A Republican Approach to Constitutional Unamendability

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Primary sources:

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Critical Reflection:

At all times, DeepL was used to translate material which was not itself written with generative AI but which was already written as a primary source of law or as a peer-reviewed scholarly work. The translations were compared against other scholars' translations of the same material so that I ensured accuracy and veracity.

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ADCT	Ato das Disposições Constitucionais Transitórias / Transitional Constitutional Provisions Act (Brazil)
ADI	Ação Direta de Inconstitucionalidade / Direct Action of Unconstitutionality (Brazil)
BJP	Bharatiya Janata Party (India)
BSD	Basic structure doctrine
BVerfG	Bundesverfassungsgericht / Federal Constitutional Court (Germany)
CCF	Conseil constitutionnel /Constitutional Council (France)
ECHR	European Convention on Human Rights
NZBORA	New Zealand Bill of Rights Act 1990
STF	Supremo Tribunal Federal / Supreme Federal Court (Brazil)
UCA	Unconstitutional constitutional amendments
UKHRA	Human Rights Act 1998 (United Kingdom)

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Abstract

A Republican Approach to Constitutional Unamendability

Seán Rainford

Constitutional unamendability is a major topic of interest in comparative constitutional studies. It holds that constitutions possess a essential core or 'basic structure' which cannot be amended by that constitution's designated amending power, and generally allows the judiciary to strike down constitutional amendments that violate this unamendable core. Unamendability arguably represents the pinnacle of constitutionalism – its high point as well as the ultimate limit of constitutions and judicial power. Because analysis of this topic forces us to consider the ultimate purpose of constitutions, it requires perspectives external to constitutional law.

The purpose of this thesis is to provide a *republican* approach to constitutional unamendability. It considers the principles underpinning unamendability firstly at a theoretical level and then at a comparative constitutional level, comparing how unamendability is treated in the constitutions of Ireland, India, Germany, Brazil, and France – each of which approaches unamendability in a distinct way. It excavates salient republican principles on constitutional change and applies them to unamendability at both levels. The thesis argues that unamendability violates these republican principles, namely *mutability*, *living constituent power*, and *contestability*. Further, judicially-enforced unamendability has the effect of making the judiciary the 'final say sovereign' within the constitution, undermining republican defences of judicial review. The thesis concludes with some tentative suggestions on how republican constitutionalism can approach unamendability where it exists.

In attempting to offer a republican approach to unamendability, this thesis does not deny that every constitution has an essential basic structure. However, it *does* deny that the definition and protection of this core is the exclusive province of the judiciary. In a republic, it is the responsibility of citizens to maintain a constitution's basic structure, as well as to judge whether it is worth saving in the first place.

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Any errors or omissions are my own. I have endeavoured to state the law correctly as of 26 May 2026.

1. INTRODUCTION

1.1 Overview

In its basic English definition, something's 'constitution' is its core components, its essential features.[1] In its traditional political/legal definition, a constitution was a state's basic institutions of authority alongside its most important rules and conventions.[2] In its modern definition, a constitution generally means a state's highest positive law expressed in a written document, which defines (and thus limits) the political and legal system.[3] This fundamental law is the benchmark to which all other laws and ordinances must comply, and which – in the modern world – is generally enforced by courts it establishes. 'Constitutionalism' is the belief that government is limited by rules, and that its authority derives from observing these rules.[4] According to Kumm, constitutions 'define the legal framework *within which* collective self-government can legitimately take place."[5] If this is true, it stands to reason that this legal framework should be difficult to change, lest those in power change it to suit their interests and become hegemonic. Though modern written constitutions generally include a procedure for their own amendment (so as to maintain compatibility with the societies in which they exist), they are invariably more difficult to change than ordinary laws.[6]

In recent times, many constitutionalists have argued that some aspects of constitutions must be *fully* protected from the amending power, either through explicitly unamendable clauses or unamendable limits interpreted by courts.[7] This phenomenon – *'unamendability'* and, more pertinently, judicial enforcement of unamendability – is a growing trend of constitutional practice and scholarship around the world.[8] In simple terms, it holds that there are parts of a constitution which cannot be amended. In a global political context of rising authoritarianism and democratic backsliding, perhaps constitutionalism now demands that every constitution has

[1] 'Constitution', *Merriam-Webster Dictionary* https://www.merriam-webster.com/dictionary/constitution accessed 19 May 2026.
[2] See Martin Loughlin, *Foundations of Public Law* (OUP 2011) 288.
[3] ibid
[4] Wil Waluchow and Dimitrios Kyritsis, 'Constitutionalism' in Edward N Zalta and Uri Nodelman (eds), *Stanford Encyclopedia of Philosophy* (Summer 2023) https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/ accessed 22 May 2026.
[5] Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (CUP 2012) 258.
[6] See Cormac Mac Amhlaigh, *New Constitutional Horizons* (OUP 2022) 122.
[7] See Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017).
[8] ibid, 47-70. See also Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 Hastings Law Journal 639, 640.

a 'minimum core' which cannot be touched by the amending power and which must be protected by the courts through judicial review.[9]

If limiting political power is the essence of constitutionalism, then unamendability is its *quintessence*.[10] Once a court rules that a constitutional amendment is unconstitutional, there is no further constitutional avenue for politicians or the wider public – it is an absolute limit on how far the democratic process can go.[11] It represents the pinnacle of constitutional entrenchment and perhaps even of constitutionalism itself. At the same time, though unamendability could reasonably be seen as the final triumph of constitutionalism over democracy,[12] constitutional law cannot really go beyond a judicial decision that a constitutional amendment is unconstitutional. In this sense, it not only expresses the ultimate power of the judicial branch, but its ceiling. Additionally, the content of what is protected by unamendability doctrines represents the kernel of what a constitution seeks to protect. Because of all this, unamendability forces us to consider the essential nature and purpose of constitutions themselves – to consider constitutions in their wider political context. Doing this comprehensively requires us to go beyond the confines of 'constitutional law' or even 'constitutional theory', but into the broader normative arena of political theory.

As constitutional unamendability has grown as a feature of global constitutional practice, so too has the scholarship on this phenomenon. Most notable here is Yaniv Roznai's *Unconstitutional Constitutional Amendments* which provides an invaluable global survey of and theoretical grounding for unamendability.[13] Normative analysis of unamendability often frames it through the 'constitutionalism' against 'democracy' binary.[14] There is a logic to this: within a given political system, unamendability represents the final triumph of constitutional constraints over democratic majoritarianism because it places an absolute limit on how far a democratic majority can go and gives the last word over the constitution to an unelected judiciary.

Despite an explosion of unamendability scholarship in recent years,[15] there are significant gaps in normative theoretical analysis. As Doyle observes, legal scholarship often obscures rather than clarifies the normative values that unamendability implicitly serves, with much of the focus

[9] See Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13(3) International Journal of Constitutional Law 606.
[10] Pietro Faraguna, 'Unamendability and Constitutional Identity in the Italian Constitutional Experience' (2019) 21(3) European Journal of Law Reform 329, 344.
[11] See Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663.
[12] ibid.
[13] Roznai (n 7).
[14] Albert (n 11)
[15] See Roznai (n 7); Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021); Richard Albert (n 11); Richard Albert, *Constitutional Amendments: Making, Breaking, and Transforming Constitutions* (CUP 2019); Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008).

being on the *quantum* of a given amendment rather than unamendability in principle.[16] Similarly, Suteu argues that amidst this flurry of scholarship, 'there is a risk that we adopt an overly doctrinal, legal constitutionalist reading of unamendability and lose track of the real democratic challenge that it poses.'[17] Much of the theoretical scholarship takes for granted that unamendability is legitimate and instead assesses its utility as a tool to defend liberal democratic norms. There has not been sufficient focused application of normative political theories on the core question: *should the scope of constitutional amendability be limited?*

This thesis begins from the presumption that the most useful and clarificatory way to answer this question is through the application of normative political theory rather than constitutional law. In this vein, it offers *republicanism* as an alternative, critical perspective on the legitimacy or otherwise of limiting the scope of constitutional amendment powers. While republicanism was instrumental in the development of historical constitutionalism and has been applied extensively to constitutional law issues in the past, its focused perspective on *this issue* has been absent. This is where my thesis attempts to fill a gap in the scholarship. Republicanism is an invaluable political tradition to apply because of its nuanced endorsement and synthesis of constitutionalism *and* democracy.[18] As a philosophy oriented around freedom as non-domination, republicanism sees constitutional constraints as essential for preventing arbitrary rule.[19] This is grounded on the idea of popular control and contestatory democracy in which every law or state action can be challenged by the citizenry.[20] How republicanism can be applied to unamendability is thus unclear because both of these impulses seem to pull in opposite directions – the instinct to constrain political power can naturally lead one to accept unamendability, while the instinct to keep everything contestable would lead to the opposite conclusion.

My thesis attempts to provide a normative republican approach to constitutional unamendability. With the intention of contributing a novel piece of research to the field of comparative constitutional studies, it tasks itself with answering the following research question:

> *From a normative republican perspective, is it legitimate to limit the scope of constitutional amendment powers?*

Its more specific research questions are:

- *In principle, can unamendability be a feature of a republican constitution?*

[16] Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Oxford: Hart Publishing 2017) 95.
[17] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 9.
[18] See Philip Pettit, *Republicanism* (OUP 1997) ch 6;
[19] ibid, 172-183.
[20] ibid, 183-205; Philip Pettit, *On the People's Terms* (CUP 2014).

- *Should judicial enforcement of unamendability be a feature of a republican constitution?*
- *From a normative republican perspective, is express unamendability more legitimate than implied unamendability?*

To answer these questions, this thesis first considers the theoretical principles that ground unamendability before considering the republican principles relating to constitutional change. Because unamendability is embedded in the operation of real-world constitutions, it then considers the approaches of a number of jurisdictions which have taken a variety of approaches to amendability and unamendability. These are grouped into three categories: constitutions with express unamendability (Brazil, France, and Germany), a constitution with implied unamendability (India), and a constitution with no unamendability (Ireland). It then applies the relevant republican principles to these case studies.

The thesis argues that at a purely theoretical level, unamendability violates a number of important republican principles – namely 'contestability', 'living constituent power', and 'mutability'. Because of this, unamendability does not sit easily inside a republican constitution. At a practical level, a republican assessment is more mixed: eternity clauses *can* be legitimate as long as they are understood as either *non-justiciable* or *amendable in some form* (thereby undermining the degree to which they are unamendable); separately, judicially-created basic structure doctrines *cannot* be legitimate under a republican lens. When judicially-enforced, the invariable practical effect of unamendability is to make the judiciary the 'final say sovereign' within the constitution, undermining the basis of many republican defences of judicial review. The thesis concludes with a consideration of alternatives that are conceptually close to unamendability and how they can potentially fit with republican constitutionalism.

Republicanism does not deny that every constitution has some core features or a basic structure without which it would not be a constitution. However, republicans cannot divorce constitutions from the wider political context in which they arise or the purpose for which they are created. Further, republicans cannot separate constitutions from citizenship, particularly active participation in democratic life, contestation, and civic virtue. For republicans, the citizens of a society, who have the means to legitimately contest all that the state does, are the force that continuously legitimises and revivifies the constitution – in other words, *the constituent power*. Therefore, the maintenance of a constitution's core essence is the political responsibility of the contestatory citizenry, not just judges. Indeed, it is ultimately for this citizenry to judge whether a constitution's core essence is *worth* maintaining in the first place.

1.2 Why republicanism?

The central question for this thesis is whether it is legitimate to limit the scope of constitutional amendability – amendability being how much a constitution can be legitimately changed through the amendment process. This thesis is built on the premise that this question is essentially one of general political theory rather than specifically of constitutional law or even constitutional theory. Answering it demands the focused normative perspective from a specific political theory. An easy consequentialist answer to this question from a given political theory would be that it is legitimate to limit the scope of amendability provided this limitation protects the basic principles of this political theory. Famously, John Rawls argued that an amendment repealing the 1st Amendment to the United States Constitution (the prohibition on state religion) would be unconstitutional.[21] It is thus unsurprising that, in a modern political context of illiberal democracy, democratic backsliding, and abuse of constitutional norms, unamendability has been put forth as a tool to defend the institutions and values of liberal democracy from attack.[22] This consequentialist logic could be applied to any normative perspective: in the case of Marxism, perhaps unamendability could be justified if it protects the common ownership of the means of production; in the case of Catholicism, perhaps unamendability could be justified if it protects the precepts of Scholastic natural law. However, this is *not* the approach taken by this thesis. Instead, it considers *unamendability in principle* rather than its consequences or the precise content which it protects in a given situation.

There are three reasons why seeking a republican answer to this question is worthwhile. Firstly, as mentioned above, normative theoretical discussion on unamendability is often framed (correctly in my view) through the prism of *constitutionalism v democracy*. In simplistic shorthand, unamendability is the ultimate constitutional constraint on how far a democratic majority can go. The democratic critiques of unamendability are well laid out in separate works by Melissa Schwartzberg and Silvia Suteu.[23] Republicanism's relevance here is in its positive inclination to and nuanced synthesis of constitutionalism *and* democracy. Republicanism and constitutionalism have always been closely associated political and intellectual traditions.[24] Indeed, at different points in history, it has been difficult to distinguish them.[25] Republican scholarship (particularly that of Philip Pettit) dedicates a large amount of its attention to the principles of constitutionalism, such as the separation of powers, the rule of law, counter-

[21] John Rawls, *Political Liberalism* (Columbia University Press 2005) 177-178
[22] See Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?' (2024) 16 Hague Journal on the Rule of Law 315.
[23] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007); Suteu (n 15).
[24] Alan Ryan, *On Politics* (Penguin 2012) 497-498.
[25] See e.g. the role Montesquieu plays for republicanism and constitutionalism; Ryan (n 1) 518-531. See also Rachel Hammersley, *Republicanism: An Introduction* (Polity 2020) 6.

majoritarianism, and democratic accountability. Because republicanism has traditionally brought a *positive* attitude to constitutionalism, its perspective on unamendability can be constructive, not simply deconstructive – if it critiques unamendability, this need not represent a case against constitutionalism generally.

