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Yaniv Roznai
NYU School of Law, yr640@nyu.edu

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Towards A Theory of Unamendability

Yaniv Roznai

This article stems from a single puzzle: how can constitutional amendments be unconstitutional? Adopting a combination of theoretical and comparative enquiries, this article focuses on the question of substantive limitations on the amendment power, looking at both their prevalence in practice and the conceptual coherence of the very idea of limitations to constitutional amendment powers. The article constructs a general theory of unamendability, which explains the nature and scope of amendment powers. The theory of unamendability identifies and develops a middle ground between constituent power and pure constituted power, a middle ground that is suggested by the French literature on ‘derived constituent power’. Undergirding the discussion, therefore, is a simple yet fundamental distinction between primary constituent (constitution-making) power and secondary constituent (constitution-amending) power. This distinction, understood in terms of an act of delegation of powers, enables the construction of a theory of the limited (explicitly or implicitly) scope of secondary constituent powers. The theory of unamendability aims to clarify the puzzle of unconstitutional constitutional amendments.

I. Introduction

II. The Nature of Amendment Powers

A. Constituent Power and Constituted Power

B. The Amendment Power as Sui Generis

C. The Secondary Constituent Power

   1. The Distinction between ‘Original’ and ‘Derived’ Constituent Powers

   2. The Formal and Substantive Theories

   3. Integration: A Theory of Delegation

   4. Terminological Clarification: Primary and Secondary Constituent Powers

D. Conclusion

III. The Scope of Amendment Powers

A. Explicit Limits

   1. The Validity of Unamendable Provisions

* Post-Doctoral Global Fellow, Hauser Global Law School's Global Fellows Program, New York University (NYU) (Spring, 2015); Ph.D, The London School of Economics & Political Science (LSE) (2014); Secretary General, The Israeli Association of Public Law. Email: yr640@nyu.edu. This article is drawn from my PhD dissertation entitled ‘Unconstitutional Constitutional Amendments: A Study of The Nature and Limits of Constitutional Amendment Powers’ (Thesis submitted to the Department of Law of the London School of Economics and Political Science for the degree of Doctor of Philosophy February 2014) which was awarded the 2014 Thesis Prize of the European Group of Public Law. I wish to thank Aharon Barak, Alexander Somek, Amnon Reichman, Amnon Rubinstein, Carlos Bernal-Pulido, Claude Klein, Conor Gearty, David Landau, Dorit Rubinstein Reiss, Gábor Halmay, Gad Barzilai, Grégoire Webber, Guy Lurie, Hillel Sommer, Ittai Bar-Siman-Tov, Jaco Bomhoff, Jan Komárek, Jan Kudrna, Jo Murkens, Joel Colón-Ríos, Kim Lane Scheppele, Lawrence Sager, Mark Tushnet, Martin Loughlin, Michael Freitas Mohallem, Michael Wilkinson, Nathan Brown, Neil Walker, Ozan Varol, Radim Dragomaca, Richard Albert, Richard Kay, Serkan Yoleu, Silvia Sutuc, Suzie Navot, Thomaz Pereira, Thomas Poole, and Vicki C. Jackson for assistance, useful comments and valuable suggestions.

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Constitutions change with time. Such change can take place in various ways. Constitutions may be modified according to a procedure stipulated within them, for instance, through judicial interpretations or practice. Indeed, a modification of a constitutional text’s meaning may often carry a greater effect than its formal modifications. For some, such as Georg Jellinek, the issue of constitutional amendments is less interesting than that of transformation, which occurs outside of the constitutional text. Nonetheless, formal constitutional amendments remain an essential means of constitutional change.

1 MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 5 (2009).
3 Karl N. Llewellyn, The Constitution as an Institution, 34 COLUM. L. REV. 1 (1934); David A Strauss, The Irrelevance of Constitutional Amendments, 114 HARV. L. REV. 1457 (2000-2001). Some have claimed, for example, that certain judicial interpretations of the U.S. Constitution are better viewed as amendments. See Frederic R. Coudert, Judicial Constitutional Amendment, 13 YALE L. J. 331 (1904); Sanford Levinson, How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in RESPONDING TO IMPERFECTION, supra note 2, at 33.
5 Georg Jellinek, Constitutional Amendment and Constitutional Transformation, in WEIMAR, supra note 2, at 54.
change, and, as this article demonstrates, constitutional amendments raise imperative questions about constitutional theory and are far from being tedious. This article thus focuses on formal constitutional amendment enacted through the amendment procedure and not to any constitutional changes.

Ever since the modern era of constitutionalism after the American Revolution, the constitutional amendment formula is considered important as the constitution’s ‘vis medicatrix’ or the ‘healing principle’ that would allow the constitution to stand the test of time. It is ‘the keystone of the Arch’. Amendment procedures are nowadays a universally recognised method. Since ‘the ultimate measure of a constitution is how it balances entrenchment and change’, the importance of the amendment formula is clear. This is why the debate on amendment rules has attracted the interest of constitutional economics and public choice theorists. However, the ‘rule of change’ is not merely a technical mechanism of balancing constitutional stability and flexibility. It directly implicates the nature of the constitutional system, as it is after all, ‘the space in which law, politics, history and philosophy meet’. It was therefore argued, in the American context, that the amendment procedure contains ‘a microcosm the most fundamental principles of our constitutional structure’.

So, constitutions can be formally changed through the amendment procedure. Are there any substantive limitations on the ability to amend constitutions? Is the scope of the amendment power sufficiently broad to permit any amendment whatsoever, even one that violates

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7 Earlier constitutional literature drew a distinction between major and minor constitutional alterations, calling the former revisions and the latter amendments. See WILLIAM FRANKLIN WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 128 (1921); Donald S. Lutz, Toward a Theory of Constitutional Amendment, 88(2) AMER. POL. SCI. REV. (1994), 355, 356. I use amendments to describe any formal changes to the constitution, whether major or minor.
8 See, for example, DAWN OLIVER AND CARLO FUSARO EDS., HOW CONSTITUTIONS CHANGE - A COMPARATIVE STUDY (2011); Xenophon Contiades ed., ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (2012).
9 JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 295 (1851).
fundamental rights or basic principles?20 In earlier pieces, I have described in relatively length the increasing trend of imposing limitations on constitutional amendment powers.21 As my research demonstrates, whereas between 1789 and 1944, only 17% of world constitutions enacted in this period included unamendable provisions (52 out of 306), between 1945 and 1988, 27% of world constitutions enacted in those years included such provisions (78 out of 286), and out of the constitutions which were enacted between 1989 and 2013 already more than half (53%) included unamendable provisions (76 out of 143).22 It seems that nowadays having an unamendable provision is becoming a universal fashion. I use the term unamendability to describe the resistance of constitutional subjects (provisions, principles or institutions) to their amendment.23 Such subjects may be described as impervious to constitutional amendment, either explicitly or implicitly. Unamendability is not a mere declaration. In various jurisdictions, such as India, the Czech Republic, Turkey and Brazil, amendments which affect or violate those unamendable subjects may be considered ‘unconstitutional’ and even invalidated by courts.24 The idea that amendments that were enacted according to the amendment procedure could be declared ‘unconstitutional’ on the grounds that their content is at variance with the existing constitution is perplexing. After all, is it not the purpose of amendments to change the existing constitution’s content?25

Indeed, at first glance, the very idea of an ‘unconstitutional constitutional amendment’ seems puzzling.26 The constitution is the highest positive legal norm.27 The power to amend the constitution presupposes the same kind of power as the one to constitute a constitution.28 It is a supreme power within the legal system, and as such, it can reach every rule or principle of the legal system.29 If this power is indeed supreme, how can it limit itself?30 If it is limited, how can it be supreme? This is the legal equivalent of the ‘paradox of omnipotence’: can an omnipotent entity bind itself?31 Both positive and negative answers to these questions lead to the conclusion that it is not omnipotent.32 Moreover, if the amendment power is a kind of constituent power, then it remains unclear why a prior manifestation of that power prevails over the later exercise of a similar power.33 Quite the reverse: according to the lex posterior derogat priori principle, a later norm

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20 Imagine Ackerman’s scenario of an amendment to the U.S. Constitution repealing the 1st Amendment and establishing Christianity as state religion. ACKERMAN: WE THE PEOPLE: FOUNDATIONS, supra note 2, at 14-15.
26 GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 34 (2010) (calls it a ‘conundrum!’).
28 Rivka Weill, Shouldn’t We Seek the People’s Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel’s Constitution, 10 MISHPAT U’MIMSHAL 449, 483-84 (2007).
should prevail over a conflicting earlier norm of the same normative status.\footnote{Herbert Broom, A Selection of Legal Maxims, Classified and Illustrated 26-27 (8th American ed., The Lawbook Exchange, Ltd., 2000); Hans Kelsen, Pure Theory of Law 206 (Max Knight trs., University of California Press, 1967).} Finally, the constitution, which expresses the people’s sovereign power, binds and guides ordinary law, which expresses the parliament’s ordinary power.\footnote{John Rawls, Political Liberalism 231-33 (1993).} The common meaning of ‘unconstitutionality’ is that an ordinary law, inferior to and bound by the constitution, violates it.\footnote{A. V. Dicey, Introduction to the Law of the Constitution 371-72 (8th ed., Liberty Classics, 1982).} How can ‘unconstitutionality’ refer to an act carrying the same normative status as the constitution itself? Arguably, as equal components of the same constitution, constitutional amendments simply cannot be unconstitutional.\footnote{Gottfried Dietze, Unconstitutional Constitutional Norms: Constitutional Development in Postwar Germany, 42 Virginia L. Rev. 21 (1956); Kathleen M. Sullivan, Constitutional Amendmentitis, The Am. Prospect 20, 24 (Fall 1995).} Therefore, the idea of an unconstitutional constitutional amendment seems \textit{prima facie} paradoxical.\footnote{The relationship between the problems of amendments and logical paradoxes are well known. See Alf Ross, On Self Reference as a Puzzle in Constitutional Law, Mind 78 (1969), 1; H.L.A. Hart, Self-Referring Laws, Essays in Jurisprudence and Philosophy (2001), 170; Peter Suber, The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change (1990).} Is it an actual paradox, or merely an ostensible one caused by an imprecise understanding of certain presuppositions? This article argues that clarifying the main concept – the constitutional amendment power, its nature, and its scope – is the first step for undoing this apparent paradox.

Whereas the definition of the nature of the amendment power is among the most abstract questions of public law,\footnote{Claude Klein, Is There a Need for an Amending Power Theory?, 13 ISR. L. Rev. 203 (1978).} the question of its scope is not purely of academic interest; it raises important questions with practical importance; Are there any constitutional principles so fundamental that they carry a \textit{supra-constitutional} status in the sense that they cannot be amended?\footnote{By the term \textit{supraconstitutional}, I refer to principles or rules that might be placed ‘above’ the constitutional power. See, for example, Serge Arné, \textit{Exciste-t-il des normes supra-constitutionnelles}, 2 Revue du droit public 460, 461 (1993); Georges Vedel, Souveraineté et supra-constitutionnalité, 67 Pouvoirs 76 (1993); Louis Favoreu, Souveraineté et supra-constitutionnalité, 67 Pouvoirs 71, 74-6 (1993); Yaniv Roznai, The Theory and Practice of “Supra-constitutional” Limits on Constitutional Amendments, 62(3) Int’l. & Comp. L. Q. 557 (2013).} What can and should courts do when they face a \textit{fait accompli} in the form of a constitutional amendment adopted according to the amendment procedure but that changes the constitution’s basic structure?\footnote{Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv. L. Rev. 19, 89 (2002-2003).} Does a radical constitutional change brought about through an amendment cease to be ‘an amendment’ and become an act of revolution or \textit{coup d’état} by those holding the amendment power?\footnote{Cf., Arun Prokas Chatterjee, Constitutional Change: Problems and Prospects, 5(4) Social Scientist 58, 70 (1976).} Since nowadays constitutional reforms are ‘part of normal constitutional life’\footnote{Xenophon Contiades, Constitutional Change Engineering, in Engineering Constitutional Change, supra note 8, at 1, 2.} these questions regarding the nature and scope of the amendment power are imperative. And even though this issue has attracted increased attention in recent years,\footnote{See, for example, Entela Hoxhaj and Florian Bjanku, The Basic Principles as Limits of Constitutional Revision in the Constitutional Jurisprudence and Doctrine in Europe, 1(3) Global Journal of Arts Humanities and Social Sciences 47, 49-50 (2013); Gábor Halmai, Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?, 19(2) Constellations (2012), 182; Otto Pffersmann, Unconstitutional Constitutional Amendments: A Normativist Approach, 67 ZOR 81 (2012); Christoph Bezemeck, 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); Jasna Ormenec, Kontrola Ustavnosti Ustavivih Normi (Ustavivih Amandmana I Ustavivih Zakona), 1(1) Godišnjak Akademije Pravnih Znanosti Hrvatske (2010); 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.} it suffers from the
lack of a comprehensive and coherent theoretical framework that is globally applicable. The framework which contextualises the theoretical approach of this article is constitutional theory which aims to ‘identify the character of actual existing constitutional arrangements’ and ‘offer an explanation of character of the practice’.\(^4^5\) This article therefore develops a general theoretical framework that addresses unamendability which would explain the doctrine of unconstitutional constitutional amendments. True, one may be inclined to share Joseph Raz’s scepticism about the potential of grand constitutional theories. Perhaps there really is ‘no room for a truly universal theory of the subject’.\(^4^6\) However, due to the foremost theoretical nature of this research, it does not focus on any specific jurisdiction and confronts the research questions from a more general perspective. Its enquiries transcend any specific boundaries insofar as they present phenomena common to all contemporary constitutional democracies.

This article progresses as follows: Section II addresses the thorny problem of the nature of the amendment power: is it an exercise of *constituent power* or *constituted power*? Reviving the old French doctrine distinguishing between *original constituent power* and *derived constituent power*, it argues that the amendment power is *sui generis*: it is neither a pure *constituted power*, nor an expression of *original constituent power*. It is an exceptional authority, yet a limited one. I term it a *secondary constituent power* and apply a theory of delegation in order to illuminate its unique nature. While section II explains *why* the amendment power is limited, Section III explains *how* it is limited. Following the delegation theory presented in section II, it is argued that the *primary constituent power* may explicitly limit the inferior *secondary constituent power*. Moreover, any organ established within the constitutional scheme to amend the constitution, however unlimited it may be in terms of explicit language, nonetheless cannot modify the basic pillars underpinning its constitutional authority so as to change the constitution’s identity. A constitution, according to this section, has to be read in a *foundational structuralist* way – as a certain structure that is built upon certain foundations. Section IV deals with the implications of a theory of unamendability. On the grounds of the foregoing theoretical analysis conducted in earlier sections, it provides a theoretical explanations for the practice of judicial review of constitutional amendments in light of the theory of unamendability. It also identifies and confronts the main objections to the theory of unamendability. Section V concludes.

II. THE NATURE OF AMENDMENT POWERS

This section examines the nature of constitutional amendment powers. It serves as a base for developing a theory of unamendability since the theoretical path for comprehending any limitation on the amendment power must commence by explaining the nature of that power. The manner in which we grasp the nature of the amendment power affects our thinking about its scope. In other words, a basic inquiry into the nature of amendment power simultaneously


develops into an inquiry into its limits. The section begins by illuminating the theoretical distinction between constituent power and constituted power. It then explores possible understandings of the amendment power, both as a constituent and a constituted power. It proposes that the amendment power has to be regarded as sui generis, a unique power situated in a grey area between the two powers. It is distinguished from constituent power in that it ought to be comprehended in terms of delegation, but it is also a distinctive form of a constituted power. Understanding the exceptional nature of the amendment power as a secondary power serves as the theoretical starting point for understanding its limited nature and scope.

A. CONSTITUENT POWER AND CONSTITUTED POWER

In 1792, Thomas Paine articulated that ‘all power exercised over a nation, must have some beginning’. What is this beginning? Constituent power, understood as the power to establish the constitutional order of a nation, is the procreative principle of modern constitutional arrangements. The definition of constituent power is among the most elusive terms within constitutional theory. Julien Oudot best illustrated this in 1856: ‘What is constituent power? Everything you please, reader! Given the multiple definitions, history has more to tell than what a priori logic reasons’. Oudot explained that ‘sometimes it is the act of a skilful and strong dictator, winning the power due to its genius, and then bearing by the recognition or the habit of governed. Sometimes it is a partial riot, a beginning of a revolution that the general citizens accept’.

It is often argued that the concept of constituent power is relatively modern, emerging almost simultaneously in French and North America revolutionary thinking. In order to understand the features of that principle, one has to return to Abbé Emmanuel Joseph Sieyès, who stated in a speech before the National Assembly in 1789: ‘Une Constitution suppose avant tout un pouvoir constituant’. Sieyès distinguished between constituent power (pouvoir constituant) and constituted power (pouvoir constitué): ‘in each of its parts a constitution is not the work of a constituted power but a constituent power’. The latter is the extraordinary power to form a constitution – the immediate expression of the nation and thus its representative. It is independent of any constitutional forms and restrictions. The former is the power created by the constitution, an ordinary, limited power, which functions according to the forms and mode that the nation grants it in positive law.

47 In that respect, a theory of amendment power is connected to a larger theory of constitutionalism. See Douglas Linder, What in the Constitution Cannot be Amended?, 23 Ariz. L. Rev. 717, 718 (1981).
50 JULIEN OUDOT, CONSCIENCE ET SCIENCE DU DEVOIR: INTRODUCTION A UNE EXPLICATION NOUVELLE DU CODE NAPOLEON, TOME SECOND 397-398 (1856) [my translation].
51 OUDOT, ibid., at 398-99 [my translation].
53 EMMANUEL JOSEPH SIEYES, PRELIMINAIRES DE LA CONSTITUTION- RECONNAISSANCE ET EXPOSITION DES DROITS DE L'HOMME 18 (1789).
constituted power is inseparable from a pre-established constitutional order, while constituent power is external to a constitutional order and exists without it. Hence, contrary to constituted powers, constituent power is free and independent from any formal bonds of positive law created by the constitution. 'The nation', Sieyès wrote, 'exists prior to everything; It is the origin of everything. Its will is always legal. It is the law itself.'

Whereas Sieyès is famous for his contribution to the refinement of the distinction between constituent and constituted power, he was not the first to articulate this distinction, which can be traced back to Bodin’s distinction between sovereignty – the locus of authority – and the government – the instituted form through which the sovereign rules. Similar distinction between constituent and constituted powers appeared in George Lawson, John Locke, and Daniel Defoe’s writings, roughly eighty years before Sieyès elaborated on the distinction between constituent and constituted powers. Yet, these writers limited the community’s constituent power to create and alter constitutional regimes for explaining the right of resisting an oppressive regime. Sieyès’ conception of constituent power was not restricted to those circumstances where the government was dissolved by breaching trust or tyranny. For him, constituent power can be legitimately reclaimed at any time. The constitution, as a positive law, emanates ‘solely from the nation’s will’. For Sieyès, the constituent power was unlimited for ‘it would be ridiculous to suppose that the nation itself could be constricted by the procedures or the constitution to which it had subjected its mandatories’. The nation is free from constitutional limits. The sovereign people, according to his idea of constituent power, are exterior to their institutions.
What is ‘the nation’? For Sieyès, it is ‘a body of associates living under a common law, represented by the same legislature, etc.’. This could mean that the political will of the people to be linked to each other (politically and legally) is what creates a national bond. It is ‘the people’, rather than a divine Monarch, who is the subject and the holder of the constituent power. Indeed, in the modern era, a nation’s constitution is regarded as receiving its normative status from the political will of ‘the people’ to act as a constitutional authority, and through which ‘the people’ manifest itself as a political and legal unity. The ultimate source of legitimacy is bottom-up, originating in ‘the people’. This notion is now explicitly stated in various constitutions.

