).

52. J. Lloyd Mecham, *The Origins of Federalism in Mexico*, 18(2) *THE HISPANIC AMERICAN HISTORICAL REVIEW* 164, 177, 179 (May, 1938). See also Watson Smith, *Influences from the United States on the Mexican Constitution of 1824*, 4(2) *ARIZONA AND THE WEST* 113 (1962).

53. The establishment of a state religion is one obvious example. See FARNHAM BISHOP, *OUR FIRST WAR IN MEXICO* 17 (2009).

54. See generally William Whatley Pierson, Jr., *Foreign Influences on Venezuelan Political Thought, 1830-1930*, 15(1) *THE HISPANIC AMERICAN HISTORICAL REVIEW* 3 (1935).

55. Venezuela Const. (1830), art. 228. See also the Const. (1858), art. 164.

56. Peru Const. (1839), art. 183.

57. Ecuador Const. (1843), art. 110.

58. Ecuador Const. (1851), art. 139.

59. Ecuador Const. (1852), art. 143; (1861), art. 132; (1869), art. 115; (1967), art. 258.

from setting “constraints on rights and guarantees.”⁶⁰ The Honduran Constitution of 1848 prohibited amendments “regarding guarantees,” unless they extended existing ones, and changes to the division of powers.⁶¹ The Dominican Republic’s Constitution of 1865 stipulated that “the power conferred on the Chambers to reform the Constitution does not extend to the form of government that will always be Republican, Democratic, representative, responsible and alternative.”⁶² El Salvador’s Constitution of 1886 prohibited amending those articles that stipulated, *inter alia*, the prohibition of the President’s re-election and the duration of the presidential term, a prohibition that was repeated in later constitutions.⁶³

The idea of protecting certain principles or institutions through unamendable provisions has enjoyed enormous success. A review I conducted of 192 written constitutions reveals that, as of 2011, eighty-two constitutions include unamendable provisions (forty-two percent).⁶⁴ Even more astoundingly, of 537 past and present national constitutions, 172 constitutions (thirty-two percent) include unamendable provisions. This significant number documents the importance and relevance of the issue. Just as having a formal constitution became a universal trend after the American and French Revolutions—a symbol of modernism⁶⁵—so in the aftermath of the Second World War, including an unamendable provision became a symbol of modernism.

The French protection of the republican form of government was incorporated into many other countries’ constitutions,⁶⁶ but other forms of government, such as democratic,⁶⁷ federal,⁶⁸ parliamentary republic with a president as head of state,⁶⁹ amiri,⁷⁰ and monarchy⁷¹

60. Ecuador Const. (2008), art. 441.

61. Honduras Const. (1848), art. 91.

62. Dominican Republic Const. (1865), art. 139. This formula was repeated, in similar terms, in twenty-two constitutions of the Dominican Republic.

63. El Salvador Const. (1886), art. 148; (1945), art. 171; (1983), art. 248.

64. This result seems to support Hourquebie’s assertion that nearly forty percent of the constitutions of 170 states include explicit limitations on the constitutional amendment power. See Fabrice Hourquebie, *Pouvoir Constituant Derive et Controle du Respect des Limites*, PAPER PRESENTED AT THE VII WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW 3 (June 13, 2007), <http://droitconstitutionnel.org/athenes/hourquebie.pdf>.

65. Benjamin Akzin, *The Place of the Constitution in the Modern State*, 2(1) ISR. L. REV. 1 (1967).

66. Algeria, 1989 (art. 178); Italy, 1947 (art. 139); Moldova, 1994 (art. 142); Cameroon, 1972 (art. 64); Chechnya, 2003 (art. 112) (http://www.servat.unibe.ch/icl/cc00000_.html); Congo, 2006 (art. 220); Djibouti, 1992 (art. 88); Equatorial-Guinea, 1991 (art. 104); Madagascar, 2010 (art. 163); Mauritania, 1991 (art. 99); Portugal, 1976 (art. 288); Romania, 1991 (art. 152); Rwanda, 2003 (art. 163); Turkey, 1982 (art. 4).

67. Armenia, 1995 (art. 114); Czech Republic, 1992 (art. 9); Equatorial-Guinea, 1991 (art. 104); Romania, 1991 (art. 152).

68. Brazil, 1988 (art. 60(4)).

69. Greece, 1975 (art. 110).

enjoy protection as well. Unamendable provisions did not only grow in numbers, but also in length, complexity, and detail. Prior to World War II, the average number of words per an unamendable provision was 29.4. Afterwards, the number dramatically increased to 39.5. Whereas in the past, unamendable provisions mainly protected the particular form of the state's government, in the aftermath of the Second World War with the new wave of constitutionalism and the emergence of new states, limitations upon the amendment power were extended to protect other features of democracy, particularly fundamental rights and freedoms.⁷² Perhaps the most famous example is the German Basic Law (1949). Arnold Brecht, writing in 1945 in the post-war context, suggested that:

For preventing the possibility the majority rule will be abused to authorize barbaric measures . . . it would be advisable for the new German Constitution (and for any other democratic constitution to be enacted in the future) to contain certain sacrosanct principles and standards [which] . . . could not be impaired even by constitutional amendments. They should include fundamental principles regarding respect for the dignity of man, the prohibition of cruelties and tortures, the preclusion of ex post facto laws, equality before the law, and the democratic principle that the law itself cannot validly discriminate for reasons of faith or race.⁷³

Indeed, written against the background of the Weimar Constitution,⁷⁴ Article 79(3) of the German Basic Law prohibits amendments affecting the division of the Federation into *Länder*, human dignity, the constitutional order, or the basic institutional principles establishing Germany as a democratic and social federal state.⁷⁵ Following the Second World War and the development of human rights law, prohibitions on amendments infringing upon fundamental rights and

70. Kuwait, 1962 (art. 175).

71. Bahrain, 1973 (art. 120); Morocco, 1992 (art. 100).

72. See Michael Freitas Mohallem, *Immutable Clauses and Judicial Review: Social Rights and Politics in the Jurisprudence of India, Brazil and South Africa*, 15(5) THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 765 (2011).

73. ARNOLD BRECHT, FEDERALISM AND REGIONALISM IN GERMANY—THE DIVISION OF PRUSSIA 138 (1945).

74. See Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 S. M. U. L. REV. 443, 445 (2000); Ulrich K. Preuss, *The Implications of "Eternity Clauses": The German Experience*, 44 ISR. L. REV. 429, 439-40 (2011); Claudia E. Haupt, *The Scope of Democratic Public Discourse: Defending Democracy, Tolerating Intolerance, and the Problem of Neo-Nazi Demonstrations in Germany*, 20 FLA. J. INT'L L. 169, 208 (2008); DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 9 (1994).

75. Ackerman, *supra* note 4, at 13, calls states like Germany, which entrench certain rights, "rights foundationalists," for placing rights before majorities. The United States, in contrast, he asserts, is "dualist," for the Constitution is concerned first with democracy and second with rights-protection.

freedoms became a popular entrenchment,⁷⁶ and the primary underlying idea is that “unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority.”⁷⁷

Other protected principles include the state’s religion, such as Islam;⁷⁸ the official language;⁷⁹ secularism or separation of state and church;⁸⁰ the rule of law, multi-party system, political pluralism or other democratic characteristics;⁸¹ territorial integrity or independence;⁸² judicial review or independence of courts;⁸³ separation of powers;⁸⁴ rule of the constitution;⁸⁵ sovereignty of the people;⁸⁶ and the state’s existence.⁸⁷ In addition, some constitutions contain unique entrenchment provisions. For example, Qatar’s Constitution of 2004 protects the state’s inheritance and the functions of the Emir (Articles 145, 147). Niger’s various Constitutions protect amnesties granted to perpetrators of human rights violations.⁸⁸ Finally, some states have general provisions protecting the spirit of the preamble⁸⁹ or the principles of the constitution and its spirit.⁹⁰ Admittedly, this latter protection in the Norway Constitution of 1814 was adopted prior to the French limitation on the constitutional amendment

76. Algeria, 1989 (art. 178); Angola, 2010 (art. 236); Bosnia and Herzegovina, 1995 (art. 10); Brazil, 1988 (art. 60(4)); Chechnya, 2003 (art. 112); Congo, 2006 (art. 220); Greece, 1975 (art. 110); Kuwait, 1962 (art. 175); Moldova, 1994 (art. 142); Namibia, 1990 (art. 131); Portugal, 1976 (art. 288); Qatar, 2004 (art. 146); Romania, 1991 (art. 152); Ukraine, 1996 (art. 157).

77. Gunnar Beck, *The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness*, 25 PENN ST. INT’L L. REV. 615 (2006-2007).

78. Algeria, 1989 (art. 178); Bahrain, 1973 (art. 120); Iran, 1979 (art. 177); Morocco, 1992 (art. 100).

79. Algeria, 1989 (art. 178); Bahrain, 1973 (art. 120); Moldova, 1994 (art. 142); Romania, 1991 (art. 152); Turkey, 1982 (art. 4).

80. Angola, 2010 (art. 236); Congo, 2006 (art. 220); Portugal, 1976 (art. 288); Turkey, 1982 (art. 4).

81. Algeria, 1989 (art. 178); Angola, 2010 (art. 236); Armenia, 1995 (art. 114); Brazil, 1988 (art. 60(4)); Burkina-Faso; Cameroon, 1972 (art. 64); Czech Republic, 1992 (art. 9); Djibouti, 1992 (art. 88); Iran, 1979 (art. 177); Mauritania, 1991 (art. 99); Moldova, 1994 (art. 142); Portugal, 1976 (art. 288); Romania, 1991 (art. 152); Rwanda, 2003 (art. 163).

82. Algeria, 1989 (art. 178); Angola, 2010 (art. 236); Cameroon, 1972 (art. 64); Congo, 2006 (art. 220); Equatorial-Guinea, 1991 (art. 104); Mauritania, 1991 (art. 99); Portugal, 1976 (art. 288); Romania, 1991 (art. 152); Rwanda, 2003 (art. 163); Turkey, 1982 (art. 4).

83. Angola, 2010 (art. 236); Moldova, 1994 (art. 142); Portugal, 1976 (art. 288); Romania, 1991 (art. 152).

84. Brazil, 1988 (art. 60(4)); Greece, 1975 (art. 110); Portugal, 1976 (art. 288).

85. Ukraine, 1996 (art. 157).

86. Armenia, 1995 (art. 114).

87. Djibouti, 1992 (art. 88); Mauritania, 1991 (art. 99); Moldova, 1994 (art. 142).

88. Niger Const. (1999) art. 139; (2009), art. 152; (2010), art. 177.

89. Nepal, 1990 (art. 116(1)).

90. Norway, 1814 (art. 112).

power⁹¹ although it was not nearly as well known at the time as the French example.⁹²

B. Implicit Substantive Limits on the Constitutional Amendment Power—American, French and German Origins

Apart from the notion that the amendment power is subject to limits expressed in the constitution, another theory, rooted in American, French and German origins, is that the amendment power is substantively limited by its very nature as a creature of the constitution.⁹³ In the first American Congress, Roger Sherman—whom Thomas Jefferson described as “a man who never said a foolish thing in his life”⁹⁴—argued that there is a difference between the authority upon which the Constitution rests and that upon which amendments rest:

The Constitution is the act of the people, and ought to remain entire. But the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build.⁹⁵

The U.S. Supreme Court case *Dodge v. Woolsey* adopts a somewhat similar position in Justice Wayne’s majority opinion, ruling

91. Interestingly, it seems that in Norway this explicit limit is only a directive for Parliament, not one granting the courts any authority, and thus Parliament—the *Storting*—has the final word in interpretation of the constitution’s spirit. On this provision, see Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15-16 INDIAN Y.B. INT’L. AFF. 380 (1966-1967); Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1217 (1965-1966); CLAUDE KLEIN, THÉORIE ET PRATIQUE DU POUVOIR CONSTITUENT 181 (1996); Eivind Smith, *On an old Protected Constitution*, IACL ROUND TABLE ON UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS (Apr. 25, 2010); Staale T. Risa, *Legal System of Norway*, in 4 MOD. LEGAL SYS. CYCLOPEDIA 4.100.17 (1989); Rolv Ryssdal, *The Relation Between the Judiciary and the Legislative and Executive Branches of the Government in Norway*, 57 N.D. L. REV. 527, 530-35 (1981); Hans Christian Bugge, “Constitution” and “Constitutional Law” in Norway, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 308-09 (Eivind Smith ed., 1995); Torkel Opsahl, *Limitation of Sovereignty under the Norwegian Constitution*, 13 SCANDINAVIAN STUD. L. 151, 164 (1969); Torkel Opsahl, *The Reflection of Social Values in the Constitutional History of Norway: Some Illustrations*, 15 HOLDSWORTH L. REV. 181, 185-86 (1991-1992); Eivind Smith, *Old and Protected? On The “Supra-Constitutional Clause in the Constitution of Norway*, 44 ISR. L. REV. 369 (2011).

92. See Klein, *supra* note 32, at n.9.

93. See MARKKU SUKSI, MAKING A CONSTITUTION: THE OUTLINE OF AN ARGUMENT 5, 10-11 (1995); RENE BARENTS, THE AUTONOMY OF COMMUNITY LAW 91 (2004).

94. See *A Review of Robert Waln, Biography of the Signers to the Declaration of Independence*, Vol. 3 (R.M. Pomeroy, 1823), in 18 PORT FOLIO 441, 450 (Joseph Denied ed., 1824).

95. Annals of Congress, House of Representatives, 1st Congress, 1st Session 735 (Aug. 13, 1789), <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=369>.

that the constitutional amendment power is a delegated power because it is exercised by agents and, therefore, is limited.⁹⁶ This approach was later abandoned.⁹⁷ Edward Everett gave one of the more enthusiastic arguments in favor of implicit limits in a speech delivered in the House of Representatives in 1826, in which he argued that the amendment power couldn't have such scope in framing government:

[T]he distinction still recurs, that to amend is one thing, essentially to change another. To amend is to make changes consistent with the leading provisions of the Constitution, and by means of which those leading provisions will go into happier operation. Can this be the same thing as to change . . . those essential provisions themselves?

After examining the explicit limits on amendments stipulated in Article V, Everett continued:

[O]ne of two propositions must be maintained: either that these two expressed limitations are the only limitations of the amending power, or, that there is a prior limitation of the amending power, growing out of the nature of the Constitution as a compact. Unless we admit the latter proposition, there is nothing to prevent [the majority required for amendments] . . . from depriving the remainder of the States of any advantage they possess in these provisions of the Constitution, which guaranty the Federal equality, which was not to be touched without unanimous consent. Nay, sir, without this prior limitation of the amending power, there is nothing to prevent the only express limitation which not exists from being itself removed by way of amendment . . . I am, therefore, strongly inclined to think, that the principle of this implied limitation must always be consulted; that this must show us in each case how far alterations may go, and that it does dictate to us that amendments must be confined to those changes which are necessary, not to alter the essential provisions of the Constitution, but to carry them into more perfect operation.⁹⁸

Later, Joseph Story, though stating that the constitutional amendment "with few limitations" can change "the whole structure

96. 59 U.S. (18 How.) 331, 347-348 (1885).

97. *Dillon v. Gloss*, 256 U.S. 368, 373-374, 41 S. Ct. 510, 65 L. Ed. 994 (1921). See discussion in Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185, 189 (1950-1951).

98. EDWARD EVERETT, SPEECH OF THE HON. EDWARD EVERETT, IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, MARCH 9, 1926: IN COMMITTEE, ON THE PROPOSITION TO AMEND THE CONSTITUTION 3-6 (1826).

and powers of the government,"⁹⁹ seemed to hold a similar notion of implicit limits on the amending power, suggesting that: "The Union which is perfected by means of it is indissoluble through any steps contemplated by, or admissible under, its provisions or on the principles on which it is based, and can only be overthrown by physical force effecting a revolution."¹⁰⁰ This notion led to the recurring argument that even the amending power cannot lead to the destruction of the Union or the States, or interfere with their sovereignty.¹⁰¹ In his *Discourse on the Constitution and Government of the United States*, published shortly after his death in 1850, John Calhoun wrote:

[I]f it transcends the limits of the amending power,—be inconsistent with the character of the Constitution and the ends for which it was established,—or with the nature of the system . . . the State is not bound to acquiesce . . . that a State, as a party to the constitutional compact, has the right to secede . . . if a power should be inserted by the amending power, which would radically change the character of the Constitution, or the nature of the system . . .¹⁰²

From this, one learns that Calhoun believed that the amending power is implicitly limited in scope; it has to be consistent with the "nature of the system" and the Constitution's "character." Not everyone accepted this view, of course. Others regarded the amendment power as "absolutely unlimited."¹⁰³

In 1893, Thomas Cooley explained that the framers abstained from forbidding changes that would be incompatible with the Constitution's spirit and purpose, for they would be impossible under the terms of the amendment process itself.¹⁰⁴ George Curtis made a similar argument in favor of limitations on the amending power in 1896:

It seems to me, therefore, that while it is within the amending power to change the framework of the government in some respects, it is not within that power to deprive any state, without its own consent, of any rights of self-government which it did not cede to the United States by the

99. JOSEPH STORY, VOL 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES BOOK III 374 (1833).

100. JOSEPH STORY & THOMAS M. COOLEY, VOL. 1, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION 216 (4th ed. 2008).

101. See CHARLES G. HAINES, REVIVAL OF NATURAL LAW CONCEPTS 228 (1930).

102. JOHN CALDWELL CALHOUN, DISQUISITION ON GOVERNMENT: AND, A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 300-01 (1851).

103. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 72 (1868).