Secondly, in attempting to apply a critical perspective on unamendability, this thesis employs republicanism as a reasonably self-contained political tradition. Little would be gained by way of novelty if this thesis offered another *democratic* critique of unamendability – the respective works of Schwartzberg and Suteu have done this authoritatively and comprehensively already.[26] Further, when assessing the democratic legitimacy or otherwise of unamendability, contemporary political and constitutional theory spends a significant amount of time and energy on semantic discussions about the meaning of 'democracy' (whether prefixed as 'consensus' democracy, 'majoritarian' democracy, 'liberal' democracy, 'deliberative' democracy or otherwise) which can often obfuscate rather than clarify. While republicanism is a broad and contested tradition, its literature is nonetheless more self-contained and delimited than the wider democratic literature.

Thirdly, while this thesis aims to further the scholarship on unamendability, applying a republican perspective on this topic can further our understanding of republicanism too. Unamendability has not yet received dedicated, focused attention from republicans, despite their strong interest in constitutions and constitutional change. In offering democratic critiques of unamendability, Schwartzberg and Suteu's respective works developed the political theory on democracy generally. In an analogous way, by applying a republican perspective to unamendability, this thesis aims to further the scholarship on republican constitutionalism.

This thesis engages with the republican tradition on two levels: 1) with influential early modern republican thinkers and 2) with contemporary neo-republicanism put forward by Philip Pettit. On the first level, this considers the works of Niccolò Machiavelli, Algernon Sidney, and Thomas Jefferson as they apply to constitutions and constitutional change. The salient principle that emerges from this tradition is that of constitutional mutability – that constitutions are fallible, finite, mutable human creations which are designed to serve a wider republican project of freedom and self-government. On the second level, Pettit's neo-republicanism is a tradition more applicable and comprehensible to the modern constitutional state. Though uncompromising in its advocacy of the separation of powers, the rule of law, and non-arbitrary rule, it grounds its republican account on the principle of contestability. This is the core republican benchmark of legitimacy – can citizens challenge with the possibility of changing a

[26] Schwartzberg (n 23); Suteu (n 15).

given law, decree, or even constitution? This contestation can occur individually or collectively, through elections, protests, judicial action, or other means. On both levels, the idea of 'constituent power' – the power of the people to create and recreate constitutions – is indispensable. On both levels, republicans understand this as a living power which continually influences and directs the constitution. Under republicanism, constituent power is nothing more or less than the contestatory citizenry.

These principles push against unamendability on a theoretical level. As we will see in Chapter 2, the 'unconstitutional constitutional amendments' ('UCA') doctrine is based on a presumption of a dormant or 'deistic' constituent power which is not present in the day-to-day operation of the constitution. In this context, unamendability is a method of protecting the people's will in its absence. However, this makes little sense if the constituent power is continuously active within and without the constitution. Further unamendability seeks to make a mutable creation immutable and to limit the space of legitimate political contestation. On the other hand, a fully amendable constitution satisfies republican principles by granting the contestatory citizenry control over the direction of constitutional development.

1.3 Thesis structure

This thesis contains seven chapters: two theoretical chapters, three comparative case study chapters, one application chapter, and a brief conclusion. Chapter 1 outlines the purpose and structure of this thesis. Chapter 2 distils the theoretical foundations of unamendability as it exists in judicial practice and comparative constitutional scholarship. Chapter 3 covers the major republican principles that relate to constitutional change. Chapter 4 considers Irish constitutional law where there are no limits on amendability. Chapter 5 considers the Indian basic structure doctrine, the leading exemplar of the implied/judicially-defined unamendability. Chapter 6 considers explicit unamendability ('eternity clauses') of three constitutions: Brazil, Germany, and France. Chapter 7 applies the republican framework of Chapter 3 to the case studies of Chapters 4-6. It attempts to formulate a republican approach to constitutional unamendability and assesses some alternatives.

Chapter 2 explains two arguments which are made in favour of unamendability: Argument 1 is that the power to amend a constitution is different to a power to replace a constitution; Argument 2 is that a constitution must include some substantive content in order to be a constitution. Both of these arguments entail substantive limits on the scope of the amending power. Chapter 3 responds to this theoretical outline of unamendability and stresses three important republican principles: i) mutability, ii) living constituent power, and iii) contestability.

i) The *mutability* principle holds that constitutions, just like all human creations, are imperfect and subject to corruption through the passage of time. This is not a uniquely republican perspective; however, republicanism's contribution comes in its response to this. Machiavelli emphasised that if one wishes to maintain a constitution's 'first principles', one must be willing to embrace the full spectrum of reforms. ii) The principle of *living constituent power* is both descriptive and normative, but in short hand it means that the people who authorise and create a constitution do not disappear at the moment that constitution is created. For republicans, constituent power is an ongoing capacity and stands for nothing more or less than the active contestatory citizenry. In this context, the justification for unamendability as a shield for a dormant constituent power disappears. iii) According to Pettit, a republican democracy requires that the citizen/citizenry can effectively *contest* every public measure (whether individually or collectively). Unamendability necessarily makes some principles incontestable – this is illegitimate from a republican perspective. Finally, to republicans, civic virtue is the ultimate guarantor of a non-arbitrary, constitutional form of government. At a certain point, legalistic methods of maintenance are exhausted and civic virtue becomes vital – it is argued that this point lies in the power to amend a constitution.

Chapters 4 to 6 are the comparative case studies. They each embody a distinct approach to unamendability. Chapter 4 considers the Irish Constitution, under which amendability is expressly unlimited and the courts refuse to interpret any such limits either. This full scope of amendability through the referendum is, I argue, related to the fact that before the enactment of the current Constitution in 1937, the scope of amendability was limited by the Anglo-Irish Treaty with the UK. Because limited amendability was linked to the Irish state's lack of full national sovereignty, full amendability must be understood as a marker of this national sovereignty and self-determination.

Chapter 5 considers the vital case study of the Indian basic structure doctrine. Though the Indian Constitution lacks an eternity clause, the Supreme Court has determined that there is an unamendable basic structure and enforce it strongly against Parliament's amending power. This doctrine was a product of a period of intense constitutional conflict in the 1970s over who should have the final say within the Indian Constitution: politicians or judges. The ultimate purpose of the basic structure doctrine is to protect judicial review and judicial independence from Parliament's amending power, and it grants judges the intra-constitutional final say. This chapter covers the doctrinal grounds on which the Supreme Court holds to the basic structure idea, the motivations for its development, and its wider effect on Indian constitutional law.

Chapter 6 considers 'eternity clauses' in three constitutions: Brazil, France, and Germany. Since eternity clauses are varied in scope, content, and efficacy, it is necessary to consider a

representative selection of constitutions which include this kind of clause. Each case approaches their respective clause differently. In Brazil, the 'stone clauses' are comparatively broad and are enforced strictly by superior courts. However, there may be the possibility to alter these clauses through referendums. The French Constitution prevents amendments to the 'republican form of government', but the judiciary refuses to enforce it against the amending power – rendering it a declaratory clause. In Germany, the eternity clause is similar in scope to Brazil's and though courts reserve the right to enforce it, they have not yet done so. This survey of eternity clauses demonstrates the variety of enforcement and meaning attributed to unamendability. One salient finding is that in each case there likely exists a constitutional method by which these clauses can be altered or even removed.

Chapter 7 applies the republican principles of Chapter 3 to the case studies of Chapters 4-6 as well as the principles of unamendability recounted in this introduction. It underlines the *principled republican objection to unamendability*, not just for violating the principles outlined in Chapter 3, but for the structural effect of judicially-enforced unamendability we see from the case studies: giving the judiciary 'final say sovereignty'. Though stating categorically that unamendability cannot be legitimate from a republican perspective, it concludes that eternity clauses can, under the right conditions, be accommodated within a republican constitution. The chief condition is that there exists *some* constitutional method by which this clause can be altered. It then considers a number of potential alternatives to unamendability that may come close to it. These include tiered scales of amendment difficulty, soft-form judicial review of amendments, and amendment-specific interpretation clauses. The republican advantages, disadvantages, and feasibility of each are assessed here. Chapter 8 offers brief concluding remarks for the thesis.

1.4 Methodology

This project is an interdisciplinary piece of research that engages ideas in political theory and relates them to the concrete question of the proper scope of constitutional amendment powers. It is therefore a work of *theoretical*, *comparative*, and *doctrinal* research design. It begins on theoretical grounds in order to understand the topic conceptually and apply political theory principles to it. It is comparative in its objective to understand the topic at practical and generalisable levels. It is doctrinal in describing and analysing the state of the law concerning unamendability in various jurisdictions and comparing and contrasting judicial approaches.

Theoretical methods

This thesis seeks to answer a normative question about constitutional theory. Therefore, it employs analytical constitutional theory and normative political theory, specifically

republicanism. Chapters 2 and 3 form the theoretical axis of this thesis. They consider the underlying constitutional theory behind unamendability and then the relevant republican principles. Chapter 2 covers *constitutional theory* as it exists today. The work of leading constitutional theorists of unamendability such as Yaniv Roznai, David Landau, and Rosalind Dixon is assessed. The principles distilled here guide our comparative study of unamendability at the level of individual constitutions. In Chapter 3, we move to *political theory*, considering republican thinkers who wrote about constitutional change. It firstly looks at early modern republicans: Niccolo Machiavelli, Algernon Sidney, and Thomas Jefferson. Secondly, it looks to the contemporary republican scholarship of Philip Pettit. The republican principles distilled here are applied to the comparative case studies in Chapter 7.

To be clear: this thesis' use of republican political theory is a somewhat partial one. It does not attempt to offer *the comprehensive* republican approach to the issue of unamendability, taking into account all the various strands of republican thought. It employs two (related) strands of republican thought which bring a particular approach to constitutionalism and constitutional change: one starting with Machiavelli, through Sidney, to Jefferson; the other associated with Pettit. To this extent, the republican theoretical conclusions on unamendability made in this thesis are accurate to these strands, but cannot be generalised to others.

Comparative case studies

Since this research project concerns unamendability and its legitimacy, an understanding of how it manifests itself in real-world constitutions is necessary. Therefore, this project employs comparative constitutional law methodology, contrasting the diversity of rules and approaches in different jurisdictions. As set out already, it considers five jurisdictions whose constitutions and jurisprudence are distinct, even if subtly.

In the broadest sense of the term, this research design is a comparative one. Since it is of a qualitative nature, this type of comparative research design could be categorised as what Bryman calls a 'multiple case study'[27] or a small-*C* study – a case study involving the observation of a small number of cases. Although it does not involve a single case, Gerring points out that a case study need not be limited in this way in order to classify as a case study.[28] While this research is broadly part of the 'comparative constitutional law' field, it is not comparative in a theory-testing sense. This research design is not deductive – there is no overarching theory which the comparative exercise seeks to prove or disprove. Nor is it an inductive explanation of patterns from the data observed in the comparators. It may be more accurate to describe the ultimate

[27] Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 74.
[28] John Gerring, *Case Study Research: Principles and Practice* (Cambridge University Press, 2016) §2.1

aim as 'theory-building' as outlined in the research questions. According to Bryman, 'the main argument in favour of the multiple-case study is that it improves theory building'.[29]

As will be apparent from the outline above, the criteria for case selection in this thesis is *schematic* and based on which countries are *typical* of approaches in the field of study. The schema or pre-existing framework for selection is taken mostly from Roznai's research on unamendability:[30] *explicit* unamendability and *implied* unamendability. In addition, I thought it wise to include a jurisdiction which does *not* employ unamendability in either guise. This requires *three categories* of cases, allowing for a selection which is, in Ran Hirschl's terminology, 'prototypical' of the field of study.[31] This is also the reason why there are not simply three cases: one with explicit unamendability, one with implied unamendability, and one with no unamendability. Because explicit unamendability (eternity clauses) come in a variety of forms – in terms of length, scope, specificity, and enforcement – it was decided to choose a somewhat prototypical array of cases within this category too. Therefore, this category includes three cases: Brazil, Germany, and France. The implied unamendability category is filled by India and the no unamendability category is filled by Ireland.

Doctrinal-interpretive methods

The last method is the standard one employed most often in legal research: doctrinal methods. This is often grounded in legal positivism: viewing the law as it is. Naturally, this involves reading and understanding firstly the piece of law itself and secondly any corresponding caselaw. It involves the search for a logically consistent system of rules within the law.[32] In this case, it means understanding the method of amendment for a constitution, the substantive limitations (if any) on that power, the caselaw that has accompanied that amendment power, and how the approach taken by that country has evolved. This will be more important for some cases but less for others: in common law jurisdictions like Ireland and India, this will be vital; for those like Germany, the letter of the constitutional provision is more important than any judicial statements. Though in the latter category, caselaw is still vital to understanding how a provision is interpreted and applied.

Doctrinal methodology will not be sufficient on its own in understanding unamendability. When used as the sole method of legal research, doctrinal methods can channel underlying biases and

[29] Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 74.
[30] See Roznai (n 7) 10-11.
[31] Ran Hirschl, 'The Question of Case Selection in Comparative Constitution Law' (2005) 53(1) American Journal of Comparative Law 125, 142.
[32] Shane Kilcommins, 'Doctrinal Legal Method (Black-Letterism): assumptions, commitments and shortcomings', in Laura Cahillane and Jennifer Schweppe (eds) *Legal Research Methods: principles and practicalities* (Clarus Press 2016) ch 1.

values without expressing them openly.[33] Therefore, another mode of interpretation should be used. The research methodology of *legal interpretivism* can aid this doctrinal approach by bringing focus on the purpose of these limits and their grounding in political principles. Legal interpretivism grounds its methodology in the idea that behind laws are moral and political principles.[34] As set out by Dworkin, understanding the law in a holistic way requires an understanding of these principles rather than simply reading black letter law. For constitutional law, this is especially relevant given constitutions' political and historical purpose.

Legal interpretivism will be employed in my research in the following way: using the doctrinal analysis of the selected case studies, it will consider the political principles which ground the presence/absence of limits on amendability. This will involve caselaw analysis and broadening the scope of investigation to the drafting process of each constitution. This is perhaps where much of the political theory which grounds unamendability is found. Each case study has rich archival primary sources and academic and historical secondary sources on the origins of constitutions.