How may the nation exercise its constituent power? According to Joseph de Maistre, ‘the people are the sovereign which cannot exercise their sovereignty…’. However, if the people are said to ‘exercise their sovereignty by means of their representatives’, this, de Maistre believed, ‘begins to make sense’. Indeed, Sieyès’ conception of constituent power is attached to representation as extraordinary representatives serve as ‘a surrogate for the Nation in its independence from all constitutional forms’.

The doctrine of constituent power was later developed by Carl Schmitt. Like Sieyès, Schmitt declared that ‘the constitution does not establish itself’. It ‘is valid because it derives from a constitution-making capacity… and is established by the will of this constitution-making power’. For Schmitt, the constitution is created through the act of political will and is composed of fundamental political decisions regarding the form of government, the state’s structure, and society’s highest principles and symbolic values which represent the democratic political order’s

69 Sieyès, supra note 54, at 97. This definition appears to be contradictory to Sieyès’s claim that the nation is to be conceived as a ‘pre-political entity’. This is part of the circularity problem of ‘we the people’ idea behind the constituent power. As Ivison wrote: ‘constitution constitutes the People who in turn constitute it’. See Duncan Ivison, Pluralism and the Hobbesian Logic of Negative Constitutionalism, 67 Pol. Stud. 83, 84 (1999). On this dilemma see Zoran Oklopcic, Constituent Power and Polity Legitimacy in the European Context: A Theoretical Sketch, in Redefining Europe 133, 134 (Joseph Drew ed., Rodopi, 2005).


72 On ‘the people’ as the subject of constituent power see Ulrich K. Preuss, The Exercise of Constituent Power in Central and Eastern Europe, in The Paradox of Constitutionalism, supra note 60, at 211-22.


79 Schmitt, ibid., at 64.
core constitutional identity.\textsuperscript{80} Schmitt accepted Sieyès’ distinction between \textit{constituent} and \textit{constituted power}, and conceived \textit{constituent power} to be unlimited and unrestricted by positive constitutional forms or rules - external to (and above) the constitution.\textsuperscript{81} However, contrary to Sieyès, Schmitt rejects the theory of the ‘representation of the people’, deeming it ‘antidemocratic’.\textsuperscript{82} Although this could be seen as Schmitt’s acknowledgment of democratic sovereignty,\textsuperscript{83} one should be cautious as Schmitt’s theory is limited to a mere acclamation.\textsuperscript{84} This conception of \textit{constituent power} can thus be criticised for its lack of any rational deliberations or discourse.\textsuperscript{85} The focal point is that \textit{constituent power} was understood by Schmitt as an ‘unmediated will’, which cannot be regulated or restricted by legal procedures or process.\textsuperscript{86} Any attempt to formalize it would be ‘akin to transforming fire into water’.\textsuperscript{87} For Antonio Negri, \textit{constituent} and \textit{constituted powers} are not only strictly separate, but contrasting, concepts.\textsuperscript{88} Any legal approach to \textit{constituent power} fails since: ‘the radical quality of the constituent principle is absolute. It comes from a void and constitutes everything’.\textsuperscript{89} Negri proposes to understand it as a ‘creative work of strength’ – a purely creative and revolutionary power of the multitude, which can disrupt constituted boundaries.\textsuperscript{90}

Some scholars regard the conception of a formless and limitless power of ‘the people’ to break any constitutional bounds at any time as a dangerous idea, open to abuse.\textsuperscript{91} Hannah Arendt wrote about:

\begin{quote}
the extraordinary ease with which the national will could be manipulated and imposed upon whenever someone was willing to take the burden or the glory of dictatorship upon himself. Napoleon Bonaparte was only the first in a long series of national statesmen who, to the applause of a whole nation, could declare: “I am the pouvoir constituant”.\textsuperscript{92}
\end{quote}

For Arendt, the legacy of a radical \textit{constituent power} is ‘a poisonous recipe for permanent revolution [by groups which are] likely to claim the awesome power of the pouvoir constituant’.\textsuperscript{93} Indeed,

\textsuperscript{80} \textit{Schmitt}, \textit{ibid.}, at 125; \textit{Andreas Kalyvas, Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt and Hannah Arendt} 139 (2008).
\textsuperscript{83} \textit{Anne Norton, Pentecost: Democratic Sovereignty in Carl Schmitt}, 18(3) \textit{CONSTELLATIONS} 389 (2011); \textit{Andreas Kalyvas, Carl Schmitt and The Three Moments of Democracy}, 21 CARDozo L. Rev. 1525, 1536-7 (1999-2000).
\textsuperscript{86} \textit{Schmitt}, supra note 78, at 132.
\textsuperscript{87} \textit{Scheuerman, supra note 84}, at 71.
\textsuperscript{88} \textit{Antonio Negri, Insurgencies: Constituent Power and the Modern State} 3, 11 (1999).
\textsuperscript{89} \textit{Negri, ibid.}, at 14, 16.
\textsuperscript{90} \textit{Negri, ibid.}, at 333.
experience teaches us that dictators seized governmental powers through revolutionary acts or coups, claiming to be the bearers of the constituent power.\textsuperscript{94}

More recently, David Dyzenhaus has argued that the question of constituent power exists outside of normative constitutional theory.\textsuperscript{95} He urges constitutional theorists to avoid the idea of constituent power, which has its basis outside of the legal order, and instead to focus on the question of the constitution’s authority as completely internal to the legal order, as founded on the intrinsic morality of law.\textsuperscript{96} In contrast, Martin Loughlin argues that ‘constitutional legality is not self-generating: the practice of legality rests on political conditions it cannot itself guarantee. … Consideration of the origins of constitutional ordering invariably brings the concept of constituent power into play’.\textsuperscript{97} János Kis’s approach to this matter seems lucid. Kis acknowledges the risks carried with the concept of constituent power.\textsuperscript{98} However, at the same time, Kis rejects calls to abandon the doctrine of constituent power as based on ‘the people’, since there is no other satisfactory answer but ‘the power of the people’ as the ultimate source of state power. Instead of being abandoned, constituent power ‘should be given an interpretation that, on the one hand, arrests the regress, and on the other, may not be mobilizes for the purpose of totalitarian politics’.\textsuperscript{99} Claims to abandon constituent power give short shrift to the connection between constituent power and democracy.\textsuperscript{100} It is the collective power of the people – to constitute for themselves a constitutional regime.\textsuperscript{101} Constituent power, properly construed, is a democratic concept that ‘belongs solely to the context of a democratic constitutional theory’.\textsuperscript{102}

Moreover, constituent power is a more complicated concept than sheer power of a multitude since it requires a certain representational form.\textsuperscript{103} As Ulrich Preuss explains, ‘being directed at the creation of an order whose structure is, so to speak, anticipated in its actions, the constituent power ceases to be mere force’.\textsuperscript{104} Constituent power and constituted powers have an internal relation.\textsuperscript{105} Constituent power has a legal aim – the creation of a legal constitutional order. Ultimately, this is a juridical exercise.\textsuperscript{106} As one French commentator wrote in 1851, ‘La constitution est une loi; donc le


\textsuperscript{95} David Dyzenhaus, The Question of Constituent Power, in THE PARADOX OF CONSTITUTIONALISM, supra note 60, at 129, 143–5.

\textsuperscript{96} David Dyzenhaus, Constitutionalism in an Old Key: Legality and Constituent Power, 1(2) GLOBAL CONSTITUTIONALISM 229 (2012). See also Yasuo Hasebe, On The Dispensability of the Concept of Constituent Power, 3 INDIAN J. CONST. L. 39 (2009) (the mythical concept of constituent power is dispensable for constitutional scholarship).

\textsuperscript{97} Loughlin, supra note 59, at 6.

\textsuperscript{98} JÁNOS KIS, CONSTITUTIONAL DEMOCRACY 136-7 (2003).

\textsuperscript{99} Kis, ibid, at 137.

\textsuperscript{100} COLÓN-RÍOS, supra note 59, at 110, 122, n 45; NEGRI, supra note 88, at 1; ILLAN RUA WALL, HUMAN RIGHTS AND CONSTITUENT POWER – WITHOUT MODEL OR WARRANTY 6 (2012).

\textsuperscript{101} Alexander Somek, Constituent Power in National and Transnational Contexts, 3(1) TRANSNATIONAL LEGAL THEORY 31, 34 (2012).

\textsuperscript{102} Ernst-Wolfgang Böckenförde, Die verfassungsgebende Gewalt des Volkes-Ein Grenzbegriff des Verfassungsrechts, in STAAT, VERFASSUNG, DEMOCRATIE. STUDIEN ZUR VERFASSUNGSTHEORIE UND ZUM VERFASSUNGSRECHT 90 (1991); cited in Kalyvas, supra note 83, at 1525, 1538.

\textsuperscript{103} Loughlin, supra note 49, at 113.


\textsuperscript{105} Miguel Vatter, Legality and Resistance: Arendt and Negri on Constituent Power, in THE PHILOSOPHY OF ANTONIO NEGRI – REVOLUTION IN THEORY VOL.2 52, 66-67 (Timothy S. Murphy and Abdul-Karim Mustapha eds., 2007).

\textsuperscript{106} See OLIVIER BEAUD, LA PUISSANCE DE L’ ´ETAT 207 (1994); Kalyvas, supra note 80, at 86; Andreas Kalyvas, Popular Sovereignty, Democracy, and the Constituent Power, 12(1) CONSTELLATIONS 223, 232-233 (2005); COLÓN-RÍOS, supra note 59, at 112.
pouvoir constituant est une sorte de pouvoir législatif'. In addition, in order to be exercised, constituent power, in a way, must act as an already constituted power, since the constitution-making process necessitates a certain institutionalised framework through which the people can express their will. Even Schmitt distinguished between the ‘initiation’ of constituent power (which is unlimited) and the ‘execution and formulation’ of the decisions of the constituent power, which undeniably require certain procedures and organisation. Legal constructs (such as constituent assemblies and referenda) thus aid the exercise of constituent power.

What is the relationship between constituent and constituted power and why is it relevant to our enquiry? The conceptual relationship between constituent and constituted powers is that of subordination. Constituted powers are legal powers (competence) derived from the constitution (and are limited by it). They owe their existence to the constituent power and depend on it; thus, constituent power is superior to them. In contrast to constituted power, constituent power manifests unlimited power – unlimited at least in the sense that it is not bound by previous constitutional rules and procedures. On that account, the distinction between constituent and constituted powers is imperative for any investigation regarding possible limitations on the amendment power, since if this power is conceptualised as constituent power, then it should be regarded as unlimited and unbound by prior constitutional rules. If it is conceptualised as a constituted power, it is subordinated to the constitution. However, as demonstrated in the next section, this classification seems extremely thorny when one has to assess the nature of the constitutional amendment power.

B. THE AMENDMENT POWER AS SUI GENERIS

The constituent power establishes the constitution, which in turn regulates the ordinary constituted powers, such as the executive, legislative, and judiciary, which govern every-day political life. Once the constituent power has fulfilled its extraordinary constituting task, it ‘becomes dormant’ or ‘retire[s] into the clouds’. From that moment public authority is exercised under the constitution. Thus, by establishing a constitution, the constituent power is ‘digging its own grave’. At the backdrop of this story, the amendment power is an extraordinary authority. It

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107 Felix Berriat Saint-Prix, Théorie du droit constitutionnel français: esprit des constitutions de 1848; précede d’un essai sur le pouvoir constituant et d’un précis historique des constitutions françaises 2 (1851).
108 Loughlin, supra note 59, at 227; Hasebe, supra note 96, at 41.
109 Colón-Ríos, supra note 59, at 87.
113 See, for example, Richard S. Kay, Constituent Authority, 59 AM. J. COMP. L. 715, 719 (2011).
114 See e.g. François Laurent, Principes de Droit Civil, Tome Premier 216 (1869); Felix Berriat Saint-Prix, Commentaire sur la Charte constitutionnelle 118, 187 (1836).
117 Preuss, supra note 72, at 220.
118 Schmitt, supra note 78, at 150.
is ‘peculiar and not fully understandable in terms of the hierarchical model of the legal pyramid’. The reason for that is because, as Stephen Holmes and Cass R. Sunstein observe, it:

\[\text{does not fit comfortably into either category. It inhabits a twilight zone between authorizing and authorized powers. The amending power is simultaneously framing and framed, licensing and licensed, original and derived, superior and inferior to the constitution.}\]

The amending power possesses characteristics of both constituent and constituted power, hence its puzzling nature.

On the one hand, one might suppose that the amendment power expresses the ultimate constituent power, the ‘final controlling power’ or ‘the ultimate locus of political sovereignty’. This is a plausible theoretical approach. If ‘the people’ control the government (qua constituted powers) through the constitution, then arguably, constitutional amending power is ‘the highest power in the nation’s political life’. Viewed in that respect, the amendment process is a mechanism for constitution-makers to ‘share part of their authority’ with future generations. Ostensibly, if it is permissible for ‘the people’ to re-shape their constitution, amending a constitution, like constitution making, is part of the people’s constituent power. This is the prevailing approach of American constitutionalism. ‘Americans’, as Gordon Wood wrote, ‘had in fact institutionalized and legitimized revolution’. This approach may be supported by several arguments:

\[\text{Supremacy argument: constituted powers are bound by the constitution. By means of constitutio}\]nal amendments, ‘the people’ may alter constituted powers. Therefore, this power differs from and superior over ordinary constituted powers and must be of a constitutive nature. Not only can it modify other constituted powers, but it may also, arguably change its own boundaries since it possess ‘competence over the competence’ (Kompetenz-Kompetenz).

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119 Preuss, supra note 25, at 430.
120 Stephen Holmes and Cass R., Sunstein, The Politics of Constitutional Revision in Eastern Europe, in Responding to Imperfection, supra note 2, at 275, 27.
121 Paine, supra note 48, at 245.
122 Sujit Choudhry, Does the world need more Canada? The politics of the Canadian model in constitutional politics and political theory, in Constitutional Design for Divided Societies: Integration or Accommodation? (Sujit Choudhry ed., 2008), 141, 171. See also Sujit Choudhry, Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities, 37 Conn. L. Rev. 933, 939 (2005).
125 Recall, Lawson considered ‘real Majesty’ to be the power ‘to constitute, abolish, alter, reform form of governments’. Lawson, supra note 60, at 47-48.
127 Wood, supra note 10, at 614. See also Palmer, supra note 52, at 215; Westel Woodbury Willoughby, An Examination of the Nature of the State - A Study in Political Philosophy 219 (BiblioBazaar, LLC, 2009).
128 This article generally rejects this argument. As a delegated power, the amendment power cannot change its own terms of delegation. See Sieyes, supra note 54, at 136.
Procedural argument: most constitutions provide different procedures for ordinary legislation and constitutional amendments. They dedicate a special procedure or involve bodies that are separate to the ordinary legislature (for example, constituent assemblies), which emphasize the exceptional process of constitutional amendment. This distinction strengthens the argument that the amendment procedure is not an ordinary constituted power; it is different from and more unique than ordinary law making. As I argue below, this claim is built on a fallacy since the mere stipulation of an amendment procedure points to its instituted and thus constituted – rather than constituent – nature.

Consequential argument: from a juridical perspective, constituent power is ‘the source of production of constitutional norms’. If constituent power produces constitutional laws that govern constituted powers, then amending those constitutional laws (or producing new ones through amendments) is an exercise of constituent power. Amending a constitutional provision creates the same legal product as writing a new provision. Therefore, amending the constitution is arguably an exercise of a power similar to that which created the constitution in the first place – constitute power: “Le pouvoir de révision est évidemment le même que le pouvoir constituant”.

On the other hand, the amendment power may simply be regarded as a constituted power. True, it has a remarkable capacity to reform governmental institutions; yet it is still a legal competence defined in the constitution and regulated by it. Even if one applies here the term Kompetenz-Kompetenz, the constituent power declares the constituted power competent to define its competences, but only within the limits set in the constitution. If all powers derive from the constitution, then the amending power must be a constituted power just like the legislative, judicial, or executive powers. Since it is a legally defined power originating in the constitution, it cannot ipso facto be a genuine constituent power.

Amending power is multi-faced. It carries dual features of both constituent and constituted power. Asem Khalil writes that the amendment power is ‘constituent power in nature and a constituted power in function’. Others might argue the complete opposite; it is constituted by nature, but functions as constituent power. As Grégoire Webber wrote, ‘amendment formulas are, by definition, means according to which a constituted authority may assume the status of constituent authority ...’. Accordingly, the question of the nature of the amendment power is a knotty one. This article argues that since this power does not fit comfortably into any of these

130 Preuss, supra note 25, at 436.
131 Negri, supra note 88, at 2.
132 Negri, supra note 88, at 216.
133 BIBLIOTHEQUE HISTORIQUE : OU , RECUEIL DE MATERIAUX POUR SERVIR A L 'HISTOIRE DU TEMPS , TOME DOUZIEME 225 (1819).
134 Markku Suksi, Making a Constitution: The Outline of an Argument 5, 10-11 (1995); Barents, supra note 73, at 91.
135 Barents, supra note 73, at 91.
136 Preuss, supra note 25, at 430.
137 Asem Khalil, The Enactment of Constituent Power in the Arab World: The Palestinian Case 25 (Thesis presented to the Faculty of Law at the University of Fribourg for the Doctorate Degree in Law, Helbing & Lichtenhahn, 2006).
categories, it should neither be regarded as another form of constituted power nor equated with the constituent power; it is a sui generis power.  

C. THE SECONDARY CONSTITUENT POWER

1. The Distinction between ‘Original’ and ‘Derived’ Constituent Powers

‘To know how the constitution of a given State is amended’, A. V. Dicey wrote, ‘is almost equivalent to knowing who is the person or who are the body of persons in whom, under the laws of that State, sovereignty is vested’ (emphasis added). Dicey is not stating that sovereignty is vested in the amendment authority. Amendment authority is ‘almost equivalent’ to the sovereign. This terminology of ‘not quite’ – but ‘very nearly’ – sovereignty resembles Max Radin’s two notions of ‘sovereignty’. Radin distinguished between real sovereignty, which can materialise only in revolutions, and ‘minor or lesser sovereigns’, created by the real sovereign. The amendment power, created by the ‘original sovereign’, is a lesser sovereign, almost ‘coextensive in power with itself’. It is ‘almost sovereign’ or ‘pro-sovereign’, situated between the real sovereign and lesser sovereign, such as governmental functions. The basic presupposition underpinning Radin’s argument, and the one this article advances, is that the amendment power is a special power, weaker than the constituent power but greater than the ordinary legislative powers. This proposition revives and relies upon the French doctrine that distinguishes between original constituent power and derived (or derivative) constituent power. The first is a power that is exercised in revolutionary circumstances, outside the laws established by the constitution, and the latter is the power exercised under legal circumstances according to rules established by the constitution.