104. Thomas M. Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L. J. 109, 118-20 (1893).

Constitution, or which the Constitution did not prohibit it from exercising. In other words, I think the power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three fourths of the states to grasp new power at the expense of any unwilling state.¹⁰⁵

In 1919, William L. Marbury articulated the basic premise that “the power to ‘amend’ the Constitution was not intended to include the power to destroy it.”¹⁰⁶ The scope of the amendment power was given relatively extensive attention during the 1920s and 1930s.¹⁰⁷ After the adoption of the Eighteenth Amendment, it was argued before the courts that the amendment was void because it conflicted with the Constitution’s fundamental principles and spirit. In the *National Prohibition* case, the U.S. Supreme Court, without refuting the arguments in detail, held that the amendment was within the constitutional amendment powers.¹⁰⁸ Similarly, in *Leser v. Garnett*, the Supreme Court held that the Nineteenth Amendment had been constitutionally established.¹⁰⁹ This willingness to review amendments, however, was later rejected in *Coleman v. Miller*, in which the majority deemed the amendment process a political question not subject to judicial review.¹¹⁰

During that same period, in the early 1920s, French scholars developed the concept of “supra-constitutional laws,” which exist even

105. GEORGE TICKNOR CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES*, II 160-61 (1896).

106. William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 225 (1919-1920); *contra* William L. Frierson, *Amending the Constitution of the United States: A Reply to Mr. Marbury*, 33 HARV. L. REV. 659 (1919-1920) (arguing that there are no implicit restrictions on the constitutional amendment power).

107. *See, e.g.*, Everett P. Wheeler, *Limit of Power to Amend Constitution*, 7 A.B.A. J. 75 (1921); D. George Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, 18 MICH. L. REV. 213 (1919-1920); Lester B. Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1929-1930); E.V. Abbot, *Inalienable Rights and the Eighteenth Amendment*, 20 COLUM. L. REV. 183 (1920); Justin DuPratt White, *Is There an Eighteenth Amendment?*, 5 CORNELL L. Q. 113 (1920); Arthur W. Machen, *Is The Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1909-1910); Dudley O. McGovney, *Is The Eighteenth Amendment Void Because of its Contents?*, 20 COLUM. L. REV. 499 (1920); Note, *Challenge to the Constitutionality of Proposed Constitutional Amendments*, 17 IOWA L. REV. 250 (1931-1932); George Washington Williams, *What, If Any, Limitations Are There upon the Power to Amend the Constitution of the United States?*, 62 AM. L. REV. 529 (1928).

108. *State of Rhode Island v. Palmer*, 253 U.S. 350 (1920); *see* Chas. W. Pierson, *The Eighteenth Amendment*, 18 LAW & BANKER & S. BENCH & B. REV. 54 (1925).

109. 258 U.S. 130 (1922).

110. 307 U.S. 433, 456 (1939); *see* Fleming, *supra* note 23, at 375; Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 389-92 (1983-1984).

above the constitutional laws.¹¹¹ In 1921, Pierre Guillemon argued this point and applied it to principles contained in the French Declaration of the Rights of Man and Citizen of 1793 to which he attributed super-constitutional status, meaning they were beyond change by constitutional amendments.¹¹² Among the most famous French scholars who advocated in favor of limitations to the amendment power was the institutionalist Maurice Hauriou.¹¹³ Not only did Hauriou argue that the explicit constitutional limitation on amending the republican form of government of 1884 is valid and from it one should logically conclude that "a revision of the Constitution amending the republican form of government would be unconstitutional,"¹¹⁴ he also opined that certain principles limit the amendment power, even if these do not appear in the constitutional text:

There are many fundamental principles that could constitute a constitutional legitimacy placed above the written Constitution . . . Not to mention the republican form of government for which there is a text, there are many other principles for which there is no need to text because of its own principles is to exist and assert without text.¹¹⁵

Such principles, according to Hauriou, are situated above the Constitution, and no constitutional amendment is allowed to contradict them:

The Constitutional Law itself does not escape before the judge, there are occasions where the check could be conducted on it. For example, in essence, an amendment to the Constitution in conflict with the constitutional legitimacy . . . which is above the superlégalité itself because it consists of principles and the principles that are always above the text¹¹⁶

This school of thought regarding the limited amendment power is best represented by the German jurist Carl Schmitt. Drawing on

111. For the general debate in France regarding supra-constitutionality see, e.g., Serge Arné, *Existe-t-il des normes supra-constitutionnelles*, 2 *REVUE DU DROIT PUBLIC* 460 (1993); Louis Favoreu, *Souveraineté et supraconstitutionnalité*, 67 *POUVOIRS* 71 (1993); Georges Vedel, *Souveraineté et supra-constitutionnalité*, 67 *POUVOIRS* 76 (1993); Stéphane Rials, *Supraconstitutionnalité et Systématique du Droit*, *ARCHIVES DE PHILOSOPHIE DE DROIT* 57, 64 (1986).

112. PIERRE GUILLEMON, *DE LA REBELLION ET DE LA RESISTANCE AUX ACTES ILLEGAUX* 10-12 (1921), cited in HAINES, *supra* note 101, at 270-71.

113. On Maurice Hauriou's work, see *THE FRENCH INSTITUTIONALISTS—MAURICE HAURIOU*, GEORGES RENARD, JOSEPH T. DELOS (Albert Broderick ed., Mary Welling trans., 1970).

114. MAURICE HAURIOU, *PRÉCIS DE DROIT CONSTITUTIONNEL* 297 (1st ed. 1923).

115. *Id.*

116. MAURICE HAURIOU, *PRÉCIS DE DROIT CONSTITUTIONNEL* 269 (2d ed. 1929). See also LÉON DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 603-07 (3d ed. 1930).

the writings of Hauriou,¹¹⁷ Schmitt claims that certain basic freedoms:

have, as an outstanding French theorist of public law, Maurice Hauriou has explained, a ‘superlégalité constitutionnelle’, which is raised not only above the usual simple laws, but also over the written constitutional laws, and excludes their replacement through laws of constitutional revision. I agree with Hauriou, that every unchangeable ‘constitutional system’, . . . and that it is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy.¹¹⁸

One has to distinguish, according to Schmitt, between the procedural rules and substantive principles of the constitution. The basic substantive principles of the constitution, such as the state’s character, are a fundamental decision of the constituent power, and can therefore not be set aside through amendments. The constitution contains a core of implicitly unalterable principles that embody the constitution’s identity. The constitution’s procedural rules were designed to protect its essence, not to abolish it.¹¹⁹ For Schmitt, a constitutional amendment transforming a state that rests on the people’s constitutional power into a monarchy or vice versa would not be constitutional.¹²⁰ An amendment cannot annihilate or eliminate the constitution. These matters are for the constituent power of the people to decide, not the organs authorized to amend the constitution.¹²¹ It is interesting to note that in supporting his arguments, Schmitt also relies on the constitutions of other states, such as Article 112 of the Norwegian Constitution and Article 5 of the U.S. Constitution, and specifically refers to William Marbury’s article.¹²²

117. GOPAL BALAKRISHNAN, *THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT* 162 (2000). Schmitt claimed that Hauriou’s work on institutions was the “first systematic attempt of a restoration of concrete-order thinking since the dominance of juristic positivism.” Cited in David Bates, *Political Theology and the Nazi State: Carl Schmitt’s Concept of the Institution*, 3(3) *MODERN INTELLECTUAL HISTORY* 415, 424 (2006).

118. CARL SCHMITT, *LEGALITY AND LEGITIMACY* 58-60 (2004).

119. CARL SCHMITT, *CONSTITUTIONAL THEORY* 150-53 (2008).

120. *Id.* at 151.

121. *Id.* at 152.

122. *Id.* at 152-53.

C. *Unconstitutional Constitutional Amendments? German Origins of the Doctrine*

Paradoxically, while Schmitt is infamous for his adherence to Nazism, his ideas of a limited amendment power reappeared in post-World-War II jurisprudence. German jurisprudence in the post-Nazi regime era was characterized by the rejection of pure positivism and the endorsement of natural law ideas,¹²³ supporting the notion that even the constitutional amendment power is limited by certain supra-constitutional principles.¹²⁴ In 1950, the Bavarian Constitutional Court declared:

There are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the Constitution, that the maker of the Constitution himself is bound by them. Other constitutional norms . . . can be void because they conflict with them.¹²⁵

The Federal Constitutional Court later cited this paragraph with approval in the 1951 *Southwest* case.¹²⁶ Similarly, two years later, in the *Article 117* case, the Federal Constitutional Court acknowledged the possibility of invalid constitutional norms.¹²⁷ These statements, however, were mere *obiter dictum*. The idea that supra-constitutional limits on the amendment power exist was best described by Otto Bachof in his book *Unconstitutional Constitutional Norms?*, published in 1951.¹²⁸ Bachof's book is important as it affirms the power of courts to declare constitutional amendments unconstitutional and thus void.¹²⁹

123. See generally Heinrich Rommen, *Natural Law in Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany*, 4 NAT. L. F. 1 (1959); Edgar Bodenheimer, *Significant Developments in German Legal Philosophy since 1945*, 3AM. J. COMP. L. 379 (1954); Taylor Cole, *The West German Federal Constitutional Court: An Evaluation After Six Years*, 20(2) THE J. OF POLITICS 278, 302-04 (1958).

124. On natural law imposing limits on constitutional amendments, see Gottfried Dietze, *Unconstitutional Constitutional Norms? Constitutional Development in Post-war Germany*, 42 VIRGINIA L. REV. 1 (1956); Matthias J. Herdegen, *Unjust Laws, Human Rights, and the German Constitution: Germany's Recent Confrontation with the Past*, 32 COLUM. J. TRANSNAT'L L. 591 (1994-1995). More generally on this idea, see Yaniv Roznai, *The Theory and Practice of Supra-Constitutional Limits on Constitutional Amendments*, 62(3) INT'L & COMP. L. Q. (forthcoming, 2013).

125. Decision of Apr. 4, 1950, 2 Verwaltungs-Rechtsrechnung No. 65, *quoted in* Dietze, *supra* note 124, at 15-16.

126. 1 BverfGE 14, 32 (1951); see GÖZLER, *supra* note 10, at 84-86.

127. 3 BverfGE 225, 234 (1953), see Dietze, *supra* note 124, at 17-19; GÖZLER, *supra* note 10, at 86-87; DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 55 (1989).

128. OTTO BACHOF, *VERFASSUNGSWIDRIGE VERFASSUNGSNORMEN?* (1951).

129. *Id.* at 35, 47 et seq. I thank Marjorie Kaufman for translating Bachof's book to Hebrew.

After 1953, the Federal Constitutional Court declined to refer to supra-constitutional principles and concentrated instead on explicit limits to the amendment power. To date, an amendment has never been invalidated for conflicting with the narrowly interpreted Article 79(3).¹³⁰ In the *Klass* case, the Constitutional Court considered the constitutionality of an amendment that permitted violations of communication privacy for the purpose of protecting national security and substituted judicial review with parliamentary review of any alleged violation of this right. Although the Constitutional Court affirmed the amendment's validity, three dissenting judges were of the opinion that the amendment infringed upon the principles of human dignity, separation of powers, and the rule of law, and should therefore be annulled.¹³¹ In the recent *Electronic Eavesdropping* case, the Constitutional Court held that an amendment permitting eavesdropping in homes does not affect the inviolable human dignity and therefore accords with Article 79(3).¹³²

II. THE MIGRATION OF A CONSTITUTIONAL IDEA

A. *The Doctrine Arrives in Portugal and Brazil*

Portugal's constitutional law was deeply influenced by French and German jurisprudence. The Constitution of 1911, which abolished the monarchy and established Portugal's first republican government,¹³³ stipulated in Article 82(2) that bills for the revision of the constitution that purport to abolish the republican form of government cannot be admitted to discussion.¹³⁴ This provision is clearly taken from the French constitutional limitation. The current Constitution of 1976 includes in Article 288 the most detailed of any

130. In the Land Reform I case, it was suggested that the protection of Article 79(3) of the Basic Law extends beyond human dignity to include equality before the law, but in the Land Reform II case, the Constitutional Court held that an amendment would be unconstitutional only if it affected one of the immutable principles explicitly mentioned in Article 79(3); thus the principle of equality is not immutable. See 84 BVerfGE 90 (1991); 94 BVerfGE 12 (1990); GÖZLER, *supra* note 10, at 61.

131. 30 BVerfGE 1, 24 (1970); see Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 837, 852 (1991); O'Connell, *supra* note 5, at 55. An English translation of the case is available in COMPARATIVE CONSTITUTIONAL LAW—CASES AND COMMENTARIES 659 (Walter F. Murphy & Joseph Tanenhaus eds., 1977).

132. 109 BVerfGE 279 (2004); see Nicolas Nohlen, *Germany: The Electronic Eavesdropping Case*, 3 INT'L J. CONST. L. 680 (2005); Jutta Stender-Vorwachs, *The Decision of the Bundesverfassungsgericht of March 3, 2004 Concerning Acoustic Surveillance of Housing Space*, 5(11) GERMAN L. J. 1337 (2004).

133. PORTUGAL: A COUNTRY STUDY 51 (2d ed., Eric Solstein ed., 1994).

134. HERBERT F. WRIGHT, THE CONSTITUTIONS OF THE STATES AT WAR 1914-1918, at 499, 514 (1919). This limitation was omitted in Article 134 of the Constitution of 1933. See AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS: PORTUGAL TO YUGOSLAVIA 4, 25 (1950).

provision limiting the constitutional amendment power, protecting no less than fourteen subject matters from amendment.¹³⁵

Portugal's "sister," Brazil, is one of the few countries with a relatively developed jurisprudence on limits to the constitutional amendment power and judicial review of amendments, aimed at guarding the constitutional order and the fundamental elements of Brazil's historical identity.¹³⁶ Limits on the amending power already existed in four of Brazil's previous constitutions, from 1891 onwards.¹³⁷ While these limits traditionally protected the republican or federal form of government or the states' equal representation in the senate, the present Constitution of 1988 includes in Article 60(4) a wider protection of federalism; direct, secret, universal and periodic suffrage; separation of powers; and individual rights and guarantees.

Note that unlike previous Brazilian constitutions, this provision in Article 60(4) does not include protection of the republican form of government. The historical context provides an explanation. The 1988 Constitution was promulgated during the transition to democ-

135. According to Article 288, constitutional amendments must safeguard: a) National independence and the unity of the State; b) The republican form of government; c) The separation of the Churches from the State; d) The rights, freedoms, and safeguards of the citizens; e) The rights of the workers, workers' committees, and trade unions; f) The co-existence of the public, the private, and the cooperative and social sectors, with respect to the property of the means of production; g) The existence of economic plans within the framework of a mixed economy; h) Universal, direct, secret, and periodic suffrage for the appointment of the elected members of the organs of supreme authority, the autonomous regions, and the organs of local government, as well as the system of proportional representation; i) Plurality of expression and political organization, including political parties and the right to a democratic opposition; j) Separation and interdependence of the organs of supreme authority; k) The scrutiny of legal provisions for active unconstitutionality and unconstitutionality by omission; l) The independence of the courts; m) The autonomy of local authorities; n) The political and administrative autonomy of the archipelagos of the Azores and Madeira. Importantly, in a constitutional revision of 1989, the principle of collective ownership of means of production was omitted from the unamendability clause in order to comply with European Community's norms. The validity of this controversial amendment was not challenged before the courts. See VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS & DEMOCRATIC VALUES – A EUROPEAN PERSPECTIVE 107 (2009); Thomaz Pereira, *Interpreting Eternity Clauses*, YALE LAW SCHOOL 2ND DOCTORAL SCHOLARSHIP CONFERENCE, OCT. 31, 2012) [paper with author].

136. Luciano Maia, *The Creation and Amending Process in the Brazilian Constitution*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 9, at 54, 72.

137. Art. 90(4) of the 1891 Constitution contained a prohibition on "proposals tending to abolish the republican federal form or the equality of representation of the states in the senate"; art. 178(5) of the 1934 Constitution provided material limitations as expressed in the Republic and the Federation; the 1937 Constitution repeated that of 1824 and did not contain any expressed material limitations; art. 217(6) of the 1946 Constitution protected, again, the Republic and the Federation. See Conrado Hubner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449, 451-52 (2005); Adriano Santana Pedra, *Teoria da mutação constitucional: limites e possibilidades das mudanças informais da Constituição a partir da teoria da concretização* 222 (São Paulo, 2009), http://www.sapientia.pucsp.br/tde_arquivos/9/TDE-2009-07-27T08:13:39Z-8129/Publico/Adriano%20Santana%20Pedra.pdf.

racy after twenty-one years of military regime, and as such, represents a recommitment to constitutionalism and the rule of law.¹³⁸ Brazilian constitutionalism understood the republican form as requiring elections by the people.¹³⁹ The 1988 Constitution, however, reflected the country's instability at the time,¹⁴⁰ and, therefore, the Temporary Constitutional Provisions Act provided for a plebiscite through which voters would decide on the form (republic or constitutional monarchy) and system (parliamentary or presidential) of their government. In 1993, the plebiscite took place and the people voted to maintain the presidential republic. The entrenchment of the republican form of government in previous constitutions can be attributed to the adoption of the 1891 Constitution soon after the abolition of the monarchy, as well as the influence of the French Constitution. It also protected federalism because imperial Brazil had been a unitary state,¹⁴¹ and the U.S. Constitution inspired the protection of equal representation of states in the senate.¹⁴² The current and broader Brazilian unamendable provision in Article 60(4) was influenced by Portugal, and particularly by three leading Portuguese constitutionalists: José Joaquim Gomes Canotilho, Jorge Miranda, and Marcelo Rebelo de Sousa, who visited the country during the constituents' work, bringing the experience of the Portuguese constitutional process into the Brazilian process.¹⁴³ It is claimed that the Brazilian Constitution followed in the footsteps of the Portuguese Constitution, which in turn was influenced to a large extent by German jurisprudence.¹⁴⁴

In Brazil, judicial review is an established practice,¹⁴⁵ and, more importantly, the judiciary may even examine the content of constitutional amendments. From the idea of constitutional supremacy and normative hierarchy, one can reasonably deduce that when a conflict arises between an unamendable clause and a constitutional amendment, the court can declare the amendment unconstitutional and

138. Maia, *supra* note 136, at 54; Mendes, *supra* note 137, at 452-53.

139. Maia, *supra* note 136, at 59-60. On the 1988 Constitution as furnishing a mechanism for vast popular political expression in the democratic process, see KEITH S. ROSENN & RICHARD DOWNES, CORRUPTION AND POLITICAL REFORM IN BRAZIL: THE IMPACT OF COLLOR'S IMPEACHMENT vii (1999).