1.5 The scope of this thesis

The aim of this thesis is to develop a republican approach to constitutional unamendability – i.e. when the scope of a constitution's amending power is substantively limited. It does not develop a republican approach to constitutional amendment powers in their entirety. Firstly, while the *different methods* of constitutional amendment are relevant to answering this thesis' research question, this is not the focus of this thesis. It is not for this thesis to assess how constitutional amendment should be designed or what institution should hold the amending power. In the context of a particular country, that choice may make a difference in terms of unamendability,[35] but the specific focus is the legitimacy of unamendability, not who can amend the constitution.

Secondly, this thesis is not concerned with *amendment difficulty*, or how comparatively hard or easy it is to amend a constitution. This is a highly contextual issue for which it is difficult to make sweeping categorisations. In this vein, it is not concerned with what Albert calls 'constructive unamendability', whereby an amendment process is designed to be so difficult that it effectively makes amendment impossible.[36] Similarly, this project is not *specifically* concerned

[33] ibid
[34] Nicos Stavropoulos, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), Edward Zalta (ed) https://plato.stanford.edu/archives/spr2021/entries/law-interpretivist/
[35] See part 5.2 of this thesis on Indian amendment process.
[36] See Richard Albert, *Constitutional Amendments: Making, Breaking, and Transforming Constitutions* (CUP 2019) 155-157.

with 'entrenched clauses' that are more difficult to change than the rest of a constitution. In all these cases, there remain constitutional avenues through which the relevant constitutional content can be amended; the barrier to achieving amendments is the changing political circumstances in a given society.[37] Though there is a separate, important discussion about the *practical* difference between these situations and unamendability proper, this project is only concerned with the latter as it raises theoretical and doctrinal questions which are *not always* raised by the former. Particular approaches to amendment difficulty are relevant to this thesis only insofar as they have knock-on effects on the development of unamendability in a constitution.

Thirdly, this thesis is not concerned with *procedural* limitations of constitutional amendment and their judicial enforcement, but *substantive* limitations. Every amendment procedure is limited in some way: setting procedure *x* as the way to amend the constitution excludes procedure *y*. The enforcement of this kind of limit by the courts does not raise *the same* legitimacy concerns that are raised by enforcement of substantive limitations. Procedural limits on amendment do not prohibit a hypothetical amendment being made; they only prohibit a hypothetical amendment being made in a particular way. There are legitimate questions about whether it is possible to place *any* limits (procedural or substantive) on the amending power and how enforceable these limits actually are.[38] Since these questions are of particular relevance to republicans, they are considered in Chapters 3, 6 (6.4 on France), and 7. However, an all-encompassing republican theory of constitutional amendment is beyond the scope of this research project.

[37] See, for example, US Constitution Article V's equal suffrage clause which prevents any State being deprived equal representation in the US Senate save for that State's express consent.

[38] See Mark Tushnet, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018); Pettit (n 20) 292; Akhil Reed Amar, 'Philadelphia Revisited: Amending the Constitution Outside Article V' (1988) 55(4) University of Chicago Law Review 1043.

2. THE PRINCIPLES OF UNAMENDABILITY

This chapter sets out the fundamental principles that underpin unamendability. It begins by explaining unamendability as a puzzle of constitutional design. The conundrum or paradox of the 'unconstitutional constitutional amendments' doctrine is this: constitutional amendments are designed to alter the content of a constitution, so how can they possibly be held to be 'unconstitutional'? Against what benchmark could such a ruling be made? The answer comes in two forms: what I call Argument 1, 'delegation argument', and Argument 2, the 'constitutionalism argument'. Argument 1 holds that the power to amend a constitution is different to the power to replace or destroy a constitution. While the latter is unlimited in scope, the former is inherently limited and cannot amend whatever it likes. Argument 2 holds that a constitution must meet a certain criteria in order to be a constitution, and that this criteria inherently limits the scope of amendability. While Argument 1 only limits the scope of constitutional amendments, Argument 2 could potentially be applied to *any* constitutional reform, including replacements or even original constitutional provisions. However, this chapter shows that these arguments rest on highly contestable claims, and that they do not necessarily lead to unamendability. The most common critiques of unamendability are then recounted, namely that unamendability allows the dead to rule the living, that it is undemocratic, and that it seeks to make unchangeable what nature makes changeable.

Before setting out the principles of unamendability, it is necessary to briefly explain constitutional amendment generally. Virtually every written constitution in the world provides a procedure for its own amendment.[1] This is to allow the constitution to change in response to the changing needs of society: while constitutions necessarily constrain all powers they create – parliament, the government, the courts etc – they are imperfect creations and require a set procedure for addressing and remedying defects. Without this, constitutions may lose their efficacy. In most cases, amending power is vested in the country's national legislature;[2] however, amendment generally requires a high threshold for approval such as a two-thirds majority or higher in some cases. In federations, it is common to require some level of consensus among the sub-national units for the proposed change, either by state legislatures or similar.[3] It is also

[1] For an overview of constitutional amendment see: Markus Böckenförde, 'Constitution-Building Primer: Constitutional Amendment Procedures' (*International IDEA*, 1 September 2014) 6 https://www.idea.int/publications/catalogue/constitutional-amendment-procedures accessed 22 May 2026; Rosalind Dixon, 'Constitutional Amendment Rules: A Comparative Perspective', in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011).
[2] Venice Commission, *Report on Constitutional Amendment* CHL-AD(2010)001 (Strasbourg 19 Jan 2010) para 35.
[3] See Constitution of Australia 1901, art 51; Constitution of India 1950, art 368.

common for amendment rules to include a tiered scale of difficulty i.e. making some parts of a constitution more difficult to amend than others.[4] As with all constitutional provisions, political context and circumstances are often more important than the text of constitutional amendment rules: sometimes amendment rules do not function effectively to entrench the constitution, while other times they stifle a political system and make reform practically impossible.

2.1 The conundrum of unconstitutional constitutional amendments

Under written constitutions with strong-form judicial review, courts have the power to strike down ordinary laws or executive actions that violate the constitution. This is based on the principle of constitutional supremacy – that the constitution is the highest positive law in the land to which every ordinary law must adhere. The judiciary is the authoritative interpreter of the constitution. However, it need not be the final arbiter on what the constitution means – if the courts interpret the constitution in a way that makes the other branches of government or the public as a whole uncomfortable, an amendment can be made to alter this judicial interpretation.[5] Once the constitution is amended, the *updated constitution* is then the supreme law of the land. In this way, constitutional supremacy constrains all branches of the state.

If one assumes that the constitution and an amendment to that constitution are of equal standing – the latter being a part of the former – then the idea of an *unconstitutional* constitutional amendment is surely impossible: the purpose of an amendment is to change the constitution, so against what benchmark could one claim that an amendment is unconstitutional? Surely the only basis for the judiciary to review an amendment is to assess whether that amendment followed the *procedure* laid out by the constitution; it couldn't assess the substance of that amendment. After all, the purpose of an amendment is to change the constitution's substance. And yet, limitation on the scope of constitutional amendment – unamendability – *is* a common feature of modern constitutions. According to the 'unconstitutional constitutional amendments doctrine' ('UCA doctrine'), a constitution's amending power is necessarily limited in scope. We consider two basic arguments for unamendability in the next subsection.

Unamendability can take two forms: explicit and implied. Explicit unamendability is when a constitutional provision immunises some of the constitution's content from amendment. While amendment provisions necessarily limit the *procedure* of how an amendment can take place, these provisions limit what *substance* the amending power can amend. Notable examples are the German Basic Law's Article 79.3 which protects human dignity and federalism, the French

[4] See Constitution of India 1950, art 368; Constitution of South Africa, 1996, art 74.
[5] Dixon (n 1) 98.

Constitution's Article 89.5 which protects republicanism, or the Brazilian Constitution's Article 60.4 which protects the separation of powers and individual rights.[6] Implied unamendability is when a superior court *interprets* substantive limitations on the amending power. The most famous example is India's 'basic structure doctrine', through which the Indian Supreme Court holds that Parliament (the designated amending power) cannot amend whatever it wants – every amendment must leave the Constitution's 'basic structure' or 'identity' in place. This doctrine has found its way to many other jurisdictions.[7]

Unamendability goes back to the first written constitutions in the late 18th century revolutions.[8] However, unamendability and its judicial enforcement have seen notable growth in recent decades.[9] Mirroring this has been a growth in comparative constitutional scholarship of the phenomenon in the last decade and more. Roznai's *Unconstitutional Constitutional Amendments* (2017)[10] has been highly influential not only in constitutional scholarship but juridical practice in many jurisdictions .[11] Other scholars like Dixon and Landau endorse the concept, though with their own unique emphases and theoretical groundings.[12] It has also faced academic criticism, such as is found in the work of Schwartzberg,[13] Albert,[14] Suteu,[15] or Doyle.[16]

2.2 Two arguments for unamendability

There are generally two grounds on which to argue for constitutional unamendability and these are encapsulated in the following two statements:[17]

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[6] We consider these three examples in Chapter 6.

[7] See Silvia Suteu, Eternity Clauses in Democratic Constitutionalism (OUP 2021) 138, and for example: *Anwar Hossain Chowdhary v Bangladesh* 41 DLR 1989 App Div 165 (Bangladesh); *Bowen v Attorney General* BZ 2009 SC 2 (Belize); *Phang Chin Hock v PP* [1980] 1 MLJ 70 (Malaysia).

[8] Article V of the US Constitution prohibited amendments that abolished slavery for a period of 20 years and it continues to prohibit amendments depriving states of their equal suffrage (without their consent). The earliest eternity clause was found in France prohibiting amendments to the republican form of government, and was inserted into the Constitution in 1884. Constitutional Acts of the French Third Republic 1875; Constitutional Law of 25 Feb 1875, art 8.3; introduced through Amendments of 14 Aug 1884, art 2. See part 6.4.2 of this thesis.

[9] Suteu (n 7) 144; Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (2019) 15(4) European Constitutional Law Review 619.

[10] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017).

[11] See, for example, *Attorney General and 2 Others v David Ndii and 79 others,* Supreme Court Petition No 12 of 2021 (consolidated with petitions 11 & 13 of 2021), 31 Mar 2022, para 201 https://www.judiciary.go.ke/download/petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement/ accessed 17 May 2026.

[12] See Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13(3) International Journal of Constitutional Law 606.

[13] See Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007).

[14] See Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663.

[15] See Suteu (n 7).

[16] See Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenephon Contiades and Alkmene Fotiadou, *The Foundations and Traditions of Constitutional Amendment* (Hart 2017).

[17] Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008) 68-74. Doyle (n 16) argues that constitutional amendments can be unconstitutional in three ways: 'positive', 'moral', or 'conceptual'. A *conceptually* unconstitutional amendment maps onto my argument 1 and a *morally* unconstitutional amendment

1. 'The power to *amend* a constitution is not a power to *replace* a constitution.'
2. 'A constitution must have some essential characteristics *to be a constitution*.'

In practice, these arguments often bleed into one another when lawyers or scholars use them. They both imply that there is some *essence* to each constitution that is beyond the scope of the amending power, but the first holds that this essence is only as permanent as the *specific* constitution in which it exists, while the second holds that it is essential to *any* constitution. Both statements are ostensibly descriptive, but are loaded with normative claims. Both statements can also be contested on empirical grounds.

1. The delegation argument – 'The power to amend a constitution is not a power to replace a constitution.'

This is a descriptive claim that there is a qualitative difference between a *constituent power* (which has the legitimate authority to make, destroy, and/or replace a constitution) and an *amending power*. According to standard constituent power theory first articulated by Sieyes during the French revolution, the constituent power is extra-constitutional and thus unlimited in its scope, but the institutions and offices it establishes *through* the constitution are *delegated* with certain limited functions and powers – they cannot go beyond the limits of the constitution itself.[18] Those who follow this delegation theory argue that the constitution's designated amending power is similarly *delegated* authority to amend the constitution. Because of this act of delegation, it is limited in scope; the implied terms of this delegation are to maintain the constitution's basic structure or identity after any amendment. This is the basis of Roznai's UCA doctrine.

According to a line of French constitutional doctrine, there is *original* constituent power (that originally created the constitution) and *derived* constituent power (the amending power).[19] The amending power is a derived constituent power because while it can remake the contours of the constitution, its ability to do so *derives from the constitution itself*. This means that it must abide by the constitution in some way. Roznai labels these as the *primary* constituent power and the *secondary* constituent power. Just as the legislature is delegated the power to make laws from the constituent power through the constitution, the amending power is delegated a limited amount of constituent power (secondary constituent power) from the primary constituent power (the unlimited power). This reality entails procedural and substantive limits; the amending power cannot amend whatever it likes however it likes; it must abide by the constitution. The agent (the secondary constituent power) acts on behalf of their principal (the primary constituent

maps onto my argument 2. A *positively* unconstitutional constitutional amendment is an amendment that breaches the procedure laid down for amendments in the constitution's text. This is not considered a form of unamendability for this thesis as this is a procedural limit not necessarily a substantive one.

[18] See Emmanuel Joseph Sieyès, 'Qu'est-ce que le Tiers-État?' in Oliver W Lembcke and Florian Weber (eds), *Emmanuel Joseph Sieyès The Essential Political Writings* (Brill 2014).

[19] Roznai (n 10) 115-117.

power) and only enjoys as much power as they are granted by the principal. Inherent in this relationship is that the agent acts for the principal *in their absence.*

Implicit here is that 'amendment' means something narrower than 'replacement'.[20] It entails relatively minor alterations to specific components; it would be an absurdity to allow the amending power to formally repeal the entire constitution through a single amendment. That being the case, the spirit or identity of the existing constitution cannot be usurped by the amending power. When considering the US Constitution, Rawls argued that an amendment which established a state religion (overturning the 1st Amendment) would be beyond the limited scope of the amending power because it would violate the Constitution's spirit.[21] If it did so, it ought to be considered a revolutionary act rather than an act of amendment.[22] This argument only works if it is assumed that a constitution has some core essence or identity without which it would not be the same constitution properly speaking. In Indian jurisprudence (which employs the delegation argument), this is called the 'basic structure'.[23] The delegation argument is widely used by superior courts around the world to justify judicial review of constitutional amendments, such as the supreme courts of Brazil and India. As a formalist doctrine, it provides a ready justification for judicial enforcement of these limitations; it is not so large a leap for superior courts – the so-called 'guardians of the constitution'[24] – who already enjoy the power to strike down unconstitutional legislation to 'enforce constitutional limits' by asserting the power to review amendments. If the delegation argument is accepted by courts and strong-form review already exists, reviewing amendments naturally follows.