Where does this idea originate? This notion cannot be attributed to Sieyès, who did not distinguish between constituent power and amendment power and for whom the sovereign constituent power could not be limited. It appears that this distinction between original and derived constituent powers was developed during the debates of the French National Assembly on the 1791 Constitution, albeit with different terminology. At the assembly, debates took place on how the Constitution ought to be amended in light of the fragility of the constitutional project. It was seriously considered that there should be a prohibition on any amendments for thirty years. Eventually, the process that was adopted was that the Constitution would be unamendable for ten years, after which amendments could take place through an Assembly of Revision, and after approval of three successive legislatures.
During the debates of the National Assembly, some argued that the Assembly could not limit or even procedurally frame the *constituent power*, while others sought to minimise the likelihood of future constitutional changes. Frochot proposed that there be a differentiation between partial and total change to the Constitution, believing that each involves a fundamentally different power. Thus, he proposed a certain procedure for partial change and another (more complex) for a total change. While his proposal was rejected, the distinction he made allowed others, including Barnave, to justify the ability to limit and frame potential *constituent power* without forfeiting the idea of an unlimited *constituent power*. Barnave explained that the total change of the Constitution could not be predicted or controlled by the Constitution, because it is an unlimited power belonging inherently to the nation. However, the possibility of amending the Constitution is of a somewhat different nature, which may be limited and circumscribed. Barnave’s discourse reveals the distinction between *original* and *derived constituent power*.

This idea was evident in Title VII, Art. 1 of the 1791 Constitution, which, while acknowledging the nation’s ‘impresscriptible right to change its constitution’, limits the amendment power procedurally ‘by the means provided in the constitution itself’, and substantially by allowing amendments only to ‘the articles of which experience shall have made the inconveniences felt’. To support the argument regarding limited amending power, it is important to draw attention to Title VII, Art. 7, which required members of the Assembly of Revision to take an oath, ‘to confine themselves to pass upon the matters which shall have been submitted to them … [and] to maintain … with all their power the constitution of the kingdom…’. Thus, according to the Constitution of 1791, the amendment power is conditioned by preserving the entire constitution; amendment power is not constituent power, and abrogation of the Constitution is not similar to its amendment.

Explaining this special, yet legally defined, power, Oudot wrote that some constitutions have organized aside the constituted power, a *regular constituent power*; they have settled the form by which the nation could change its political mechanism. As Claude Klein explains, the *original constituent power* is the power to establish a new legal order (*ordre juridique nouveau*). It is an absolute power, which may set limits for the exercise of amendments, such as determining which body has the authority to amend the constitution and other conditions (e.g. procedural and substantive limitations). The *derived constituent power* acts within the constitutional framework and is therefore limited under the terms of its original mandate. In same vein, Markku Suksi clarified that while the *constituent power* is extra-constitutional and unrestricted by the previous or current constitution, amendment powers are the ‘highest normative powers as defined and limited in the
Kemal Gözler recognised two schools of thought, formal and substantive, as the basis for the distinction between the original and derived constituent powers, as summarised below.¹⁵⁵

2. The Formal and Substantive Theories

According to the formal theory, developed by scholars such as Raymond Carré de Malberg,¹⁵⁶ Georges Burdeau,¹⁵⁷ Roger Bonnard,¹⁵⁸ and Guy Héraud,¹⁵⁹ original and derived constituent powers are distinguished by the circumstances and form of their exercise. Constituent power is exercised outside the forms, procedures, and limits established by the constitution. It is a pure fact. On the other hand, a juridical concept of constituent power is exercised according to rules established by the constitution. Georges Vedel in fact used the term derived constituent power, which is nowadays employed by French authors, in 1949. According to Vedel, when the constituent power is exercised to amend the constitution through the conditions stipulated in the constitution, the ‘constituent power of revision’ ceases to be unconditional since it is a derived power.¹⁶⁰

The formal theory can be summarised as follows: original constituent power is exercised in a legal vacuum, whether in the establishment of the first constitution of a new state or in the repeal of the existing constitutional order, for instance in circumstances of regime change.¹⁶¹ In this theory, the nature of the original constituent power is extra-legal. This is traditional positivist approach as expressed by Hans Kelsen, who does not tackle the question of the constituent power, but rather claims that the question of the basic norm or obedience to the historically first constitution is assumed or presupposed as a hypothesis in juristic thinking.¹⁶² Likewise, for political scientists such as Carl Friedrich, constituent power is not a de jure power but a de facto power which cannot be brought under ‘four corners of the Constitution’.¹⁶³ It is not based on a prior legal norm; hence, it is unlimited, independent, and unconditional, and in that respect, original. In contrast, derived constituent power, while performing the same function of establishing constitutional laws, is a constraint power that acts according to the formal procedures as established in the constitution. Gözler makes an important clarification: for him, original constituent power does not have to be exercised for revising the entire constitution; it may be exercised even for amending a

¹⁵⁶ RAYMOND CARRE DE MALBERG, CONTRIBUTION A LA THEODRIE GENERALE DE L’ETAT 489-500 (2 tomes, 1922, réimpression par CNRS, 1962).
¹⁵⁷ GEORGES BURDEAU, ESSAI D’UNE THEORIE DE LA REVISION DES LOIS CONSTITUTIONNELLES EN DROIT FRANÇAIS 78-83 (Thèse, Faculté de droit de Paris, 1930).
¹⁵⁸ Roger Bonnard, Les actes constitutionnels de 1940, REVUE DU DROIT PUBLIC 46, 48-59 (1942).
single provision (outside of the constitutional amendment process). Similarly, the exercise of the 
*derived constituent power* may cover the entire constitution.\(^{164}\)

For the substantive theory, the main criterion distinguishing between *original* and *derived constituent powers* is the different scope of their ability to influence the substance of the constitution.\(^{165}\) This theory is best represented by Carl Schmitt who distinguished between ‘the constitution’ (*Verfassung*) and ‘constitutional laws’ (*Verfassungsgesetz*). The constitution represents the polity’s constitutional identity, which cannot be amended, and constitutional laws regulate inferior issues. The amendment process is designed for the textual change of constitutional provisions, but not of fundamental political decisions that form the substance of the constitution:

The authority ‘to amend the constitution’ . . . means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved… The authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself. It is not the authority to change the particular basis of this jurisdiction for constitutional revisions.\(^{166}\)

Thus, for Schmitt, an amendment cannot annihilate or eliminate the constitution. It cannot abolish the right to vote or a constitution’s federalist elements, or to transform the president into a monarch. These matters are for the *constituent power* of the people to decide, not the organs authorised to amend the constitution.\(^{167}\) Thus, an amendment that transforms a state that rests on the power of the people into a monarchy, or *vice versa*, would be unconstitutional.\(^{168}\)

### 3. Integration: A Theory of Delegation

Kemal Gözler argues that these two schools of thought are fundamentally irreconcilable on the grounds that according to the formal theory, as opposed to the substantive one, the *derived constituent power* is limited *only* by the formal conditions under which it operates.\(^{169}\) The argument advanced here rejects this narrow approach. The two theories should be regarded as *mutually reinforcing*, rather than exclusive. In order for the formal and substantive theories to coexist, the amendment power needs to be comprehended in terms of *delegation*.

Delegation affords the legal framework, even if not always consciously articulated, to rationalize this state of affairs surrounding the nature of the amendment power. Through the amendment provision, ‘the people’ allow a constitutional organ to exercise a *constituent authority* – the authority to constitute constitutional laws. When the amendment power amends the constitution, it uses a legal competence *delegated* to it by the *primary constituent power*.\(^{170}\) As Alf Ross


\(^{166}\) Schmitt, supra note 78, at 150.

\(^{167}\) *Ibid.*, note 152.

\(^{168}\) *Ibid.*, 151.

\(^{169}\) Gözler, Le Pouvoir de Revision Constitutionnelle, supra note 155, at 35-44; Gözler, Pouvoir Constituant, supra note 155, at 28-30.

\(^{170}\) Austin Bwagadu Boli Msowoya, Taming the tension between constituent power and constituted power in constitution making: thoughts on delegability of constituent power, http://www.academia.edu/4237119/Taming_the_tension_between_constituent_power_and_constituted_power_in_constitution_making_thoughts_on_delegability_of_constituent_power
explains ‘in the concept of delegation is implied a vague idea that the entrusting of competence is in the nature of something exceptional in that it permits the delegatus to “appear in the role of legislator.”’ 171 The amendment power is a delegated authority, where the delegatus exercises a function of a constituent authority. But why does this infer limitability? Surely, one may claim – as Carlos Bernal has – that this is a ‘clear case of a non-sequitur’ since it does not follow from the distinction between original and derived constituent power that the amendment power is limited, ‘for it is conceptually possible for the derivative constituent power to observe the procedural requirements and, at the same time, derogate the Constitution or replace it with a new one.’ 172 Allow me to offer a reply. Modern studies of delegation now adopt the model of the ‘principal-agent’ in order to define the act of delegation. The one who delegates authority (the original constituent power) is the principal, while the one whom the authority is delegated to (the amendment authority) represents the agent. 173 The amendment power is a delegated power exercised by special constitutional agents. When the amendment power amends the constitution, it thus acts per procurationem of the people, as their agent. 174 Having a principal-agent relationship, the delegated amendment power is subordinated to the principal power from which it draws its legal competency. Hence, contrary to the original constituent power, the delegation of the amendment power inherently entails certain limitations, as the legal framework of delegation is by itself characterised by constraints. 175

Since the amendment power is delegated, it ought to be regarded as a trust conferred upon the amendment authority: ‘All delegated power is trust, and all assumed power is usurpation. Time does not alter the nature and quality of either’, Thomas Paine reminds us. 176 True, the amendment authority has the ‘supreme’ amendment power, but it is only a fiduciary power to act for certain ends. 177 If the amendment power is delegated, it acts as trustee. Trustee of whom? Of ‘the people’ in their original constituent power. 178

175 Kumarjit Banerjee and Bulbul Khaitan, Resolving the “Paradox of Constituent Power and Constitutional Form” From A Schmittian Account of Sovereignty: Its Relevance to The Understanding of “Constituent Power” and “Amending Power”, 1 NUJS L. REV. 547, 555-556 (2008); Stephen A. Scott, Constituent Authority and the Canadian Provinces, 12 MCGILL L. J. 528, 555 (1966-1967).
176 Paine, supra note 48, at 238. See also ROBERT JAMES TURNBULL, BRUTUS (PSEUD.), THE CRISIS; OR, ESSAYS ON THE USURPATIONS OF THE FEDERAL GOVERNMENT 104 (1827).
Delegation and trust are conceptual keys to the nature (and consequently the scope) of amendment powers. The trustee (the amendment authority) has a legal right of possession of the trust corpus (the amendment power), conditional on his fiduciary obligation to comply with the terms of the trust (procedural or any explicit or implicit substantive requirements) and pursue the ends it established to advance (‘amend the constitution’). Due to its nature, the trustee is always conditional and thus the fiduciary amendment power necessarily entails limits. As Akhil Amar has argued, within Art. V of the U.S. Constitution, the people delegated the amendment power to ordinary government, and limitations on the amendment power, as stipulated in Art. V, exist only when it is exercised by delegated powers following from the people. Likewise, William Harris correctly claims that when the sovereign constitution-maker acts as sovereign, ‘the notion of limits on constitutional change is inapposite’; however, ‘when the machinery of government is acting as the agent of the people in its sovereign capacity, the notion of limits not only makes sense; it is necessary’.

However, one may claim that even though the amendment power is delegated, it is still limitless since it represents the unlimited sovereign. The representation of an unlimited constituent power must logically result in a similar unlimited amendment power. Such an argument should be rejected. There is always a hierarchical relationship between the grantor and the receiver: ‘the agent is never equal of the principal.’ This is precisely the distinction between original and derived constituent powers.

How does the theory of delegation manage to integrate the formal and substantive theories? First, delegation theory is not restricted to the substance of amendments. The amendment power must obey the procedure as prescribed in the constitution. Similarly, it is required to observe those explicit (not necessarily procedural, but also substantive) limits set upon it, as formally stipulated in the constitution. Explicit limits on constitutional amendments express the idea that exercise of the amendment power – established by the constitution and deriving from it – must abide by the rules and prohibitions formally stipulated in the constitution. Second, delegation theory is not restricted to form, but also concerns substance. The delegated amendment power, as a rational understanding of that delegation, must be substantively limited, whether these limits are explicitly stated in the constitution or not. Therefore, rather than being exclusive, the formal and substantive theories distinguishing between the constituent power and amendment power mutually reinforce one another.


183 See Michel Troper, *Constitutional Law, in INTRODUCTION TO FRENCH LAW* 1, 11 (George A. Bermann, Étienne Picard ed., 2008).
4. Terminological Clarification: Primary and Secondary Constituent Powers

Due to the complexity of the concept of the amendment power and its relations with the constituent power, various versions have developed in the literature to describe these concepts. In the American literature, it was often common to distinguish between framing power and amending power. The German often term the amending power ‘verfassungsändernden Gesetzgeber’, the secondary constitutional lawyer or amending legislature. In French constitutional discourse, various terms such as pouvoir constituant dérivé, pouvoir constituant institué, pouvoir de révision constitutionnelle, or even pouvoir constituant constitué, have been used to describe the amending power. Some of these terms, as Holmes and Sunstein note, are oxymoronic or ‘farfetched’. In order to elude any confusion, Schmitt plainly rejected the use of the term constituent to describe the amendment power. I agree that the oft-used terms are imprecise. Both the constitution-making and constitution-amending powers are constitutive in the sense that it these are powers to constitute constitutional rules. Nonetheless the two are not identical. As for the constitution-making power, I reject the use of the term original constituent power. A constitution always bears a ‘relational account’, and never acts in a pure vacuum. Additionally, constitution-making takes many different forms. Some constitutions were formed in revolutionary circumstances, breaking the previous constitutional order. Others were constituted through international efforts or imposed by foreign and external forces, such as the cases of Japan and Germany after 1945 or post-2003 Iraq. Often, the constitution-making process is exercised in continuity with historic or existing laws or in accordance with pre-determined rules (Post-1989 Eastern Europe and South Africa). Therefore, constituent power is never purely original, but original only in the sense that by its nature it does not necessarily derive from nor is bound to prior or existing

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186 See Gözler, Pouvoir Constituant, supra note 155, at 7-8.
187 Cass & Sunstein, supra note 120, at 276.
188 Similarly, Ramaswamy Iyer argues that ‘amending power’ is a good enough term for describing the power granted to Parliament under the Constitution, and ‘nothing is gained by calling it “constituent power”’. Ramaswamy R. Iyer, Some Constitutional Dilemmas, 41(21) ECONOMIC AND POLITICAL WEEKLY 2064, 2065 (2006).
190 Hans Lindahl, Constituent Power and Reflective Identity: Toward an Ontology of Collective Selfhood, in The Paradox of Constitutionalism, supra note 60, at 9, 21; Tushnet, supra note 33, at 1990; Palmer, supra note 52, at 215-216.
191 Klein and Sajó, supra note 184, at 422.
constitutional rules. Therefore, in the rest of this article I generally use the term primary constituent power to describe the basic power of constitution making. It is primary not only because it is the initial action, but also because it is principal in its relations with the amendment power. Congruently, instead of derived constituent power, I use the term secondary constituent power to describe the constitutional amendment power. It is secondary not merely because it necessarily comes (chronologically) after the constitution-making process, but because it is subordinated to the primary constituent power and inferior to it. No doubt, old habits are hard to break, but this terminology of primary and secondary constituent powers manifests more properly these powers’ unique nature and sharpens the delicate distinction between them.

D. CONCLUSION

To sum up the argument thus far, the amendment power is a constitutional power delegated to a certain constitutional organ. Since it is a delegated power, it acts as a trustee of ‘the people’ in their capacity as a primary constituent power. As a trustee, it possesses only fiduciary power; hence, it must ipso facto be intrinsically limited by nature. Put differently, the understanding of the amendment power as a delegated power means that a vertical separation of powers exists between the primary and secondary constituent powers. As in the horizontal separation of powers, this separation results in a power-block. The holder of the amendment power is not permitted to conduct any amendment whatsoever; he or she may be restricted from amending certain constitutional subjects. Identifying the amendment power as a delegated authority is the first step in understanding its limited scope. We now move on to explain how – according to this theoretical presupposition – the amendment power is limited, and what might constitute a breach of that trust and therefore an impermissible amendment.

III. THE SCOPE OF AMENDMENT POWERS

Based upon the theoretical presupposition argued in the previous section, according to which as a delegated power the amendment power must be limited, this part aims to elucidate how the amendment power is limited and to provide the theoretical ground that explains various explicit and implicit limitations on the amendment power.

A. EXPLICIT LIMITS

1. The Validity of Unamendable Provisions

The idea of constitutional entrenchment is debated extensively in the literature. However, when constitutions expressly prohibit the amendment of certain provisions or principles, constitutional entrenchment is taken to its extreme, hence it is often described as ‘absolute’ or ‘indefinite’. Is a statement that a constitutional provision is unamendable valid? ‘There is no law which cannot be

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194 On the change of the traditional constitution-making process see Andrea Lollini and Francesco Palermo, Comparative Law and the “Proceduralization” of Constitutionbuilding Processes, in FACETS AND PRACTICES OF STATE-BUILDING 301 (Julia Raue and Patrick Sutter eds., 2009).

195 See GEORGES FREDERIC SCHUTZENBERGER, LES LOIS DE L’ORDRE SOCIAL, TOME SECOND 19 (1850), (when constituent power is exercised by the legislature, this is the consequent of an imperfect separation of powers).


198 Richard Albert, Constitutional Handcuffs, 42(3) ARIZONA STATE L. 663, 672, 678, fn 42 (2010).
changed’, Ferdinand Regelsberger argued, adding that ‘a legislator … cannot control the unchangeability of a legal norm’. For this reason, unamendable provisions were often criticised as ‘a bit of useless verbiage’ or ‘an empty phrase’, and their validity is disputed. Notwithstanding such criticism, Kelsen’s view was that there is no reason to suppose that a norm cannot stipulate that it cannot be repealed. For Kelsen, a norm could be declared as unamendable, yet such a declaration cannot prevent the loss of its validity by a loss of efficacy. Accordingly, a provision prohibiting any amendments is not invalid by its very nature. Moreover, since a norm forbidding amendment has to be considered valid, in the case of unamendable provisions, it is not legally possible to amend the protected provisions. Indeed, nowadays unamendable provisions are commonly deemed valid.

The theory hereby presented supports the validity of unamendable provisions, but relies on questions concerning the sources of constitutional norms. As elaborated in the previous section, a vertical separation of powers exists between primary and secondary constituent powers. The delegated amendment power may be restricted from amending certain principles, institutions, or provisions. In other words, the primary constituent power can place limits on the secondary constituent power. The motives for such restrictions and the aims those restrictions are designed to accomplish vary. What is clear is that the amendment power, which is created by the constitution and subordinate to it, is exercised solely through the process established within the constitution. The amendment power is bound by any explicit limitations that appear in the constitution, if those are set by the primary constituent power.

Indeed, viewed from the perspective of the formal theory, explicit limitations on constitutional amendments reflect the idea 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. In that respect, one can understand the claim that unamendable provisions ‘can be seen as a procedural constraint which can be surmounted by an entirely new constituent act’. Viewed from the perspective of the substantive theory, unamendable principles are an example of the fact that the amendment power may be limited with regard to the content of certain amendments, and can amend the constitution ‘only under the presupposition that the identity and continuity of the constitution as an entirety is preserved’, to use Schmitt’s words. However, the substantive theory can only explain those unamendable provisions that aim to prevent fundamental changes in an effort to ensure the constitution’s integrity and the continuity of its constitutive principles.