140. BORIS FAUSTO, A CONCISE HISTORY OF BRAZIL 316 (1999).

141. LINCOLN GORDON, BRAZIL'S SECOND CHANCE: EN ROUTE TOWARD THE FIRST WORLD 150 (2001).

142. Maia, *supra* note 136, at 61.

143. Cláudia de Góes Nogueira, *A Impossibilidade de as cláusulas pétreas vincular as gerações futuras*, 42(166) BRASÍLIA 79, 84 (2005), <http://www.buscalegis.ufsc.br/revistas/files/anexos/15484-15485-1-PB.pdf>.

144. Miyuki Sato, *Judicial Review in Brazil: Nominal and Real*, 3(1) GLOBAL JURIST ADVANCES art. 4, 1, 11 (2003).

145. Keith S. Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 293 (2000).

therefore null and void.¹⁴⁶ In ADIMC 466/91, the Brazilian Supreme Court, in a majority opinion by Justice Celso de Mello, held:

[C]onstitutional amendments . . . not being original constitutional norms, are not excluded from the ambit of a successive or repressive control of constitutionality. National Congress, when exercising its derived constituent power, and performing its reforming function, is legally bound by the original constituent power, which has laid down, besides circumstantial entrenchment to reform, an immutable clause, immune to parliamentary revision. Explicit material limitations, defined by paragraph 4 of Art. 60 of the Constitution constrain reforming power conferred upon the legislative. The immutability of such thematic nucleus, eventually violated, may render legitimate an abstract normative control and even a concrete control of constitutionality.¹⁴⁷

In a similar vein, in ADIMC 981/93 PR, the Brazilian Supreme Court held:

Revisions and amendment, as procedures to introduce constitutional changes, are expressions of an instituted constituent power, thus, limited by nature. The revision . . . is subject to the limits established by . . . the Constitution. Constitutional changes deriving from a revision are subject to judicial control and scrutiny, as regard the petrous clauses.¹⁴⁸

While the Brazilian Constitution does not expressly provide for the authority to review constitutional amendments, such practice is now widely accepted. It seems that when examining the constitutionality of an amendment *vis-à-vis* unamendable provisions, the Brazilian Supreme Court applies the same logic it uses when examining the constitutionality of ordinary laws.¹⁴⁹

146. Maia, *supra* note 136, at 69-72; Allan R. Brewer-Carías, *Models of Constitutional Review (Reform and Amendments) in Latin America: A Comparative Analysis*, Paper Prepared for the VI IACL World Congress on Constitutional Law 22 (Santiago de Chile, Jan. 2004); see ADIMC 926/1993.

147. ADIMC 466/91 DF; Celso De Mello, J.; RTJ 136/1, 25, *quoted in* Maia, *supra* note 136, at 72. Thus, a constitutional norm deriving from the constituent power and not from the amending power cannot be considered unconstitutional. See George R.B. Galindo, "That Is a Step on Which I Must Fall Down . . ." *Brazilian Judiciary Reform As a Backslide in Terms of International Protection of Human Rights in Brazil*, 6(3) GLOBAL JURIST TOPICS 1, 17 (2006), <http://www.bepress.com/gj/topics/vol6/iss3/art2>.

148. ADIMC 981-8/600/93 PR; Neri da Silveira, J.; Dec. 1993; Lex JSTF 192/56, *quoted in* Maia, *supra* note 136, at 72.

149. Mendes, *supra* note 137, at 455-56. See, e.g., ADIN 939-7 DF, in which the Supreme Court invalidated Constitutional Amendment 3 of Feb. 17, 1993, stating that: "A constitutional amendment, which is emanated from a derived constituent, when violative of the original Constitution, may be declared unconstitutional by the

The infusion of American, French, and German ideas into the Brazilian and Portuguese Constitutions is evident. The German influence rests to a large extent on the great success of Otto Bachof's book, *Unconstitutional Constitutional Norms*, in both countries. Even though the book, which was highly influential in Germany, was not translated into English, it was translated into Portuguese and received wide scholarly attention.¹⁵⁰ One can gauge the influence of Bachof's theory from the following experience in post-dictatorship Portugal: in 1975, the Council of the Revolution issued a constitutional statute—Law 8/75—which declared that the political police of the dictatorship, which had been removed immediately after the revolution on April 25, 1974, was a terrorist organization. On this basis, former prime ministers and home ministers were incriminated. The authority to adjudicate crimes based upon this law was vested in the military courts. The fact that Law 8/75 was a constitutional statute supposedly prevented any claim of unconstitutionality. In one case, however, a military court invoked Bachof's theory to find that such a law contradicted supra-constitutional norms because of its retroactive nature. Nevertheless, the Supreme Military Court dismissed this argument, and the Constitutional Commission never questioned the validity of Law 8/75.¹⁵¹

B. *Limitations on the Amending Power in other Latin American States*

As stated earlier, Latin American states were some of the first to contain unamendable provisions in their constitutions. Nowadays as well, many state constitutions include them, whether expressed or implicit, in provisions that infer a principle's "eternal" character.¹⁵²

Supreme Court, which is the guardian of the Constitution," *quoted in* Maia, *supra* note 136, at 73.

150. OTTO BACHOF, *NORMAS CONSTITUCIONAIS INCONSTITUCIONAIS? TRAD. E NOTA PRÉVIA DE JOSÉ MANUEL M. CARDOSO DA COSTA* (1994) (1977); *see* Thaís Bandeira Oliveira Passos & Vanessa Vieira Pessanha, *Normas Constitucionais Inconstitucionais? A Teoria De Otto Bachof*. http://www.conpedi.org.br/manaus/arquivos/anais/salvador/thais_bandeira_oliveira_passos.pdf.

151. Opinion no. 9/79 from the Constitutional Commission (Pareceres da Comissão Constitucional, vol. 8, pp. 3 ff.). This latter point is taken from Miguel Galvão Teles, *Ex Post Justice, Legal Retrospection, and Claim to Bindingness*, in *LIBER AMICORUM DE JOSÉ DE SOUSA BRITO 425, 430-31* (Augusto Silva et al. eds., 2009), http://www.mlghts.pt/xms/files/Publicações/Artigos/2010/Ex_Post_Justice_Legal_Retrospection_and_Claim_to_Bindingness.pdf.

152. Prime examples of these types of provisions appear in the Constitution of Venezuela of 1999:

Art. 1: The Bolivarian Republic of Venezuela is irrevocably free and independent [. . .]; Art. 5: Sovereignty resides untransferable in the people [. . .]; Art. 6: The government of the Bolivarian Republic of Venezuela and of the political organs comprising the same, is and shall always be democratic, participatory, elective, decentralized, alternative, responsible and pluralist, with revocable mandates.

For example, Article 248 of the Constitution of El Salvador says that: “in no case the Articles of this Constitution ruling the governmental form and system, the territory of the Republic and the alterability exercising the Presidency shall be reformed.” Article 137 of the Constitution of Cuba prohibits amendment with regard to “the political, social and economic system, whose irrevocable character is established in Article 3 of Chapter I, and the prohibition against negotiations under aggression, threats or coercion by a foreign power as established in Article 11.” Article 119 of the Constitution of the Dominican Republic states that “no reform can refer to the government form, which shall always be civil, republican, democratic and representative.”

Even without expressed limitations, the notion that there are implied limitations on the constitutional amendment power appears to have reached Latin America. In Argentina, Article 30 of the Constitution asserts that: “The Constitution may be totally or partially amended. The need for reform must be declared by Congress by a vote of at least two-thirds of its members; but it shall not be carried out except by an Assembly summoned to that effect.”¹⁵³ The summoned assembly is a limited one. When initiating a reform, Congress must specify the provisions that demand revision and the assembly cannot introduce amendments pertaining to provisions outside of those specified by Congress.¹⁵⁴ In 1993, in the *Rios* case,¹⁵⁵ the Supreme Court stated in an *obiter dictum* that: “the authority of a constituent convention is limited solely to the review of those matters submitted to them for resolution and *within the principles of the Constitution*” [emphasis added].¹⁵⁶ In the *Fayt* case¹⁵⁷ in 1998, a district court—for the first time in Argentina’s history—partially invalidated a constitutional amendment enacted by a constituent convention, on the basis that the convention exceeded its delegated authority.¹⁵⁸ This decision was affirmed by the appellate court, but on different grounds.¹⁵⁹

In Colombia, the Constitution of 1991 can be amended in three forms: by Congress’ legislation; a constituent assembly; or a referen-

See Brewer-Carías, *supra* note 146, at 25.

153. ARG. CONST. art. 30, ch. I, pt. I., cited in Ileana Gomez, *Declaring Unconstitutional a Constitutional Amendment: The Argentine Judiciary Forges Ahead*, 31 U. MIAMI INTER-AM. L. REV. 94, 101 (2000).

154. Gomez, *supra* note 153, at 103.

155. ‘Rios,’ [1994-C] L.L. 46, 48, cited in Gomez, *supra* note 153, at 107-08.

156. *Id.* at 48, cited in Gomez, *supra* note 153, at 108.

157. ‘Fayt,’ Suplemento de Derecho Constitucional, L.L., 18 de Agosto de 1998, at 1.

158. *Id.* at 8-9, cited in Gomez, *supra* note 153, at 111.

159. ‘Fayt,’ L.L., 28 de Mayo de 1999, at 3. See Gomez, *supra* note 153, at 112.

dum, approved by Congress.¹⁶⁰ Article 241(1) of the Constitution empowers the Constitutional Court to review constitutional amendments “exclusively for errors of procedure” and not substance.¹⁶¹ The Constitution does not include any unamendable provisions. The Constitutional Court, however, gave a wide definition of the concept of “procedural error.” In opinion C-551/03, the court noted that the amendment power does not extend to the replacement of the Constitution with a different one. Procedure and substance are thus related because when the amending power “substitutes” the Constitution it acts in *ultra vires*. It is only the constituent power, acting through extraordinary mechanisms such as a constituent assembly, that can constitute a new Constitution. The Court recognizes this as “substitution theory.”¹⁶² The Constitutional Court repeated this in its opinion C-1040/05 regarding presidential re-election, in which the Court upheld the amendment that permitted presidential re-election, but invalidated a constitutional amendment that empowered a non-elected body a temporary authority to legislate without being subject to any form of judicial review. This amendment, according to the court, contradicted the principle of constitutional supremacy and amounted to the formation of a new Constitution:

[T]here is a difference, then, between the amendment of the Constitution and its replacement. Indeed, the reform that is incumbent upon Congress may contradict the content of constitutional norms, even drastically, since any reform implies transformation. However, the change should not be so radical as to replace the constitutional model currently in force or lead to the replacement of a “defining axis of the identity of the Constitution,” with another which is “opposite or completely different.”¹⁶³

160. See Articles 375-78, the Constitution of 1991. See also William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender?*, 23 U. MIAMI INTER-AM. L. REV. 39, 89-90 (1991-1992).

161. See also art. 379:

The Legislative Acts, the convocation to referendum, the popular consultation, or the act of convocation of the Constituent Assembly may be declared unconstitutional only when the requirements established in this Title are violated. The public action against these acts may only proceed within the year following their promulgation, observing that provided in Article 241, numeral 2.

162. Sentencia 551/03, 09.07.2003, cited in Joel I. Colón-Ríos, *Carl Schmitt and Constituent Power in Latin American Courts: The Case of Venezuela and Colombia*, 18(3) CONSTELLATIONS 365, 373-76 (2011). See also Carlos L. Bernal-Pulido, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT'L J. CONST. L. (forthcoming, 2013). More generally on the replacement of constitutions in Latin America, see Gabriel L. Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46(4) L. & SOC. REV. 749 (2012).

163. Opinion C-1040/05, cited in Daniel Bonilla & Natalia Ramirez, *National Report: Colombia*, 19 AM. U. J. GENDER SOC. POL'Y & L. 97, 99 (2011), at n.10. See also

The Constitutional Court is also competent to decide on the constitutionality of a call for a referendum to amend the Constitution, exclusively for “errors of procedure” (Article 241(2)). In a decision in 2010, however, the Constitutional Court, in a 7-2 vote, invalidated a law that called for a referendum on a constitutional amendment that would allow the President to stand for a third term of office. Such a reform, according to the Court, violates a basic principle of democracy, which would affect the entire constitutional order.¹⁶⁴ According to the Court:

Congress derives its power to reform the Constitution from the Constitution itself. It has a derivative or secondary status as a constituent force. Therefore, it can reform or amend the Constitution, but it cannot replace it or substitute it for another constitution. If Congress crosses the line between amending the Constitution, and replacing it, it violates its constitutional powers and competence. If that happens, the Court can overturn Congress’s decision, not on the grounds of content review, but based on the fact that a branch of government has ignored its constitutional competence, and therefore, violated constitutional procedural rules.¹⁶⁵

Modifying an essential clause that transforms the nature of the constitutional regime can be considered, according to the Court, a “constitutional substitution.” Such a change can only occur by convening a constitutional assembly extraordinarily to review the constitutional regime.¹⁶⁶

In a series of cases in Peru in 2005¹⁶⁷ regarding “reform of the pensionary system,” the Peruvian Constitutional Tribunal declared that it is competent to invalidate a constitutional amendment that violates the basic principles of the Constitution and basic democratic values. While upholding the amendment at issue, the Court stated that the argument that the control of a constitutional reform bill could be seen as a “non-justiciable political question” yields under the consideration that the Court, as the main guarantor of the Constitution, must ensure that the Supreme Norm itself is not violated by

Joel I Colón-Ríos, *The Three Waves of the Constitutionalism-Democracy Debate in the United States: (And an Invitation to Return to the First)*, 18 WILLAMETTE J. INT’L L. & DISPUTE RES. 1 (2010).

164. Allan R. Brewer-Carías, *General Report: Constitutional Courts as Positive Legislators in Comparative Law*, XVIII INTERNATIONAL CONGRESS OF COMPARATIVE LAW, INTERNATIONAL ACADEMY OF COMPARATIVE LAW 42-44 (Washington, July 26-30, 2010).

165. Taken from the English summary of the decision that is available on the website of the Constitutional Court of Colombia, <http://english.corteconstitucional.gov.co/sentences/C-1040-2005.pdf>.

166. *Id.*

167. Opinion No. 050-2004-AI/TC, 004-2005-PI/TC, Sentencia No. 007-2005-PI/TC, and Opinion No. 009-2005-PI/TC (03.06.2005).

amendments that could harm the basic legal principles and basic democratic values on which it is based, even against the established procedures for constitutional reform.¹⁶⁸ In another case in 2005, the court emphasized what it regarded as the material limits of a reform, namely the fundamental principles that give identity to the Constitution. These are the principles of human dignity, the republican form of government, the democratic rule of law, the people's sovereign power, and any other fundamental matter the Charter recognizes.¹⁶⁹

C. *The Doctrine Arrives in other European Countries*

The notion of limited amendment power has reached most European states, many of which include in their constitutions explicit limits on constitutional amendments of certain provisions or principles.¹⁷⁰ In some states, the issue of unconstitutional constitutional amendments has entered the scholarly debate. In Hungary, for example, Parliament, considered to be the holder of the "constituent power," often incorporates into the Constitution laws that the court had previously declared unconstitutional.¹⁷¹ Recent articles discuss unconstitutional modifications, drawing on comparative scholarship.¹⁷² Similarly, in Slovakia, where the Constitution does not impose limits on the amendment of certain principles, a recent article, again drawing upon comparative sources, calls for judicial review of constitutional amendments in order to protect the Constitution's substantive core.¹⁷³ In Switzerland, the Constitution includes explicit

168. *Id.* at para. 3, <http://www.tc.gob.pe/jurisprudencia/2005/00050-2004-AI%200051-2004-AI%2000004-2005-AI%2000007-2005-AI%2000009-2005-AI.html>; see Colón-Ríos, *supra* note 163; JACOBSON, *supra* note 3, at 37; Anibal Quiroga León, *Los Excesos del Tribunal Constitucional Peruano: A Propósito Del Control Concentrado De La Constitución*, 3(2) ESTUDIOS CONSTITUCIONALES 29, 38 (2005).

169. Opinion No. 0024-2005-PI/TC, at para. 12 (02.11.2005), <http://www.tc.gob.pe/jurisprudencia/2005/00024-2005-AI.html>.

170. For a full review, see *Constitutional Provisions for Amending the Constitution: Limits to Constitutional Amendments*, STUDY NO. 469 / 2008 OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) (Strasbourg, Aug. 4, 2008), [http://www.venice.coe.int/docs/2008/CDL\(2008\)086add-e.pdf](http://www.venice.coe.int/docs/2008/CDL(2008)086add-e.pdf).

171. See Gyorgy Szoboszlai, *The Politics of Constitutional Amendment: Hungary's Lasting Transitory Constitution*, in *THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS*, *supra* note 9, at 174, 183-85.