The delegation argument becomes more normatively loaded when we remember that 'constituent power' is almost always understood to be 'the people'.[25] This provides a democratic justification for limiting amendability; since the constitution is supposedly the creation of the people, it would be wrong for the amending power to destroy the basic constitutional structure that the people entrusted it to protect *in their absence*. Importantly, this presumes that the primary constituent power of the people only expresses itself at moments of constitution-making and

[20] Walter F Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 117 (Princeton University Press 1995); quoted in Kemal Gözler (n 17) 68.
[21] See John Rawls, *Political Liberalism* (Columbia University Press 2005) 177-178.
[22] Later, he clarified that the people could by their constituent power achieve this change, but that this would be outside the existing Constitution; John Rawls, 'Political Liberalism: Reply to Habermas' (1995) 92(3) Journal of Philosophy 132.
[23] Doyle and Jacobsohn call this 'particular constitutional identity'. See Gary Jacobsohn, Constitutional Identity (Harvard University Press 2010) 18-19; Oran Doyle, 'Constitutional Identity and Unamendability' in Ran Hirschl and Yaniv Roznai (eds) *Deciphering the Genome of Constitutionalism* (CUP 2024).
[24] See Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 Journal of Civil Liberties 48, available from: https://pure.ulster.ac.uk/ws/files/11442558/Guardians.pdf accessed 20 May 2026.
[25] Roznai (n 10) 125.

not through the 'constituted' powers or constitutional amendments. The primary constituent power is dormant until the next moment of replacement arises. If, as Colón-Ríos advocates, we are constantly open to this possibility of reemergence, unamendability loses its anti-democratic bite – he does not see a problem with judicially-enforced unamendability if the people have avenues to assert their constituent power.[26] Similarly, Roznai argues that the more the secondary constituent power reflects the primary constituent power (by a higher degree of representativeness or public participation), the less substantively fettered it should be.[27] A referendum or a popularly-elected convention has more scope to amend the constitution than, say, a two-thirds parliamentary majority.[28]

If we accept this theory of delegation based on the distinction between primary and secondary constituent power, it allows us to conclude that unamendable features are capable of being changed by *some power* (the primary constituent power) but not others. There is thus no claim to perpetual immutability – Roznai rejects the term 'eternity clauses' on this basis.[29] The delegation argument for unamendability can be thought of as formalist and positivist in orientation – while it is concerned with *what* is being amended, of more importance is *who* is doing the amending. Do they have the authority to make x,y,z change? Is it the primary or secondary constituent power?

However, this argument is built on a number of highly contestable claims. The most basic of these claims is that a constitutional amendment power is qualitatively different to a constitutional replacement power – why should the amending power be prohibited from enacting a constitutional replacement? More broadly, the delegation argument falters once the distinction between primary and secondary constituent power disappears.[30] The distinction may collapse when an empirical analysis of the representativeness/level of popular participation in amendment procedures is applied. Amendment procedures are often *more* participatory than the process by which the constitution was originally created.[31] If this is the case, the normative democratic aspect of the argument falters because a comparatively *less* democratic process is forcing a *more* democratic process to abide by its previous decisions. This argument also falters

[26] Joel Colón-Ríos, *Weak Constitutionalism* (Routledge 2012) 182-183.
[27] Roznai (n 10) 164-168.
[28] However, Roznai maintains that the secondary constituent power will always be subordinate to the true primary constituent power, regardless of how representative it is; see Yaniv Roznai, 'We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments' (2023) 110 Supreme Court Law Review (2d) 103 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206373 accessed 20 May 2026.
[29] Roznai (n 10) 129.
[30] See Conall Towe, 'Constituent Power and Doctrines of Unconstitutional Constitutional Amendments' Trinity College Law Review January 21, 2020; Oran Doyle, 'Populist constitutionalism and constituent power' (2019) 20(2) German Law Journal 161–180.
[31] For example, the Italian Constitution's amendment procedure is more participatory than the process by which it was created. Pietro Faraguna, 'Unamendability and Constitutional Identity in the Italian Constitutional Experience' (2019) 21(3) European Journal of Law Reform 329, 343.

the moment a living – instead of dormant – constituent power is accepted as a possibility. In other words, it does not make sense to talk about delegation if the supposed principal – the primary constituent power – is present and active in the constitutional system already. Whose will is unamendability supposedly protecting?[32]

It is important to note (and this does not impact on the integrity of this argument in principle) that Roznai, who employs the delegation argument to justify unamendability, also believes that there are substantive limits on the *primary constituent power*.[33] He believes that the power that creates a constitution is actually limited in scope, however minimal these limits may be. However, the delegation argument he uses cannot avail this possibility. The delegation argument is limited to the four walls of an actually-existing constitution – delegation is a process that happens through a constitution and cannot transcend it. In order to justify such supraconstitutional limits, one must employ a different argument.

2. *The constitutionalism argument – 'A constitution must have some essential characteristics to be a constitution.'*[34]

Unlike the delegation argument, this argument does not concern itself with origin- or author-based legitimacy for constitutional reforms. It is based on the claim that any constitution must meet some basic criteria *to be a constitution* properly speaking. Therefore, any amendment that detracts from this basic criteria would be unconstitutional. This grounding of unamendability does not hold that unamendable features are only unamendable until the primary constituent power changes them; it holds that some features cannot be changed *period* – no actor or institution could ever legitimately touch them. To use human rights language, they are *non-derogable*. Whereas the delegation argument can only apply substantive limits to amending powers, the constitutionalism argument can apply substantive limits to *any kind* of constitutional reform – whether amendment or replacement. It can even be applied to an existing provision of an existing constitution, opening up the possibility of *unconstitutional constitutions* as well as unconstitutional constitutional amendments.[35]

The constitutionalism argument brings unamendability to the same place as natural law and reflects the traditional maxim that 'an unjust law is not a law'. According to Doyle, it does the same thing for the concept of 'constitution' that Fuller did for the concept of 'law', especially

[32] Since the delegation argument is not essentially tied to democratic theory, this problem does not affect its core descriptive claim that amendment means something less significant than replacement.
[33] See Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) Connecticut Law Review 1381.
[34] This argument is sometimes referred to in the literature as 'supraconstitutionality'; Roznai (n 10) 71-100. Jacobsohn refers to it as '*generic* constitutional identity'; Jacobsohn (n 23) 18-19; Doyle refers to it as the '*moral* sense of constitutionalism'; Doyle (n 23) 18.
[35] See David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8(1) Global Constitutionalism 40.

when articulated by Jacobsohn.[36] *Contra* the legal positivists who, according to Fuller, believed that 'law' could include any content regardless of its moral quality,[37] Fuller held some (minimal) moral criteria – such as non-retroactivity and public promulgation – were essential to the very concept of 'law', without which a thing could not be classed as law properly understood.[38] In the *exact same way*, the constitutionalism argument holds that a constitution cannot include anything or everything; it must meet some basic criteria to be a constitution. In Landau's words, unamendability suggests that 'a constitution is not really constitutional unless it actually works in certain ways and adheres to certain fundamental principles.'[39]

What this basic criteria entails is interpretive: depending on one's view, it could entail traditional natural law limitations, Fuller's rule of law criteria themselves, international law *jus cogens*, or a 'transnational' understanding of constitutionalism.[40] Most constitutionalists would hold that it includes a minimal, functional protection of individual rights, judicial independence, the rule of law, and (most importantly) the *limitation of government*. The last of these criteria arguably encapsulates all others – constitutionalism is about placing political power under some form of law. If we start from a consideration of constitutions' ultimate purpose, we may conclude that *this* is a constitution's essence. If a constitution does not limit and define the government's power, it is not a constitution. In the words of the *Declaration of the Rights of Man and of the Citizen*, '[a]ny society in which no provision is made for guaranteeing rights or for the separation of powers, *has no Constitution*.'[41] Along the same lines, Weinrib holds that '[e]very modern constitutional state has an implied eternity clause' and '[e]very precursor to modern constitutionalism must engage in constitutional reform' to arrive at this state of affairs.[42] To him, 'public justice' (or equal freedom under the law) is 'a justiciable constraint on all public authority', regardless of whether this authority is legitimised by a law, a constitutional amendment, or an original constitutional provision.[43]

For Landau and Dixon, the delegation argument's rigid distinction between amendment and replacement is problematic because it allows the latter to legitimise a whole host of unpalatable regimes.[44] Instead, they argue that any measure violating what they call the 'democratic

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[36] Doyle constitutional identity and unamendability (n 27) 266.
[37] See Raz's argument that law necessarily claims 'unlimited authority'; Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 76.
[38] Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969).
[39] David Landau, 'Abusive Constitutionalism' (2013) 47 UCDL Rev 189, 260; quoted in Doyle (n 16) 75.
[40] Dixon and Landau (n 12).
[41] Declaration of the Rights of Man and of the Citizen 1789, art 16. https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen (emphasis added).
[42] Jacon Weinrib, *Dimensions of Dignity* (CUP 2016) 201-202.
[43] ibid, 201.
[44] David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859, 860.

minimum core' is illegitimate.[45] This minimum core entails only those things that are *absolutely necessary* for the functioning of a constitutional democracy: '(1) a commitment to regular, free and fair multi-party elections; (2) political rights and freedoms; and (3) a set of institutional checks and balances necessary to maintain (1) and (2).'[46] Violations of this core could be anything: *ab initio* provisions, amendments, or replacements. For Roznai, history and experience indicate that there are various constraints on constitution-making, such as natural law, international law, and the basic principles of constitutionalism.[47] He also argues that the very concept of constituent power (primary or otherwise) is loaded with conceptual limitation – for instance, it is only empowered to create a constitution, not whatever it wants.[48]

There are two problems with this argument for unamendability. The first is that 'constitutionalism' and 'constitution' are contested concepts with many different interpretations on offer. While it may be that these terms often imply something like 'law-bound government', this is not universal. The 'political' constitutionalist tradition sees constitutions not simply as limits on government but also channels for political power.[49] In the famous line of Griffith, '[e]verything that happens is constitutional. And if nothing happened that would be constitutional also'.[50] Going back to the delegation argument, Tushnet states that the core principle of constitutionalism is that 'constitutions rest on exercises of the […] 'constituent power"[51] – if this is the case, it entails multiple possible 'constitutions' depending on what the people choose. In short, the 'reasonable disagreement' that Bellamy and Waldron speak of also includes the essence of constitutions. The second problem is raised by Doyle: that it suggests a kind of 'value-monism' for the entire society, that the ideology of constitutionalism ought to outweigh any and every other moral or political consideration that may exist, regardless of context or circumstance.[52]

[45] ibid, 888. See also Landau, Dixon, and Roznai (n 35) 62-63.
[46] Rosalind Dixon and David Landau, 'The Democratic Minimum Core' *The Democracy Project* (2 December 2025) https://democracyproject.org/posts/the-democratic-minimum-core. accessed 3 February 2026. For a more detailed account, see Rosalind Dixon and David Landau, 'Competitive democracy and the constitutional minimum core' in Tom Ginsburg and Aziz Huq (eds), *Assessing Constitutional Performance* (CUP 2016) 268, 269.
[47] See Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) Connecticut Law Review 1381.
[48] ibid, 1404-1406.
[49] See Richard Bellamy, *Political Constitutionalism* (OUP 2007).
[50] JAG Griffith, 'The Political Constitution' (1979) 42(1) Modern Law Review 1, 19.
[51] Mark Tushnet, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018) 329.
[52] Doyle (n 16) 75

2.3 Criticisms of unamendability

In limiting the scope of the amending power and expanding the scope of the judicial power, unamendability doctrines have faced strong criticism since they first raised their heads in the 18th century. The most common of these are recounted here.[53]

The 'dead hand' criticism

According to its critics, unamendability effectively allows the dead to tie the hands of the living. It was understood around the time of the French and American revolutions that since the purpose of these new constitutions was to enshrine the people's power to self-determine and self-organise, it would be wrong to subject one generation to a constitutional regime made by another. There would always need to be some capacity to review the constitution. This would be made far worse if all or part of that old constitution was immune from such alteration.[54]

This criticism is based on two separate principles. The first is popular sovereignty and self-determination – that the people living in society today are the only authority capable of legitimising a constitutional regime. Once they tire of a constitution, they are within their rights to do away with it. Therefore, as a matter both of principle and logic, no unamendable clause can tie their hands and it is wrong to attempt to do so. The second is that human beings are both fallible and unable to perceive the future comprehensively. As Kelbley argues, '[g]iven where we stand today in our constitutional democracy, it is nearly impossible for us to imagine the moral, philosophical, and religious doctrines that may prevail in 100 or 200 years from now.'[55] A previous generation's decision to immunise some part of the constitution from change would be wrong because that generation's knowledge and reason was unable to perceive the needs, mores, and conditions of the present one. We cannot know the effect that an unamendable clause will have at that point in time.

In Roznai's estimation, this argument rests on a fallacy: that the present generation is actually constrained by unamendability.[56] He reiterates that the primary constituent power – the present generation – can always undo unamendable features if they wish. Unamendability simply closes *one avenue* of constitutional reform – constitutional amendment – and forces the present generation to use a different path to achieve their objective.

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[53] Roznai summarises a number of arguments against unamendability, along with his response; Roznai (n 10) 186-196.

[54] See part 3.3.3. of this thesis.

[55] Charles A Kelbley, 'Are there limits to constitutional change? Rawls on comprehensive doctrines, unconstitutional amendments, and the basis of equality' 72 Fordham Law Review 1487, 1520.

[56] Roznai (n 10) 189.