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200 John W. Burgess, Political Science and Comparative Constitutional Law 172 (1893).
201 Robert Valeur, French Government and Politics 281 (1938).
203 Kelsen, supra note 199, at 109-110.
204 Kelsen, supra note 199, at 344.
207 Roznai, supra note 22.
208 Kemal Gözler, Judicial Review of Constitutional Amendments: A Comparative Study 52 (2008). Gözler’s approach is positivistic, resting on a purely textual basis. The theory advanced in this article is much wider as it supports implicit limitations on the amendment power, even if not explicitly written in the constitutional text.
209 See Troper, supra note 183, at 11.
211 Schmitt, supra note 78, at 150.
But unamendable provisions may simply derive from constitutional compromise and contingency and cover a wide range of topics, not necessarily the basic principles of the constitutional order.212 These cannot be supported by the substantive theory. The theory of delegation manages to explain all types of unamendable provisions. The secondary constituent power, as a delegated power, acts as a trustee of the primary constituent power. It must obey those ‘terms’ and ‘conditions’ stipulated in the ‘trust letter’ – the constitution. The delegated amendment power is limited according to the conditions stipulated in the constitution, including various substantive limits.

What are the legal implications of a conflict between a new constitutional amendment and an unamendable provision, according to the delegation theory? Unamendable provisions create a normative hierarchy between constitutional norms. Just as an ordinary law prevails over an administrative regulation, and a constitutional law prevails over an ordinary law,213 a constitutional provision established by the primary constituent power prevails over constitutional provisions established by the secondary constituent power. When resolving conflicts between constitutional provisions (unamendable provisions contrasted with later amendments), the paramount factor is not their chronological order of enactment (lex posterior derogat priori), but rather, the sources of these constitutional norms. Thus, the constituent power is divided conforming to a hierarchy of powers – primary and secondary – governed by the principle lex superior derogat inferiori; the constitutional rule issued by a higher hierarchical authority prevails over that issued by a lower hierarchical authority. Just as ordinary legislation retreats when it conflicts with constitutional norms, so do constitutional amendments retreat when they conflict with unamendable provisions.214 In other words, since the primary constituent power is an authority that is superior to the secondary one, the normative creations of the latter should withdraw when conflicting with that of the former.215 Unamendable provisions may lose their validity when they face a conflicting valid norm that was formulated by the same authority.216 Therefore, unamendable provisions cannot limit the primary constituent power; rather they ‘invite’ it to be resurrected in order to change unamendable subjects.217

2. An ‘Unamendable Amendment?’

Unamendable provisions raise a unique difficulty when an amendment stipulates by its own terms that it may not be subject to amendments; an ‘unamendable amendment’. This is not a hypothetical scenario. The original French unamendability of the republican form of government was inserted into the 1875 Constitution through an amendment in 1884, stimulating lively debate among scholars.218 Similarly, in 1861, the original proposal for a 13th Amendment to the U.S. Constitution...
Constitution, known as the ‘Corwin Amendment’, ‘eternally’ prohibited Congress from abolishing slavery. 219

The distinction between primary and secondary constituent power provides a simple solution to this conundrum. As only the primary constituent power can limit the secondary constituent power, unamendable amendments lose their validity when they face a conflicting norm formulated by the same authority. Accordingly, provisions created by the amendment power could subsequently be amended by the amendment power itself. For that reason, I disagree with the argument that as an unamendable amendment, the Corwin Amendment could not have been altered. 220 A better argument is that an ‘implicit limit’ exists, according to which ‘an amendment cannot establish its own unamendability’. 221 Limitations upon the delegated amendment power can be imposed solely by the higher authority from which it is derived – the primary constituent power. 222


Most of the world’s unamendable provisions are non-self-entrenched provisions, i.e. they establish the unamendability of certain constitutional subjects but they are themselves not entrenched. 223 Can non-self-entrenched provisions be amended? As a matter of practice, the answer is positive. In 1989, the unamendable provision in the Portuguese Constitution of 1976 (Art. 288) was itself amended and the unamendable principle of collective ownership of means of production was omitted, in order to comply with the European Community’s norms and in the the context of the collapse of communism. 224 Da Cunha notes that this amendment ‘has always shocked us because it undermines the standard meaning and thus causes the Constitution to lose all of its enforceability.’ 225 Importantly, the court was never asked to review the validity of this controversial amendment. 226
There are three theoretical approaches for solving the challenge posed by non-self-entrenched provisions. According to the first approach, if unamendable provisions are non-self-entrenched, unamendable principles or provisions may be amended in a **double amendment procedure**. The first stage is to repeal the provision prohibiting certain amendments, an act that is not in itself a violation of the constitution. The second stage is to amend the previously unamendable principle or provision, which is no longer protected from amendments. This approach finds supporters in the French, Norwegian, and American debates.

According to the second approach, there is no need for a two-stage process as the unamendable provision and the protected subject could both be repealed in the same act since the outcome is similar. As Douglas Linder puts it, ‘only a hide-bound formalist would contend that the difference [between one and two amendments] is significant’.

The third approach rejects such attempts by the amendment power to circumvent limitations that are set upon it. At the outset, it is important to admit that from a purely practical point of view, in order to avoid the double amendment procedure tactic, a clever constitution-maker would draft self-entrenched unamendable provisions, i.e. unamendable provisions that by their express terms not only prohibit amendments of certain subjects, but also prohibit amendments to themselves (a ‘double entrenchment mechanism’). True, the unamendable provision cannot, as Vedel puts it, ‘be given to a jailer who will guard its intangibility’, but it could be self-entrenched. This mechanism, which exists in several constitutions, could block the aforementioned loophole.

I argue that even if unamendable provisions are not self-entrenched, they should be implicitly recognised as unamendable. Liet-Veaux famously described the use of the French Third Republic’s legal devices in order to form the Vichy regime as ‘Fraude a la Constitution’. Whereas the double-amendment procedure may be tolerable from a purely formalistic perspective, such a legal manoeuvre may also be regarded as ‘fraud upon the constitution’.

**Footnotes:**

227 Da Silva, supra note 44, at 456-458.

230 Laurence H. Tribe, American Constitutional Law 111-114 (3rd edn, Foundation Press, 2000). For support and opposition of this approach within the American debate see Orfield, supra note 140, at 85.
231 Linder, supra note 47, at 729.
233 Cited in Klein, supra note 228, at fn 10.
From a practical point of view, if unamendable provisions could be amended by means of the same procedure required to amend other provisions, they would almost be devoid of meaning. The declaration of unamendability remains important even if conceived as eventually amendable because its removal would still necessitate political and public deliberations regarding the protected constitutional subject, which assign the unamendable provision important role. Moreover, the unamendability adds a procedural hurdle – and thus, a better procedural protection. Lastly, the unamendability of a provision might have a ‘chilling effect’, leading to hesitation before repealing the so-called unamendable subject.

It is true that, formally speaking, by amending the non-self-entrenched unamendable provision (the first stage), the amendment authority prima facie purports to act within the limits of its lawful powers. However, it is clear that substantively, it transgresses those limits. In 1867, the U.S. Supreme Court declared that ‘what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not with shadows’. Indeed, this maxim, without which constitutional provisions ‘would be meaningless’, equally applies with regards to the amendment power. Therefore, unamendable provisions should be given a purposive interpretation according to which they are implicitly self-entrenched. The double-amendment procedure should therefore be rejected on both theoretical and practical grounds.

B. IMPLICIT LIMITS

In a previous article I demonstrated that in many jurisdictions, courts have ascertained a certain constitutional core, a set of basic constitutional principles which form the constitution’s identity and which cannot be abrogated through the amendment procedure. In this section, I argue that the global trend of recognising implicit limits on the amendment power rests on a solid theoretical basis.

1. Foundational Structuralism

The first implied limitation derived from the theory of delegation is the most basic: the constitutional amendment power cannot be used in order to destroy the constitution. The delegated amendment power is the internal method that the constitution provides for its self-preservation. By destroying the constitution, the delegated power subverts its own raison d’être. Since, ‘the Constitution is not a suicide pact; and, consequently, its provisions should not be construed to make it one’, amendment provisions should not be construed as to embody ‘the death wish of


\[\text{238 Da Silva, supra note 44, at 470; Han, supra note 164, at 91.}\]

\[\text{239 Mazzone, supra note 44, at 1818.}\]


\[\text{242 Mazzone, supra note 44, at 1818.}\]

\[\text{243 For a similar approach see Klein, supra note 206, at 37-38; Jean-Philippe Derosier, La Limite Au Pouvoir De Révision Constitutionnelle, VIIÈME CONGRÈS MONDIAL DE DROIT CONSTITUTIONNEL 5 (Athens, 11 Aug 15 Juin 2007); Schwartzberg, supra note 1, at 9.}\]

\[\text{244 Roznai, The Migration and Success of a Constitutional Idea, supra note 21.}\]

\[\text{245 Sampson R. Child, Revolutionary Amendments to the Constitution, 10 Const. Rev. 27, 28 (1926).}\]

the Constitution. The amendment authority entrusted with the amendment power cannot use this power in order to destroy the very same instrument from which its authority streams and on which it is built. Thomas Cooley wrote that the U.S. Constitution’s framers abstained from explicitly forbidding changes that would be incompatible with the Constitution’s spirit, simply because they did not believe that those would be possible under the terms of the amendment process itself. His metaphor is astoundingly clear:

The fruit grower does not forbid his servants engrafting the with-hazel or the poisonous sumac on his apple trees; the process is forbidden by a law higher and more imperative than any he could declare, and to which no additional force could possibly by given by re-enactment under this orders.

As the amendment power was introduced for the purpose of preserving the constitution, it cannot be used in order to abolish the constitution even in the absence of any explicit limitations to that effect. This idea might be analogue to Wesley Hohfeld’s scheme of jural correlatives. Hohfeld notes that upon the creation of an agency power, “the agent is subject to a liability of having his power “revoked” or divested by the principal”. Put differently, alongside the legal constitutional amendment power rests the liability not to undermine the same constitution itself. To amend the constitution as to destroy it and create a new constitution would be an action ultra vires; a usurpation of the amendment power that ‘the people’ have not delegated to the amendment authority. It would be a breach of the trust.

The second limitation derives from the first one, but it is one logical step forward: the constitutional amendment power cannot be used in order to destroy the basic principles of the constitution. The constitution, in that respect, is not the mere formal existence of the document, but rather it includes the constitution’s essential features. Each constitution has certain fundamental core values or principles, which form the ‘the spirit of the constitution’. This is what I term the foundational structuralist perception of constitutions. According to this perception, constitutions are not merely ‘power maps’ that reflect the political power distribution within the polity. They are more than instruments of empowerment and restrictions. They reflect certain basic political-philosophical principles, which form the constitution’s foundational substance, its essence.

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250 Wesley N. Hohfeld, Fundamental Legal Conceptions as Applied in judicial Reasoning, 26 Yale L. J. 710, 727 (1917).


254 Note that foundational structuralism is not to be understood in terms of natural law, rather as the “spirit” of legality that pervades the forms of constitutionalism to which societies commit themselves. See Mark Walters, Written Constitutions and Unwritten Constitutionalism, EXPONDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 245, 261 (Grant Huscroft ed., 2008).
constitution is structured upon these basic principles and it is no longer the same without them. That is, when the amendment power alters the basic essential principles of the constitution, it ‘substantially varies’ from the purpose for which it was originated. It no longer amends the constitution but constitutes a new one. The alteration of the constitution’s core results in the collapse of the entire constitution and its replacement by another. Since an amendment cannot annihilate or eliminate the constitution, amending its basic elements and principles is prohibited, just as eliminating the constitution is prohibited. This is the basic rationale behind the Indian basic structure doctrine and the Colombian Constitutional Replacement Doctrine. Thus, Schmitt was right to argue that the amendment process is not designed for modifying the fundamental decisions forming the constitution’s substance, since such modification results in a new constitution, not in the amendment of the same constitution. Such constitutive acts are for the people’s primary constituent power, not the delegated organs.

The third limitation is that the amending power, like any governmental institution, must act in bona fides. The amendment power is not the power to destroy the constitution. Constitutional destruction, Dietrich Conrad remarked, can also occur ‘by using the form of amendment to directly exercise other constitutional functions in given cases, disregarding constitutional limitations and upsetting the constitutional disposition of powers’. Even Richard Thoma, who otherwise opposed any notion of implicit limitations on the amendment power, maintained that parliament could not, for example, dissolve itself in violation of normal prescribed procedures, or pass a bill of attainder. A ‘government with limited powers of legislation and at the same time, with unlimited powers of legislation, would be an absurdity’, Holding wrote, adding that ‘no enactment, in substance purely legislative, should be permitted to become a part of the Constitution’. I agree that if the material of an amendment is not commonly ‘constitutional’, i.e. it is ordinarily legislative in nature – this raises suspicions that the provision is being given a constitutional status solely in order to ‘shield’ it from judicial review. The overall surrounding circumstances that led to the decision to amend the constitution in such a way are imperative in the analysis of whether the amending power is being abused or not. The doctrine of implicit limitations on the amendment power, which is built upon historical events, is a method to protect the constitution against the possibility that ‘the legislature of the day, hijacked

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255 Compare with Ernst Rudolf Huber, Constitution, in WEIMAR, supra note 2, at 328.
257 Smith, supra note 229, at 369.
259 SCHMITT, supra note 78, at 152.
261 Conrad, supra note 140, at 17.
262 See Peter C. Caldwell, Richard Thoma – Introduction, WEIMAR, supra note 2, at 151, 153; Richard Thoma, the Reich As a Democracy, in WEIMAR, supra note 2, at 157, 163.
263 RICHARD THOMA, GRUNDFRECHTEN UND GRUNDPFICHTEN DER REICHSVERFASSUNG 40ff (1929), cited in Conrad, supra note 140, at 17.
265 Constitutions usually include provisions regarding basic governmental structures and the relations between the main powers and functions of government; basic values and commitments; and human rights. See Ruth Gavison, What Belongs in a Constitution?, 15 CONS. POL. ECON. 89 (2002).
266 Cf., Israeli Supreme Court decision in HCJ 4908/10 Knesset Member Bar-On v. The Knesset (Apr. 7, 2010).
by individual, group and institutional interests and temporary impulses or permanent passions may use its authority to inflict torture on the Constitution'.

The comprehension of the constitution in terms of foundational structuralism necessitates an acknowledgment of two notions: a hierarchy of constitutional values and a constitutional identity.

2. Hierarchy of Constitutional Values

A constitution is ‘a rich lode of principles’. But not all constitutional principles are equally basic. The German jurisprudence on this idea is instructive. The German Basic Law 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. This was recognised by the German Federal Constitutional Court early in 1951 in the Southwest case:

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.

Drawing from German jurisprudence, Walter Murphy consistently argued that constitutions in constitutional democracies present not simply a set of values, but rather a hierarchy or ordering of values. This system of values precludes the possibility of adopting an amendment that would infringe human dignity. A similar view, according to which amendments are not intended to disassemble the constitution’s structure or repeal constitutional essential was defended by John Rawls, Samuel Freeman, and Stephen Macedo. Even Laurence Tribe, who calls for a reserved judiciary role with regard to constitutional amendments, 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. Tribe recently wrote that some amendments,

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274 MACEDO, supra note 269, at 183.

even harsh ones such as allowing torture in certain circumstances, while being objectionable could not be said to be ‘beyond the pale as a constitutional matter if adopted in accordance with Article v’. This might seem to be a rejection of any implicit limits. But then, Tribe continues to note 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 repudiated without a full-blown revolution’. These leading scholars seem to share with Carl Schmitt the essential notion of substantive implicit limitations on the amendment power. This article defends a similar view based on the distinction between primary and secondary constituent powers. As aforementioned, being a delegated authority, the amendment power must be conceived as inherently limited.

The claim for recognition of a hierarchy of constitutional values is not immune from criticism. Kemal Gözler, for example, argues that even if there might be a moral difference between constitutional norms, there is no hierarchy, since they do not derive their validity from one another. More recently, Richard Albert criticised any attempt to create a hierarchy of constitutional norms which ‘threatens to deplete the text of its intrinsic value as an institution whose authority applies equally, fairly and predictably to citizens and the state’. This criticism seems to be based on a misapprehension of the idea behind the hierarchy of constitutional values with respect to implicit limitations on the amendment power within a foundational structuralist analysis. A foundational structuralist analysis of the constitution does not necessarily require the picking of a certain secluded constitutional provision, as ‘an isolated island’; rather, it indeed urges us to look at the constitution as an organic whole. It is an exercise to find those systematic principles underlying and connecting the constitution’s provisions and which make the constitution coherent. In his early writings, which were so influential on the Indian endorsement of the basic structure doctrine, Dietrich Conrad used the metaphor of pillars to explain the unamendability of basic constitutional principles: ‘any amending body organized within the statutory scheme, however verbally unlimited its power, cannot by its very structure change the fundamental pillars supporting its constitutional authority’. This sentence was quoted verbatim by Khanna J. in the famous Kesavananda case in which the basic structure doctrine was developed and was persuasive in adoption of the basic structure doctrine in Bangladesh. Conrad later remarked that, ‘the graphical appeal almost by itself has the force on an argument’, highlighting the power of metaphors and language formulas within legal argumentation. The metaphor of the pillars that hold the constitutional structure is powerful and corresponds with the foundational structuralism perspective endorsed in this article.

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276 Laurance H. Tribe, The Invisible Constitution 33-34 (2008). Tribe mentions there amendments repealing the republican form of government or repudiating the rule of law, as examples for radical amendments which might be deemed void.

277 For a comparison between Schmitt and Rawls on this point see Joel Colón- Rios, The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform, 48 Osgoode Hall L. J. 199, 221-228 (2010).


279 Albert, supra note 198, at 683.


282 Conrad, supra note 256, at 379.


285 Conrad, supra note 281, at 190.
Even to those who do not regard the constitution as a structure but as an organic instrument, the argument of unamendable basic principles, which provide meaning for the greater whole, remains coherent. The metaphor of a living constitution is usually used to imply that the language of the constitution should evolve through judicial decisions according to the changing environment of society. A constitution’s amendment process provides another mechanism for such evolution, as a ‘built-in provision for growth.’ Prima facie, the view that a constitution must develop over time supports a broad use of the amendment power. Nevertheless, even if we conceive of the constitution as a living tree, which must evolve with the nation’s growth and develop with its philosophical and cultural advancement, it has certain roots that cannot be uprooted through the growth process. In other words, the metaphor of a living tree captures the idea of certain constraints: ‘trees, after all, are rooted, in ways that other living organisms are not’. These roots are the basic principles or structure of a given constitution, even if conceived as a living system.

Therefore, it is not merely a matter of which principles are more fundamental than others. It is not an exercise of ‘ranging over the constitutional scheme to pick out elements that might arguably be more fundamental in the hierarchy of values’, William Harris correctly claimed, adding that: ‘a Constitutional provision would be fundamental only in terms of some articulated political theory that makes sense of the whole Constitution’. The idea of a hierarchy of norms within foundational structuralism is to examine whether a constitutional principle or institution is so basic to the constitutional order that changing it – and looking at the whole constitution - would be to change the entire constitutional identity.