172. See Krisztián Legény, *Alkotmányellenes alkotmányosdiktatók?*, 53(3) MAGYAR JOG 129 (2006); Halmi, *supra* note 5, in which he criticizes the Hungarian Constitutional Court decision of July 2011 for not recognizing its authority to substantively review constitutional amendments. In that respect, it is important to mention Judge Laszlo Kiss, who was in the minority and who held in his dissenting opinion that the court has jurisdiction to review the substance of a constitutional amendment based on the "essential core" of the Republican Constitution, such as the rule of law and fundamental human rights. See also Kim Lane Scheppele, *The New Hungarian Constitution: Unconstitutional Constituent Power*, (Penn DCC, 21.02.2013), http://www.sas.upenn.edu/dcc/documents/Scheppele_unconstitutional-constituentpower.pdf.

173. Michal Val'ò, *Protecting Against the Constitutional Framers of the Constitution*, 1(1) J. CRIM. L. & PUB. PROSECUTION 28, 30-31 (2010).

limits to respect the mandatory rules of international law (Articles 193(4), 194(2)). Nevertheless, constitutional scholars repeatedly call for further implicit limits, for instance, with regard to the fundamental norms of the Federal Constitution.¹⁷⁴ Lastly, in Finland, the Constitution lacks any explicit limits on the amendment power. Regardless, some scholars suggest that the fundamental elements of the Finnish Constitution should be recognized as an unamendable core.¹⁷⁵ In other states, the issue has reached the courts.

1. Italy

In Italy, Article 139 of the Italian Constitution of 1947 includes an explicit limitation according to which “[t]he republican form of the state may not be changed by way of constitutional amendment.” Italian scholars have elaborated upon the substantive theory contending that the constitutional amendment procedure (Article 138) cannot be used to deny fundamental norms propounded and protected by the Constitution.¹⁷⁶ Among the principles that Italian scholars consider to be implicitly unamendable are: democracy, inviolable rights, and the core of the Constitution itself.¹⁷⁷ This approach was accepted in 1988 by the Italian Constitutional Court, which stated that the Constitution contains some supreme principles that cannot be:

subverted or modified in their essential content Such are principles that the Constitution itself explicitly contemplates as absolute limits to the power of constitutional revision, such as the republican form . . . as well as principles that, although not expressly mentioned among those not subject to the principle of constitutional revision, are part of the supreme values on which the Italian Constitution is based.¹⁷⁸

In other words, notwithstanding the explicit limitation that exists in Article 139, the Constitutional Court recognized other implicit

174. See Giovanni Biaggini, *Switzerland*, in *HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY* 303, 317 (Dawn Oliver & Carlo Fusaro eds., 2011).

175. See Markku Suksi, *Finland*, in *HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY*, *supra* note 174, at 87, 105.

176. Paolo Carrozza, *Constitutionalism’s Post-Modern Opening*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM*, *supra* note 37, at 168, 174-75. For more opinions, see also Paolo Galizzi, *Constitutional Revisions and Reforms: The Italian Experience*, in *THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS*, *supra* note 9, at 235, 241; Carlo Fusaro, *Italy*, in *HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY*, *supra* note 174, at 211, 215.

177. COMELLA, *supra* note 135, at 107.

178. Corte Const. judgment no. 1146 of Dec. 15, 1988, *quoted in* Lois F. del Duca & Patrick del Duca, *An Italian Federalism? The State, its Institutions and National Culture as Rule of Law Guarantor*, 54 AM. J. COMP. L. 799, 800-01 (2006).

limits on the amendment of other supreme principles that the Constitution is based upon.¹⁷⁹

2. Austria

The Austrian Constitution of 1920 does not include any substantive limits on constitutional amendments. Article 44 of the Constitution, however, draws a procedural distinction between partial and total revision, as the former requires enactment by Parliament and the latter requires both enactment and a referendum.¹⁸⁰ The Austrian Constitutional Court has declared itself competent to review constitutional laws with regard to their form, but not their substance. This formal review, however, must relate to the substance of constitutional amendments as the Constitutional Court defines “total revisions” as amendments that affect the Constitution’s leading principles (*leitender Grundsatz*), which include democracy, rule of law, and federalism. Therefore, an amendment affecting one of these principles would therefore require a referendum; otherwise, it would violate the Constitution.¹⁸¹

Indeed, the Constitutional Court annulled constitutional amendments that were adopted by Parliament but were deemed to be a “total revision” of the Constitution.¹⁸² In its recent decision in 2001, the Constitutional Court reiterated this approach when it annulled a constitutional amendment, which stated that specific statutes of the *Länder* could not be deemed unconstitutional. The Constitutional Court held that this deprivation of the Constitution’s normative authority violates the rule of law, which is a basic principle, and therefore adoption of this amendment requires a referendum. Since the amendment was adopted by Parliament without a referendum, it was deemed unconstitutional and was annulled.¹⁸³

3. The Czech Republic

On September 10, 2009, the Czech Constitutional Court delivered its decision on the constitutionality of Constitutional Act no.

179. See Jean-Claude Escarras, *Présentation Du Rapport Italien de Massimo Luciani*, in *LA REVISION DE LA CONSTITUTION* 105, 112-16 (1993); Massimo Luciani, *La Revisione Costituzionale In Italia*, in *LA REVISION DE LA CONSTITUTION* 117, 130-38 (1993).

180. Bundes-Verfassungsgesetz [B-VG] [Constitution] art. 44 (Austria).

181. Decision of Dec. 12, 1952 (Länder Citizenship), *SAMMLUNG DER ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES* [VfSlg], No. 2455; see also Decision of Sept. 29, 1988, VfSlg, 11.829; both cited in GÖZLER, *supra* note 10, at 34-39. See generally Alexander Somek, *Constitutional Theory as a Problem of Constitutional Law—On the Constitutional Court’s Total Revision of Austrian Constitutional Law*, 32 *ISR. L. REV.* 567 (1998).

182. See, e.g., Decision of June 23, 1988, VfSlg, 29, V 102/88; cited in GÖZLER, *supra* note 10, at 37.

183. Decision of Mar. 10, 2001, G 12/00, G 48-51/00, cited in GÖZLER, *supra* note 10, at 38-39; see also Val’o, *supra* note 173, at 29; Pfersmann, *supra* note 5.

195/2009 Coll., on shortening the Fifth Term of Office of the Chamber of Deputies. The Constitutional Court held this constitutional act to be unconstitutional and thus null and void.¹⁸⁴ The Constitutional Court relied upon Article 9(2) of the Czech Constitution: “Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.” The Constitutional Court pointed to the roots of the Constitution’s unamendable provision, referring to the actions of Germany under the Weimar Constitution, which led to the Nazi regime usurping power. The Court drew an analogy between Article 9(2) of the Constitution and the interpretations of Article 79(3) of the Grundgesetz by the German Federal Constitutional Court and declared that “as a result of this analogy, interpretation of Article 79 par. 3 of the Grundgesetz and similar steps in other democratic countries are deeply inspiring for the Constitutional Court of the Czech Republic,” and that the possibility of judicial review of constitutional amendments is “in line with the constitutional development of European democracies in the protection of the constitutive principles of a democratic society.”¹⁸⁵ Relying heavily on German and Austrian jurisprudence, the Constitutional Court declared that it is competent to review constitutional acts and concluded its review by holding that the contested ad hoc constitutional act was individual (i.e., not general) and retroactive, thus violated Article 9(2) and therefore declared it to be unconstitutional.

4. Turkey and Greece

The Constitutions of Greece were traditionally characterized by a high degree of rigidity. Arguably, this is due to the ancient Athenians’ respect for the “fundamental principles that animated their law.”¹⁸⁶ The Constitution of 1844 did not include any procedure

184. The full judgment is available at <http://www.usoud.cz/clanek/pl-27-09>. For comments, see Maxim Tomeszek, *Proportionality in Judicial Review of Constitutional Amendments*, Paper presented at the VIIIth World Congress of the International Association of Constitutional Law (2010), <http://www.juridicas.unam.mx/wcc/ponencias/9/175.pdf>; Kieran Williams, *When a Constitutional Amendment Violates the Substantive Core: The Czech Constitutional Court’s September 2009 Early Elections Decision*, 36 REV. CEN. & EAST EUR. L. 33 (2011); Jan Kudrna, *Cancellation of Early Elections By The Constitutional Court of The Czech Republic: Beginning of A New Concept of “Protection of Constitutionality*, 4(122) JURISPRUDENCE 43 (2010); Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections Following the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act*, 8 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW (forthcoming, 2014); Zdenik Koudelka, *Abolition of Constitutional Statute by the Constitutional Court of the Czech Republic* 2 JOURNAL ON LEGAL AND ECONOMIC ISSUES OF CENTRAL EUROPE (2010), is.muni.cz/repol/930534/Abolition_of_constitutional_statue.doc.

185. See part IV of the judgment, *supra* note 184.

186. On fundamental principles, see Mark J. Sundahl, *The Living Constitution of Ancient Athens: A Comparative Perspective on the Originalism Debate*, 42 J. MARSHALL L. REV. 463, 483 (2008-2009).

whatsoever for revision of the Constitution.¹⁸⁷ The Constitutions of 1864 (Article 107),¹⁸⁸ 1911 (Article 108),¹⁸⁹ and 1927 (Article 125)¹⁹⁰ prohibited revisions of the entire Constitution and allowed revisions only of non-fundamental provisions. Article 108 of the Constitution of 1952 prohibited the revision of the entire Constitution, as well as those provisions “which determine the regime as that of a crowned democracy as well as its fundamental provisions.” The 1967-1974 dictatorship had a strong influence on Greece’s constitutional development, and it subsequently led to the adoption of limits on the possibility of parliamentary obstruction.¹⁹¹ Therefore, Article 110(1) of the Constitution of 1975 specifies certain provisions that cannot be the subject of revision. This protection includes: maintaining the form of government as a Parliamentary Republic; certain fundamental rights and freedoms, such as human dignity, equality, freedom of personal development, personal liberty, and religious freedom; and separation of powers.¹⁹²

In Turkey, constitutional and public debate centers on judicial review of constitutional amendments. The legal order of the Ottoman state was based on Islamic Shari’a law.¹⁹³ After the founding of the Republic of Turkey in 1923, secularism (*laiklik*) became a constitutive principle of the state.¹⁹⁴ Under Article 4 of the current 1982 Constitution, the provision establishing the state as a Republic (Article 1) and the provision that outlines the state’s characteristics (Article 2) may not be amended, nor may their amendment be proposed.¹⁹⁵ Under the 1961 Turkish Constitution, however, which

187. Evangelos Venizelos, *The Consensual and Corroborative Revision of the Hellenic Constitution*, in 47 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 99 (1999).

188. French translation of the Constitution of 1864, 56 BRITISH AND FOREIGN STATE PAPERS 583 (1870).

189. PEASLEE, *supra* note 36, at 64.

190. FRANCOIS RODOLPHE DARESTE ET AL., LES CONSTITUTIONS MODERNES 656 (1928).

191. See Georgios Trantas et al., *Greece: ‘Rationalizing’ Constitutional Powers in a Post-dictatorial Country*, in DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 376, 377 (Kaare Ström, et al. eds., 2006).

192. PHILIPPOS C. SPYROPOULOS & THÉODORE P. FORTSAKIS, CONSTITUTIONAL LAW IN GREECE 64 (2009). See also Nikolaos K. Klamaris, *Constitutional Guarantees of the Judiciary in Greece*, 59 R.H.D.I. 415, 416 (2006); Anastasia Kaltsa, *Introduction to Greek Public Law*, 3 EUR. PUB. L. 174 (1997).

193. Ergun Özsunay, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Turkey*, 19 EMORY INT’L L. REV. 1087 (2005).

194. See Serdar Demirel, *The Roots of the Headscarf Ban in Turkey*, 5(2) JOURNAL OF ISLAM IN ASIA 164-65 (2008); Benjamin D. Bleiberg, *Unveiling the Real Issue: Evaluating the European Court of Human Rights’ Decision to Enforce the Turkish Headscarf Ban in Leyla Sahin v. Turkey*, 91 CORNELL L. REV. 134 (2005-2006); Ran Hirschl, *The Rise of Constitutional Theocracy*, 49 HARV. INT’L L.J. ONLINE 72, 75 (2008), <http://harvardilj.org/online/145>; see generally NIYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY (1998).

195. The State’s characteristics as stipulated in Article 2 are “democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public

also protected the republican form of state from amendments (Article 9), the Constitutional Court declared itself competent to review the constitutionality of constitutional amendments, holding that amendments could not abolish the Constitution's essence.¹⁹⁶ During the 1970s, the Turkish Constitutional Court rendered several decisions reviewing the constitutionality of constitutional amendments.¹⁹⁷

Under the 1982 Constitution, which restricts the adjudication of constitutional amendments to their form (Article 148(1)), the Turkish Constitutional Court ruled three times on the constitutionality of constitutional amendments, restricting itself each time to a formal review.¹⁹⁸ Nonetheless, the Constitutional Court reversed its position in its headscarf decision on June 5, 2008, and broadly interpreted its competence to substantively review constitutional amendments. The Court therefore held that it is competent to review the constitutionality of the content of amendments and whether they are contrary to the characteristics of the Republic provided in Article 2 of the Constitution.¹⁹⁹

D. *From Germany to India*

One of the most fascinating jurisdictions in which the notion of the limited constitutional amendment power has been adjudicated repeatedly is India. The Indian Constitution excluded any explicit limitations on the amendment power. Moreover, Indian jurisprudence, rooted in the British tradition, at first rejected the notion of implicit limits on the constitutional amendment power. That position, however, was revised in the 1960s and 1970s following Prime Minister Indira Gandhi's far-reaching attempts to amend the Constitution, including the declaration of a state of emergency and establishment of an authoritarian-like regime.²⁰⁰

peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble."

196. See GÖZLER, *supra* note 10, at 64-66, 95-97; see also Özbudun, *supra* note 2, and Roznai & Yolcu, *supra* note 2, at 195-97.

197. Decision of Apr. 15, 1975, no. 1975/87; Decisions of Mar. 23, 1976, no. 1976/1963 and Oct. 12, 1976, no. 1976/46; Decision of Jan. 28, 1977, no. 1977/4; Decision of Sept. 27, 1977, no. 1977/117; see GÖZLER, *supra* note 10, at 42-47; Roznai & Yolcu, *supra* note 2, at 195-97.

198. Constitutional Court decisions, E.1987/9, K.1987/1518, June 1987, TC Resmi Gazete, Official Gazette of the Republic of Turkey, [hereinafter Resmi Gazete], Sept. 4, 1987, no. 19564; E.2007/72, K.2007/68, July 5, 2007, Resmi Gazete, Aug. 7, 2007, no. 26606; E.2007/99, K.2007/86, Nov. 27, 2007, Resmi Gazete, Feb. 16, 2008, no. 26792; see Özbudun, *supra* note 2, at 537 n.6; ERGUN ÖZBUDUN & ÖMER FARUK GENÇKAYA, DEMOCRATIZATION AND THE POLITICS OF CONSTITUTION-MAKING IN TURKEY 109 (2009).

199. Turkish Constitutional Court, June 5, 2008, *supra* note 1, at 138; See Roznai & Yolcu, *supra* note 2.

200. See C.C. Aikman, *The Debate on the Amendment of the Indian Constitution*, 9 VICTORIA U. WELLINGTON L. REV. 357-83 (1977-1978); O'Connell, *supra* note 5, at 66-73; Jacobssohn, *supra* note 10, at 470-76.

The notion of limits on constitutional amendments was adjudicated in the *GolakNath* case, in which a slim majority of the Indian Supreme Court ruled, in a prospective judgment, that no amendment that violated the fundamental rights provisions of the Constitution would be held constitutional. The Supreme Court's argument was simple: Article 13(2) says that any "law" taking away or abridging those rights is void; a constitutional amendment is a type of "law."²⁰¹ Parliament attempted to nullify the *GolakNath* decision through the Twenty-fourth Amendment, according to which, in exercise of its constituent power, Parliament may amend by way of addition, variation, or repeal any provision of the Constitution, including those protecting fundamental rights. The validity of this amendment (among others) was challenged before thirteen judges of the Indian Supreme Court in 1973 in *Kesavanda Bharati v. State of Kerala*.²⁰² The Supreme Court overruled *GolakNath* and held that the term "law" does not refer to a constitutional amendment. More importantly, seven of the judges held that "the power to amend the Constitution does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity,"²⁰³ creating what has come to be known as the "basic structure doctrine."

After *Kesavanda*, the Indian Supreme Court invoked the basic structure doctrine several times to invalidate constitutional amendments. In *Indira Nehru Gandhi v. Raj Narain*, the Supreme Court invalidated the Thirty-ninth Amendment, which insulated the election of a prime minister from judicial review, on the grounds that it contradicted the principle of separation of powers.²⁰⁴ In an effort to reclaim its authority to amend the Constitution, Parliament passed the Forty-second Amendment, removing the Supreme Court's authority to declare amendments unconstitutional, but that amendment was struck down in *Minerva Mills Ltd. v. India*.²⁰⁵ The Supreme Court held:

[I]f by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Con-

201. *GolakNath v. Punjab*, AIR 1967 SC 1643. The same argument was raised and rejected in *Shankari Prasad v. India*, AIR 1951 SC 458, and *Singh v. Rajasthan*, AIR 1965 SC 845; see Aikman, *id.* at 366-70; S.P. Sathe, *India: From Positivism to Structuralism*, in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 215, 242-43 (Jeffrey Goldsworthy ed., 2007).

202. AIR 1973 SC 1461. For an analysis of the case, see David G. Morgan, *The Indian 'Essential Features' Case*, 30 INT'L & COMP. L.Q. 307 (1981). For the story behind the case, see T.R. ANDHYARUJINA, *THE KESAVANANDA BHARATI CASE—THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT* (2012).