'The laws of the Medes and the Persians'

While the dead hand argument is probably the oldest modern criticism of unamendability, a more ancient argument is found in the Old Testament, in the Books of Daniel and of Esther.[57] 'The laws of the Medes and the Persians' were alleged laws or decrees of the sovereign ruler which were distinctive in that they *could never be rescinded*. In the story of Daniel, King Darius decrees that anyone caught praying would be thrown into a lion pit, and his advisors remind him that the laws of the Medes and the Persians prescribes the *inalterability* of his decrees.[58] Daniel the prophet is found praying and punished, but when he is thrown into the pit, God commands that the lions' mouths be fused shut, protecting Daniel from harm. The King then throws Daniels' captors into the pit instead. In Schwartzberg's words, the men 'die by the immutability of their own maxims.'[59]

Schwartzberg interprets this as a clear biblical injunction against the idea of an unchangeable law – for the only authority that can make an unchangeable law is God. Any discussion about the immutability of natural law must distinguish whether we are speaking of *natural* law or *positive* law. According to Aquinas, though natural law is eternal law cognisable to human reason and conscience, human-made laws could never encapsulate the eternal and unchanging nature of either natural law or eternal law:[60]

> The natural law is a participation of the eternal law […] and therefore endures without change, owing to the unchangeableness and perfection of the Divine Reason, the Author of nature. But the reason of man is *changeable and imperfect*: wherefore *his law* is subject to change. — Moreover the natural law contains certain universal precepts, which are everlasting: whereas human law contains certain particular precepts, according to various emergencies.
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> […] A measure should be as enduring as possible. But nothing can be absolutely unchangeable in things that are subject to change. And therefore human law cannot be altogether unchangeable.[61]

At moments of great constitutional development, the laws of the Medes and the Persians were often invoked to illustrate the hubris of anyone who wished to make a law or constitution unchangeable. Oliver Cromwell invoked them disparagingly during the English Revolution, as did Jeremy Bentham in the 19th century[62] and Jawaharlal Nehru during the debate on the First Amendment to the Indian Constitution.[63] The point being that anyone wishing to make an

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[57] See Schwartzberg (n 13) 9-10.
[58] Daniel 6:8-15, *The New Jerusalem Bible* (Bengaluru: St Pauls 2020) 1075.
[59] Schwartzberg (n 13) 10.
[60] ibid, 16-17.
[61] St Thomas Aquinas, *Summa Theologica* Q97; Thomas Aquinas, *Treatise on Law* (Henry Regnery Company 1992) 107.
[62] Schwartzberg (n 13) 10.
[63] Parliamentary Debates, Constitution (First Amendment) Bill (16 May – 2 June 1951), 2 June 1951; Jawaharlal Nehru, *Selected works of Jawaharlal Nehru Vol 16 Pt I* (OUP 1994) 239 https://nehruarchive.in/documents/the-constitution-first-amendment-bill-2-june-1951-go79gx accessed 13 May 2026.

unalterable law was fooling themself – there is no permanency in an imperfect world defined by change.

The democratic criticism

The most trenchant argument against unamendability is that it is an unpalatable restriction on the scope of democracy within a constitution.[64] While constitutions frequently entrench, they equally make provision for their own change (however difficult this may be). To *permanently* entrench a part of a constitution is to rob a people of the capacity to rule themselves. Schwartzberg argues that an essential feature of democratic rule is that all laws – even constitutional laws – can be changed through the democratic process.[65] She excavates political thinking from Ancient Athens through to the 17th and 18th century revolutionaries to illustrate the importance of *legal mutability* to democracy and she critiques both unamendability and entrenchment on this basis.[66] Further, unamendability in the modern world empowers the most obviously undemocratic element of government: the judiciary. While judicial review in general is often criticised as undemocratic,[67] the capacity for democratic rebuttal to the judiciary exists as long as amendability remains unrestricted. Once judicially-enforced unamendability enters the picture, this ability for democracy to overturn judicial decisions is gone.

The response to this argument from unamendability's advocates comes in two forms. The first is to reiterate that the constitution as originally enacted 'by the people' – the primary constituent power – has some higher democratic legitimacy than amendments.[68] The constitution is the product of the people's considered deliberation, consensus, and will, but an amendment may be the product of a fleeting, capricious, and momentary majority. In defending the Indian basic structure doctrine, Mehta argues that it is based on 'deeper democracy'[69] (amendments being products of shallower democracy). The second response centres on how one defines 'democracy'. If democracy is defined procedurally (something like majority rule) then unamendability is undemocratic. If, as Roznai argues, democracy is defined as consisting of *substantive* rights, values, and institutions rather than merely procedural majority rule, unamendability can be seen as democratic.[70]

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[64] These objections to unamendability are common to democratic objections to constitutionalism generally: see Cormac Mac Amhlaigh, *New Constitutional Horizons* (OUP 2022) 143-148.
[65] Schwartzberg (n 13) ch 6.
[66] ibid.
[67] See Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115(6) Yale Law Journal 1346; Richard Bellamy, *Political Constitutionalism* (CUP 2007).
[68] Roznai (n 10) 193.
[69] See Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism' in Zoya Hasan, Eswaran Sridharan, and R. Sudarshan (eds) *India's Living Constitution* (London: Anthem Press 2005) 179-206.
[70] Roznai (n 10) 191.

This reflects a distinction within constitutional theory between 'thin' and 'thick' democracy.[71] Under a thick, substantive view, democracy cannot include anything and everything that a temporal majority may vote for – it must include some basic respect for values like political equality, separation of powers, and free and fair elections *to be a democracy*.[72] Note here that Dixon and Landau's concept of an unamendable 'democratic *minimum* core', while attempting to appear limited and restrictive, is still a substantive understanding of democracy. Following the 'militant democracy' idea that democracies should be able to effectively counter anti-democratic/anti-constitutionalist forces,[73] unamendability has been proposed as a means to prevent so-called 'abusive constitutionalism', democratic backsliding, and other assaults on liberal democracy today.[74]

Today, unamendability arguably finds its strongest pragmatic and political justification in what is variously called 'liberal democracy', 'liberal constitutional democracy', or 'liberal constitutionalism' – i.e. a form of democracy where majoritarian government is conditioned by liberal norms like fundamental rights and the rule of law.[75] This is closely related to the wider phenomenon of 'legal constitutionalism' or 'liberal legalism' in which politics and politicians are understood to be constrained by judicial oversight.[76] However, this normative liberal perspective is not ironclad. As Suteu observes, unamendability need not always protect liberal values; it can (and often does) protect elitist, illiberal, exclusionary, and anti-democratic constitutional features.[77] This reminds us that unamendability is a political tool which can be used for good or ill. The important question, then, is whether this kind of power should be included in a constitution at all.

2.4 Conclusion

This chapter has laid out the two salient arguments for unamendability. The first of these is that there is a qualitative difference between the power to amend a constitution and a power to

[71] Rosalind Dixon, 'The New Responsive Constitutionalism' (2024) 87(4) Modern Law Review 799, 803.
[72] See Dixon's concept of a 'minimum core' of democracy in Rosalind Dixon, *Responsive Judicial Review* (OUP 2023).
[73] Jan-Werner Müller, 'Militant democracy and constitutional identity' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018).
[74] Beatrice Monciunskaite, 'Unconstitutional Constitutional Amendments' Max Planck Encyclopedia of Comparative Constitutional Law (July 2024) paras 6, 8, 34 https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e840 accessed 31 March 2025; Landau, Dixon, Roznai (n 35) 46-47.
[75] I make this claim based on how constitutional scholars tend to employ or justify unamendability doctrines in application to real-world problems in contemporary politics. In a different geographical/historical context, unamendability's normative grounding would be different. See, for example: Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, 87; David Landau, Rosalind Dixon, Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8(1) Global Constitutionalism 40, 47; Monciunskaite (n 74).
[76] See Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22(1) Oxford Journal of Legal Studies 162.
[77] Suteu (n 7) 8-9, 110.

replace a constitution. While the latter may be unlimited in scope, the former is inherently limited. This is the most common argument for unamendability given by superior courts around the world and in constitutional scholarship today. The second argument is that a constitution must meet some criteria to be a constitution properly speaking. This limits what an amending power can legitimately change. While the first argument is formalist and limited to the four walls of a given constitution, the second argument lends itself to far more *supraconstitutionalist*/natural law-based limits which can apply to constitutional replacements and even original constitutional provisions. As many scholars have argued already, both of these arguments are highly contestable and do not necessarily mandate unamendability.

3. REPUBLICANISM AND CONSTITUTIONAL CHANGE

3.1 Introduction

Republicanism and constitutionalism have always been closely associated political traditions.[1] The belief in freedom as non-domination and the belief that political power should be limited by fundamental law go hand-in-hand. Indeed, at different points in history, it has been difficult to conceptually prise republicanism and constitutionalism apart.[2] As part of the general effort to avoid arbitrary rule, constitutional governance and constitutional constraints have been key pillars of republicanism since the Roman Republic.[3] As we saw in the preceding chapter, the constitutionalist impulse to constrain political power leads some to argue that a constitution's core essence must be fully unamendable.[4] This chapter tries to provide a republican answer to this question of unamendability at the level of principle. To do this, it sketches a republican attitude to constitutional endurance and change, emphasising republicanism's *open posture* towards the full scope of potential change as the basis of its constitutionalism.

This chapter firstly considers a thread of political thought from early modern republicans and secondly Philip Pettit's 'neo'-republicanism. The main theme that emerges from early modern republicanism is that of *constitutional mutability*. Though republicans of this period thought constitutional constraints on political power were essential for achieving republican objectives, they had no significance beyond this. Being created by fallible, corruptible human beings and existing amidst the passage of time, constitutions would inevitably change and decay if not repeatedly subjected to fundamental renovations. Building on this, the main theme for Pettit's republicanism is *contestability* – that laws or constitutions are legitimate to the degree that it can be *changed* by individual citizens or groups. Therefore, rendering important constitutional issues *incontestable* through unamendability detracts from such legitimacy.

As with many other traditions, these republicans see the people as the original legitimisers of a constitutional regime i.e. the constituent power. However, republicans understand constituent power to be a *living political force* that *continuously* influences the constitution from within and without. This is distinct from standard definitions of constituent power which generally treat it as an exceptional power that only expresses itself at moments of constitutional foundation. By contrast, in Pettit's phrasing, constituent power is simply the *contestatory citizenry* – the power of citizens to individually and collectively contest all aspects of the constitutional system. For early

[1] Alan Ryan, *On Politics* (Penguin 2012) 497-498.
[2] See, for example, the central role Montesquieu plays for republicanism and constitutionalism; Ryan (n 1) 518-531.
[3] Rachel Hammersley, *Republicanism: An Introduction* (Polity 2020) 6.
[4] See Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017).

modern republicans, constituent power was the force that could revitalise a constitution, and this was expressed through the conflict and struggle that defined everyday politics.

This chapter considers the attitude of republicans to constitutional endurance and change firstly from a historical perspective and secondly from the perspective of contemporary republicanism. As republicanism is a broad political tradition whose contours can be hard to define, we must first consider republicanism's first principles: freedom, constitutionalism, civic virtue, and popular sovereignty. Following this, the chapter sets out a strand of thought among early modern republicans – from Niccolò Machiavelli to Algernon Sidney and Thomas Jefferson – which strongly opposed constitutional permanency. It then considers neo-republicanism, a contemporary political philosophy as set out primarily by Philip Pettit. The chapter concludes that danger of problematic or 'unrepublican' amendments to a constitution is best addressed at the level of *civic virtue* and an active contestatory citizenry rather than through legal constraints. 'The price of liberty, in the hallowed republican slogan, is eternal vigilance.'[5]

3.2 Republican first principles

3.2.1 Liberty

Republicanism traces its history to the Roman Republic, where there co-existed a strong constitutional tradition and a social cleavage between slaves and citizens.[6] A slave's life was defined by their master's arbitrary will, and because they depended on their master's arbitrary will, they were unfree. Some masters were brutal, some were kind, some interfered very little in their slaves' lives – regardless, all slaves were unfree. A citizen was free because no such domination existed over his life and he could participate in the public arena unencumbered. He could influence laws that governed society and could make his opinion heard. He was free not because he was without interference, but because he was without a master.[7]

It is through this lens and historical context that we can best appreciate the *republican* understanding of liberty, described as 'freedom as non-domination' by Philip Pettit or 'liberty as independence' by Quentin Skinner.[8] You are free so long as you are not dominated i.e. you are independent of the arbitrary will of another.[9] Republicans often contrast this understanding of freedom with a classical liberal definition of freedom as *non-interference*: under this liberal view, one is free to the degree that one's choices are not interfered with externally. Because the state

[5] Philip Pettit, *On the People's Terms* (CUP 2014) 174.
[6] Hammersley (n 3) 15
[7] Pettit (n 5) 2
[8] See Philip Pettit, *Republicanism* (OUP 1997); Quentin Skinner, *Liberty as Independence* (CUP 2025).
[9] See Quentin Skinner, *Liberty before Liberalism* (CUP 1998).

and laws necessarily interfere, they are intrinsic violations of freedom, though they may be justified for other reasons.[10] In contrast, republicans believe that to be free is to be *sui juris* or 'under one's own law'.[11] Though the state and the law necessarily interfere, they do not necessarily dominate; in fact, they may be necessary to reduce domination and thus necessary for freedom to exist.

This view of republican liberty is negative (freedom *from* domination) but some republicans define it more positively as *self-government*. To be free is to have a say in the decisions that affect one's life; to the extent that one cannot participate in decision-making, one is subject to domination and is thus unfree. Participation in politics and decision-making *is* freedom, not just a means to freedom.[12] Rousseauian and Jeffersonian republicanism would emphasise this kind of freedom, as would Hannah Arendt's *freedom as action* – action being participation in political life[13] – and Iseult Honohan's *freedom as autonomy*. These stress the importance of *active citizenship* as intrinsic to freedom.[14] Although this distinction between freedom as non-domination and freedom as self-government is a longstanding one in republicanism, Honohan correctly reminds us that the gulf between these concepts is tiny.[15] While the former sees political participation (self-government) as *instrumental* to freedom, and the latter sees this as *intrinsic* to freedom, in both cases the citizens' participation in politics is *essential* for freedom to exist.