3. Constitutional Identity

‘A constitution’, Peter Häberle states, ‘is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of cultural heritage and the foundation of its expectations’. Constitutions are designed to reflect society’s identity and delineate the highest principles shared by the state’s citizens. A constitutional identity, as Gary Jacobsohn shows, represents ‘a mix of aspirations and commitments expressive of a nation’s past’. It is defined by the intermingling of universal values with the nation’s particularistic history, customs, values, and aspirations. Constitutional identity is never a static thing, as it emerges from the interplay of inevitably disharmonic elements. But changes to the constitutional identity, ‘however significant, rarely culminate in a wholesale

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290 CARL JOACHIM FRIEDRICH, MAN AND HIS GOVERNMENT 272 (1963).
291 HARRIS, supra note 181, at 188.
295 See generally Jacobsohn, ibid., at 361 (2006); JACOBSON, supra note 26.
transformation of the constitution’. This is because a nation usually aims to remain faithful to a ‘basic structure’, which comprises its constitutional identity. ‘It is changeable’, Jacobsohn writes, ‘but resistant to its own destruction’.

The identity, for foundational structuralism theory, is ‘the normative identity of the Constitution, supported by a coherent interpretation of its core constitutional principles or basic features’. Each constitutional system has its own basic principles. Changing this identity would result in the formation of a new constitution. The constitutional identity is the constitution’s ‘genetic code’. This idea may extend back to Aristotle, who believed that a polis should be identified with its constitution, and that a change in identity of the polis cannot be considered a mere reform, but ‘a birth of a new regime’. A constitutional change which exceeds the theoretical parameters of the existing constitution, fundamentally transforming it, is a recreation of the constitutional identity, an act which lies beyond the authority of those governmental institutions created by the people. True, one should not confuse constitutional preservation with constitutional stagnation. Conversely constitutional changes should not be tantamount to constitutional metamorphosis. Imagine Joseph Raz analogy between constitutions and a house built two hundred years ago: ‘the house had been repaired, added to, and changed many times since. But it is still the same house and so is the constitution. … the point of my coda is to warn against confusing change with loss of identity… An analogy between a constitution and a house is indeed convenient to explain this: ‘just as a house does not lose its identity so long as you are decorating and repairing it on the same foundations on which it was built, so a Constitution does not lose its identity if it changed according to the requirements of changing times so long as its basic foundations are maintained’.

One may again wonder, why is it not the prerogative of the amendment power to change even the basic foundations of the system? James McClellan, for example, asserted that amendments which violate the spirit of the constitution, no matter how foolish they are, are still ‘the prerogative of the American people under Article V to make fools of themselves and to abolish their form of government and replace it with a new system if that is their wish. McClellan is correct that it is the prerogative of the people to change their system of government,

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296 Jacobsohn, supra note 26, at 325-326.
297 Jacobsohn, supra note 295, at 363.
298 Krishnaswamy, supra note 251, at 118.
300 Da Cunha, supra note 155, at 11.
305 Joseph Raz, Between Authority and Interpretation 370 (2009).
but this cannot be made through the amendment procedure. This should be ‘the people’s exercising their constituent power, not the old constitution’s benediction, that validates the new order’. This is precisely the distinction between the primary and secondary constituent powers, to use Jacques Baguenard’s metaphor; the primary constituent power is the power to build a new structure and the secondary constituent power is the power to make alterations to an existing building. As the constitution’s core cannot be altered without destroying the whole constitution, the delegated amendment power cannot use the power entrusted to it for quashing the constitution or its fundamentals so that it loses its identity. Amending the essential and pivotal principles to the constitution’s identity may be viewed as a ‘constitutional breakdown’.

4. Textualism

The idea that the amendment power is inherently limited in its scope finds a textual support in the literal meaning of the term ‘amendment’. Literally, the Latin word _emendere_ means ‘to remove lies’ (_mendāciōnem = lie_); ‘to correct fault’ (_ē_ (‘out’) + _menda_ (fault)). Based on this textual meaning, Walter Murphy argues that: ‘amendments that would change the basic principles on which the people agreed to become a nation or overturn compromises on any principle that made the coming together possible would not be _amendments_ at all, but efforts to construct a new constitution.’ The textual basis distinguishes between amendments and revolutionary changes to the constitution. An amendment can alter the existing constitution, but must not comprise a change so radical that it has to be regarded as a new constitution: ‘the word “amendment” itself implies limitations. It implies construction rather than destruction’. According to the textual rationale, amendments must operate within the boundaries of the existing constitutional order and its foundational principles.

The textual argument is not novel. It appeared in the briefs presented before the U.S. Supreme Court against the validity of the 18th Amendment, and more recently in court

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308 Murphy, supra note 303, at 14.
310 Conrad, supra note 256, at 418-419.
312 Howard Shane, _Original Meaning, Democratic Interpretation, and the Constitution_, 21 PHIL & PUB. AFF. 3, 42 (1992). See also Wright, supra note 44, at 747; Amar, _Philadelphia Revisited, supra note 180_, at 1045; V.R Krishna Iyer, _A CONSTITUTIONAL MISCELLANY_ 1, 3 (2nd Ed., Eastern Book Company, 2003); Harris, _supra note 181_, at 183.
315 Murphy, _Slaughter-House, supra note 271_, at 12-13
316 Child, _supra note 245_, at 28. Child noted also that since amendments become ‘a part of this constitution’, this excludes the idea that amendment can make a new or a changed constitution. It has to remain ‘this Constitution’. See also Arthur W. Machen, _Is The Fifteenth Amendment Void?, 23 HARV. L. REV. 169-170_ (1909-1910); Judge M. F. Morris, _The Fifteenth Amendment to the Federal Constitution_, 189 N. AM. REV. 82, 85 (1909); Marbury, _supra note 249_, at 225; Holding, _supra note 264_, at 487; Murphy, _Merlin’s Memory, supra note 271_, at 177; Murphy, _supra note 303_, at 14
317 See SIMEON C. R. MCINTISH, _FUNDAMENTAL RIGHTS AND DEMOCRATIC GOVERNANCE: ESSAYS IN CARIBBEAN JURISPRUDENCE_ 74-75 (2005); Barak, _supra note 44_, at 377; Joan Schaffner, _The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?, 54 AM. UNIV. L. REV. 1487, 1493_ (2005); Han, _supra note 164_, at 82; Murphy, _supra note 237_, at 506.
318 See, for example, JEFFERSON DAVIS, _THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT_ (1881), 197; Livermore v. Waite, 36 P. 424,426 (Cal. 1894).
decisions that recognised implicit limitations on the amending power, for example, in India\textsuperscript{320} and in Bangladesh.\textsuperscript{321}

The textual argument is not exempt from criticism. McGovney argues that ‘amendment’ encompasses as an element of euphemism, the assumption that it is an improvement. But ‘beyond this euphemistic tinge, amendment as applied to alteration of laws, according to current dictionaries means alteration or change’.\textsuperscript{322} Hence the term ‘amendment’ includes any change whatsoever. This claim negates the original and everyday meaning of the word. Even ‘in our everyday discourse’, Sotirios Barber notes, ‘we distinguish amendments from fundamental changes because the word \textit{amendment} ordinarily signifies incremental improvements or corrections of a larger whole’.\textsuperscript{323}

Kemal Gözler claims that it is difficult to infer legal consequences from the grammatical interpretation of the word amendment in the absence of any explicit limitations. The amendment provision can be used in order to change several or even all of the constitution’s provisions. Some constitutions, for example, that of Austria (Art. 44), Spain (Art. 168), and Switzerland (Art. 139), explicitly allow for their total revision. Lastly, the textual argument may be valid for the English term, but not necessarily in other languages. Francophile constitutions use the term \textit{revision} (e.g. the French Constitution, in Art. 89), the Italian Constitution uses \textit{revision} (Art. 138-139), the Portuguese Constitution uses \textit{revisão}, the Spanish Constitution uses \textit{reforma}, the German Basic Law uses \textit{anderung}, and the Turkish Constitution use \textit{degisklik}. These terms, Gözler claims, do not carry the exact same meaning as \textit{amendment}.\textsuperscript{324}

These arguments carry some force, but they are not entirely convincing. From the theory of delegation, it can be argued that in those numerous and limited cases in which constitutions allow for their total revision, this authorisation is an explicit permissibility given to the delegated amending authority to revise the entire document. However, \textit{this is the exception rather than the rule}. It can also be argued, that when constitutions allow their total revision, this should be regarded as allowing amendments of the entire constitution’s provisions, but not of the state’s basic premises.\textsuperscript{325} What is important is the \textit{content} of the amendment, not its \textit{quantum}. An amendment of a single provision can be considered as a revolutionary change, while revising the entire constitution can still maintain its basic constitutional principles. This applies with even greater force for constitutions that use the terms \textit{revision} or \textit{reform}, rather than \textit{total reform}. A revision or a reform can indeed make dramatic changes, but they still cannot destroy the existing constitutional order and replace it with one that denies these basic values.\textsuperscript{326} The Latin meaning of the word \textit{reformare} is ‘to transform an already existing thing’.\textsuperscript{327} Lastly, even in some other languages, the amending

\begin{itemize}
\item D. O., McGovney, \textit{Is The Eighteenth Amendment Void Because of its Contents?}, 20 COLUM. L. REV. 499, 514 (1920). See also \textit{Orfield}, supra note 140, at 108: ‘by an amendment is meant an addition as well as an alteration’.
\item SOTIRIOS A. BARBER, \textit{ON WHAT THE CONSTITUTION MEANS} 43 (1984).
\item GöZLER, supra note 208, at 69-71.
\item SCHMITT, supra note 78, at 152.
\end{itemize}
provisions carry the same meaning as amendment. For instance, the Israeli Basic Laws use the Hebrew term Tikun (תיקון), which means ‘repair’. In any event, as Ashok Dhamija demonstrates in his comprehensive study on amendment procedures, the vast majority of states’ constitutions use the term amendment.³²⁸

It is true that self-standing the textual argument is inconclusive. It ‘needs to be supplemented by… a deeper argument’.³²⁹ However, taken as an element in the overall theoretical analysis as elaborated in previous sections, it may provide additional support to the general claim that the amending power must operate within the existing constitutional framework.³³⁰

C. Conclusion

The formal and substantive theories distinguishing between primary and secondary constituent powers are not mutually exclusive, but rather mutually reinforcing. Being a delegated authority, the amendment power may be explicitly limited. It must abide these limitations. However, even a ‘blank cheque’ which leaves everything to the judgment and discretion of the constitutional amendment authority has to be for the achievement of a certain objective – amending the constitution and not destroying it, or replacing it with a new one. It is thus implicitly limited by its nature. This conclusion is a indispensable consequence of the organization of the amendment power within the framework of a limited government.³³¹

IV. Enforceability and Implications of Unamendability

A. Judicial Review of Constitutional Amendments

In 1921, Edouard Lambert argued that owing to two features of American judicial review – the common law technique of judging and substantive jurisprudence, which elevates individualism above social values – the practice of judicial review would extend not only to ordinary legislation, but also to constitutional amendments.³³² At that time, the ‘threat’ of the possibility that judicial review could extend to constitutional amendments hit the French readers with stupefaction.³³³ Seven years later, Carl Schmitt argued that Lambert’s core thought is correct and ‘will sooner or later show its practical significance’.³³⁴ It seems that both predictions were spot on. Today, judicial review of constitutional amendment is an existing practice in various jurisdictions.³³⁵

In the previous sections, I developed a theory to explain the limited nature of amendment powers. Yet, it is one thing to claim that the amendment power is limited; it is quite another question as to whether such limitations are legally enforceable by courts.³³⁶ One can certainly make the claim that even if the amendment power is limited, whether a particular amendment

³²⁸ Ashok Dhamija, Need to Amend A Constitution and Doctrine of Basic Features 223 (2007).
³³⁰ Conrad, supra note 256, at 416-417.
³³¹ Keshavamurthy, supra note 182, at 89.
³³³ Davis, ibid., at 563.
³³⁴ Schmitt, supra note 78, at 153.
³³⁵ See O’Connell, supra note 44, at 74; Jacobsohn, supra note 44, at 460; Gözler, supra note 208; Halmai, supra note 44.
oversteps those limitations is not a decision for courts to make.\textsuperscript{337} Constitutional limitations on the amending power would then constitute a rule without a legal sanction (but perhaps with a political or social sanction) to prevent the amendment authority from exceeding its limits. Of course, a constitution may expressly vest a court with the authority to substantively review amendments.\textsuperscript{338} This is a relatively easy case, as it raises no question with regards to the courts’ authority.\textsuperscript{339} However, most constitutions are silent on this point. Confronted with such a question, a court cannot avoid a decision arguing \textit{non liquet}.\textsuperscript{340} It has to fill this gap and interpret this silence.\textsuperscript{341} Comparative constitutional law reveals that such silence was not necessarily interpreted as negating an authority to review amendments, and courts in states such as Germany,\textsuperscript{342} Brazil,\textsuperscript{343} and the Czech Republic\textsuperscript{344} have declared themselves competent to substantively review amendments, even without any expressed authority.\textsuperscript{345} Especially in those

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\item \textsuperscript{337} Tribe, \textit{supra} note 275, at 440-43; Joseph F. Ingham, \textit{Unconstitutional Amendments}, 33 Dick. L. Rev. 168 (1928-1929). For Schmitt, for example, the ‘guardian of the constitution’ would not be a constitutional court rather the President, see Claire-Lise Buis, \textit{France, in The ‘Militant Democracy’ Principle in Modern Democracies} 75, 83 (Markus Thiel ed., 2009). Nevertheless, it has to be remembered that with the limited judicial review of legislation during the Weimar period, judicial review over constitutional amendments was naturally not recognised. See Arato, \textit{supra} note 329, at 335-336 (noting that the ‘striking thing about Schmitt’s analysis of the limits to the amending power is that he never discusses how these limits are to be enforced’).
\item \textsuperscript{338} This is the case in Romania, Kyrgyzstan, Ukraine, and Kosovo. See \textit{Romania Const.} (1991), Art. 146(a); Ion Deleanu, Emil Boe, \textit{The Control of the Constitutionality of Laws in Romania}, 2(1) J. CONST. L. EASTERN & CENTRAL EUROPE 119, 120, 124 (1995); Ioan Deleanu, \textit{Separation of powers – Constitutional Regulation and Practice of the Constitutional Court}, 3(1) J. CONST. L. EASTERN & CENTRAL EUROPE 57, 63 (1996); \textit{Ukrainian Const.} Arts. 157-159; Lech Garlicki, Zofia A. Garlicka, \textit{Exterritorial Review of Constitutional Amendments? International Law As a Norm of Reference}, 44 Isr. L. Rev. 343, 347-348, fn 8 (2011); \textit{Kosovo Const.}, Arts. 113(9) and 144(3); Enver Hasani, \textit{Preventive Abstract Control of Constitutional Amendments and Protection of The Head of State From Unconstitutional Dismissal: The Case of Kosovo}, 1 E. DREJTÅ - LAW REVISTE PËR ÇËSHTJE JURIDIKE & SHOQËRORE JOURNAL FOR JURIDICAL AND SOCIAL ISSUES 105, 106 ft. 188 (2003); Enver Hasani, \textit{Constitutional Protection of the Head of State; The Case of Kosovo}, 7 \textit{Vienna J. INT’L Const. L.} 128 (2013).
\item \textsuperscript{339} Gözler, \textit{supra} note 208, at 4-7. A constitution may expressly vest courts with competence to formally review amendments, i.e. only with regard to their form or procedure of adoption. See for instance, the \textit{Chilean Const.}, Art. 82(2); Pfersmann, \textit{supra} note 44, at 97.
\item \textsuperscript{340} On ‘\textit{non liquet}’ see Alfredo Mordechai Rabello, \textit{Non Lique From Modern Law to Roman Law}, 9 Isr. L. Rev. 63 (1974).
\item \textsuperscript{341} See Aḥaron Barak, \textit{The Various Judicial Creations: Interpretations, Filling the gap and Developing the Law}, 39 HAPRAKLIT 267 (1990).
\item \textsuperscript{345} Gözler, \textit{supra} note 208, at 100.
\end{itemize}
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states in which the constitution includes unamendable provisions, judicial review is conceived as a natural mechanism which supplies the effectiveness of unamendability.\(^{346}\) According to this approach, judicial review of an amendment that violates an unamendable provision should be recognised, just as it is recognised when an ordinary law violates the constitution.\(^{347}\) Nonetheless, in some states, such as Norway\(^ {348}\) and France,\(^ {349}\) the existence of unamendable provisions did not necessarily lead to the power of judicial review over the content of constitutional amendments. In these states, one may argue, unamendable provisions are merely declarative,\(^ {350}\) which raises questions regarding the effectiveness of these non-justiciable constitutional provisions.\(^ {351}\)

The situation becomes much more complicated when it comes to implicit limits on the amendment power. From the fact that the constitution does not contain any explicit limitations, it may be inferred that the amendment power is intended to be very wide.\(^ {352}\) Indeed, courts in Sri Lanka,\(^ {353}\) Malaysia,\(^ {354}\) and Singapore,\(^ {355}\) expressly rejected any notion of implicit limitations due to the constitution’s lack of explicit limits. In Pakistan, even though the Supreme Court acknowledged a set of implicitly unamendable ‘salient features’ of the constitution, it drew a distinction between these limitations and their judicial enforcement, holding that limitations on the amendment power are to be enforced by the body politic through the ordinary mechanisms of parliamentary democracy, rather than by the judiciary.\(^ {356}\) On the other hand, as my tour d’horizon of the basic structure doctrine demonstrates, judicial enforceability of implicit limitations is in many cases possible. Courts around the world, in countries such India, Bangladesh, Kenya, Colombia, Peru, and Taiwan, have held that the amendment power is inherently limited, even in

\(^{346}\) Barak, supra note 44, at 333; Weintal, supra note 217, at 30.

\(^{347}\) See Barak, supra note 44, at 333.


\(^{351}\) Baranger, supra note 349, at 398.

\(^{352}\) Conrad, supra note 140, at 18.


the absence of any explicit limitations, and that the court – as the guardian of the constitution – has the duty to enforce such implied limitations.357

Thus, the non-existence of unamendable provisions does not – and should not, as I argue – necessarily mean that judicial review of constitutional amendments is impossible. The language of the constitution is not only explicit, but also implicit. Every constitution has an implicit unamendable core, which demands appealing to the primary constituent power for its amendment. Of course, facing silence regarding limitations on the amendment power, any court’s decision regarding implicit limitations may only derive from judicial activism coupled with ‘judicial daring and courage’.358 In light of all these, judicial review of constitutional amendments deserves a careful attention.359

This section directly follows previous sections as it deals with the practical implications of a theory of unamendability. Against the backdrop of the theory regarding the limited nature and scope of amendment powers, I begin by explaining the main rationales behind the practice of judicial review of constitutional amendments.