203. *Id.* at 1510, 1603, 1624-25.

204. AIR 1975 SC 2299.

205. AIR 1980 SC 1789.

stitution including its basic structure and even to put an end to it by totally changing its identity.²⁰⁶

In *Sambamurthy v. Andhra Pradesh*, the Supreme Court partially invalidated an amendment that granted state governments the power to annul orders issued by administrative tribunals.²⁰⁷ Subsequently, in *Chandrakumar v. Union of India*, the Supreme Court invalidated a provision that removed the High Courts' jurisdiction in those cases in which administrative tribunals had jurisdiction.²⁰⁸

The basic structure doctrine is "an attempt to identify the moral philosophy on which the Constitution is based."²⁰⁹ It includes the general features of a liberal democracy, such as the supremacy of the Constitution, the rule of law, separation of powers, judicial review, freedom and dignity of the individual, unity and integrity of the nation, free and fair elections, federalism, and secularism.²¹⁰ The Indian basic structure doctrine is widely debated and studied.²¹¹ While modern Indian law borrowed extensively from English and American sources,²¹² the basic structure doctrine finds its origins in Germany.

In February 1965, a German professor who was an expert on South Asian law, Dietrich Conrad, visited India and delivered a lecture on the "implied limitations of the amending power" at the law faculty of Banaras Hindu University. The paper was brought to the attention of one of the counsels for the petitioner in the *GolakNath* case, M. K. Nambyar. When arguing before the Indian Supreme Court, Nambyar, reading from Conrad's paper, claimed that implied limitations exist on constitutional amendment power. The Court affirmed the considerable force of this argument, but deemed it unnecessary to expound upon it. Conrad's contribution to the Indian basic structure doctrine did not end there. After the *GolakNath* case

206. *Id.* at 1824.

207. AIR 1987 SC 663.

208. AIR 1997 SC 1125.

209. See Salman Khurshid, *The Court, the Constitution and the People*, in *THE SUPREME COURT VERSUS THE CONSTITUTION: A CHALLENGE TO FEDERALISM* 95, 98 (Pran Chopra ed., 2006) [hereinafter *SUPREME COURT VERSUS THE CONSTITUTION*].

210. Jacobsohn, *supra* note 10, at 1763, 1795; Subhash Kashyap, *The "Doctrine" versus the Sovereignty of the People*, in *SUPREME COURT VERSUS THE CONSTITUTION*, *id.* at 103-05; Klein, *supra* note 17, at 36.

211. See, e.g., SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009); A. LAKSHMINATH, *BASIC STRUCTURE AND CONSTITUTIONAL AMENDMENTS—LIMITATIONS AND JUSTICIABILITY* (2011); ASHOL DHAMLA, *NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC STRUCTURES* (2007); R.K.P. Shankardass, *Anomalies of the "Doctrine,"* in *SUPREME COURT VERSUS THE CONSTITUTION*, *supra* note 209, at 137; N.R. Madhava Menon, *Basic Structure: After 30 Years*, in *SUPREME COURT VERSUS THE CONSTITUTION*, *supra* note 209, at 59; P.P. Rao, *The Constitution, Parliament and the Judiciary*, in *SUPREME COURT VERSUS THE CONSTITUTION*, *supra* note 209, at 70.

212. Rajeev Dhavan, *Borrowed Ideas: On the Impact of American Scholarship on Indian Law*, 33 AM. J. COMP. L. 505 (1985).

ruling in 1967, Conrad published a detailed article expressing his views on the limited nature of amendment power.²¹³ As mentioned earlier, in 1973 the Indian Supreme Court ruled (by a 7-6 majority) in the *Kesavananda* case. Justice H. R. Khanna, writing in favor of the basic structure limits on the amendment power, cited with approval Conrad's remark that "any amending body organized within the constitutional scheme, howsoever verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority."²¹⁴

As the doctrine further developed during the years following *Kesavananda*, Conrad continued to appraise the doctrine.²¹⁵ He wrote, that "there are, beyond the wording of particular provisions, systematic principles underlying and connecting the provisions of the Constitution . . . [which] give coherence to the Constitution and make it an organic whole."²¹⁶ This statement mirrors the German *South-west* case in which the German Constitutional Court found: "A Constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a Constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate."²¹⁷

Therefore, the Indian constitutional narrative owes a debt of gratitude to the German jurist, and it is fitting that Conrad was called "the author of the basic structure doctrine."²¹⁸ Mahendra P. Singh notes that: "by bringing [the doctrine] to the notice of the lawyers in India and by convincing them about its natural existence in the Indian Constitution, or for that matter in any Constitution, Conrad bridged the common law and the civil law."²¹⁹ The fact that the doctrine crossed different legal systems shows its inherent force.

213. Conrad, *supra* note 91.

214. *Id.* at 379.

215. See Dietrich Conrad, *Constituent Power, Amendment and Basic Structure of the Constitution: A Critical Reconsideration*, 6-7 DELHI L. REV. 1 (1977-1978); Dietrich Conrad, *Basic Structure of the Constitution and Constitutional Principles*, in LAW AND JUSTICE: AN ANTHOLOGY 186 (Soli J. Sorabjee ed., 2003)[hereinafter Conrad 2003].

216. Conrad 2003, *id.* at 200-01. See also M.P. Singh, *Bridging Legal Traditions: Professor Dietrich Conrad 1932-2001*, 18(8) FRONTLINE (Sept. 1, 2001), <http://www.hinduonnet.com/fline/fl1818/18181240.htm>.

217. 1 BVerfGE 14, 32; see KOMMERS, *supra* note 127, at 54-55; Kommers, *supra* note 131, at 852.

218. A.G. Noorani, *Author of "Basic Structure,"* DAWN (July 3, 2010), <http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/editorial/auth-or-of-basic-structure-370>; see also A.G. Noorani, *Behind the "Basic Structure" Doctrine: On India's Debt to a German Jurist, Professor Dietrich Conrad*, 18(9) FRONTLINE (May 11, 2001), <http://www.hinduonnet.com/fline/fl1809/18090950.htm>.

219. See Singh, *supra* note 216.

E. *From India to Nepal, Bangladesh, and Pakistan*

After India adopted the basic structure doctrine, it migrated to neighboring countries.

1. Nepal

Nepal expressly mentions the basic structure doctrine in its Constitution of 1990, which allows for judicial review of constitutional amendments.²²⁰ Article 116(1) of the Constitution stipulates that: “any bill purporting to amend or repeal any Article of this Constitution may be introduced, without contravening the spirit of the Preamble of this Constitution . . . provided that this Article shall not be subject to amendment.”²²¹

Before the Nepalese Constitution of 1990 was drafted, debate focused on creating a list of basic features that would require ratification by a referendum for their amendment, in addition to adoption by a majority in both houses. Adopting the basic features doctrine in form of a list of specific provisions was eventually rejected, and instead agreement was reached to adopt the more general formula set forth in Article 116(1). Of course, this compromise exacerbates the debate as to what exactly is the “spirit of the Preamble.”²²² In answering the question “But why did this solution occur to the framers?” Richard Stith claims: “The answer here takes us deep into Indian constitutional history, on which Nepalese legal culture, and particularly the new democratic regime, is based.”²²³ Once again, we can identify the enormous influence of the migration of a constitutional idea.

2. Bangladesh

Bangladesh is another jurisdiction to which the basic structure doctrine has migrated.²²⁴ The Appellate Division of the Supreme Court of Bangladesh adopted the Indian basic structure doctrine in

220. Shambhu Thapa, *Nepal*, 2005 LAWASIA J. 237 (2005); Richard Stith, *Unconstitutional Constitutional Amendments: The Extraordinary Power of Nepal's Supreme Court*, 11 AM. U. J. INT'L. L. & POL'Y 47 (1996).

221. Interestingly, this prohibition was removed from Article 148 of the interim Constitution of 2007.

222. See Andreas Buss, *Dual Legal Systems and the Basic Structure Doctrine of Constitutions: The Case of India*, 19 CAN. J.L. & SOC. 23, 45 (2004); Conrad 2003, *supra* note 215, at 192-94. On the drafting process of the constitution, see Michael Hutt, *Drafting the Nepal Constitution, 1990* 31(11) ASIAN SURVEY 1020, 1028-32 (1991).

223. Stith, *supra* note 220, at 55.

224. See generally Conrad 2003, *supra* note 215, at 187-91; Jafar Ullah Talukder & Jashim Ali Chowdhury, *Determining the Province of Judicial Review: A Re-evaluation of 'Basic Structure' of the Constitution of Bangladesh*, 2(1) METROPOLITAN UNIV. J. (2009), <http://mjashimalichowdhury.blogspot.com/2009/10/determining-province-of-judicial-review.html>; for a summary of the Supreme Court of Bangladesh decisions, see also Writ Petition No.696 of 2010, Siddique Ahmed v. Bangladesh, judgment of

its 1989 case, *Anwar Hossain Chowdhury v. Bangladesh*,²²⁵ which expressly refers to the Indian *Kesavananda* case. In that case, the Constitutional Amendment Act 1988, which had affected the judicial review jurisdiction of the Supreme Court by decentralizing its High Court Division, was declared unconstitutional and void.

The majority in the Appellate Division endorsed the basic structure doctrine, ruling that although the constitutional amendment power is not an ordinary legislative power but a constituent power, it nevertheless is merely a power granted to Parliament by the Constitution and thus remains limited. Judge B.H. Chowdhury listed twenty-one unamendable basic “unique features” of the Constitution. According to him, since the executive initiates the proposals for laws and the legislature enacts the laws, it is obviously the judiciary that is authorized to declare as void any amendments that contravene the Constitution’s basic features. Judge Shabuddin Ahmed reasoned that the “constituent power,” in the sense of the power to create a Constitution, belongs to the people alone. The constitutional power, which is vested in Parliament, is a “derivative” power, and thus limited. Judge Shabuddin Ahmed listed a number of principles, such as the peoples’ sovereignty, supremacy of the Constitution, democracy, unitary state, separation of powers, fundamental rights, and independence of the judiciary, which he contends are the structural pillars of the Constitution and therefore beyond the reach of the amendment power.²²⁶ The *Kesavananda* judgment certainly reverberates loudly in these words.

This line of reasoning was reaffirmed in *Alam Ara Huq v. Government of Bangladesh*,²²⁷ which involved a challenge to the validity of an order for detention. The Appellate Division held that the constitutional judicial review competence vested in the High Court Division could not be limited or taken away by subsequent constituent legislation.²²⁸ In *Fazle Rabbi v. Election Commission*,²²⁹ the Appellate Division recognized the basic structure doctrine in *obiter dicta*, but held that because reserved seats for women in Parliament had existed in the original Constitution, the Constitution (Tenth Amendment) Act, which extended the tenure of these reservations, cannot violate the “basic structure.”²³⁰ Indeed, the judicial review of

Aug. 26, 2010, pp. 107-14, http://www.thedailystar.net/newDesign/images/text/7th%20Amendment_full%20text_The%20Daily%20Star.pdf.

225. 41 DLR 1989 App. Div. 165.

226. See a summary of the case at *Eighth Amendment Case*, Bangladesh Supreme Court Bar Association website, http://www.bangladeshsupremecourtbar.com/eighth_amendment_case.php.

227. 42 DLR (1990) 98.

228. See M.A. Fazal, *Effectiveness of Ouster Clauses in India*, 25 ANGLO-AM. L. REV. 482, 499 (1996).

229. 44 DLR 14.

230. *Id.*, see also *Dr. Ahmed Hossain v. Bangladesh*, 44 DLR (AD) 109, 110.

constitutional amendments, which may be regarded as judicial activism,²³¹ has developed into an accepted practice in Bangladesh.²³²

3. Pakistan: Implicit Limits with no Judicial Enforcement?

The basic structure doctrine has also reached Pakistan, where it has been widely addressed in the courts under the name of “salient features of the Constitution.”²³³ In the case of *Darvesh M. Arbey v. Federation of Pakistan*, the Pakistan Supreme Court held that “the Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the Constitution,”²³⁴ a statement that was discounted in subsequent cases.²³⁵ In *Al-Jehad Trust v. Federation of Pakistan*,²³⁶ the Supreme Court came close to recognizing a “basic structure” limitation on the amendment power. The subsequent case of *Mahmood Khan Achakzai v. Federation of Pakistan*²³⁷ is considered a landmark in that it incorporates the Indian *Kesavananda* case into Pakistan’s legal system through the Supreme Court’s observations that Pakistan’s Constitution has a basic structure that may not be altered.

In *Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan*,²³⁸ it was claimed that an amendment to the Constitution was void since it violated the basic structure of the Constitution. Chief Justice Ajmal Mian noted that, despite *Achakzai*, Pakistan’s courts had not accepted the basic structure doctrine, while Justice Akhtar left its applicability open. Eventually, the Supreme Court declined to decide the issue, holding that even if the doctrine was recognized in Pakistan, the amendment under review did not violate it. It seems, however, that the Supreme Court adopted the basic structure doctrine’s path of reasoning without “calling the child by its name:”

[W]e may observe that in Pakistan instead of adopting the basic structure theory or declaring a provision of the Constitution as ultra vires to any of the Fundamental Rights, this Court has pressed into service the rule of interpretation that if there is a conflict between two provisions of the Constitution which is not reconcilable, the provision which contains

231. See RIDWANUL HOQUE, *JUDICIAL ACTIVISM IN BANGLADESH: A GOLDEN MEAN APPROACH* ch. 4 (2011).

232. See also *Mashihur Rahman v. Bangladesh*, 1997 BLD 55; Talukder, Chowdhury, *supra* note 224.

233. See generally PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 237-45 (2002); MARTIN LAU, *THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN* 81-88 (2006); Conrad 2003, *supra* note 215, at 191-92.

234. PLD 1980 Lah. 846, *quoted in* LAU, *id.* at 82.

235. See, e.g., *Fouji Foundation and another v. Shamimur Rehman*, PLD 1983 SC 457; *Pir Sabir Shah v. Federation of Pakistan*, PLD 1994 SC 738.

236. PLD 1996 SC 324, 367.

237. PLD 1997 SC 426, 458, 479-80. See LAU, *supra* note 233, at 81-85.

238. PLD 1998 SC 1263.

lesser rights must yield in favour of a provision which provides higher rights.²³⁹

In other words, it is the judiciary's inherent obligation to make every effort to preserve the Constitution's basic structure. It is important to note that the dissenting judge, Justice Raja Afrasiab Khan, upheld the basic structure doctrine in such a way that the Islamic character of the state and the constitutional basic rights could not be repealed by Parliament.²⁴⁰ Similarly, Justice Mamoon Kazi asserted that the basic structure doctrine exists in Pakistan, noting that the Court, as the guardian of the Constitution, has a right to declare constitutional amendments that violate the basic structure of the Constitution or fundamental rights as void.²⁴¹

In *Syed Masroor Ahsan and others v. Ardeshir Cowasjee and others*,²⁴² the Supreme Court observed that the “[j]udiciary enjoys ultimate authority of judicial review, when Parliament at any stage endeavours to transgress its limit by infringing upon the jurisdiction of other organs and thereby affecting the ground norms, the basic structure or broad features of objective resolution.”²⁴³ In the Supreme Court's ruling in the *Zafar Ali Shah v Pervez Musharraf*²⁴⁴ case, the Court approved General Musharraf's military coup on the basis of the doctrine of state necessity.²⁴⁵ Nevertheless, in the operative part of its order, the Court emphasized: “That no amendment shall be made in the salient features of the Constitution i.e., independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions.”²⁴⁶

Despite these statements, the Supreme Court did not invalidate any amendment, yet it appeared to accept the idea of implicit limits in the form of “salient features.” The Supreme Court seems to draw a distinction between implicit limits on the amending power in the form of “salient features” and the judicial enforcement of these limits.

239. *Id.* at 1313.

240. *Id.* at 1423.

241. *Id.* at 1436.

242. PLD 1998 SC 823.

243. *See id.*, at 1252, <http://pakistanconstitution-law.org/p-l-d-1998-sc-823>.

244. [2000] 52 PLD SC 869.

245. *See* Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35 N.C.J. INT'L L. & COM. REG. 485, 491 (2009-2010).

246. [2000] 52 PLD SC 869, 1221, section 6(iii). *See* Smruti S. Pattanaik, *Pakistan's 'Sustainable Democracy': Army as the Political Architect*, 28(2) STRATEGIC ANALYSIS 272, 277 (2004). On federalism as a salient feature of the constitution, see Umer Akram Chaudhry, *Jurisprudence of a Fledgling Federation: A Critical Analysis of Pakistan's Judicial View on Federalism* (2011). Cornell Law School Inter-University Graduate Student Conference Papers. Paper 50, http://scholarship.law.cornell.edu/lps_clacp/50.

In the *Seventeenth Amendment Case* of 2005,²⁴⁷ the Supreme Court faced a challenge to the Seventeenth Amendment, which, *inter alia*, allowed the President to hold the offices of both President of Pakistan and Chief of Army Staff, exempting General Musharraf from the Constitution's explicit ban on dual offices. The Court limited its scope of judicial review, holding that "an Amendment to the Constitution, unlike any other statute can be challenged only on one ground, *viz.*, it has been enacted in a manner not stipulated by the Constitution itself."²⁴⁸ The Court held that it had no jurisdiction to invalidate the amendment on substantive grounds:²⁴⁹

There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary . . . but by the body politic, *i.e.*, the people of Pakistan.²⁵⁰

The Court concluded this point by ruling that:

No constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the courts. A constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.²⁵¹

Based upon the aforementioned cases and Indian and Bangladeshi jurisprudence, it was argued in a recent case before the Supreme Court that sections of the Eighteenth Amendment concerning appointment of judges violate the independence of the judiciary, one of the salient features of the Constitution, and that the Supreme Court has the power of judicial review of constitutional amendments

247. Judgment on Seventeenth Amendment and President's Uniform Case (2005) [Pakistan Lawyers Forum v. Federation of Pakistan, reported as PLD 2005 SC 719].