3.2.2 Constitution

When introducing republicanism to his readers, Alan Ryan begins with the idea of constitutionalism – in his view, republicanism's historic distinctiveness was its advocacy of non-arbitrary, law-bound government.[16] Or as Lovett puts it, 'Protecting citizens from the arbitrary or uncontrolled power of their government through good institutional design represents perhaps the signature classical republican concern.'[17] Going back as far as Polybius and the Roman Republic, republicans placed great weight on the form of government i.e. the constitution; what it opposed more than anything was hegemonic power or 'tyranny'.[18] From then until now, the idea of a 'mixed constitution' – incorporating Aristotle's ideal models of monarchy, aristocracy, and democracy – is attractive to republicans, not only in being able to

[10] Pettit (n 8) 41.
[11] Pettit (n 5) 7.
[12] Iseult Honohan, *Civic Republicanism* (Routledge 2002) 84.
[13] ibid, 125.
[14] ibid, 238.
[15] ibid, 85.
[16] Ryan (n 1) 497.
[17] Frank Lovett, 'Republicanism' in n Edward N Zalta and Uri Nodelman (eds), *Stanford Encyclopedia of Philosophy* (Fall 2022) s 4.2 https://plato.stanford.edu/entries/republicanism/ accessed 9 May 2026.
[18] Hammersley (n 3) 6

take the best from each model, but also in ensuring that no one political institution becomes a source of unrestrained power.[19]

Because domination means arbitrary rule, creating a political and legal system which is *non-arbitrary* is essential to the wider republican project of liberty. If the proper constitutional architecture is in place, laws need not be arbitrary impositions on individuals.[20] According to Pettit, non-arbitrary governance demands a constitution which is based on rule of law conditions (as articulated by Fuller),[21] non-manipulability, the dispersal of state power, and restraints on majority rule.[22] What precise forms a republican constitution ought to take is continuously debated. While all contemporary republicans agree that representative democracy is an essential feature of a modern republican constitution, they disagree on the role of referendums or direct democracy.[23] Another significant disagreement centres on the role of judicial review – whether courts should have the power to strike down laws as unconstitutional. While some republicans offer qualified defences of this kind of judicial power, there seems to be consensus that this power ought not give judges the absolute last word within a republican constitution.[24]

3.2.3 Civic virtue

Though constitutional governance is an essential feature of republican political thought, republicans have also been aware since ancient times that constitutions can only go so far in protecting liberty – a republic can only be maintained if its citizens are minded to maintain it. *Civic virtue* is thus indispensable for understanding republicanism, though the weight that republicans have placed on it has waxed and waned. Ancient Roman republicanism emphasised the need for virtue among rulers and citizens (citizens here being an exclusive category alongside the categories of women, children, and slaves). These virtues included placing the needs of others above their own and placing the common good over the good of any specific part; this would ensure that corruption (a perennial evil to republicans) could be avoided and liberty be maintained.[25] Since corruption can occur at the level of the ruler and at that of the citizenry, virtue is necessary at both levels. Lovett summarises the core virtue as 'a willingness to do one's

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[19] Pettit (n 5) 5.
[20] See Philip Pettit, 'Law and Liberty' in Samantha Besson and José Luis Martí (eds) Legal Republicanism (OUP 2009) 39; Pettit (n 8) 66.
[21] See Lon Fuller, *The Morality of Law* (Yale University Press 2000); Pettit (n 8) 174.
[22] Pettit (n 8) 172-182.
[23] Eoin Daly, 'A republican defence of the constitutional referendum' (2015) 35(1) Legal Studies 30; Richard Bellamy 'Political Constitutionalism and Referendums: The Case of Brexit' (2023) 32(6) Social & Legal Studies 973.
[24] See Tom Hickey, 'The republican core of the case for judicial review' (2019) 17(1) International Journal of Constitutional Law 288, 313; Iseult Honohan, Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?' in Samantha Besson and José Luis Martí, *Legal Republicanism* (OUP 2009) 83, 99; Richard Bellamy, *Political Constitutionalism* (CUP 2007).
[25] Hammersley (n 3) 11-13. However, contemporary republicans would deny that this level of public-mindedness is necessary for civic virtue.

part in supporting the public good.'[26] Honohan describes civic virtue in functional terms (its function being the maintenance of self-government), that its content is specific to the circumstances of a given society.[27] For Pettit, virtue is best understood as the *contestatory* capacity of citizens.[28] Civic virtue is instrumental to the wider aim of maintaining liberty 'both in bringing about the right sorts of laws, institutions, and norms, and in ensuring their durability and reliability'.[29]

Hammersley highlights a shift in emphasis from Renaissance and early modern republicans onwards, away from the need for *good men* (virtue) towards the need for *good laws* (constitution).[30] Machiavelli's work was emblematic of this, seeking institutional arrangements capable of channelling ordinary human motivations towards the preservation of a republic.[31] Overall, the republican value of virtue lies in its role as an ethical foundation that enables republican institutions to function effectively and resist corruption. As Lovett argues, virtue and constitution are ultimately codependent if a republican constitution is to survive: good laws require citizens willing to uphold them, while virtuous citizens require institutions through which their commitment to the common good can be realised.[32]

3.2.4 Popular sovereignty

When we assemble these three republican principles, we arrive at a fourth – a principle which is not unique to republicanism but is nonetheless essential to understanding its political philosophy: *popular sovereignty*. The concept – also called 'the consent of the governed'[33] – is fairly simple: governments, states, and laws derive their power and authority from the people they govern. Most famously, Rousseau argued that the only legitimate basis upon which a law could bind an individual was if it was the product of the 'general will'.[34] While it is sometimes understood in terms of the people's positive and freely given consent to a regime, popular sovereignty can also be understood as the people's ongoing capacity to contest the regime's actions as well as the regime itself.[35] For Arendt, the essence of a republic was 'the rule of law *resting on the power of the people'*, as opposed to the rule of man over man.[36] True 'power', as opposed to violence, rested on this basis of popular sovereignty, regardless of the specific form of government: 'All political institutions […] petrify and decay as soon as the *living power of the people*

[26] Lovett (n 17) s 4.3.
[27] See Honohan (n 12) 147-179.
[28] Pettit (n 5) 228.
[29] Lovett (n 17) 4.3.
[30] Hammersley (n 3) 53.
[31] Ryan (n 1) 384.
[32] Lovett (n 17)
[33] Ryan (n 1) 483-486.
[34] Jean-Jacques Rousseau, *The Social Contract* (Wordsworth 1998).
[35] Pettit (n 8) 277-278.
[36] Hannah Arendt, *On Violence* (HBJ 1970) 40.

ceases to uphold them.' This was as true for monarchies as it was for democracies.[37] For Michelman, the genesis of law comes from 'the people's ongoing normative contention'.[38]

Because popular sovereignty entails free choice by the people in terms of the constitution, it implies that all substantive normative considerations – including the protection of certain rights – are subject to this choice. It is partially because of this that republicanism can seem hostile to the idea of human/natural rights[39] – rights are the product of a republican constitution, not the other way round, and they cannot limit the choice of the popular sovereign.[40] To Habermas, this *natural rights vs popular sovereignty* binary was the essence of the liberal/republican debate in constitutional theory, with the liberal camp supposedly prioritising rights over the people's power and the republican camp prioritising self-government over individual rights.[41] However, republicanism cannot be distilled simply to a belief in popular sovereignty – other principles like liberty, civic virtue, and constitutionalism provide the popular sovereignty principle with its ontological grounding.

A specific application of the popular sovereignty idea comes in the theory of constituent power – the power of the people to create and recreate a constitution – which we considered in Chapter 2. First set to paper by Sieyès during the French Revolution,[42] the theory holds that the people freely create a constitution and through it delegate various powers to the branches of government. Once this occurs, the constituent power – defined solely by its capacity to bring a constitution into being – leaves the stage, allowing the constituted powers to operate the constitutional system until the constituent power returns. However, as we will see in the following two sections, this somewhat deistic view of constituent power and popular sovereignty sits ill-at-ease with how the republicans understand it: a living and ever-present political force that *continually* reshapes and reinvigorates a republic's constitution.

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[37] Hannah Arendt: 'This is what Madison meant when he said "all governments rest on opinion," a word no less true for the various forms of monarchy than for democracies. ("To suppose that majority rule functions only in democracy is a fantastic illusion," as Jouvenel points out: "The king, who is but one solitary individual, stands far more in need of the general support of Society than any other form of government." […] and tyranny, as Montesquieu discovered, is therefore the most violent and least powerful of forms of government.' Arendt (n 36) 41.

[38] Frank Michelman, 'Law's Republic' (1988) 97(8) Yale Law Journal 1493, 1525.

[39] Duncan Ivison, 'Republican Human Rights?' (2010) 9(1) European Journal of Political Theory 31; Hannah Arendt, *The Origins of Totalitarianism* (London, Penguin, 1951) 177–78; Samantha Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' in Marco Goldoni, and Chris McCorkindale *Hannah Arendt and the Law* (Bloomsbury 2012) 415-416.

[40] Eoin Daly, 'Republican themes in the Irish constitutional tradition' (2016) 41(2) Études irlandaises 163-184, 168.

[41] Frank Michelman, 'Conceptions of Democracy in American Constitutional Arguments: Voting Rights' (1989) 41 Florida Law Review 443; cited in Jurgen Habermas, *Between Facts and Norms* (MIT Press 1996) 271.

[42] Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers-État?* [What is the Third Estate?] (1789); republished in Oliver W Lembcke and Florian Weber (eds) *Emmanuel Joseph Sieyès The Essential Political Writings* (Brill 2014).

3.3 Constitutional mutability in early modern republicanism

There are arguably infinite strands of republicanism depending on which value one chooses to stress. When we stress the issue of constitutional change and endurance, a commonality can be seen through the thought of at least three influential early modern republicans. What follows in this section is a thread of political thought among Niccolò Machiavelli, Algernon Sidney, and Thomas Jefferson. Each comes to the same conclusion on the need not only for constitutional change in principle, but for fundamental change and replacement at regular intervals. Each was sceptical of constitutional permanence and stressed the *mutability* of constitutional systems. Though constitutional governance was essential for a republic, individual constitutions were means to republican ends, not ends in themselves. As human creations existing in a world defined by the passage of time, they would inevitably experience change, often for the worse. If one wished to maintain a republican constitution, this demanded an open posture towards change and upheaval so that this power could be harnessed in ways that renewed the spirit that brought the constitution into being in the first place.

While Sidney and Jefferson grounded their republicanism in a belief in natural law and natural rights (as was commonplace for republicans of the time),[43] Machiavelli was famously sceptical of universal moral claims. His readiness to embrace an infinite amount of change, untethered to any moral absolutes, could be seen as overly pragmatic and amoral, making any attempt to draw a common thread between his thought and that of Sidney and Jefferson incongruous. However, as we will see, this distinction itself raises important insights into how natural rights (or other moral first principles) can be accommodated within republicanism and, in particular, with a readiness to embrace the full scope of constitutional changes. For these first principles are not the same as their positivised, institutionalised human expressions. To these republicans, the latter are simply pragmatic attempts to protect the former, which must yield to alteration and replacement when circumstances demand.

It is also important to contextualise the concept that we are discussing: we are not discussing 'constitutional amendment' but the more general concept of constitutional change. 'Constitutional amendment' is an idea born of the late modern understanding of a 'constitution' as a written document that serves as a relatively entrenched and supreme positive law vis-à-vis ordinary laws.[44] Under an ancient to early modern understanding, 'constitution' meant the institutions and norms that defined a polity, not a specific codification or rulebook. For some of the republicans discussed in this section, this older understanding was current. The idea of

[43] See discussion in Pettit (n 8) 101.
[44] See Martin Loughlin, *Foundations of Public Law* (OUP 2010) 288.

an 'amendment' to a constitution would have seemed a rather technical, overly legalistic description for constitutional change. This does not mean that constitutional change was of more or less significance than today, only that it did not have the same legalistic connotations that 'constitutional amendment' conveys. The republicans addressed in this section also straddle a transitionary period in the meaning of 'constitution'. By the end of Thomas Jefferson's life, the notion of a master-text positive constitution was coming more to the fore, at least in America.[45]

3.3.1 Niccolò Machiavelli

Niccolò Machiavelli's (1469-1527) republicanism cannot be divorced from the political context of the Florentine Republic in which he lived: while the city-state had traditionally been governed as a republic, for much of its history it was ruled by the autocratic Medici family, including when Machiavelli was born.[46] He worked as a diplomat and politician for the newly revived Republic that replaced Savonarola and the Medici. However, republican rule did not last long, and Machiavelli's political role ended when the Medici returned to rule Florence.[47] Renaissance-era Italy was a tumultuous environment in which states and governments had a short shelf-life.

Machiavelli's most famous work is *The Prince*, but his lasting influence on republicanism stems from his *Discourses on Livy* (1517),[48] in which he argues for republican government by tracing the development of the ancient Roman Republic. His work was key to the early modern republicanism's shift away from *virtue* towards *constitutionalism*.[49] A state's form of government – i.e. its constitution – was the most important factor for its survival. Machiavelli famously doubted whether human beings could ever be virtuous enough to avoid falling into corruption: 'In constituting and legislating for a commonwealth it needs to be taken for granted that *all men are wicked* and that they will always give vent to their malignity that is in their minds when opportunity offers.'[50] Whether or not one believed that humans were inherently wicked, prudent constitutional design must assume that they were; all human beings could be swayed by corrupting influences. A well-designed republican constitution must attempt to inculcate virtues in citizens,[51] but could not take these virtues for granted.