1. Separation of Powers

At first look, judicial review of amendment seems as a violation of separation of powers. Invalidating an amendment on the grounds of unconstitutionality is constitutive in its functional meaning. Constitutional legislation is an activity that is imposed upon the constituent authority (primary or secondary) and not upon the judiciary. A deeper look reveals otherwise. The amendment power is limited in scope by its nature as a delegated power. It may be limited explicitly or implicitly. Judicial review of amendments serves as a mechanism to enforce those limitations. Judicial review, as Eugene Rostow claimed, ‘is implicit in the conception of a written constitution delegating limited powers.’360 It fulfils the vertical separation of powers, which exists between the primary and secondary constituent power.361 The amending authority bears the function set upon it by the constitution: to amend the constitution according to the amendment procedure and its possible limitations. It must obey any explicit limits set upon it and preserve the constitution. The vertical separation of powers between the primary and secondary constituent powers means that the amending authority is independent within its margins as long as it acts within its authority. But it also necessitates a mechanism for determining if the amending authority surpassed its limits.362 This mechanism ought to exist outside of the authority that allegedly surpassed its limits. It should be conducted by an unbiased organ thus ensures that the authorised amending authority

358 Weintal, supra note 217, at 50-51. Indeed, the Indian basic structure doctrine is one of the most significant examples for judicial activism. See Payel Rai Chowdhury, Judicial Activism and Human Rights in India: a Critical Appraisal, 15(7) INT’L J. HUM. RTS. 1055 (2011); Ronojoy Sen, Walking a Tightrope: Judicial Activism and Indian Democracy, 8(1) INDIA REV. 63 (2009).
359 In fact, it was suggested that judicial review of constitutional norms (‘metaconstitutional review’) should be studies as a distinctive legal phenomenon, different from ordinary judicial review. See Gabriel Franco Fernández, THEORETICAL AND PRACTICAL PROBLEMS OF METACONSTITUTIONAL REVIEW (A thesis submitted in conformity with the requirements for the degree of Master of Laws, Graduate Department of Law, University of Toronto, 2009).
361 See, for example, Guha and Tundawala, supra note 267, at 544.
does not exceed its delegated power.\footnote{363} While it does not necessarily have to be within the judiciary, this mechanism fits naturally within the judicial process.

2. The Essence of Judicial Duty

One of the arguments Chief Justice John Marshall made in favour of judicial review of legislation in the celebrated \textit{Marbury v. Madison} case\footnote{364} was that judicial review is ‘of the very essence of judicial duty’.\footnote{365} According to this argument, those who apply the law (naturally, courts) must determine what the law is. A similar argument can be made with regard to judicial review of constitutional amendments. In order to carry out its constitutional role, the court has to interpret the constitution. Hans Kelsen argues that ‘[i]f the constitution contains no provision concerning the question who is authorized to examine the constitutionality of statutes, then the organs competent to apply statutes, that is, especially, the courts, have the power to perform this examination.’\footnote{366} Likewise, if the constitution is silent on the organ that is authorised to review constitutional amendments, courts – which apply the constitution – should possess this power. Accordingly, as in conflicts between ordinary law and the constitution, when courts face a conflict between constitutional norms, they have to determine, as part of the judicial process, what is the legal norm to be applied. They therefore have to conduct some form of judicial review.

Analytically, there is also a great resemblance between judicial review of ordinary legislation and that of constitutional amendments. Both are done in light of normative obliged standards (whether explicit or implicit). At least when it comes to unamendable provisions, judicial review of amendments seems to be a similar intellectual operation as ordinary judicial review; it is an examination of the compliance of a given legal standard to a superior standard. In that respect, it does not matter whether the examination is a statute \textit{vis-à-vis} the constitution or a constitutional amendment \textit{vis-à-vis} an unamendable provision.\footnote{367} Therefore, it would only seem natural, that ‘the institution best suited to verify an unconstitutional constitutional amendment is the constitutional court, which has the authority to review the constitutionality of legislative acts’.\footnote{368}

3. The Rule of the Constitution

According to the ‘rule of constitution’ justification, a government’s activities – including its constitutional amendment activities – must be conducted according to the law or the constitution. Judicial review ‘is necessary (or at least extremely important) to maintaining a disinterested eye on the conduct and activities of government’.\footnote{369} When courts declare an amendment as ‘unconstitutional’, they accomplish the rule of the constitution.

But should not the review of amendments be left to the political spheres? Surely, the political body entrusted with the amendment power is aware of its constitutional limitations. Self-restraint is, unfortunately, not always enough. If we care about the constitution, should we entrust the role

\footnote{363}Weintal, supra note 178, at 289.
\footnote{364}Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). See Michel Troper, Marshall, Kelsen, Barak and the Constitutionalist Fallacy, 3 INT’L J. CONST. L. 24, 37-38 (2005) (claiming that Marbury contains almost all the arguments that could be raised (and have been, historically) in favor of judicial review).
\footnote{365}Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).
\footnote{366}HANS KELSEN, ON THE PURE THEORY OF LAW 272 (Max Knight trans., 1978).
\footnote{367}Klein, supra note 228.
\footnote{368}Preuss, supra note 25, at 441-442.
\footnote{369}Daniel B. Rodriguez et al., The Rule of Law Unplugged, 59 EMORY L. J. 1455, 1476-77 (2010).
of guardian to the same body that might infringe upon it.\footnote{See Elihu Root’s brief in the case of \textit{FeigenSPAN v. Bodine}, at p. 128, \textit{as cited in} Dodd, \textit{supra} note 319, at 332 (‘it would certainly be vain for a constitution to declare or imply limitations upon the power to amend it, if those limitations could be transgressed at will by the very persons who were intended by the people to be restrained and confined within fixed prescribed limits’).} Since the judiciary may impartially determine if the governmental organs observe their constitutional limitations,\footnote{Robert J. Pushaw, Jr., \textit{Justiciability and Separation of Powers: A Neo-Federalist Approach}, 81 \textit{Cornell L. Rev.} 393, 503 (1996).} judicial review of constitutional amendments is a powerful mechanism for protecting the rule of the constitution, in both the formal and substantive senses. In the formal sense, it maintains the constitutional limits, which bind the \textit{secondary constituent power}. In the substantive sense, it aims to protect the basic fundamentals of the constitution, to preserve the constitutional in its totality.

4. The Supremacy of the Constitution

One of the main arguments in favour of judicial review that appeared in the \textit{Marbury v. Madison} was that the Constitution is supreme law, superior to ordinary legislation. Therefore, an ordinary law contrary to the Constitution is void. Judicial enforcement of a law repugnant to the constitution would undermine the purpose of creating a government with defined and limited powers.\footnote{\textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 176 (1803).} A parallel rationale may apply to judicial review of amendments, once we accept the proposition that the amendment power is, like any other power under the constitution, limited and defined. The principle of constitutional supremacy requires courts to ensure that the legislature exercises all of its powers, including its constitutional amending powers, in accordance with the constitution. By conducting judicial review of amendments, the judiciary accomplishes the supremacy of the constitution. But the judiciary is not supreme; neither the legislature. The constitution is supreme. The amendment power is itself a power granted to a constitutional organ by the constitution: ‘it is not and cannot be the whole of Constitution’.\footnote{Raymond Carré de Malberg, \textit{Expression de la volonté générale} 126 (Economica 1984); \textit{as cited in} Michel Troper, \textit{The Logic of Justification of Judicial Review}, 1(1) \textit{Int’l J. Const. L.} 99, 103 (2003).}

A further argument of Marshall is that the people’s ‘original and supreme will’ organises the government and may define its limits. If limited authorities can eradicate their own limits at will, there is no purpose for such limitations, as the distinction between a limited and unlimited government would simply be abolished.\footnote{Paulo Ferreira Da Cunha, \textit{Les limites du pouvoir de révision constitutionnelle entre le pouvoir constituant et la constitution matérielle. Une illustration dans le contexte lusophone}, VII\textsuperscript{th} \textit{Constitutional Law World Congress - Athens} 11 (2007), \url{http://works.bepress.com/pfc/6}} This argument is particularly relevant with regard to amendment provisions, through which the people delegated their \textit{constituent power} to secondary constitutional organs and prescribed the specific procedure by which these organs may exercise this power, and often under which explicit limitations. Carré de Malberg offered a similar idea when he linked the possibility of judicial review and the separation of \textit{constituent} and \textit{constituted power}.\footnote{\textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 176 (1803).} Viewed in this regard, judicial review of the constitutionality of amendments is a condition \textit{sine qua non} of a rigid constitution, which is essential for the effective distinction between \textit{primary} and \textit{secondary constituent powers}.\footnote{Baxi, \textit{supra} note 249, at 123.} Judicial review of amendments assures normative superiority of the \textit{primary constituent power}'s decisions – the people’s supreme will.
5. Political Process Failure

Judicial review, as famously developed by Alexander Bickel, faces a ‘counter majoritarian’ difficulty since it undermines the will of the majority by allowing unelected and unaccountable judges to overrule the law making of the people’s elected representatives. 377 One of the responses to this charge is provided by ‘political process’ justification, best represented by John Hart Ely. 378 Ely admits the charge that judicial review is prima facie incompatible with democracy as it is counter-majoritarian. 379 Yet, he advances a theory according to which judicial review should reinforce the political process. Courts should intervene only when the political process fails, when either power-holders obstruct it to preserve the status quo, or when the government targets minorities. By such judicial intervention, the court is preventing the tyranny of the majority. 380 Accordingly, in a democratic system of government courts should have an inherent authority to protect basic freedoms of the minority against attempts by the majority to violate them, by legislation enacted by majority of the elected representatives, since such a violation would contradict the basic principles upon which the system is based. Courts are the appropriate institution to carry the counter-majoritarian role, since contrary to parliament they are not directly and immediately dependent on an approval or support of the public’s majority for their decisions. 381

Similar to this familiar argument, it may be argued that in a democratic society a court ought to have the authority to annul even constitutional amendments when a failure exists in the work of the democratic institutions. For such a failure to occur, usually two conditions need to be fulfilled: the work of the amendment authority contradicts basic principles of the democratic system, and the nature of this failure is such that its correction cannot be made through the political institution itself, but through an independent agent, i.e. courts. The usual example is of a situation in which the parliament, which was elected for a limited time period, amends the constitution according to the amendment procedure in order to prolong its term. 382 This is not an imaginary hypothesis. 383 In such a scenario, it is clear that no one can expect the elected

379 ELY, ibid., at 4-12.
381 On the countermajoritarian role of courts with regard to constitutional amendments see Nicholas W. Erickson, Break on Through: The Other Side of Varnum and the Constitutionality of Constitutional Amendments, 59 DRAKE L. REV. 1225, 1242-1244 (2011).
383 In June 2006, the National Assembly of Benin, in a parliamentary session which was closed for the public, amended art. 80 of the Constitution by Constitutional Law No. 2006-13, which extended the duration of the parliamentary term (retrospectively to the existing legislature) from four to five years. A month later, the Beninese Constitutional Court declared the amendment to be unconstitutional, holding that due to the importance of the principle of ‘national consensus’, which is a principe à valeur constitutionnelle, constitutional amendments should follow a public and open process. See Decision DCC 06-074 of the Beninese Constitutional Court of 08.07.2006, http://ddata.over-blog.com/1/35/48/78/Benin-2/CC-Benin-censure-revision-2006.pdf; Horace Ségononna Adjolohoun, Between Presidencialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and The Dilemma of Revising The 1990 Constitution of Benin, CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA: CONTEMPORARY PERSPECTIVES FROM SUB-SAHARAN AFRICA 245, 250-251, 273-274 (Morris Kiwinda Mbondenyi and Tom Ojienda eds., 2013); Babacar Kante, Models of Constitutional Jurisdiction in Francophone West Africa, 3 J. COMP. L. 158, 167 (2008). On 4 September 1999, the Third National Assembly of Taiwan ratified a 5th Amendment to the Constitution, which extended the National Assembly term to two additional years. On 24 March 2000, the Council of Grand Justices announced Interpretation No. 499, which declared the Amendment unconstitutional on the
institution to correct this failure, as it is itself its very source. A court’s authority to review such a case and to decide its merits cannot solely depend on the wording of the constitution, but one can certainly claim that the court absorbs its authority to review such conflicts from the basic principles of the constitutional order itself.

Indeed, as ordinary legislation, constitutional amendments raise the ‘majoritarian’ problem. The argument according to which judicial review is necessary in order to protect minorities from the majority’s abuse of power, as the people’s institutionalised self-control, applies to constitutional amendments to the same extent, if not all the more so. When enacting ordinary legislation, the government is explicitly limited from violating protected constitutional rights (for instance through limitation clauses). This protection, however, limits only the ‘ordinary legislative’, not the constitutional legislative. Therefore, if a constitutional norm infringes a constitutional right, the former would not be void merely due to the constitutional protection granted to the right, since this infringement takes place at a similar normative level – the constitution. Therefore, when courts refuse to review constitutional amendments which abrogate civil liberties, the constitution then loses its ability to protect rights and liberties. Judicial review of amendments may be a useful tool for protecting minorities’ rights and preventing more general human rights abuses.

One of the dangers embodied in acts of delegation is that those to whom power is delegated will abuse it. As noted in part IIIB1, the abuse of power is not to be feared only from the legislative branch, but also from the amendment authority. As David Landau recently demonstrated, amendment procedures are increasingly being abused in order to erode the democratic order. In fact, it was suggested that judicial review of amendments was developed precisely because of the fear of abuse of the amendment power and the recognition that ordinary judicial review was insufficient. The governmental nature of the legislative amendment power and the dangers of coupling governmental interest with fundamental constitutional decisions justify judicial intervention when the amendment authority abuses its power. Judicial review in this context can be regarded as a useful mechanism to protect democracy from usurpation by transient majorities, and it may seem valuable, especially in weak democracies.

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385 Gv. Israeli Supreme Court: HCJ 1368/94 Porat v. The State of Israel, 57 (5) PD 913.
387 Baranger, supra note 349, at 424.
388 Lupia, supra note 173, at 3375-3377.
392 Landau, supra note 390, at 231-239.
To conclude, the formal positivistic framework of judicial review is that the constitution
is simultaneously the source of authority granted to the courts to review legislation, and the
source of substantial criteria and mechanism through which courts conduct the task of a
review. Such an approach might reject judicial review of constitutional amendments, not the
least without any clear authority or constitutional limitations, and certainly in the absence of any
explicit limitations on the amendment power. Such a framework, notwithstanding its simplicity, is
insufficient to encompass the complicated relationship between basic concepts such as
democracy, constitutionalism, and judicial review. The formalistic framework has to be set aside
in favour of a new one that examines the relationship between legal institutions, and the
fundamental principles and procedures that stand at the basis of the system of government
within which these institutions work. Such a framework, which considers the distinction between
the primary and secondary constituent powers, assists in explaining the judicial review of constitutional
amendments. Nevertheless, the theory of unamendability in general and its judicial enforceability
in particular raises many objections which I now turn to assess.

B. Assessing Objections to Unamendability

The theory of unamendability and judicial review of constitutional amendments raise many
complications and objections on various grounds. This sub-section engages with the main
objections to the theory of unamendability and demonstrates that the approach taken in this
article, mainly building upon the distinction between the primary and secondary constituent power
manage to mitigate many of these difficulties.

1. The ‘Dead Hand’

Unamendability poses an obstruction to what some view as healthy social development. When a
change in a society’s values takes place without the ability to accordingly amend the constitution,
the constitution does not then protect the values that the society believes in, but simply binds the
current generation to the values of previous generations. This is a known problem according to
which present and future generations are governed by the ‘dead hand’ of their ancestors.

The amendment process, which serves as a mechanism for the constitution-makers to
share part of their authority with future generations, is Janus-faced. It both creates the ‘dead hand’
difficulty by requiring an often-formidable procedure for amending the constitution and relaxes it
by allowing future generations to change the constitution. Unamendability exacerbates the
‘dead hand difficulty’ by preventing the ability to amend certain parts of the constitution. One
can only recall Art. 28 of the French Declaration of Rights and Men and Citizens of 24 July 1793,
according to which ‘A people have always the right of revising, amending and changing their Constitution. One generation cannot subject to its laws future generations’. Thomas Jefferson\(^{401}\) and Thomas Paine\(^{402}\) pronounced similar ideas. That is why Elisha Mulford described an unamendable constitution as:

> The worst tyranny of time, or rather the very tyranny of time. It makes an earthly providence of a convention which has adjourned without day. It places the sceptre over a free people in the hands of dead men, and the only office left to the people is to build thrones out of the stones of their sepulchres.\(^{403}\)

One possible reply to the ‘dead hand’ objection is that it is founded on a fallacy: the purpose of the constitution is not to empower past generations, but to maintain and reform the fundamental political institutions in a self-conscious manner.\(^{404}\) A practical reply is that when considering the simple fact that a national constitution’s median lifespan is a mere nineteen years,\(^{405}\) any argument regarding unamendability as binding future generations to the ‘dead hand of the past’ is relaxed.

The main reply is that unamendability does not entirely restrict future generations who may exercise their primary constituent power and alter even unamendable provisions. As Jason Mazzone claims, ‘limitations on constitutional amendments are ... consistent with democratic government. The people may change each and every provision of their Constitution, but not every change can be accomplished through a constitutional amendment.’\(^{406}\) Unamendability limits only the secondary – and limited – constituent power. It is entirely consistent with the people’s sovereignty as manifested by the primary constituent power, through which ‘the people’ can constitute a new constitutional order. Thus, not only that unamendability is consistent with the people’s sovereignty,\(^{407}\) by allowing them to reform their constitution, but it is also a sovereignty-reinforcement mechanism, as it creates a decision-making space reserved solely for ‘the people’.

2. Revolutionary Means

One of the most serious objections to unamendability is that it is potentially dangerous. Unamendability blocks any constitutional manner to amend certain principles or rules. When the citizens find unamendability to be an intolerable obstacle to political and social change, they might resort to extra-constitutional means, such as a forcible revolution, in order to change the constitution.\(^{408}\) In fact, since it excludes the legal option of amending certain constitutional subjects, unamendability almost forces a society to recourse to extra-constitutional means for


\(^{403}\) ELISHA MULFORD, THE NATION: THE FOUNDATIONS OF CIVIL ORDER AND POLITICAL LIFE IN THE UNITED STATES 155 (1870).


\(^{405}\) See ZACHARY EKINS, TOM GINSBURG AND JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 129 (2009).


\(^{407}\) In contrast with the writings of Orfield, supra note 240, at 581; McGovney, supra note 322, at 511-513; Albert, supra note 198, at 676.