248. *Id.* at 27, para. 32.

249. *Id.* at 35, para. 41.

250. *Id.* at 42, para. 56.

251. *Id.* at 42-43, para. 57.

if the basic features or the core values have been tinkered with.²⁵² In response, it was argued that the concept of basic structure as a touchstone to strike down a constitutional provision is alien to Pakistani jurisprudence.²⁵³ The Supreme Court admitted the petition; however, it decided in its order not to express its opinion on the merits of the issues raised at this stage, but to refer the matter first to Parliament for reconsideration in light of the concerns expressed and the suggestions made in the order, holding that thereafter the Court would decide all of the issues raised.²⁵⁴ It thus remains to be seen whether the Supreme Court will override three decades of jurisprudence and precedents according to which even if the amending power is limited by “salient features” of the Constitution, it is not the role of the judiciary to decide whether a certain amendment impinges on these limits or not, thus turning the “salient features” almost into “silent features.” This is especially intriguing in light of the judicial independence and activism that the Supreme Court has demonstrated in its post-Musharraf era and since the restoration of Chief Justice Chaudhry in 2009 after his 2007 suspension.²⁵⁵

F. The Rejection of the Indian Doctrine in Malaysia, Singapore & Sri Lanka

Nations such as Malaysia, Indonesia, Tanzania, and India’s neighbors regularly refer to Indian judgments. In certain states, however, the Indian basic structure doctrine, while migrating into the constitutional debate, faced difficulties in “crossing the borders” and was rejected on various grounds. Rejection is sometimes more important to the story of an idea’s migration than reception, for often it reveals a good deal about the country. The migration of a constitutional idea involves not only the acceptance of a doctrine, but also the adoption of a legal theory—which may reject that constitutional doctrine because the two are at odds. Even rejection can migrate between jurisdictions, as is the case with the Indian doctrine.

In Sri Lanka, the Supreme Court dealt with the question of whether the constitutional amendment power is limited with regard to the Thirteenth Amendment. Relying on decisions of the Supreme Court of India, it was argued that the scope of amendment power is

252. Constitution Petitions No. 11-15, 18-22, 24, 31, 35, 36, 37 & 39-44/2010, Nadeem Ahmed and others v. Federation of Pakistan and others 9-10 (order delivered on Oct. 21, 2010), http://www.supremecourt.gov.pk/web/user_files/File/18th_amendment_order.pdf.

253. *Id.* at 10.

254. *Id.* at 11-15.

255. See generally Mohammad Waseem, *Judging Democracy in Pakistan: Conflict between the Executive and Judiciary*, 20(1) CONTEMPORARY SOUTH ASIA 19 (2012). Apparently, Chief Justice Chaudhry was forced to resign for being “overly independent” and “unreliable” from the government’s point of view. See RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 99 (2010).

limited and that there are certain basic features of the Constitution that cannot be altered, even if compliant with the amendment process. The Supreme Court rejected this argument based upon the wording of the Constitutions of 1972 and 1978, which expressly provide for the amendment or repeal of any provision of the Constitution or for the repeal of the entire Constitution. The Supreme Court held that due to the exhaustive language that allows the repeal of any provisions, there is no basis for the contention that some provisions of the Constitution are unamendable, and therefore, it would be improper to apply the Indian basic structure in Sri Lanka.²⁵⁶

The Indian basic structure doctrine was also presented in Malaysia in several cases. However, in what seemed to many an abandonment of its responsibility to guard constitutional rights,²⁵⁷ the Malaysian Federal Court rejected the Indian doctrine, granting Parliament the right to amend the Constitution without material constraints.²⁵⁸ In the *Loh Kooi Choon* case, Justice Raja Azlan directly referenced *Kesavananda* and contended that, in contrast with Indian jurisprudence, any provisions of the Malaysian Constitution could be amended.²⁵⁹ Although counsel in the case of *Phang Chin Hock*²⁶⁰ cited *Kesavananda* to claim that an amendment cannot destroy the basic doctrine of the Constitution, the Federal Court held that the basic structure doctrine does not apply in Malaysia because of the differences between the Indian and Malaysian Constitutions; these were mainly historical differences and the fact that in contrast with the Indian Constitution, the Malaysian Constitution has no preamble.²⁶¹

The basic structure doctrine also migrated into Singapore's legal discourse. Following the Malaysian cases, however, its application was rejected. In the case of *Teo Soh Lung v. Minister for Home Affairs*,²⁶² constitutional amendments that established the non-judiciability of detaining persons without a trial on security grounds

256. *In Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* 1999 LRC 1 (Const), http://www.lawnet.lk/docs/case_law/slr/HTML/1987SLR2V312.htm.

257. *Constitutional Court Judges' Roundtable: Comparative Constitutionalism in Practice*, 3 INT'L J. CONST. L. 543, 564 (2005).

258. See *Government of the State of Kelantan v. Government of the Federation of Malaya and Anor* (1963) MLJ 355; *Loh Kooi Choon v. Government of Malaysia* (1977) 2 MLJ 187; *Phang Chin Hock v. PP* (1980) 1 MLJ 70; see Ravneet Kaur, *The Basic Features Doctrine and the Elected President Act*, 15 SING. L. REV. 244, 248 (1994); Andrew J. Harding, *The Death of a Doctrine*, 21 MAL. L. REV. 365, 368 (1979) [hereinafter Harding 1979]; Andrew Harding, *The Constitutional Amendment Process in Malaysia*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 9, at 250, 255-57.

259. *Loh Kooi Choon v. Government of Malaysia*, *id.*; see Harding 1979, *supra* note 258, at 369.

260. *Phang Chin Hock v. PP*, *supra* note 258.

261. See Harding 1979, *supra* note 258, at 371.

262. (1989) 2 M.L.J. 449, 456-7.

were contested. Relying on Indian jurisprudence, counsel argued that Parliament's constitutional amendment power was limited by implied limitations deriving from the Constitution's basic structure.²⁶³ The Supreme Court rejected this argument. Justice Chua, writing for the majority, reasoned that as an amendment is part of the Constitution itself, it could never be invalid if it was enacted in compliance with the amendment procedure. Had the Constitution's framers intended to prohibit certain amendments, one could reasonably expect them to have included a provision to that effect. Furthermore, the reasoning continued, if the courts were allowed to impose limitations on the amendment power, they would be usurping Parliament's legislative function.²⁶⁴

In rejecting the application of the basic structure doctrine, Justice Chua specifically drew upon arguments from both Indian and Malaysian judicial opinions. Justice Chua cited Justice Ray's dissent in *Kesavananda* to support the premise that "fundamental or basic principles can be changed," as well as Justice Raja Azlan Shah's majority opinion in the Malaysian case of *Loh Kooi Choon* that "a constitution has to work not only in the environment in which it was drafted but also centuries later."²⁶⁵ Justice Chua also relied on the Malaysian case of *Phang Chin Hock*, claiming that the application of the basic structure doctrine in Singapore should be rejected considering the differences between the Constitutions of India and Singapore—mainly the different processes in which the Constitutions were formulated and the lack of a preamble in Singapore's Constitution.²⁶⁶ The doctrine was subsequently rejected in another case.²⁶⁷

Therefore, it seems that while the idea of basic structure limitations on the amendment power migrated from India to its neighboring states, it is the rejection of the doctrine—and the legal reasoning in support of rejection—that migrated from Malaysia to Singapore.

G. *Limited Amendment Power in Indonesia, Thailand, Cambodia, China, South Korea, Japan, and Taiwan*

Limits on the amendment power emerged in other parts of Asia. In Indonesia, according to Article 37(5) of the Constitution of 1945, "Provisions relating to the form of the unitary state of the Republic of Indonesia may not be amended." The original amendment procedure, however, did not include such a limitation; it was inserted by subse-

263. *Id.* at 471, 474–75.

264. *Id.* at 456–57; see also L.R. Penna, *The Diceyan Perspective of Supremacy and the Constitution of Singapore*, 32 MAL. L. REV. 207 (1990); Kaur, *supra* note 258, at 248–50.

265. (1977) 2 MLJ 187, 189, *cited in* Kaur, *supra* note 258, at 250.

266. (1989) 2 MLJ 449, 457.

267. *Vincen Cheng v. Minister for Home Affairs* (1990) 1 MLJ 449.

quent amendments.²⁶⁸ In Cambodia, according to Article 7 of the Constitution of 1993: “Cambodia’s King reigns but does not wield power.” This provision is absolute and cannot be amended (Article 17).²⁶⁹ In Thailand, Section 313 of the 2007 Constitution stipulates: “A motion for amendment which has the effect of changing the democratic regime of government with the King as Head of State or changing the form of the State shall be prohibited.”²⁷⁰ In a recent decision of July 2012, the Thai Constitutional Court declared that it has jurisdiction to review amendments to the Constitution, ruling that a re-write of the entire Constitution is impossible by way of constitutional amendments. Amendments can only amend certain articles but not the whole Constitution. Such an act would require a national referendum.²⁷¹

A variation of the basic structure doctrine has also reached South Korea, Japan, China, and Taiwan. Although the Constitution of South Korea does not explicitly include any substantive limits on constitutional amendments,²⁷² it is commonly accepted that the constitutional amendment power is substantially limited.²⁷³ In the same vein, the Japanese Constitution is built upon three basic principles: popular sovereignty, the guarantee of fundamental human rights, and pacifism.²⁷⁴ Although the Constitution does not contain any provision prohibiting amendments, most scholars believe that these basic principles cannot be altered through the process of constitutional amendments.²⁷⁵ Likewise, in China, Article 1 of the

268. See Tim Lindsey, *Indonesian Constitutional Reform: Muddling towards Democracy*, 6 SING. J. INT’L & COMP. L. 244, 278, 300 (2002).

269. See Stephen P. Marks, *The New Cambodian Constitution: From Civil War to a Fragile Democracy*, 26 COLUM. HUM. RTS. L. REV. 45, 66-67 (1994-1995).

270. Andrew Harding, *May There Be Virtue: ‘New Asian Constitutionalism’ in Thailand*, 3 ASIAN L. 236, 256 (2001).

271. See Nophakhun Limsamarnphun, *Court Delivers Compromise Decision on Charter Change*, THE NATION (July 14, 2012), <http://www.nationmultimedia.com/opinion/Court-delivers-compromise-decision-on-charter-chan-30186143.html>; Suthichai Yoon, *Constitutions Court’s Ruling: A New Stalemate of Ambiguities*, THE NATION (July 19, 2012), <http://www.nationmultimedia.com/opinion/Constitution-Courts-ruling-A-new-stalemate-of-ambi-30186450.html>; Constance Johnson, *Thailand: Court Rules on Draft Constitutional Amendment*, THE LAW LIBRARY OF CONGRESS (Aug. 7, 2012), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_1205403270_text.

272. See generally Dae-Kyu Yoon, *Constitutional Amendment in Korea*, 16 KOREAN J. COMP. L. 1 (1998).

273. Dante B. Gatmaytan, *Can Constitutionalism Constrain Constitutional Change?* 3(1) N.I.L.R. 22, 25 (2010). On the Constitutional Court in Korea, see generally Jonghyun Park, *The Judicialization of Politics in Korea*, 10 APLPJ 62 (2008-2009).

274. John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, LAW & CONTEMP. PROBS. 53, 73 (1990).

275. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 144 (1998); for a useful review of this notion, see Noriko Ofuji, *Tradition constitutionnelle et supra-constitutionnalité: y a-t-il une limite à la révision constitutionnelle? L'exemple de la Constitution japonaise*, 59 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 619 (2004).

Constitution of 1923 stipulated that, “The Republic of China shall be a unified republic forever” and had an explicit limitation according to which “[t]he form of government shall not be a subject for amendment” (Article 138). The Constitution of 1982 does not include any explicit limitation. Nevertheless, a number of scholars in China believe that some implied principles limit the constitutional amendment power.²⁷⁶

Whereas the courts in the aforementioned countries have not (yet) accepted as doctrine scholars’ calls for recognizing implicit limits, the idea of implicit limitations on the amendment power has been judicially recognized in Taiwan. The Taiwanese Constitution established a special body, the Grand Justices, as the head of the judiciary (Article 79II). The Grand Justices have special competence to “interpret” the Constitution (Article 78).²⁷⁷

On September 4, 1999, the Third National Assembly, afraid of being abolished, ratified a Fifth Amendment to the Constitution (in a secret ballot), which provides that the Fourth National Assembly shall be appointed from the various political parties according to the ratio of votes each party received in the corresponding Legislative Yuan election. In other words, the amendment turned the National Assembly into an unelected body. The amendment also extended the National Assembly term by two additional years. This was challenged by a group of Legislative Yuan lawmakers as inconsistent with Article 25 of the Constitution, which requires the Assembly to exercise its powers “on behalf of all citizens of the nation.”²⁷⁸ On March 24, 2000, the Council of Grand Justices announced Interpretation No. 499, which declared the constitutional amendment unconstitutional on the grounds that it violated certain basic constitutional principles.²⁷⁹ The Council of Grand Justices stated:

Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and,

276. See Wang Liangliang, *Limits on the Power to Revise A Constitution*, in *STUDY ON THE WORLDWIDE CONSTITUTIONAL LAWS VOL. I* 38, 48 (Mo Jihong ed., 2007).

277. Thilo Tetzlaff, *Kelsen’s Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan*, 1(2) *NTU L. REV.* 75, 95 (2006).

278. See Eric C. Ip, *Constitutional Review as Political Investment: Evidence from Singapore and Taiwan*, (Political Economy Working Paper No. 2, Oct. 2011). For a history of constitutional revisions in Taiwan, see Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan, 1945-2000*, in *TAIWAN’S MODERNIZATION IN GLOBAL PERSPECTIVE* 47, 55-58 (2001).

279. See J. Y. Interpretation No. 499 (2000/03/24); English text, http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=499. See also Jiunn-Rong Yeh, *Opening Remarks of the Asian Constitutions in Comparative Perspectives Roundtable*, 4(1) *NATIONAL TAIWAN UNIVERSITY L. REV.* 187, 188 (2009); CHANG-FA LO, *THE LEGAL CULTURE AND SYSTEM OF TAIWAN* 29, 31 (2006).

hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a whole.²⁸⁰

In its decision, the Constitutional Court cites the Turkish and German Constitutional Court's jurisprudence regarding judicial review of constitutional amendments.²⁸¹ The Court was especially interested in the Italian Constitutional Court's decision recognizing basic constitutional principles as limits to constitutional amendments,²⁸² and worked hard to get it translated from Italian to Chinese.²⁸³ One month after this judgment, the National Assembly re-amended the Constitution accordingly.²⁸⁴ Therefore, by this reasoning, as two commentators claim, "[t]he Grand Justices in Taiwan gradually established their authority and gained trust from the Taiwanese public through their newly established independence."²⁸⁵ In fact, the Court became the most significant organ to safeguard the rule of law in Taiwan.²⁸⁶ It was also argued that these implicit limits imposed by the Court are essential in preserving the democratic constitutional order in Taiwan.²⁸⁷

H. Limited Amendment Power in Africa

Limited amendment power is also familiar to Africa. Certain states include explicit limits on constitutional amendments in their

280. See J. Y. Interpretation No. 499, *id.* at ¶ 2.

281. See John Trone, *German Constitutional Decisions in English Translation: A Supplement*, 11 INT'L TRADE & BUS. L. REV. 299, 302 (2008).

282. Corte Cost., 29 dicembre 1988, n. 1146, Giur. it. 1988, I, 5565 (It.).

283. David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523, 564 (2011).

284. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4(1) N.T.U.L. REV. 145, 170 (2009).

285. Tay-Sheng Wang & I-Hsun Sandy Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 N.T.U. L. REV. 1, 23 (2010). For an analysis of judicial behavior in Taiwan, see Nuno Garoupa et al., *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20(1) PACIFIC RIM LAW & POLICY JOURNAL 1 (2011).

286. Tsung-fu Chen, *The Rule of Law, in TAIWAN, THE RULE OF LAW: PERSPECTIVE FROM THE PACIFIC RIM* 107, 111 (2000).

287. See Wu Sheng-Wen, *Popular Sovereignty and Limitations on Constitutional Amendments—Dissertate from Constitutional Interpretation No. 499 of the Grand Justices, Judicial Yuan* (Graduate Institution of Political Science, National Sun Yat-Sen University, May 2005).

constitutions.²⁸⁸ Again, the influence of the French and Portuguese origins is evident, as those countries tend to be francophone²⁸⁹ and lusophone²⁹⁰ states, with a few anglophone exceptions.²⁹¹ Others have incorporated, or are in the process of doing so, some version of the basic structure doctrine.

1. The Doctrine Arrives in South Africa

The Indian basic structure doctrine was highly influential in South Africa as both countries share significant historical links: India was a great source of inspiration for the drafting of the South African Constitution, and South African judges have been influenced profoundly by Indian judgments. Former South African Constitutional Court judge, Albie Sachs, wearing his academic hat, notes:

We look to the Indian Supreme Court which had a brilliant period of judicial activism when a certain section of the Indian intelligentsia felt let down by Parliament. They were demoralized by the failure of Parliament to fulfill the promise of the Constitution, by the corruption of government, by the authoritarian rule that was practiced so often at that time. Some of the judges felt the courts must do something to rescue the promise of the Constitution, and through a very active and ingenious interpretation bringing different clauses together they gave millions of people the chance to feel “we are people in our country, we have constitutional rights, we can approach the courts”²⁹²

Despite the positive remarks of the South African Constitutional Court with regard to Indian jurisprudence, the Indian basic structure doctrine has not been formally accepted as a fundamental element of South African constitutionalism.²⁹³ The issue extends back to the in-

288. See, e.g., Cameroon, 1972 (art. 63); the Democratic Republic of Congo, 2006 (art. 220); see Charles M. Fombad, *Limits on the Power to Amend Constitutions: Recent Trends in Africa and Their Potential Impact on Constitutionalism*, 6 U. BOTSWANA L.J. 27, 34-51 (2007).