In explaining the Roman Republic's constitution, Machiavelli distinguished between *leggi* and *ordini* – the former being ordinary laws or decrees made by a legislating body, the latter being

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[45] ibid, 276-282.
[46] Ryan (n 1) 360.
[47] Ryan (n 10) 355-356.
[48] Pettit (n 8) 5. See generally on Machiavelli's republicanism JGA Pocock, *The Machiavellian Moment* (Princeton University Press 1975).
[49] Hammersley (n 3) 52-53.
[50] Niccolò Machiavelli, *The Discourses* (Pelican 1970) I.3, 112.
[51] Hammersley (n 3) 51

the relatively fixed and rigid structure that organises lawmaking and politics.[52] This distinction brought republicanism towards what we today consider basic constitutionalism, grounded on a distinction between flexible ordinary law and comparatively rigid constitutional laws. As with ancient republicans, Machiavelli saw the mixed constitution as the best system of government. Again, the Roman Republic was exemplary in this regard, not only in incorporating various elements in its constitution, but being flexible enough to alter its composition as circumstances demanded.[53] However, he did not demand this mixture to be harmonious.[54] He believed that the most latent and enduring social conflict was between rulers and ruled,[55] and a well-ordered republic would need to incorporate this conflict directly into its constitution in order to survive: in Rome, this was embodied in the relationship between the patrician senate and the tribune of the plebeians.[56] Machiavelli was also an early defender of the people's role in lawmaking and governing and favoured a large role for 'plebeians' – Rome's longevity showed the virtuous power of the masses for preserving republican liberty.[57] He believed that when the people were in power and well-ordered, they could be far more prudent and wise than princes, even going so far as to say that the people's voice was akin to that of God in the accuracy of its assessments.[58]

A recurring theme in Machiavelli's *Discourses* is the virtue of political turmoil. Confrontation and conflict was what gave the Roman republic its vitality and capacity to renew itself, as well as keeping the various branches of the state in check. Machiavelli saw efforts to reduce social conflict as futile and undesirable: political change was always a necessity, and political change could only take place through conflict.[59] This did not mean that Machiavelli was indifferent to the forces of *fortuna* which would inevitably surround a republic – a great political leader had the ability to take decisive action in the midst of change and harness *fortuna* to build long-lasting institutions for the good of the republic.[60] To Del Lucchese, Machiavelli's agonistic openness to social and political conflict was a form of *living* constituent power, in contrast to today's theories of constituent power as a 'founding moment' of a constitution.[61] Turmoil and conflict are what allow a republic and its constitution to operate and renew themselves. They are not legitimised in a single act of a founder but through constant struggles for freedom and for power

[52] Machiavelli (n 50) I.18, 161; Pettit (n 8) 182; Ryan (n 1) 384-385.
[53] Machiavelli (n 50) I.2,110-111.
[54] Filippo Del Lucchese, 'Machiavelli and constituent power: The revolutionary foundation of modern political thought' (2017) 16(1) European Journal of Political Theory 11.
[55] Machiavelli (n 50) I.4-6.
[56] Machiavelli (n 50) I.4, 113.
[57] See Camila Vergara, 'Republican Constitutional Thought: Elitist and Plebeian Interpretations of the Mixed Constitution' (2022) 43 History of Political Thought 28.
[58] Machiavelli (n 50) I.58, 254-255
[59] Hammersley (n 3) 55; Bernard Crick, 'Introduction' in Machiavelli (n 50) 33-37.
[60] ibid, 56.
[61] Del Lucchese (n 54) 5.

on the part of rulers and ruled. The *constituent* nature of this power came from its capacity to renew and revivify a state and its constitution.

This revivifying power was vital to Machiavelli for another reason – as a safeguard against the inevitable decay and corruption that every constitution would face. He reminded his readers that no human institution could last forever; circumstances and events would always pose a threat to its survival:

> Since no sure remedy can be prescribed for such disorders, to which republics are liable, it follows that it is impossible to constitute a republic that shall last for ever, *since there are a thousand unpredictable ways in which its downfall may be brought about*'[62]

Because of this mutability and the resulting possibility of institutional corruption, the whole state and its constitution must frequently be reduced to its original aims, its *first principles*.[63] These first principles – of a state, a religious institution, or other human association – were those things that originally brought that organisation into being and motivated its creation.[64] Doing this would allow a republic to revive the original spirit through which it was born,[65] and a well-constituted republic would make provision for this in its own constitution (though this could be brought on externally too).[66] The original Italian of Book 3, Ch 1 of *Discourses* reads '*A volere che una Setta o una Repubblica viva lungamente, è necessario ritirarla spesso verso il suo principio*'[67] – Walker translates this as 'In Order that a Religious Institution or State should long survive it is essential that it should frequently be Restored *to its original principles'*.[68] '*Il suo principio'* can also be translated as 'to its start' or beginning.[69]

Without undergoing regular periods of constitutional renovation to first principles, a republic would corrupt, decay, and die.[70] Though Machiavelli's motivation is, in some senses, conservative[71] – trying to maintaining the original ethos or spirit of a republic – protecting or restoring these principles demanded a readiness to embrace an infinite number of reforms. Remember here that Machiavelli said that there are 'a thousand unpredictable ways' for constitutional decay to occur[72] – therefore, the capacity for reform must be *equally unbounded*.

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[62] Machiavelli (n 50) III.17, 455; Hammersley (n 3) 53-54 (emphasis added).
[63] Machiavelli (n 50) III.1, 385.
[64] Machiavelli (n 50) III.1, 386. See generally on this point Eero Arum, 'Machiavelli's *Principio*: Political Renewal and Innovation in the *Discourses on Livy*' (2020) 82 Review of Politics 525, 528.
[65] Arum (n 64) 527.
[66] Machiavelli (n 50) III.1, 387.
[67] Machiavelli (n 50) III.1, 385.
[68] ibid fn (emphasis added).
[69] 'Principle' and 'beginning' share the same Latin root. See discussion by Hannah Arendt, *On Revolution* (Penguin 1990) 212.
[70] Machiavelli (n 50) III.1, 385
[71] Though Arum rejects the notion that Machiavelli is 'conservative' in wanting to 'return to the beginning', emphasising the revolutionary potential of this philosophy; Arum (n 64) 545.
[72] Machiavelli (n 50) III.17, 455.

For first principles to endure, the structure around them would need to be replaced. An ancient Roman example Machiavelli cited was the creation of the plebeian office of the tribune which, in his view, allowed the Roman republic to renew its constitution.[73] He also cited St Francis and St Dominic whose reforming efforts allowed the Catholic Church to return to its basic Christian principles.[74]

> Hence those are better constituted and have a longer life whose institutions make frequent renovations possible, or which are brought to such renovation by some event which has nothing to do with their constitution. For it is clearer than daylight that, without renovation, these bodies do not last.[75]

In attempting to explain how a republic could endure amidst the natural cycle of birth and death, Machiavelli set out a republicanism which demanded an *open* posture towards constitutional change and upheaval. This was inseparable from how Machiavelli understood what we now call 'constituent power' – the power of the political community to express itself through conflict, tumult, overthrow, and revolution. A constitution could only endure through frequent renovations, and such renovations could only occur by embracing social and political conflict. As Del Lucchese summarises:

> The return back to the beginning means keeping open the initial wound whereby politics and law started marching together. It is the concrete reactivation of the initial conflict, not through homogenisation of different political forces or pacification of conflict, but rather *through its endless reiteration*.[76]

3.3.2 Algernon Sidney[77]

Algernon Sidney (1623-1683) was an English republican associated with the parliamentary cause in the English Civil War and remembered for plotting against Charles II, for which he was executed. He was one of the first philosophers to articulate the Roman idea of freedom as non-domination in the modern era, doing so with such clarity that it was later able to be recovered by Skinner and Pettit.[78] In a notable contrast to contemporary republicans (but more common among early modern republicans),[79] his belief in freedom as non-domination went hand-in-hand with a belief in God-given natural law and inalienable natural rights.[80] His belief in popular sovereignty stemmed from this belief in natural rights: the people's sovereign right to remake

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[73] Machiavelli (n 50) III.1, 387.
[74] Machiavelli (n 50) III.1, 389.
[75] Machiavelli (n 50) III.1, 385.
[76] Del Lucchese (n 54) 20.
[77] I am indebted to Dr Thomas Ashby for providing me with a copy of his doctoral dissertation on Sidney's republicanism. Dr Ashby recently completed his PhD at the European University Institute. Thomas Ashby, *De republica saeculari: The Architectonic of Freedom and the Temporal Republic of Algernon Sidney* (PhD thesis, EUI, 2024).
[78] See Pettit (n 8) 33-34.
[79] See Ivison (n 39); Honohan (n 15) 90; Eoin Daly, 'Republican themes in the Irish constitutional tradition' 41(2) Études irlandaises 163, 177.
[80] Thomas Ashby, 'Democracy in Algernon Sidney's Discourses Concerning Government' in Skadi Siiri Krause and Dirk Jörke (eds) *Republicanism and Democracy* (Springer 2023) 97.

their system of government was the corollary of all their individual natural rights taken collectively.[81]

Sidney was a contemporary of John Locke and much of their political thinking – from natural rights to the right to resist tyrannical government – was *ad idem*. As Ryan argues, the common ground between Sidney and Locke (the latter an essential influence on the development of liberalism) largely shows the distinction between what is now called 'liberalism' and 'republicanism' to be anachronistic – neither man would have recognised it in their day.[82] We can, however, draw *one difference* between Sidney and Locke which concerns the issue of this thesis. Sidney was deeply influenced by Machiavelli's republicanism, including the need to embrace inevitable political and constitutional change. While Locke famously drafted into the *Fundamental Constitutions of Carolina* that it would remain the colony's 'sacred and unalterable form and rule of government […] forever',[83] Sidney's constitutional vision was decidedly more provisional and mutable.

As with Locke, Sidney offered a somewhat uncompromising vision of the natural law and natural rights: any civil law which breached the natural law was invalid.[84] The novelty of his political thought (from the perspective of republicanism today) comes in his fusion of this natural rights theory with a classical Roman understanding of freedom as non-domination. As with Cicero, freedom as non-domination as well as popular sovereignty are grounded in God-given natural law. As Ashby summarises:

> Thus, Sidney explains, this "exemption from the dominion of another, which we call liberty", is a "gift of God and nature" (D, ch. I, 57), "universally residing in everyone" equally (D, ch. II, 305), and "subsists as arising from the nature and being of a man" (D, ch. III, 510)

Sidney believed that though various states devise constitutions which allow for more or less popular participation in government, ultimately the people grant authority to *every* constitutional form. In Sidney's phrasing, the people could choose to bestow power on one person, a group of people, or could choose to 'retain' it in themselves;[85] in every case, original sovereignty remained in the people's hands through their right to resist government and replace the constitution. This was a descriptive account of constituent power – the people retained this power as a matter of fact. Normatively, like Machiavelli, he favoured a mixed constitution

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[81] Ashby (n thesis) 246.
[82] Ryan (n 1) 518.
[83] John Locke, 'The Fundamental Constitutions of Carolina, 1669' (Art 120) Avalon Project <https://avalon.law.yale.edu/17th_century/nc05.asp> accessed 23 May 2025. Of course, Locke's belief in the people's right to revolution was as strongly felt as it was for Sidney. Overall, I agree with Ryan that compartmentalising either man into 'liberal' or 'republican' camps is anachronistic and reductionist.
[84] Ashby (n 77) 224.
[85] Algernon Sidney, *Discourses Concerning Government* (Liberty Fund 1996) I.6, 20.

featuring elements of monarchical, aristocratic, and democratic governance[86] – 'He that would have a state composed of one sort of persons only, will appear little wiser than he that would have […] music of one note.'[87] However, Ashby argues that Sidney's preference was what he calls a '*prevailing part democracy*'[88] – a mixed constitution where the final appeal, or *prevailing power*, is held by the democratic element.[89]

Most importantly, popular sovereignty implied full scope of action: 'God leaves to man the choice of forms in government; and *those who constitute one form may abrogate it*.'[90] Since the people instituted each constitutional form, they also had the power to do away with these and replace them, including through a right to revolt.[91] As with Machiavelli, this popular power to overthrow a constitutional order was embodied in social conflict and was as central to his understanding of political power as it was for Machiavelli. According to Ashby, the people's 'right to tumult' was, for Sidney, a 'sovereign activity'.[92] In this way, Machiavelli's living constituent power suggested by Del Lucchese is equally present in Sidney's political thought.

Explicitly following Machiavelli, he believed that a republic's survival depended on its capacity to harness inevitable change by returning to its beginning.[93] As he titles Ch 2 Section 17, 'Good Governments admit of changes in the Superstructures, *whilst the Foundations remain unchangeable'*.[94] Superstructures here meant the architecture of the constitutional and legal form, the unchangeable foundations included things like liberty rooted in natural law and popular sovereignty.[95] But what if the first principles themselves are problematic and require reform? In Ashby's view, this is where Sidney advances beyond Machiavelli: these first principles should be superseded if found to be flawed.[96] Permanency in such things was undesirable and impossible[97] – permanency was an attribute only of that which was perfect, and perfection was something attributable only to the divine.[98] A natural right or natural law may be perfect, but its human expression through positive law or institutional design could never be. As he observed regarding Machiavelli's first principles:

> Some men […] have proposed a necessity of reducing every state once in an age or two, to the integrity of its first principle: but they ought to have examined, whether that principle be good

[86] Sidney (n 85) II.16, 166.
[87] Algernon Sidney, *Court Maxims* (CUP 1996) 23.
[88] Sidney (n 85) II.18, 177; Ashby (n 80) 105.
[89] This democratic element excluded women as well as men without property.
[90] Sidney (n 85) I.6, 20 (emphasis added).
[91] John Locke, *Two Treatises on Government* (first published 1690, Thomas Hollis ed 1764) §.222 https://oll.libertyfund.org/titles/hollis-the-two-treatises-of-civil-government-hollis-ed accessed 22 May 2026.
[92] Ashby (n 77) 238.
[93] Sidney (n 85) II.13, 150.
[94] ibid, II.17, 170 (emphasis added).
[95] Ashby (n 77) 237.
[96] ibid, 242.
[97] ibid, 237.
[98] Sidney (n 85) III.25, 461; cited in Ashby (n 61) 242.

> or evil, or so good that nothing can be added to it, *which none ever was*; and this being so, those who will admit of no change would render errors perpetual, and depriving mankind of the benefits of wisdom, industry, experience, and the right use of reason, oblige all to continue in the miserable barbarity of their ancestors, which suits better with the name of a wolf than that of a man.[99]

We see here the development of Machiavelli's thought – first principles themselves ought to be reassessed in light of experience – and a premonition of Jefferson's dictum that every generation has the right to self-constitute. Sidney's approach on this point was influenced by his belief in original sin: no perfect constitutional arrangement – *no perfect anything* – could exist in the *saeculum*, or the fallen sinful realm in which man lives defined by the passage of time.[100] No individual or constitution could be virtuous enough to avoid corruption completely. *Everything* made by human hands should be subject to revision.