\(^{408}\) See FRIEDRICH, supra note 163, at 143, 145-146; Suber, supra note 29, at 31-32; Fombad, supra note 400, at 57.
changing these unamendable principles or rules. 409 ‘Ulysses’, in the words of Jon Elster, ‘would have found the strength to break the ropes that tied him to the mast’. 410 Especially if courts can enforce unamendability, then a revision of that decision can take place only by forcible revolutionary means. 411 It follows that, in terms of constitutional dynamics, unamendability serves the exact opposite of its original purpose: not only does it not prevent the changes, but it also encourages the realisation of that change in a revolutionary manner. 412 This might be especially dangerous in developing countries or weak democracies that lack established democratic traditions, or countries with an apparent history of coups, where the temptation to use extra-constitutional measures might be irresistible. 413 This raises the inevitable question: if the change were to occur regardless of the temporary hindrance by a few judges, would it not be better to allow the change to occur by peaceful constitutional means? 414

This objection relates to another issue and this is the effectiveness of unamendability. A famous Yiddish phrase states \textit{hot er gezogt} (‘so he said so, big deal’), reflecting doubts on the power of words alone. In a similar vein, it appears that the main issue with regards to unamendable provisions is their effectiveness. As Lawrence Lowell wrote, ‘the device of providing that a law shall never be repealed is an old one, but I am not aware that it has ever been of any avail’. 415 Two premises underlie the effectiveness problem. First, unamendability cannot block extra-constitutional activity since ‘in a conflict between law and power, it is seldom the law which will emerge as victory’. 416 For example, the prohibition of the 1824 Mexican Constitution on altering the form of government did not prevent a \textit{coup d’état}, in which the conservatives came into power and in 1836 replaced the Constitution with a new one that rejected federalism. 417 Likewise, in Greece, notwithstanding the unamendability protection of the democratic system of government in the Constitution of 1952, the Constitution was suspended in April 1967 by a military putsch, which established a military dictatorship that lasted until July 1974. 418 Hence, the ability of physical power to force prohibited changes is unquestionable. Second, the effectiveness of unamendability is directly linked to the effectiveness of the entire constitution. Where the constitution is mostly ignored, regarded as a mere parchment, one cannot expect unamendable provisions to be any more effective or operative than the constitution’s other provisions. 419 The issue of unamendable provisions can thus be both a question of norm and fact. 420

\textsuperscript{409} Albert, \textit{supra} note 198, at 684-685; Tushnet, \textit{supra} note 33, at 2007. 
\textsuperscript{410} Elster, \textit{supra} note 129, at 95-96. 
\textsuperscript{412} Jorge Reinalso A. Vanossi, \textit{Teoria Constitutionali} 188 (2nd ed., 2000). 
\textsuperscript{413} See Friedman, \textit{supra} note 220, at 93-96. 
\textsuperscript{414} Linder, \textit{supra} note 47, at 723. 
\textsuperscript{415} A. Lawrence Lowell, \textit{Greater European Governments} 103 (1918). For a similar sceptical view see Benjamin Akzin, \textit{The Place of the Constitution in the Modern State}, 2(1) \textit{ISR. L. REV.} 1, 12 (1967). 
\textsuperscript{416} Arendt, \textit{supra} note 92, at 142. See also Benjamin Akzin, \textit{On the Stability and Reality of Constitutions}, 3 \textit{SCRIPTA HIEROSOLYMITANA} 313, 332 (1956). 
\textsuperscript{419} For example, the Brazilian Constitutions of 1891 and 1946 protected the republican form from amendments, but in the third (1937-1945) and fifth (1964-1988) republics, the republican principle was suppressed as the right to vote (among other rights) was severely violated. See Maia, \textit{supra} note 343, at 60. 
Admittedly, there is no easy answer for these questions, which might seem to be legitimate objections to the theory of unamendability. Nevertheless, one has to consider the following claims:

First, the fact that unamendability can be overridden by extra-constitutional means should not severely undermine its usefulness in normal times and in states where political players understand that they have to play according to the democratic rules of the game. In that respect, unamendability can be explained by the metaphor of a lock on a door. A lock cannot prevent housebreaking by a decisive burglar equipped with effective burglary tools. On the other hand, there is no need for the safety-measure of a lock if we are dealing solely with honest people, because then there is no fear that any of them will attempt to break into one’s house. The lock’s utility is in impeding and deterring those who usually obey the accepted rules but who might not overcome the temptation to exploit an easy opportunity to improve their condition at the expense of fellowmen. Similarly, unamendability cannot block extra-constitutional measures and is also not needed once the socio-political culture is that of self-restraint, since there is no fear of an attempt to change the political system’s fundamentals or to abuse powers. No constitutional schemes – even such that expressly attempt to - can hinder for long the sway of real forces in public life.\footnote{ZWEIG, supra note 55, at 324. See also John R.Vile, Legally Amending the United States Constitution: The Exclusivity of Article V’s Mechanisms, 21 CUMB. L. REV. 271, 295 (1990-1991).} Karl Loewenstein was not mistaken in his observation that in times of crisis, unamendable provisions are just pieces of paper which political reality could unavoidably be disregarded or ignored. But in normal times, unamendable provisions can be a useful red light to violation inspired by the political parties to change the constitution and stand firm in the normal development of political momentum.\footnote{Karl Loewenstein, Constitutions, Constitutional Law, in MARXISM, COMMUNISM, AND WESTERN SOCIETY: A COMPARATIVE ENCYCLOPEDIA 169, 180-181 (C. D. Kernig ed., 1972).}

Second, whereas it is true that unamendability cannot serve as a complete bar against movements aiming to abolish them,\footnote{Conrad, supra note 256, at 394.} it is not completely useless. Unamendability mandates political and legal deliberation as to whether the amendment in question is compatible with society’s basic principles or not. And it may provide additional time for the people to reconsider their support for a change contrary to their fundamental values and thereby impede the triumph of the revolutionary movements.\footnote{ACKERMAN: WE THE PEOPLE: FOUNDATIONS, supra note 2, at 20-21. See Gregory H. Fox and Georg Nolte, Intolerant Democracies, 36 HARV. INT’L L.J. 1, 19 (1995) (remark that the framers of the German Basic Law believed that if an unamendable provision ‘had been presented in the Weimar constitution, Hitler would have been forced to violate the constitution openly before assuming virtually dictatorial power. … given the traditional orderly and legalistic sentiment of the German people, this might have made the difference.’)}

Lastly, the idea that unamendability limits only the secondary constituent power and not the primary constituent power need not necessarily result in a call for violent changes. On the contrary, understanding a democratic constituent power simply calls for further development of how the primary constituent power may peacefully ‘resurrect’.

3. Expressio Unius est Exclusio Alterius

The mere recognition of the existence of any implicit limitations on the amendment power is in itself contentious. Had a constitution’s framers intended to prohibit certain amendments, one
could reasonably expect them to have included a provision to that effect.\textsuperscript{425} This problem obviously exists with regards to silent constitutions, i.e. those constitutions that lack any unamendable provisions. Indeed, perhaps the strongest argument against implied limitations on the amendment power,\textsuperscript{426} is that according to the maxim \textit{expressio unius est exclusio alterius}, the existence of explicit limitations provides evidence that the constitution-makers considered limits on the amendment power, the omission of other limitations was intentional, and, therefore, implicit limitations should be excluded.\textsuperscript{427} In 1871, George Helm Yeaman attacked the notion of implicit limitations on the amendment power:

> We cannot have two constitutions, one of the letter and one of the spirit, the letter amendable and the spirit not. Letter, spirit and approved judicial construction all go to make up the constitution. That constitution by its own terms is susceptible of amendment, and the amendments, when adopted in the way pointed out, are binding and must be obeyed.\textsuperscript{428}

This is akin to David Dow’s argument that Art. V of the U.S. Constitution is exclusive and that its words ‘mean what they say’.\textsuperscript{429} Likewise, Kemal Gözler defends a formalistic approach according to which no limitations exist apart from those expressly provided in the constitution.\textsuperscript{430}

These arguments are important, but they are not entirely resounding. To begin with, I share Otto Pfersmann’s position that this approach is too narrow: ‘many things are indirectly explicit, i.e. they are contained in the meaning of the norm-formulation, accessible though interpretation’.\textsuperscript{431} Indeed, it is rarely the case that everything is said expressly within the written constitution.\textsuperscript{432} More importantly, according to the delegation theory distinguishing between the primary and secondary constituent power, any organ established within the constitutional scheme to amend the constitution cannot modify the basic principles supporting its constitutional authority; even in the absence of any explicit limitations.\textsuperscript{433} The existence of explicit limitations does not negate the existence of implicit limits, and \textit{vice versa}. The two are mutually reinforcing. Explicit limitations on the amendment power should be regarded as confirmation, a ‘valuable indications’, that the amendment power is limited, but not as an exhaustive list of limitations. Other principles may be analogous or equally fundamental.\textsuperscript{434}

Examples from comparative law can strengthen this claim. For instance, in Turkey, under the 1961 Constitution, there was only one explicit substantive limitation on the amendment: the unamendability of the republican form of government. Even so, the Turkish Constitutional
Court declared in 1965 that other principles such as the rule of law, basic rights and freedoms and the essence of the constitution are implicitly unamendable. In 1971, the Court reaffirmed its competence to examine whether amendments do not damage the ‘coherence and system of the constitution’. In Italy, Art. 139 of the Italian Constitution of 1947 includes an explicit limitation according to which ‘The republican form of the state may not be changed by way of constitutional amendment’. Italian scholars have contended that the amendment procedure cannot be used to deny fundamental norms (principi supremi) propounded and protected by the constitution, such as democracy, inviolable rights, and the rigidity of the constitution itself. The Italian Constitutional Court accepted this approach in its decision 1146/1988, in which it stated that:

The Italian 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.

Thus, notwithstanding the unamendable provision, the Constitutional Court recognised further implicitly unamendable principles upon which the constitution is based.

Therefore, the existence of substantive limitations on amendments which are expressly provided in the constitution does not exclude implied substantive limitations, which must be read between the lines of constitutional text. It is with this understanding that one can accept Maurice Hauriou’s claim that there are always implicit supra-constitutional principles: ‘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’. Even Georges Burdeau, who took a formal approach in his doctoral thesis, later changed his mind to claim: ‘to say that the power of revision is limited, is to support, not only that it is bound by the terms of form and procedure made its exercise by the text – which is obvious – but also that it is incompetent, basically, to repeal the existing constitution and develop a new one…

I am fully aware that my argument in favour implicit limitations on the amendment power may seem contradictory in that it both upholds and rejects the constitution; in one breath it views the constitution as so sacred that interference with its basic principles is prohibited, while in the next breath it claims that the constitution’s own amendment procedure must be recognised only

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435 Turkish Constitutional Court’s decision of September 26, 1965, No. 1965/40, 4 AMKD 290, 329 (obiter dicta), cited in GÖZLER, supra note 208, at 95-96.
436 Turkish Constitutional Court’s decision of April 3, 1971, No. 1971/37, 9 AMKD 416, 428-429, cited in GÖZLER, supra note 208, at 96-97.
437 Carrozza, supra note 161, at 174-75; Tania Groppi, Constitutional Revision in Italy – A Marginal Instrument For ENGINEERING CONSTITUTIONAL CHANGE, in ENGINEERING CONSTITUTIONAL CHANGE, supra note 8, at 203, 210. For such opinions see also Paolo Galizzi, ‘Constitutional Revisions and Reforms: The Italian Experience’, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, supra note 18, at 235, 241; Carlo Fusaro, ‘Italy’, in HOW CONSTITUTIONS CHANGE, supra note 8, at 211, 215; COMELLA, supra note 224, at 107.
441 BURDEAU, supra note 157, at 78-83.
442 BURDEAU, supra note 56, at 231-232 quoted in GÖZLER, POUVOIR CONSTITUANT, supra note 155, at 94 (my translation).
to a limited extent. However, to demonstrate the absurdity of relying solely on explicit limitations, imagine the extreme examples of amendments providing that the constitution has no legal validity, or that the Parliament extends its term indefinitely without elections. Such amendments undermine the entire legitimacy of the constitutional order. Restricting ourselves to a formal theory, according to which the amendment power is solely limited by explicit limitations, would mean that such amendments would be ‘constitutional’ in the absence of express limitations to the contrary. Yet, it would be absurd to include in every constitution a provision stating that it is prohibited to use the amendment process to destroy the constitution itself, because it is evident that the delegated amendment power cannot destroy the fundamental political system to which it owes its existence. Just as in private law, no action may be founded on illegality or immorality (ex turpi causa non oritur action), so too, the constitutional process cannot be used to undermine the constitutional regime itself. The all-encompassing idea underlying amendment formulas in the first instance was the desire to preserve the constitution. While infallibility is not an attribute of a constitution, its fundamental character and basic structure cannot be overlooked. Otherwise the power to amend may include the power to destroy the constitution, and that would be reductio ad absurdum. Thus, the best response to the expressio unius est exclusio alterius argument is that ‘what is logically impossible does not need to be positively prescribed’.

In reply to this ‘amendophobia’, the fear that the amendment power will be abused to subvert democracy or constitutionalism, Lester Orfield has argued that the possibility of abuse of power should not be the test for the power’s existence. Moreover, even if the amendment power is abused, ‘it occurs at the hands of a special organization of the nation…so that for all practical purposes it may be said to be the people, or at least the highest agent of the people, and one exercising sovereign powers…. it seems anomalous to speak of “abuse” by such a body.

These claims should be refuted. While it is true that the mere possibility of abuse should not be the test to the mere existence of a power, it is unclear why it should not be a test for its scope, especially if ignoring limitations may bring to absurd results and subvert the entire notion of constitutionalism. Furthermore, it is the basic proposition of this article that the amendment power, though an extraordinary one, is not sovereign. It is indeed different from ordinary governmental power, but it is still an agent of the people, an agent that is capable of abusing its power. True, implicit limitations on the amendment power and their judicial enforcement may be seen as ‘an imperfect response to imperfections’. Nonetheless, the Indian basic structure doctrine was created as a response to abuse of the amendment power, and proved that a limited amendment power may avoid unauthorised usurpation of power and preserve democracy.

443 Williams, supra note 252, at 543.
444 As Charles Black once wrote, ‘these are (in part at least) cartoon illustrations. But the cartoon accurately renders the de jure picture, and seems exaggerated only because we now conceive that at least some of these actions have no appeal to anybody.’ See Charles L. Black, Jr., The Proposed Amendment of Article V: A Threatened Disaster, 72 YALE L.J. 957, 959 (1963).
446 HARRIS, supra note 181, at 83.
448 Da Silva, supra note 44, at 459.
449 ORFIELD, supra note 140, at 123.
450 ORFIELD, supra note 140, at 124.
452 Katz, supra note 197, at 273; A. Lakshminath, Justiciability of Constitutional Amendments, in INDIAN CONSTITUTION – TRENDS AND ISSUES, supra note 249, at 144, 159; KESHAVAMURTHY, supra note 182, at 82; Vijayashri Sripati, Toward
4. Logical failure

The constitution creates courts and grants them authority. All powers possessed by constituted organs derive from the constitution. This simple postulation raises the *prima facie* difficulty of logical subordination: how can courts – an organ created by the constitution and subordinated to its provisions – rule upon the constitution’s validity? As Joseph Ingham wondered:

If the Supreme Court, created by, and owing its authority and existence to the Constitution, should assume the power to consider the validity or invalidity of a constitutional amendment … it would be assuming the power to nullify and destroy itself, of its own force, a power which no artificial creation can conceivably possess.453

The subordination difficulty only arises if one conceives of the amendment power as equivalent to the *primary constituent power*. Indeed, if the court reviewed a provision of an original constitution that established its own authority, this might involve the logical subordination difficulty.454 Just as in ordinary judicial review, the acts of a lawmaker operating under the constitution are reviewed against the background provided by the constitution-maker,455 a constitutional amendment adopted by the *secondary constituent power* may be reviewed against the background provided by the *primary constituent power*. In acknowledging the distinction between the *primary* and *secondary constituent power*, it is possible to grasp that by exercising judicial review of amendments the judiciary does not act in contradiction of the constitution, but as its preserver.456

5. Undemocratic

The ability to amend the constitution seems an essential element of any democratic society, since a self-governing people ought to be able to revise or reform its basic commitments.457 By positions certain rules or values not only above ordinary politics, but also above constitutional politics, unamendability is in clear tension with democratic principles.458

Whether unamendability and its judicial enforcement are ‘undemocratic’ involves four separate aspects. The first is unamendability itself, i.e. whether the absolute entrenchment itself of any subject (regardless of its content) is undemocratic. The second is whether the content of the protected unamendable subject is undemocratic. The third is the scope of the unamendability,
and the fourth is its judicial enforcement. Any answer to these different questions depends on what one considers ‘democracy’. If one considers democracy as purely procedural, i.e. simply as a system of self-government in which citizens have the ability to make majority collective decisions, then surely unamendability is ‘undemocratic’ in some respects. But if one conceives democracy to include protection of certain basic rights and principles, this adds a substantive pre-condition for a democracy. In that respect, entrenching certain principles and values that characterise modern democracy in the substantive sense is not necessarily undemocratic. Therefore, the argument that any pre-commitments constraining the amendment power present a challenge to democracy relies on a narrow view of democracy and confuses democracy with a mere majority. Unamendability may accord with a theory of democracy that conceives democracy as a system of government that is based on certain values and fundamental rights.

There is no doubt that the unamendability exacerbates the counter-majoritarian difficulty. But then again, unamendability, as a counter-majoritarian institution, aims to neutralize the dangers of majoritarianism. Unamendability could thus be viewed not as undemocratic, but rather as a tool forestalling the possibility of a democracy’s self-destruction. Moreover, if we recognise constitutionalism as a system of ‘higher law’, according to which democratic majoritarianism must give way to certain commitments to principles, or as indispensable legal limits to governmental power, unamendability simply takes this idea to its extreme. But this is only a matter of a degree, not of a kind.

With regard to the content of the unamendable subject, every case must be judged on its own merits. Clearly, unamendability can protect issues that would reasonably be considered ‘desirable’ democratic values, such as fundamental rights, separation of powers or the rule of law. But they can also protect ‘undesirable’ principles or practices, from a democratic perspective, such as the Corwin Amendment, which was proposed in 1860 and aimed to protect slavery.

With regard to the scope of unamendability, the more detailed the unamendable provision is and the wider its scope, the greater its tension with democracy, because it would place a larger number of principles or rules beyond the reach of any majority. Without the ability of citizens to participate in debates with regards to society’s basic values, and in the absence of any mechanism to modify these values, civil motivation to participate in any decision-making process would probably deteriorate. By that, unamendability risks impoverishing democratic debates. On the other hand, unamendability does not necessarily completely impoverish popular debates regarding society’s values. The unamendability of certain values might place them at the centre of public debate when otherwise such values might not have been even open for dispute. In addition, unamendability creates a ‘chilling effect’ leading to hesitation before

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462 Albert, supra note 198, at 675.
464 Dow, supra note 429, at 121-130.
466 SAPIR, supra note 397, at 179.
repealing an unamendable principle, which can give time for political and public deliberations regarding the protected constitutional subject and puts it at the centre of the public agenda.

As for judicial review of amendments, the theory of unamendability acknowledges that endowing courts with authority to invalidate constitutional amendments enhances the counter-majoritarian difficulty embodied in the situation of a non-elected and unaccountable judiciary overrules decisions of the people's representatives. How can a small, often divided, set of judges replace the democratic judgment of the people and their representatives? Allowing courts to review amendments might turn the ‘people’s guardian of the constitution against politicians’, into ‘a guardian of the constitution against all comers’.

One reply to this objection is that when courts review amendments vis-à-vis the constitution’s unamendable fundamental principles, they are not acting in a completely counter-majoritarian manner, for they have the support of the high authority of the primary constituent power. In other words, judicial review expresses the democratic base of the constitution, i.e., it gives expression to the will of ‘the people’ as a superior legal norm which conflicts with the present will of the political majority as expressed by the amending power. Especially if one adopts a transcendental conception of the primary constituent power, judicial review of amendments then articulates a different will, a deeper or more basic one, from the current political majority. The conflict that the court then decides is between the will of the people (exercised by the primary constituent power) – a supra temporal will that lasts for long terms – expressed in the basic principles of the constitution, and the temporary will of the people as expressed in a constitutional amendment. According to this rationale, judicial review of constitutional amendments is not only democratic, but rather, it is an expression of the will of the people as manifested in the constitution’s basic principles.