289. Algeria, 1989 (art. 178); Burkina Faso, 1991 (art. 165); Chad, 1996 (art. 223), 2006 (art. 124); Gabon, 1991 (art. 117); Mali, 1992 (art. 118); Morocco, 1992 (art. 100); Senegal, 2001 (art. 103).

290. Equatorial Guinea, 1991 (art. 104); Mozambique, 2004 (art. 292); Angola, 1975 (art. 159), 2010 (art. 236); Burundi, 2005 (art. 299).

291. Namibia, 1990 (art. 131).

292. Albie Sachs, *Making Rights Work: The South African Experience*, in MAKING RIGHTS WORK 1, 10 (Penny Smith ed., 1999).

293. See generally Avinash Govindjee & Rosaan Kruger, *The Basic Structure Doctrine Debate: South African Explorations*, in BASIC STRUCTURE CONSTITUTIONALISM-REVISITING KESAVANANDA BHARATI (Sanjay S. Jain & Sathya Narayan eds., 2011) (on file with author); G.E. Devenish, *A Jurisprudential Assessment of the Process of Constitutional Amendment and the Basic Structure Doctrine in South African Constitutional Law*, 68(2) TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 243 (2005).

terim Constitution of 1993. In the case of *Premier of KwaZulu-Natal v. President of the Republic of South Africa*,²⁹⁴ Mahomed DP, in a judgment in which all the members of the Court concurred, declared:

There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an “amendment” at all.²⁹⁵

In contemplating whether an extreme amendment that would effectively abolish democracy could be deemed an “amendment” at all, it seems that the Court followed the line of reasoning in the Indian basic structure argument.²⁹⁶ Indeed, Mahomed DP specifically referred to the Indian Supreme Court’s jurisprudence in his judgment.²⁹⁷ This led Andrew Henderson to remark that “The court left open the possibility that it may subsequently incorporate a basic-structure doctrine into South African law . . .”²⁹⁸ In *Executive Council of the Western Cape Legislature v. President of the Republic*,²⁹⁹ Justice Sachs noted:

There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life—the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor,

294. 1996 (1) SA 769 (CC), 1995 (12) BCLR 1561 (CC).

295. *Id.* at para. 47.

296. See DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW* 236 (2010).

297. See *KwaZulu-Natal case*, *supra* note 294, at paras. 47-48; Devenish, *supra* note 293, at 248-49.

298. See Andrew J.H. Henderson, *Cry, the Beloved Constitution: Constitutional Amendment, the Vanished Imperative of the Constitutional Principles and the Controlling Values of Section 1*, 114 S. AFRICAN L.J. 542, 553 (1997).

299. 1995 10 BCLR 1289 (CC).

to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution.³⁰⁰

In South Africa, the notion that certain principles are fundamental received interesting treatment during the establishment of the new Constitution. The interim Constitution entrusted the constitutional assembly with constituent power within a framework of thirty-four agreed-upon principles. These pre-established principles ensure that political parties publicly pledge themselves to a definite vision, clarifying the direction of the constitutional process.³⁰¹ The Constitutional Court of South Africa was empowered to review the Constitution draft's compliance with those principles. In its review, the Constitutional Court declared that although the Constitution established democratic institutions and protected human rights, it failed to comply with certain agreed-upon principles, and was therefore unconstitutional.³⁰² Only after the draft's amendment did the Constitutional Court declare that the new Constitution complied with the principles.³⁰³ Against that background, the entire notion of unconstitutional constitutional norms should not come as a surprise. As Heinz Klug remarks regarding the Certification of the Constitution case:

Significantly, at least two Justices of the Constitutional Court have made reference to the notion of the basic structure of the Constitution used by the Indian Supreme Court in its jurisprudence striking down validly enacted Constitutional Amendments. To this extent the Constitutional Assembly and the Court have left open the future of the Court's role in the formal constitution-making or amending process under the final Constitution.³⁰⁴

In line with Klug's conclusion, the Court has continued to leave this issue open. In a later case in 2002, *United Democratic Movement v. President of the Republic of South Africa and Others*,³⁰⁵ the Consti-

300. *Id.* at para. 204; cited in Devenish, *supra* note 293, at 249; see also Govindjee & Kruger, *supra* note 293.

301. Sam Brooke, *Constitution-Making and Immutable Principles* 3-10 (Thesis, M.A. in Law and Diplomacy, The Fletcher School, Tufts University, 2005).

302. *Re Certification of the Constitution of the Republic of South-Africa*, 1996(4) SALR 744; see Brooke, *id.* at 14, 16-22; Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power*, 41 ST. LOUIS U. L.J. 1249 (1996-1997).

303. *Re Certification of the Amended Text of the Constitution of the Republic of South-Africa* 1997(2) SALR 97 (CC), in Brooke, *supra* note 301, at 23-24.

304. Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. ON HUM. RTS. 185, 202 (1997).

305. (11) BCLR 1179 (Oct. 4, 2002), <http://www.saflii.org/za/cases/ZACC/2002/21.pdf>; see also Devenish, *supra* note 293, at 249-50.

tutional Court assumed for the sake of argument that the basic structure doctrine applies to the South African Constitution, but then found that no basic feature was violated. Consequently, the precise status of the basic structure doctrine in South Africa remains ambiguous.³⁰⁶

2. Zambia, Kenya, Zimbabwe, Tanzania, and Malawi

In the rest of Africa, the case law concerning the judicial review of constitutional amendments is sparse.³⁰⁷

In Zambia, the introduction of a one-party state by way of a constitutional amendment was challenged in *Henry Nkumbula v. Attorney-General of Zambia*³⁰⁸ on the basis that it would infringe upon fundamental rights. The High Court held that although the amendment would limit freedom of assembly and association, it is the government's legal right to amend the Constitution, including the protection of rights for any purpose provided that it follows the amendment procedure.

In Kenya, the High Court was confronted in 1991 with the question of whether the constitutional amendment power is limited while reviewing an amendment that transformed Kenya into a one-party state. The High Court held that the constitutional amendment was valid.³⁰⁹ During the constitution-making process in Kenya in 2004, the High Court in the case of *Njoya v. Attorney General*³¹⁰ rejected the claim that the amendment power includes the power to make changes that amount to the replacement of the Constitution: "To my mind," Judge Ringera stated, "the [amendment] provision plainly means that Parliament may amend, repeal and replace as many provisions as desired provided the document retains its character as the existing Constitution," and that "alteration of the Constitution does not involve the substitution thereof with a new one or the destruction

306. See G.E. Devenish, *Political Musical Chairs: The Saga of Floor-Crossing and the Constitution*, 15 STELLENBOSCH L. REV. 52, 55-56 (2004). For a review of constitutional amendments in South Africa, see Hugh Corder, *The Republic of South Africa, in HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY*, *supra* note 174, at 261.

307. See Githu Muigai, *Towards a Theory of Constitutional Amendment*, 1 E. AFRICAN J. HUM. RTS. & DEMOCRACY 1, 7-8 (2003).

308. (1972) Z.L.R. 204, 215 (Zambia). See also H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80(4) TUL. L. REV. 1, 17 (2006); H. Kwasi Prempeh, *Neither "timorous souls" nor "bold spirits": Courts and the Politics of Judicial Review in Post-Colonial Africa*, 45(2) VERFASSUNG UND RECHT IN ÜBERSEE 157, 162-63 (2012).

309. See *Gitobu Imanyara v. Attorney General*, Misc. Civil Application Number 7 of 1991 (unreported); *Salim Damwe and others v. Attorney General*, HCCC 253 of 1991 (unreported); both cited in Muigai, *supra* note 307, at 7.

310. *Njoya & Others v. Attorney General & Others*, [2004] LLR 4788 (HCK), High Court of Kenya at Nairobi, Mar. 25, 2004, available at <http://www.chr.up.ac.za/index.php/browse-by-subject/336-kenya-njoya-and-others-v-attorney-general-and-others-2004-ahrlr-157-keh-2004-.html>.

of the identity or existence of the Constitution altered.”³¹¹ Based on the Indian “basic structure” doctrine, the Court held that fundamental constitutional change could solely be made by the exercise of original constituent power.³¹²

In Zimbabwe, the amendment procedure is weak, as the dominant political party can easily achieve the required majority for amendments.³¹³ At the opening of the High Court in 1991, Chief Justice Anthony R. Gubbay, in what seemed to some as “preparing the ground to adopt the basic structure doctrine,”³¹⁴ asserted that certain basic principles enshrined in the Declaration of Rights are not subject to curtailment.³¹⁵ He repeated this view years later in an academic article where, based on the Indian basic structure doctrine, he argued that “There are certain immutable, fundamental aspects of a constitution that cannot, and may not, be altered under any circumstances whatsoever, no matter how express the purported amendment.”³¹⁶

In Tanzania, the basic structure doctrine was at first adopted in 2006 in *Christopher Mtikila v. The Attorney General Respondent*.³¹⁷ The case concerned a constitutional amendment that banned the participation of no-party candidates in the general elections. The High Court of Tanzania while acknowledging that “it may of course sound

311. *Id.* at paras. 59-60.

312. *Id.* at para. 61. See also Kithure Kindiki, *The Emerging Jurisprudence on Kenya's Constitutional Review Law*, 1 KENYA L. REV. 153, 169-70 (2007); Richard Stacey, *Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's 'Constitution-Making Process'*, 9(3-4) INT'L J. CONST. L. 589, 603-06 (2011); Laurence Juma, Chuku Okpaluba, *Judicial Intervention in Kenya's Constitutional Review Process*, 11 WASH. UNIV. GLOB. STUD. L. REV. 287, 305-18, 336-37 (2012).

313. See John Hatchard, *Establishing Popular and Durable National Constitutions in Commonwealth Africa*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 9, at 1, 19.

314. JOHN HATCHARD, MUNA NDULO & PETER SLINN, *COMPARATIVE CONSTITUTIONALISM AND GOOD GOVERNANCE IN THE COMMONWEALTH: AN EASTERN AND SOUTHERN AFRICAN PERSPECTIVE* 43, 55 (2004).

315. *Id.* at 55; John Hatchard, *The Constitution of Zimbabwe: Towards a Model for Africa?* 35 J. AFR. L. 79, 96 (1991).

316. Anthony R. Gubbay, *The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience*, 19(2) HUMAN RIGHTS QUARTERLY 227, 252 (1997). See also A.R. Gubbay, *The Role of the Courts in Zimbabwe in Implementing Human Rights, with Special Reference to the Application of International Human Rights Norms*, in 8 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 52 (2001), stating that if the “structural pillars of the Constitution are damaged or destroyed the whole constitutional edifice will crumble. Therefore it is the duty and function of the judiciary to protect the Constitution against such damage.” *cited in* HATCHARD, NDULO & SLINN, *supra* note 314, at 55 n.55; *But see* Alison Van Horn, *Redefining 'Property': The Constitutional Battle Over Land Redistribution in Zimbabwe*, 38 J. AFR. L. 144, 154-60 (1994) (arguing that the “basic structure doctrine” is unsuitable for Zimbabwe, due to the lack of a constitutional preamble or reference to the people’s sovereignty. Moreover, “[i]n an infant nation where the judiciary has yet to establish its legitimacy and the fear of freewheeling judicial activism is excessive, the doctrine is destined to fail; and if pressed, it may be with devastating and destructive consequences for the Supreme Court”).

317. *Mtikila v. Attorney General* (10 of 2005) [2006] TZHC 5 (May 5, 2006), <http://www.saflii.org/tz/cases/TZHC/2006/5.pdf>

odd to the ordinary mind to imagine that the provisions of a constitution may be challenged for being unconstitutional,” declared that “this Court may indeed declare some provisions of the Constitution unconstitutional.”³¹⁸ The High Court, borrowing heavily from the Indian *Kesavananda* case, expressed the proposition that Parliament’s enactment powers are not limitless, citing Professor Issa Shivji’s article “Constitutional Limits of Parliamentary Powers,”³¹⁹ according to which:

[T]he power to amend the Constitution is also limited. While it is true that Parliament acting in Constituent capacity . . . can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution.

The High Court then examined whether the infringement of the fundamental right to join a political party was proportionate. After deciding that the infringement was substantial and unjustified, the court cited Mwalimu Julius K. Nyerere, reiterating that: “this is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications and amendments to all its provisions?”³²⁰ It therefore declared the constitutional amendment to be unconstitutional.³²¹ In the June 2010 appeal of the 2006 decision, however, the Court of Appeal of Tanzania reversed the judgment, holding that Parliament can alter any provision of the Constitution.³²² After noting that the *Kesavananda* case was influenced by the German scholar Dietrich Conrad, the court pointed out that “even Prof. Conrad himself conceded that there is no litmus test as to what constitutes basic structure,” and that this lack of precision carries its own distinct dangers.³²³ By taking a rather formalistic view after examining the Constitutions’ provisions regarding amendment, the Court of Appeal stated that, “there is no Article which cannot be amended. In short there are no basic structures,” and concluded: “It

318. *See id.* at 27-29.

319. Special edition of *THE TANZANIA LAWYER* 34, 39 (Oct. 2003); *id.* at 32.

320. *Mtikila v. Attorney General*, *supra* note 317, at 42-43, *citing* JULIUS KAMBARAGE NYERERE, *OUR LEADERSHIP AND THE DESTINY OF TANZANIA* 9 (1995).

321. *Id.* at 43. For the history of the case, see also Rachel L. Ellett, *Emerging Judicial Power in Transitional Democracies: Malawi, Tanzania and Uganda* 371-74 (A dissertation submitted to The Department of Political Science in partial fulfilment of the requirements for the degree of Doctor of Philosophy in the field of International Affairs and Public Policy, Northeastern University, Boston, Massachusetts, Apr. 2008), http://iris.lib.neu.edu/cgi/viewcontent.cgi?Article=1002&context=pub_int_aff_diss.

322. The Court of Appeal of Tanzania, Civil Appeal No. 45 of 2009, *The Attorney General v. Christopher Mtikila* (June 17, 2010), http://www.kituoachakatiba.org/index2.php?option=com_docman&task=doc_view&gid=655&Itemid=36

323. *Id.* at 57-61.

is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case persuasive, when considering our Constitution.”³²⁴

In Malawi, Section 196(1) of the Constitution provides that Parliament can amend certain provisions by referendum only. According to Section 196(3) of the Constitution, if the bill of amendment is supported by a supermajority, then the requirement for a referendum may be waived as long as the proposed amendment does not “affect the substance or the effect” of the Constitution. It has been argued that while the courts have not actively developed the basic structure doctrine, a close reading of Sections 196 and 197 of the Constitution reveals that: “the Constitution itself incipiently inculcates the ‘basic structure’ doctrine.”³²⁵

I. *From Germany Back to the United States?*

We have seen that in German jurisprudence, the Constitution is regarded as having an integrated structure and a hierarchical scheme of principles, including basic principles of government and human rights, with human dignity at the apex.³²⁶ It seems that this idea is gradually penetrating—or, one might say, returning to—the U.S. constitutional debate in a way that would permit certain amendments to be considered unconstitutional. This trend is evident in the writings of several eminent scholars. For example, and perhaps most notably, Walter Murphy has drawn from German jurisprudence to argue that constitutions in constitutional democracies present not simply a set of values, but rather a hierarchy or ordering of values, and this hierarchical system of values precludes the possibility of adopting an amendment that would infringe upon human dignity.³²⁷ Similarly, Murphy claims elsewhere that the right to privacy is also so deeply embedded in the Constitution that removing it would abro-

324. *Id.* at 61-64.

325. See *The Character of the Legislature Under the Constitution of the Republic of Malawi*, CONSTITUTIONAL REVIEW PROGRAMME DISCUSSION PAPER No. 2, 31, 33 (Malawi Law Commission, 2006), http://www.lawcom.mw/docs/discussion_paper2_legislature_character.pdf.

326. *Supra* note 217.

327. Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 756-57 (1979-1980); see also Walter F. Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 12-14 (1987); Walter F. Murphy, *Consent and Constitutional Change*, in HUMAN RIGHTS AND CONSTITUTIONAL LAW: ESSAYS IN HONOUR OF BRIAN WALSH 123, 141-46 (James O'Reilly ed., 1992); Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 163 (Sanford Levinson ed., 1995); WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 497-529 (2007).

gate the Constitution altogether.³²⁸ By the same token, Stephen Macedo suggests that an amendment denying African-Americans basic civil and political rights should be annulled for its violation of the Constitution's guarantee to equality. An amendment striving to expunge the basic guarantee to a process of free and reasonable self-government and to eliminate fundamental rights and freedoms essential to that process evokes a desire to revolutionize rather than amend.³²⁹ John Rawls defended a similar view, according to which amendments are not intended to disassemble the Constitution's structure or repeal constitutional essentials. For Rawls, the First Amendment is

entrenched in the sense of being validated by long historical practice. They may be amended but not simply repealed and reversed The successful practice of its ideas and principles over two centuries place restrictions on what can now count as an amendment, whatever was true at the beginning.³³⁰

Relating to Rawls' proposal, Samuel Freeman accepts the existence of First Amendment freedoms so basic that their amendment would amount to illegitimate constitutional suicide.³³¹ Even Laurence Tribe, who called for a reserved judiciary role with regard to constitutional amendments,³³² seems willing to embrace the notion that some principles are so fundamental to the constitutional order and so logically central to the system's coherence that they can be regarded as indispensable to the system's legitimacy. More recently, Tribe wrote that some amendments, even harsh ones such as allowing torture in certain circumstances could not be said to be "beyond the pale as a *constitutional* matter if adopted in accordance with Article V," despite being objectionable. This might be seen as a rejection of any implicit limits, but immediately afterwards, Tribe notes that "it may well be that some properly adopted formal amendments could themselves be deemed 'unconstitutional' because of their radical departure from premises too deeply embedded to be repudi-

328. Walter Murphy, *The Right to Privacy and Legitimate Constitutional Change*, in *THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES* 213 (Shlomo Slonim ed., 1990).