Finally, the theory of unamendability does not necessarily prevent the people from engaging in the political process and deliberations. Via the emergence of the primary constituent power, even the most basic principles of society can be reformed. That makes the people in their primary constituent power capacity, not the courts, the final arbiters of society’s basic values.

468 O’Connell, supra note 44, at 51. Of course, at least with regard to explicit limits on the amendment power ‘any countermajoritarian difficulty would have to be ascribed to the constitution itself rather to judicial interpretation’. See Michel Rosenfeld, Constitutional Adjudication in Europe and The United States: Paradoxes and Contrasts, in EUROPEAN AND US CONSTITUTIONALISM 165, 186 fn 80 (2005).
472 Cf. Mark Tushnet, Policy Distortion and Democratic Deliberation: Comparative Illumination of the Countermajoritarian Difficulty, 94 MICH. L. REV. 245, 299-301 (1995) (claiming that minimal judicial review provides an opportunity to the public and legislatures to articulate constitutional norms).
6. Enhancing Judiciary’s Power

Enforceability of unamendability shifts the locus of constitutional change from those authorities entrusted with the amendment power toward the courts. It allegedly grants them the last word on constitutional issues. Courts enforcement of unamendability elevates their powers vis-à-vis other branches. This problem is accentuated with regards to implicit limits, where the text does not provide guidance or constraints, and the judiciary has sweeping power to determine the ‘spirit’, ‘basic structure’, or ‘basic principles’ of the constitution.

Judicial review of amendments might also fracture the fragile balance of judicial review. One of the arguments justifying the judicial review of ordinary legislation is that courts do not necessarily possess the last word, since unpopular judicial decisions may instigate constitutional amendments to overturn these decisions. In the French constitutional debate, Georges Vedel famously compared constitutional amendments to the ancient institution of *lit de justice* by which the sovereign king could appear before the court and overturn a judicial decision. Similarly, in a sort of *lit de justice*, the people can overturn a court’s ruling through constitutional amendments. This democratic check would arguably disappear if courts could review constitutional amendments; therefore, it is arguably inappropriate for a court to rule upon the validity of an amendment overturning a judicial decision.

Judicial review of constitutional amendments undeniably enhances the judiciary’s power. The theory proposed in this article manages to moderate this concern. Again, even if courts have the power to review amendments, they do not possess final decision-making power. Recall, it is not suggested that decisions by the *primary constituent power* be submitted to judicial review, but rather those decisions adopted by the more limited *secondary constituent power*. Hence, the judicial branch may still be overridden by an exercise of the superior *primary constituent power*.

In addition, one should not be overly petrified by the possibility of courts annulling constitutional amendments. Commonly, courts can interpret amendments, which have become part of the constitution once adopted, during their ordinary judicial review of legislation.
courts have the authority to interpret the constitution, and in doing so to grant to a constitutional provision a very narrow or broad interpretation, then allowing them to invalidate an amendment is not such a drastic step. True, in the case of interpretation, it would be open to another court to choose a different interpretation in the future. Nevertheless, the result of an interpretation that differs significantly from the legislative intent, or is detached from the provision’s wording, could be more severe than the act of annulment, as it may undermine legal certainty and conflict with the separation of powers. Moreover, in the case of annulment, the ‘ball returns to the hands’ of the amending authority, which can re-constitute the amendment according to the court’s decision or otherwise. In the case of interpretation, if the amending authority is unsatisfied with the new meaning of the amendment, it would have to annul the amendment through the amendment process – ‘a reversal of political sentiment of enormous magnitude’ – only this time, the ‘ball has left the hands’ of the amending authority. It is now in the public sphere shaped by the hands of the judiciary until its abolishment or replacement.

Lastly, enforceability of unamendability can be viewed as a useful mechanism for relaxing the main abovementioned difficulties associated with unamendability, since it allows courts to interpret the protected principles and give them modern meaning. What republicanism meant in France in 1791 is infinitely different from what it means nowadays, and the Norwegian Constitution’s spirit and principles are not necessarily those of 1814. Indeed, constitutional identity is never a static thing. It can always be reinterpreted and reconstructed. The courts’ ability to review amendments can have important benefits in that respect. While unamendability is aimed, inter alia, to provide stability for society, it might cause constitutional stagnation, at least regarding those unamendable values or institutions. The ability of courts to review amendments, to interpret and reinterpret unamendable provisions manages simultaneously to preserve the core elements of the protected principles while allowing a certain degree of change, and in so doing mitigates the problem of rigidity with the changing needs of society. In the same vein, albeit suffering from uncertainty, some view the vagueness of implicit limitations on the amendment power as an advantage. Unlike explicit limitations, implicit limitations do not specify ex-ante what are precisely the protected principles, and being judicially formulated, they contain an

482 Yaniv Roznai, Retroactivity – Not Only a Matter of Time! Thoughts on Analyzing Retroactive Legislation Following Genis, 9 IDC L. REV. 395, 435 (2008). Otto Pfersmann describes provisions that were given a different meaning from what they actually mean (because otherwise they would be invalidated by the court) as ‘norms without texts’. See Otto Pfersmann, Ontological and Epistemological Complexity in Comparative Constitutional Law, in NEW DIRECTIONS IN COMPARATIVE LAW 81, 88 (Antonina Bakardjieva Engelbrekt and Joakim Nergelius eds., 2009).


486 Baranger, supra note 349, at 421.


490 Zafer Gören, Anayasa Kayan Erk Ve Anayasa - Doğruluklukların Sinirları, 16 İSTANBUL TİCARET ÜNİVERSİTESİ SOSYAL BİLİMLER DERGİSİ 1, 12-13 (2009).


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inherent flexibility as they leave space for subsequent future judicial interpretation, clarification, and public and political deliberations. 492

C. Conclusion

Noah Webster, writing a series of articles in the American Magazine in 1787-1788, criticised any attempt to create an unamendable constitution. This attempt is not only ‘arrogant and impudent’ since it means to ‘legislate for those over whom we have as little authority as we have over a nation in Asia’, but it would also be useless since ‘a paper declaration is a very feeble barrier against the force of national habits, and inclinations’. 493 Indeed, unamendability is a ‘complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order’. 494

Even more objectionable than the mere mechanism of unamendability is the idea that courts may rule upon the constitutionality of constitutional amendments. This practice surely involves significant theoretical, conceptual, and practical issues. It bears weighty implications for the principles of judicial discretion, independence, and accountability, 495 and has institutional significance as it engages with the status and role of the court in a democratic society and with its relations vis-à-vis other governmental branches. 496 It appears that most arguments against judicial review of amendments are really reopening the traditional case against judicial review. But such arguments ‘tend to overlook the limited, essentially corrective and marginal, function of judicial review, if kept within its proper sphere and exercised with judicial discipline’. 497 If judicial review of amendments is exercised with care and self-restrained, many of the objections against unamendability are relaxed. Importantly, the theoretical distinction between the primary and secondary constituent powers supplies an adequate reply to many of the objections to the theory of unamendability.

V. CONCLUSION

In 1948, Kurt Gödel, the famous Austrian logician, applied for naturalisation as an American citizen. Preparing for the citizenship examination, Gödel thoroughly studied the American history and Constitution. One day, Gödel called his friend, Princeton University mathematician, Oskar Morgenstern. Years later, Morgenstern described the conversation that he had with Gödel:

[Gödel] rather excitedly told me that in looking at the Constitution, to his distress, he had found some inner contradictions and that he could show how in a perfectly legal manner it would be possible for somebody to become a dictator and set up a Fascist regime never intended by those who drew up the

492 Mathew Abraham, Judicial Role in Constitutional Amendments in India: The Basic Structure Doctrine, in The Creation and Amendment of Constitutional Norms, supra note 18, at 195, 204; Issacharoff, supra note 394, at 45.
497 Conrad, supra note 140, at 17.
Morgenstern told him he should not worry since such events were unlikely to ever occur. Since Gödel was persistent, Morgenstern and another mutual friend – Albert Einstein – tried to persuade Gödel not to bring this issue up at the citizenship examination. On the examination day, Einstein and Morgenstern both accompanied Gödel to his interview at the Immigration and Naturalization Service as witnesses. After the examiner questioned both witnesses, the following exchange occurred, according to Morgenstern’s own account of the hearing:

Examiner: ‘Now, Mr. Gödel, where do you come from?’
Gödel: ‘Where I come from? Austria.’
Examiner: ‘What kind of government did you have in Austria?’
Gödel: ‘It was a republic, but the constitution was such that it finally was changed into a dictatorship.’
Examiner: ‘Oh! This is very bad. This could not happen in this country.’
Gödel: ‘Oh, yes, I can prove it.’
Examiner: ‘Oh God, let’s not go into this…’

Einstein and Morgenstern were horrified during this exchange, but the examiner swiftly quietened Gödel on this point until Gödel finished his interview. What was the ‘inner contradiction’ that Gödel discovered within the U.S. Constitution? This will remain a riddle as Gödel left no clues. Scholars who have studied Gödel suggest that Gödel realized that an unlimited amending power possessed the risk of a tyranny. Since the U.S. Constitution amending provision has no substantive limitations apart from equal representation in the Senate, the amendment power might be utilised to subvert the democratic institutions designated in other provisions of the Constitution, including the amendment provision itself. Is the amendment power truly sufficiently broad so as to destroy the very basis of the constitution? Richard Kay notes that ‘the core notion … that there is something wrong with the idea that an “amendment” might alter the essential character of a constitution while simultaneously invoking its authority – has been embraced by many modern constitution-makers’. Indeed, about 40% of world constitutions explicitly contain unamendable provisions. Even in states where the constitution excludes explicit limitations on the amendment power, there is a growing tendency of courts, following the Indian courts’ development of the ‘basic structure doctrine’, to acknowledge a set of implicitly unamendable core. Substantive limitations on constitutional amendment powers are now a global trend of contemporary constitutionalism.

These limitations on the constitutional amendment power, this article argues, are compatible with the nature of amendment powers. Charles Howard McIlwain wrote that ‘a constituted authority is one that is defined, and there can be no definition which does not of necessity imply a limitation’. The amendment power is not an ordinary constituted power, but a sui generis one. However, it is still a defined constitutional authority. As such, it is (and must be) a limited power. The secondary constituent power, which is a delegated power acting as a trustee of the primary constituent power, cannot destroy the constitution or replace it with a new one. This is the role of the primary constituent power. The theory of unamendability thus restricts the amending authorities

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499 Morgenstern, ibid.
500 Suber, supra note 38, at Sec. 16; F. E. Guerra-Pujol, Gödel’s Loophole, 41 CAPITAL UNIVERSITY L. REV. 637 (2013).
501 Kay, supra note 114, at 725.
502 Juan Gabriel Gómez Albarello, Reformas inconstitucionales a la constitución: un caso agravado de la tensión entre la democracia y el constitucionalismo, 75 ANALISIS POLITICO 67 (2012).
503 Charles Howard McIlwain, CONSTITUTIONALISM AND THE CHANGING WORLD 244 (1939).
from amending certain constitutional fundamentals. Underlying it rests the understanding that a
constitution is built upon certain principles, which grant it its identity and fill it with essence:

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... These superconstitutional provisions could
be referred to as the genetic code of the constitutional arrangements...

It seems that the puzzle surrounding the possibility of an 'unconstitutional constitutional
amendment' concerns a deeper conflict between substantive versus procedural approaches to
constitutionalism; the former focuses on the constitution's fundamental principles and the latter
on the constitution's procedures. A proceduralist might claim that a 'revolution' only requires a
change to or a replacement of the constitution in a way that is incompatible with the amendment
procedure in the Kelsenian sense. A substantivist might claim that a revolutionary change can also
occur through legal means. The argument advanced here might be described as a
substantive constitutionalist one as it proposes to read a country's constitution in a foundational structuralist way, according to which each constitution has to be regarded as a structure in which all of its provisions are related. But structuralism itself is not enough; this structure is built upon certain pillars, foundations that fill its essence - hence foundational structuralism. Accordingly, the focus is not merely on the constitution’s procedures, but also on its substance. Substantively, a constitutional change may be deemed unconstitutional, even if accepted according to the prescribed constitutional procedures, if it conflicts with unamendable constitutional provisions, or collapses the existing order and its basic principles, and replaces them with new ones thereby changing its identity.

The protection of a certain core through the theory of unamendability emphasizes the fine
line between constitutional success and constitutional failure. On the one hand, in order to
maintain itself and progress with time, a constitution must be able to change and adapt. An
unamendable constitution is doomed to fail. On the other hand, amendments that alter the
constitution’s basic principles so as to change its identity signal a breakdown of the existing
constitutional regime and its replacement with a new one, and can themselves be regarded as constitutional failures.

True, the thin line between primary and secondary constituent power is blurred. As Giorgio
Agamben writes, within the current trend of legalisation, ‘constituent power is more and more

504 Carlo Fusaro and Dawn Oliver, Towards a Theory of Constitutional Change, in HOW CONSTITUTIONS CHANGE, supra note 8, at 405, 428.
506 KELSEN, supra note 34, at 209; KELSEN, supra note 27, at 117.
508 Cf., PREUSS, supra note 104, at 81; Ming-Sung Kuo, Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering, 23(3) RATIO JURIS 390, 398 (2010); Albert, supra note 44, at 5.
509 Sotirios A. Barber, Constitutional Failure: Ultimately Attitudinal, in THE LIMITS OF CONSTITUTIONAL DEMOCRACY 13, 27 (Jeffrey K. Tulis and Stephen Macedo eds., 2010).
511 See Chris Thornhill, Contemporary Constitutionalism and the Dialectic of Constituent Power, 1 GLOBAL CONSTITUTIONALISM (2012), 369, 374; Kay, supra note 114, at 723.
frequently reduced to the power of revision foreseen in the constitution.\(^{512}\) Indeed, constitutional practice demonstrates that constitutional amendments are often used in order to fundamentally transform the constitutional order, establishing in effect a new constitution. This is a constitutional break concealed by continuity.\(^{511}\) For instance, the Hungarian transformation from communism was employed by way of constitutional amendments to the 1949 Constitution.\(^{514}\) Whereas such a transformation may well carry various benefits,\(^{515}\) this complete reform, which brought about a new constitution, suffered ‘legitimacy problems and clashes of identification’.\(^{516}\)

By the same token, the authoritarian regime in Chile was transformed into a democratic one in the early 1990s through a series of constitutional amendments. While this experience may show how an authoritarian constitution can change to a democratic one, utilizing amendments in order to legitimize the constitution, was neither inclusive nor deliberative and in effect held up the progress of rights-based constitutionalism. The use of amendments of the previous constitution in order to achieve the transformation, created an element of continuity with the previous authoritarian regime, which hindered the democratization and liberalization process.\(^{517}\)

When amendment provisions are used for creating new constitutional regimes, not only are important issues of legitimacy raised,\(^{518}\) but there is also a difficulty in clearly breaking with the past regime’s constitution. As Bruce Ackerman urged post-communists countries not to conduct a series of constitutional amendments, rather ‘if the aim is to transform the very character of constitutional norms, a clean break seems desirable…’\(^{519}\) Thus nations may favour completely replacing an old constitution.\(^{520}\) From a democratic theory, it is ‘the people’ in their capacity as holders of the primary constituent power who should decide upon fundamental constitutional transformations, not the instituted amendment authorities.

An unlimited amendment power collapses the distinction between constitutional replacement/making and constitutional amendment. Consequently, it can also extinguish the people’s constituent power. But amendment powers are not unlimited, and this unamendability limits only governmental organs – those authorities delegated with the competence to amend the constitution – rather than the people themselves.\(^{523}\) As Selden Bacon asks, if the legislatures possessed unlimited amendment powers ‘what was reserved to the people?’\(^{522}\) The people retain the primary constituent power; through its exercise they may amend and establish the political order.

\(^{512}\) Agamben, supra note 56, at 40.

\(^{513}\) Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 CARDOZO L. REV. (1992-1993), 661, 676; Kay, supra note 313, at 161.


\(^{515}\) See, for example, Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 CARDOZO L. REV. 661, 676 (1992-1993) (arguing that ‘the semblance of constitutional continuity provided for a transition within unchallenged rules that allowed both sides to agree upon the terms that would … largely eliminate… the powers of one of them’); Arato, Civil Society, Constitution, and Legitimacy, supra note 192, at 255–56; Parlett, supra note 91, at 46: ‘The use of an inherited constitutional order is just one method of ensuring a stable institutional basis for constitution making’.


\(^{517}\) Amaua Alvez Marin, Forcing Consensus: Challenges for Rights-based Constitutionalism in Chile, RIGHTS IN DIVIDED SOCIETIES, supra note 394, at 249, 253.

\(^{518}\) Klein and Sajó, supra note 184, at 437; Andrew Arato, Continuity and its Crisis, 3 TILBURG FOREIGN L. REV. 352 352 (1993-1994).


\(^{521}\) Harris, supra note 181, at 193-196.

\(^{522}\) Bacon, supra note 180, at 771, 778.
and its fundamental principles. 523 Understood in this way, the theory of unamendability can be seen as a safeguard of the people’s primary constituent power. Accordingly, judicial enforcement of unamendability, which serves as a mechanism for ensuring the vertical separation of powers between the primary and secondary constituent powers, should not be regarded as completely preventing democratic deliberation on a given ‘unamendable’ matter, but as making sure that certain changes take place via the proper channel of higher-level democratic deliberations. 524

Constitutional democracy is characterised by contradictory principles that are inherent in the system. 525 A conflict exists between democratic and constitutionalist approaches towards unamendability. Democrats regard unamendability as an obstacle in the way of democratic decision-making. A democratic society, according to this approach, should be able to change any law whatsoever. This notion conflicts with the constitutionalist approach. Certain principles, a constitutionalist would claim, should be above democratic decision-making. Therefore, constitutionalists would generally approve of unamendability. 526 This article seems to be positioned on both sides of the debate. The central theme of the theory of unamendability, as advanced in this article, is strongly constitutionalist; it defends a fairly broad and robust concept of limitations to the amendment power, which includes both explicit and implicit substantive limitations. The theory of unamendability also explains the controversial practice of judicial enforcement of unamendability. Strong democrats would surely not approve this mechanism. Nonetheless, the second theme of this article takes a strong democratic approach; democratic not only in the sense that it argues that the nation’s fundamental constitutional decisions belong to the people in their primary constituent power, but also that in such capacity, the people are not bound by prior constitutional rules. Constitutionalists, surely, would not support this idea. Destined to be attacked (but also supported) by both democratic and constitutionalist schools of thought, I believe that this article presents a coherent and consistent position with regard to procedural and substantive dimensions of amendment rule: the non-exclusiveness of amendment provisions and their substantively (explicitly and implicitly) limited nature. 527

‘At first blush’, William Harris comments, ‘the question of whether an amendment to the constitution could be unconstitutional seems to be a riddle, a paradox, or an incoherency. This problem is accentuated when one asks whether there is an agency that could make the determination.’ 528 As this article demonstrates, the statement ‘unconstitutional constitutional amendment’ does not entail a paradox, but merely a misapplication of presuppositions. Once the nature of the amendment power is correctly construed, the paradox disappears.

523 Katz, supra note 197, at 278, 288-290; HARRIS, supra note 181, at 174-201; Prateek, supra note 362, at 462.
527 See Michelman, supra note 505, at 1306.
528 HARRIS, supra note 181, at 169.