329. STEPHEN MACEDO, *LIBERAL VIRTUE: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 183 (1990).

330. JOHN RAWLS, *POLITICAL LIBERALISM* 238-39 (1993). See further Charles A. Kelsey, *Are There Limits To Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendment, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487, 1503-06 (2003-2004).

331. Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 *CHI. KENT L. REV.* 619, 663 (1994).

332. Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 *HARV. L. REV.* 433 (1983).

ated without a full-blown revolution.”³³³ Tribe cites amendments repealing the “republican” form of government or repudiating the rule of law as examples of radical amendments that might be deemed void.

Regardless of other disagreements, these leading constitutionalist and liberal political philosophers seem to share with Carl Schmitt at least the essential notion of substantive limits to constitutional amendment.³³⁴ The issue of whether some core elements ought to be immune from amendment is thus at the heart of the American constitutional debate.³³⁵ Therefore, while we began our story with scholars arguing in favor of a limited amendment power in the United States, we close our circle with similar observations.

III. CONCLUDING REMARKS

The *tour d’horizon* conducted in this Article (a method of comparative law at a high level of abstraction³³⁶) identifies a trend: the process of the migration—and acceptance (with some exceptions)—of the constitutional idea of limitations on amendment power.³³⁷ This idea, which finds its philosophical origins in the American and French Revolutions, flourished in Latin America in the nineteenth century, was further developed in German jurisprudence in the early years of the twentieth century, and eventually found its way to virtually every continent after the Second World War. Indeed, “constitutional ideas are on the move.”³³⁸

What, then, is the global trend in curtailing the constitutional amendment power? The idea of a limited amendment power has manifested itself in two important developments: the first is the

333. LAURANCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 33-34 (2008).

334. For a comparison between Schmitt and Rawls on this point, see Joel Colón-Ríos, *The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform*, 48 *OSGOODE HALL L. J.* 199, 221-28 (2010); JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM—DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 127-32 (2012).

335. See, e.g., Miriam Galston, *Theocracy in America: Should Core First Amendment Values be Permanent?*, 37 *HASTINGS CONST. L.Q.* 65 (2009-2010); John R. Vile, *The Case against Implicit Limits on the Constitutional Amending Process*, in *RESPONDING TO IMPERFECTION*, *supra* note 327, at 191.

336. See Otto Pfersmann, *Ontological and Epistemological Complexity in Comparative Constitutional Law*, in *NEW DIRECTIONS IN COMPARATIVE LAW* 81, 85 (Antonina Bakardjieva Engelbrekt & Joakim Nergelius eds., 2009).

337. The migration of constitutional ideas describes: “all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.” See Neil Walker, *The Migration of Constitutional Ideas and the Migration of the Constitutional Idea: The Case of the EU*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS*, *supra* note 12, at 320-21.

338. Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 *CONN. L. REV.* 907 (2004-2005).

acknowledgment by constitution-drafters or courts that certain constitutional principles are “unamendable,” i.e., their amendment is prohibited. As Dlamini contends, “it is clear that the international trend is moving towards accepting the Basic Structure doctrine”³³⁹—implicitly through judge-made laws or explicitly through constitutional provisions that are deemed unamendable. This process is theory-driven,³⁴⁰ in the sense that underlining this development there is a theory of “supra-constitutional” basic constitutional principles.³⁴¹ Carlo Fusaro and Dawn Oliver were correct in arguing that:

every constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity: this explains the tendency in many constitutional arrangements to identify a set of supraconstitutional provisions which the constitution’s text itself, or even more frequently the courts (by induction), state cannot be amended or suppressed.³⁴²

Studying the migration of the idea of limits to constitutional amendments teaches us important lessons regarding these “supra-constitutional principles.” While there is a common concept of certain basic constitutional principles that are deemed “unamendable,” not everybody has the same principles in mind. One can identify at least two kinds of protected principles: universal and particular. “Universal” does not mean that these principles are common to all constitutions, but that they are common to all modern democratic societies, such as the democratic nature of the state, human dignity of the individual, and the rule of law. Others, such as federalism, official language, and a state’s religion might be regarded as “particular” since they reflect the specific ideals and values of a distinct political

339. Qhubokuhle Dlamini, *Separation of Powers and Judicial independence: Is Zuma Government Overriding the Power of our Courts to Achieve Transformation*, CENTRE FOR CIVIL SOCIETY 1, 10 (2009), <http://ccs.ukzn.ac.za/files/Ukwabelana%20amandla3.pdf>. See also Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in JUDICIAL ACTIVISM IN INDIA—A Festschrift in Honour of Justice V. R. Krishna Iyer 240 (Malik Lokendra ed., 2012).

340. On theory-driven methodology in comparative law, see generally Maurice Adams & Jacco Bomhoff, *Comparing Law: Practice and Theory*, in PRACTICE AND THEORY IN COMPARATIVE LAW 1, 7-8 (Maurice Adams & Jacco Bomhoff eds., 2012).

341. The term “supra-constitutional” may be misleading in this context. The term supra-constitutional often refers to those principles or values which might be placed “above” the domestic constitutional order and outside it (such as natural or supranational law). But these explicit and implicit principles which limit the amending power stream from within the constitution. Therefore, perhaps a better term is “internal supra-constitutional” principles. See Favoreu, *supra* note 111, at 74–76 (1993); Roznai, *supra* note 124.

342. Carlo Fusaro & Dawn Oliver, *Towards a Theory of Constitutional Change*, in HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY, *supra* note 174, at 405, 428.

culture.³⁴³ For this reason, unamendable basic principles are strongly related to a nation's "constitutional identity."³⁴⁴

The second development is the judicial review of constitutional amendments that *prima facie* contravene the limits that were imposed upon the amendment power. In 1921, Edouard Lambert published a book entitled "*Le Gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis.*"³⁴⁵ In it he argued that "through the techniques of common law judging, statutory construction, and a substantive jurisprudence which elevated individualism above social values, judicial review could and would extend to nullification of constitutional amendments."³⁴⁶ At that time, the threat that judges could nullify a constitutional amendment stupefied French readers.³⁴⁷ In his book, *Constitutional Theory* (1928), Carl Schmitt argued that Lambert's core thought is correct and "will sooner or later show its practical significance."³⁴⁸ It seems that both predictions were spot on. Today, judicial review—and even the annulment—of constitutional amendments, i.e., the phenomenon of "unconstitutional constitutional amendments," is no longer merely a theoretical hypothesis, but rather an existing practice in many jurisdictions. Nevertheless, as we have seen, the identification of certain principles as "unamendable" does not necessarily imply judicial review of constitutional amendments. Some courts acknowledge that even if the amendment power is implicitly or explicitly limited, it is not their role to enforce these limits (see, for example, Pakistan and France). Other courts even reject the entire notion of implicit limits, claiming that the amending power is unlimited in the absence of any explicit limits (Malaysia, Singapore, and Sri Lanka).³⁴⁹ Such a rejection is important to the understanding of the migration of constitutional ideas: "if comparative law aims to understand the interaction between constitutional systems, then instances of rejection of foreign norms are presumably just as relevant as when such norms are incorporated."³⁵⁰ The judges who considered and rejected the ap-

343. Sharon Weintal, *Eternal Clauses in the Constitution* 20-25, 62-108 (2005) (unpublished Ph.D. dissertation, Hebrew Univ. of Jerusalem, Faculty of Law) (on file with the author); Weintal, *supra* note 5, at 451-53, 492-95.

344. See Gary J. Jacobsohn, *The Formation of Constitutional Identities*, in *COMPARATIVE CONSTITUTIONAL LAW* 129-42 (Tom Ginsburg & Rosalin Dixon eds., 2011); JACOBSON, *supra* note 3.

345. EDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LEGISLATION SOCIALE AUX ETATS-UNIS* (1921).

346. See Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 *AM. J. COMP. L.* 559, 561-62 (1987).

347. *Id.* at 563.

348. Schmitt, *supra* note 119, at 153.

349. See also Yaniv Ronzai, *Book Review: Dawn Oliver, Carlo Fusaro eds., How Constitutions Change: A Comparative Study*, *Hart Publishing*, 2011, 75(5) *THE MODERN LAW REVIEW* 945, 948-50 (2012).

350. See e.g., Perju, *supra* note 12, at 1307.

plication of the basic structure doctrine in their jurisdiction were in fact engaging in institutional design;³⁵¹ they were designing the powers and limits (or non-limits) of both themselves and those organs entrusted with the authority to amend the constitution.

Thus, it is clear that the limitations on the amendment power are not identical everywhere. As noted above, each state has its own supra-constitutional principles. Some states have broad limitations on the amending power, others narrow ones. In some states these limits are enforceable in courts; in others they are not. This story demonstrates not only that constitutional ideas may migrate through different jurisdictions, but also that these ideas can be re-designed or re-shaped in order to accommodate each jurisdiction's unique constitutional setting, history, culture, and design. As Mary Ann Glendon notes, "the problems confronting different societies are frequently the same, but the solutions are different inasmuch as they must be tailored to the particular needs of each society."³⁵² Therefore, the investigation of the limits of amendatory power can be useful not only in shedding light on the concept of "unconstitutional constitutional amendments," but also in clarifying the constitutional order, culture, and identity of specific states.³⁵³

Ran Hirschl urged legal scholars to explain "why, when, and how" the "large-scale migration of constitutional ideas" "has been occurring or is likely to occur," and to investigate "interlinks . . . between the triumph of democracy, the emergence of an economic and cultural 'global village,' and the transnational migration of constitutional ideas."³⁵⁴ The question then remains why this trend has become global? A full answer is beyond the scope of this Article. "Explaining the migration of constitutional ideas," Frederick Schauer writes, "is . . . the task of a lifetime and not of a brief comment."³⁵⁵ Moreover, there are of course varying motives underlying constitu-

351. Compare Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 197 (2003).

352. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 534-36 (1992).

353. See e.g., Michel Rosenfeld, *Constitutional Migration and the Bounds of Comparative Analysis*, 58 NYU ANN. SURV. AM. L. 67, 75 (2001):

When contextual variables are properly accounted for, comparative constitutional analysis can play a useful role in identifying relevant and meaningful similarities and differences, and convergences and divergences. Comparative analysis can also indicate to what extent transplanted constitutional materials assume in their country of adoption the role they perform in their country of origin. Comparative analysis can shed light on foreign constitutional concepts, doctrines, and practices, but it is also useful for purposes of obtaining a better understanding of one's own constitutional order or culture through comparisons with relevant foreign counterparts.

354. Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 154-55 (2005).

355. Schauer, *supra* note 338, at 918.

tional borrowing.³⁵⁶ For instance, one explanation might be that such a borrowing of foreign doctrines is utilized as a device to legitimize contentious judicial decisions. So, when the court is about to adopt judge-made limitations on the amendment power, without any explicit limitations in the constitution, it is likely that it will seek foreign cases that support the idea of implicit limits and would thereby assist it in justifying and legitimizing its judicial activism.³⁵⁷ This is also the case when the court is faced with an amendment that allegedly violates an unamendable provision. There, the experience of other jurisdictions with similar unamendable provisions may be a germane legal argument.³⁵⁸

We may assume that this global success of the idea of limitations on the amendment power—often complemented by judicial review—is linked to the phenomenal rise of world constitutionalism, the global spread of constitutional supremacy, and judicial review.³⁵⁹ If we recognize constitutionalism as a system of “higher law” according to which democratic majoritarianism must give way to certain commitments to principles,³⁶⁰ or as indispensable legal limits to governmental power,³⁶¹ then C. V. Keshavamurthy was correct to claim that “the theory of basic structure is not a creature of the Judges but a necessary consequence of the organisation of the amending power in the context of a limited government.”³⁶² The amending power must be limited like any other power within the constitutional scheme.

Finally, one must wonder what the implications of this trend are?

The spread of the idea of limitations to the constitutional amendment power, coupled with the practice of judicial review of constitutional amendments opens up great opportunities for constitu-

356. Perju, *supra* note 12, at 1317-19.

357. In India, for example, the “basic structure” doctrine is connected to the notion of judicial activism. See, e.g., Ronojoy Sen, *Walking a Tightrope: Judicial Activism and Indian Democracy*, 8(1) INDIA REVIEW 63 (2009); Payel Rai Chowdhury, *Judicial Activism and Human Rights in India: a Critical Appraisal*, 15(7) INT’L J. HUM. RTS. 1055 (2011).

358. See Brun-Otto Bryde, *The Constitutional Judge and the International Constitutionalism Dialogue*, 80 TUL. L. REV. 203, 214-19 (2005-2006).

359. On this phenomenon, see, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); Michel Rosenfeld & András Sajó, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, in Choudhry, *supra* note 12, at 142; Ran Hirschl, *The Rise of Comparative Constitutional Law: Thoughts on Substance and Method*, 2 INDIAN J. CONST. L. 11, 14-18 (2008).

360. David R. Dow, *The Plain Meaning of Article V*, in RESPONDING TO IMPERFECTION, *supra* note 327, at 121-30.

361. See CHARLES HOWARD McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 132 (1975).

362. C.V. KESHAVAMURTHY, AMENDING POWER UNDER THE INDIAN CONSTITUTION—BASIC STRUCTURE LIMITATIONS 89 (1982).

tionalism. The expansion of limits on constitutional amendments and the basic structure doctrine can be seen as a straightforward attempt by courts to “ensure the survival and operation of democratic institutions,”³⁶³ while curbing abuse of the amendment power.³⁶⁴ Judicial review of amendments can be regarded as a mechanism to prevent human rights violations and to protect basic democratic and constitutional principles from usurpation by transient majorities.³⁶⁵ Against such opportunities, this trend entails risks as well. The idea that courts may rule upon the constitutionality of amendments has substantial repercussions for such principles as judicial discretion,³⁶⁶ independence, and accountability,³⁶⁷ and directly touches upon the status and appropriate role of courts in any democratic society.³⁶⁸ Moreover, it involves major theoretical issues.³⁶⁹ To mention but a few, the courts’ ability to review constitutional amendments enhances the counter-majoritarian problem, exacerbates the “dead hand difficulty,” and may therefore be regarded as undemocratic.³⁷⁰ Also, limitations on the ability to amend the constitution may invite the use of extra-constitutional means (such as forcible revolutions) to obtain the desired modification.³⁷¹ Therefore, it is crucial that both constitution-makers use unamendable provisions carefully, and that courts employ the extraordinary power of declaring amendments unconstitutional with great restraint.³⁷²

363. Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 64 (2009).

364. Marie-Claire Ponthoreau & Jacques Ziller, *The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 119, 139-40 (Sadurski Wojciech ed., 2002). On the abuse of constitutional mechanisms for change to erode the democratic system see David Landau, *Abusive Constitutionalism* UC DAVIS L. REV. (forthcoming 2013), <http://ssrn.com/abstract=2244629>.

365. Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure*, INDIA’S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 179, 193-95 (Zoya Hasan et al. eds., 2002).

366. Rosalind Dixon, *Transnational Constitutionalism and Unconstitutional Constitutional Amendments* (Chicago Public Law and Legal Theory Working Paper No. 349, May 2011), <http://ssrn.com/abstract=1840963>.

367. See Teresa Stanton Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 LOY. U. CHI. L.J. 327 (2009).

368. Barak, *supra* note 5.

369. See Joseph F. Ingham, *Unconstitutional Amendments*, 33 DICK. L. REV. 161 (1928-1929); Tribe, *supra* note 332.

370. See debates in O’Connell, *supra* note 5, at 51 (1999); SCHWARTZBERG, *supra* note 19, at 2; Richard Albert, *Constitutional Handcuffs*, 42(3) ARIZ. ST. L.J. 663 (2010); Orfield, *supra* note 107, at 581; McGovney, *supra* note 107, at 511-13.

371. JRA VANOSI, *TEORIA CONSTITUCIONAL* 188 (2d ed. 2000).

372. See *Report on Constitutional Amendment*, *supra* note 16, at para. 218 (unamendability is undeniably a “complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order”).

Frederick Schauer wrote: “what makes a constitution constitutional? Nothing . . . [n]or does or can anything make a constitution unconstitutional.”³⁷³ Comparative law teaches us, however, that it is certainly possible to have unconstitutional constitutional norms. This Article examined the concept of “unconstitutional constitutional amendments” through “multiple descriptions of the same constitutional phenomena across countries.”³⁷⁴ It demonstrated that the question of “unconstitutional constitutional amendments” is a burning issue for modern constitutionalism as well as a global constitutional phenomenon.³⁷⁵ In 1895, Albert Venn Dicey wrote that: “the plain truth is that a thinker who explains how constitutions are amended inevitably touches upon one of the central points of constitutional law.”³⁷⁶ Over one hundred years later, it still seems to be true that a thinker who explains limitations on constitutional amendments inevitably touches upon one of the central points of constitutional law.

373. Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION, *supra* note 327, at 145.

374. See Hirschl, *supra* note 359, at 26.

375. Claude Klein, *Introduction*, 44 ISR. L. REV. 318 (2011).

376. A.V. Dicey, *Constitutional Revision*, 11 L. Q. REV. 387, 388 (1895).