But where stood Sidney's natural law and natural rights amidst strong popular sovereignty – could these be reassessed too? Sidney's thought on this point can help us clarify the proper place of *a priori* moral absolutes in republican thought. Though the republican tradition today could be fairly described as hostile to the idea of natural rights,[101] it would be wrong to try and explain away Sidney's use of natural rights language as a kind of rhetorical flourish to his political polemics.[102] We ought to take Sidney's *deontological* republicanism seriously and assume that he meant what he said when writing about natural rights: such rights could not be violated or abolished. He was not unique among early modern republicans in believing that the rights inherent in every human being constituted a *binding restriction* on the scope of political action – whether monarchical or popular.[103]

The clarification comes from remembering how Sidney viewed constitutions and laws vis-à-vis popular sovereignty and natural rights. Constitutions and laws were ultimately means to republican ends, not ends in themselves. Once a given constitution ceased to be useful for achieving these republican ends, or once it became a danger to them, the people ought to part with it. While the constitution may rightly attempt to encapsulate a perfect republican principle – e.g. by protecting liberty or a specific natural right – the attempted institutionalisation of that principle *was not the same as the principle itself*. While the latter was inviolable, the institutional/legal expression of that principle would always fall short. Natural law and natural rights remained absolute, but they restricted the popular sovereign *normatively,* not legally. Indeed, popular

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[99] Sidney (n 85) 462 (emphasis added).
[100] Ashby (n 77) 243.
[101] Ivison (n 39); Arendt (n 39); Pettit (n 8) 101.
[102] This is explicitly how Pettit treats the natural rights language of republicans of this era; Pettit, *Republicanism* (n 8) 101.
[103] In this sense, Sidney was in keeping with the 'Ciceronian-Lockean' tradition recently rearticulated by Michael Hawley in that popular sovereignty was ultimately limited by a kind of natural law. See Michael Hawley, *Natural Law Republicanism* (OUP 2022).

sovereignty was itself a kind of natural right – a *right to resist tyrannical government* or, more positively, a *right to self-constitution*. It would be incoherent to invoke the positivised legal expression of another natural right to restrict the exercise of *this* natural right.

'Natural' or 'human' rights language is often seen by republicans as an attempt to depoliticise rights – by conceiving them in a *pre-* or *anti-*political way, they attempt to limit the scope of legitimate contestation about important political issues.[104] Other republicans argue that this view of rights is wrong given that rights always require a legal/political structure to be effective.[105] While the idea of rights as anti-political trumps may have been the long-term effect of this era's natural rights language, we should bear in mind what Sidney himself thought about the relationship between rights and politics. Though he believed in the perfection, moral transcendence, and inviolability of these God-given rights, he was clear that any attempt to express these principles through constitutional forms would always fall short in the real world. Because of this, and following Machiavelli, he felt that they must be capable of revision.[106]

3.3.3 Thomas Jefferson[107]

Thomas Jefferson's (1743-1826) most lasting written work is the *United States Declaration of Independence* (1776). The *Declaration* was consciously inspired by Sidney and invoked the principles of popular sovereignty, natural rights, and the right to revolution we considered above.[108] The Revolution to give effect to that *Declaration* was concluded in 1783 when Britain recognised the independence of its 13 rebellious former North American colonies. In 1787, a process began to give these United States a new federal constitution. Jefferson's rejection of constitutional permanence famously distinguished him from others involved in the ratification of this Constitution. He is often contrasted with the equally republican James Madison – often called 'the father of the Constitution' – who wished to forge an entrenched, enduring settlement for the new American republic.[109] Whether Jefferson's opposition to constitutional permanency was influenced by Machiavelli or Sidney is not clear, though these republicans had an undeniable impact on wider aspects of his political thinking.[110] Machiavelli's influence on republican revolutionaries in this period was evident both in America and France,[111] and Sidney's *Discourses*

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[104] Richard Bellamy, *Political Constitutionalism* (CUP 2007) 146; Ivison (n 39).
[105] Ivison (n 39) 32. Eoin Daly and Tom Hickey, *The political theory of the Irish Constitution: Republicanism and the basic law* (Manchester University Press 2015) 64.
[106] As Schwartzberg points out, this was acknowledged by natural law theorists going back to St Thomas Aquinas; Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 17. See also Part 2.3 of this thesis.
[107] Thomas Jefferson, 'To James Madison Paris, September 6, 1789' in Joyce Appleby and Terence Ball, *Thomas Jefferson: Political Writings* (CUP 1999) 597.
[108] Thomas West, 'Foreword in Sidney, *Discourses* (n 85) xv.
[109] Loughlin (n 44) 284.
[110] West (n 108).
[111] Arendt (n 69).

has been described as the 'textbook of the American Revolution'.[112] Jefferson's concern was the maintenance of self-government and self-determination by the people. He thought that the threat of rebellion against federal and state governments from below was vital, and arguably reflected a Machiavellian embrace of conflict as a virtue: 'a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical […] It is a medicine necessary for the sound health of government.'[113] The shedding of blood was also something he was willing to embrace:

> What country before ever existed a century & half without a rebellion? & what country can preserve it's [sic] liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance? Let them take arms. The remedy is to set them right as to facts, pardon & pacify them. What signify a few lives lost in a century or two? *The tree of liberty must be refreshed from time to time with the blood of patriots & tyrants*.[114]

Jefferson's belief in the necessity for socio-political conflict brings him towards the Machiavellian view of living constituent power already highlighted. He was positive about the capacity for social conflict – especially in terms of bottom-up plebeian rebellions against elite institutions – as a revivifying force for a republic. Self-government, the cornerstone of Jefferson's understanding of liberty, could only be maintained through this kind of threat.

The creation of the US Constitution would have profound implications for the modern understanding of constitutions. By attempting to codify the structure of political power, the older understanding of constitutions as a sacred 'inheritance' would fade away.[115] Under the new understanding, as Alexander Hamilton argued, a constitution was an instrument through which the people could determine their own system of government.[116] To that end, the new Constitution would set out the procedure by which it could be amended under Article V: a combination of legislative supermajorities at the federal and state level, or through conventions.[117] However, many wished to maintain the moral authority that the ancient understanding bestowed on the state. Madison, in particular, wanted to craft a constitution that would command the respect and reverence of the public, and frequent recourse to amendment by appeals to the people would, it was felt, rob the constitution of the veneration which it needed to survive.[118] This went alongside a counter-majoritarian tendency among many drafters. As Loughlin summarises, though the Constitution was understood to be the creation of the

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[112] Caroline Robbins, 'Algernon Sidney's Discourses Concerning Government: Textbook of Revolution' (1947) 4(3) William and Mary Quarterly 266.
[113] Thomas Jefferson 'To James Madison, Paris, January 30, 1787' in Joyce Appleby and Terence Ball, *Thomas Jefferson: Political Writings* (CUP 1999) 108.
[114] Thomas Jefferson, 'To William Stephens Smith Paris, November 13, 1787' in Appleby and Ball (n 113) 110.
[115] Loughlin (n 44) 276.
[116] Alexander Hamilton, 'Federalist No 1'; quoted in Loughlin (n 44) 276.
[117] Constitution of the United States 1787, art V.
[118] James Madison, 'Federalist No 49'; cited in Loughlin (n 44) 297.

people, the government it created needed to control the people and simultaneously control itself.[119] 'Pure democracy' was explicitly rejected and 'representative democracy', as Hamilton described it, won out as the overriding philosophy of the Constitution. Madison called this latter, more cautious approach 'republicanism'.[120]

In contrast, Jefferson was sceptical of entrenching constitutional systems. The American colonies had just overthrown one system of government – British rule – by their revolutionary power; it made little sense for this revolutionary generation to shut the door at subsequent revolutionary acts by future generations.[121] Any attempt to do so would be just as tyrannical as the system they had removed. Similar to Sidney's writings, Jefferson emphasised the right of *every* generation to determine what kind of constitution would be appropriate for their needs:

> Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. […] I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. […] We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.[122]

Writing in 1816 and referring to the revolutions taking place in Europe, he put the blame squarely on the entrenchment of their constitutional regimes which made violent overthrow the only available means to achieve transformation (and arguably expressing a discomfort with bloodshed which, in earlier years, he more readily embraced):

> It is this preposterous idea which has lately deluged Europe in blood. Their monarchs, instead of wisely yielding to the gradual change of circumstances […] have clung to old abuses, entrenched themselves behind steady habits, and obliged their subjects to seek through blood and violence rash and ruinous innovations, which, had they been referred to the peaceful deliberations and collected wisdom of the nation, would have been put into acceptable and salutary forms. Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs.[123]

Most notable among Jefferson's various constitutional proposals was a sunset clause which would provide for the whole constitution's replacement every two decades or so.[124] For Jefferson, every constitution had a natural lifespan of nineteen years, the length of an average human generation – 'If it be enforced longer, it is an act of force and not of right.'[125] After this

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[119] James Madison, 'Federalist No 51'; cited in Loughlin (n 44) 274, 389-390.
[120] Hammersley (n 3) 144-147.
[121] See discussion in Arendt (n 69) 154.
[122] Thomas Jefferson, 'To Samuel Kercheval, Monticello, July 12, 1816' in Appleby and Ball (n 113) 215.
[123] ibid.
[124] ibid, 216. For a modern proposal along these lines, see Jeff King, 'The Democratic Case for a Written Constitution' (2019) 72 CLP 1.
[125] Jefferson, 'To James Madison Paris, September 6, 1789' in Appleby and Ball (n 113) 596.

timespan, the people should deputise representatives to a convention to draft a new constitution.[126] Jefferson's concern was the 'dead hand of the past' governing generations which had no role in devising the system of government under which they lived. By including a sunset clause, every citizen would have the opportunity to decide democratically, in concert with their fellow citizens, whether to stick to the constitutional *status quo* or opt for replacement. The absence of such a termination clause threatened to turn a constitution, designed to ensure the people's self-determination, into the people's straitjacket. A stagnant constitution which did not undergo a periodic renovation would be vulnerable to various forms of corruption and vice.[127]

Just as with Sidney, Jefferson believed that the right of the people to overthrow and reconstitute governments was the corollary right of individual natural rights taken collectively.[128] Government, states, and constitutions were instruments designed to secure the people's rights and liberties. The moment that the majority felt the constitution unsuitable for them, it lost its legitimacy – '*for the law of the majority is the natural law of every society of men*.'[129] The right of every group of men and, in particular, every generation of men,[130] to self-constitute was the ultimate *right of rights*.

Partly as a result of the terminology used by both men during the US Constitution's ratification debates, it has become commonplace to describe Madison as 'republican' against the 'democratic' Jefferson.[131] Since Madison argued for more constraints on majority rule than Jefferson, Madison's approach was seen as a more faithful endorsement of republicanism. Madison's republican virtues and credentials are not disputed here,[132] but the republican quality of Jefferson's contrasting approach should not be dismissed either. What distinguished his approach from Madison's was its scepticism of constitutional permanency – to Jefferson, the legitimacy of a constitutional system depended on its capacity to be changed. This stance was in keeping with a significant strain of republican thought from Machiavelli to Sidney.

3.3.4 The mutable constitution

It would be wrong to suggest that in insisting on the fickleness and mutability of constitutions, Machiavelli, Sidney, or Jefferson were *anti*-constitutional. They each favoured a system of law-bound government: Machiavelli's *ordini*, Sidney's mixed constitution, Jefferson's generational constitutions. As with Pettit, they desired a constitutional constraints for the simple reason that

[126] Jefferson (to Kercheval) in Appleby and Ball (n 113) 216.
[127] Jefferson (n 125) in Appleby and Ball (n 113) 597.
[128] Thomas Jefferson, 'II.14 To Francis W. Gilmer Monticello, June 7, 1816' in Appleby and Ball (n 113) 142.
[129] Thomas Jefferson, 'III.4 Opinion on Residence Bill, July 15, 1790' in Appleby and Ball (n 113) 159.
[130] As was common to male statesmen and political philosophers of the time, Jefferson did not believe in female political participation; 'XI – Women (not) in politics' in Appleby and Ball (n 113).
[131] Hammersley (n 3) 144-147.
[132] His republicanism would later be influential on Pettit's work; Pettit, *Republicanism* (n 8) 222-226.

arbitrary government was a threat to liberty. What distinguished their constitutional thought was their insistence on placing constitutions in the context of an inevitably changing environment. To summarise, these three republicans believed that a constitution, like any worldly object, would inevitably decay if not subjected to periodic fundamental change. If republicans wished to maintain a desirable constitutional settlement, they must allow constitutional renovation to occur. Indeed, for each man considered here, not only was social conflict the basis of this renovating impulse, but so too was the capacity for political violence. Social conflict and turmoil was the force that gave a constitutional system its vitality and legitimacy. While constituent power did reside in the people, it was not expressed in a single moment of political or foundation, but of ongoing struggle continuously present in the life of a republic. As Del Lucchese argues, this understanding of constituent power is close to Loughlin's 'relational theory' of constituent power.[133] Constitutional permanence was unobtainable, political conflict should be embraced, and inevitable change should be harnessed rather than infeasibly fended off.

This *constitutional mutability* can come in passive and active forms. In the passive sense, a constitution, like everything else in the world, is defined by its passage through time. Regardless of however verbally permanent it is declared to be, it will inevitably endure change even if it is not deliberately changed. Even if, say, the wording of a specific clause never changes from one generation to the next, the fact that it exists in a different time and context will render its meaning and effect different from what it was originally. It could passively change in desirable or undesirable ways, but *that it will change* is what is important. This opens up the ever-present possibility of *corrupting* changes. In this context, the solution that these republicans offer is the *active mutability* of a constitution. Since there is no way of fully knowing how and why a constitution could suffer from such decay,[134] an ongoing capacity for alteration is vital in order to maintain its integrity. This, of course, is the main reason why virtually every constitution in the world includes a procedure for its own amendment. But for republicans of this variety, the logic of constitutional mutability demands a full, open-ended scope of potential alteration – since there is no way of knowing how a constitution's various features will mutate in the future, the scope of alteration must be equally open. Thus, the mutability of a constitution is not a weakness, but is a necessary pre-requisite of republican self-government.

One could argue that Machiavelli's feelings on this subject were the product of his famously dim view of human nature, Sidney's of his Protestant belief in original sin, and Jefferson's of his

[133] Martin Loughlin, 'On Constituent Power' in Dowdle, Michael Dowdle and Michael Wilkinson (eds) *Constitutionalism beyond Liberalism* (Cambridge University Press 2017); Del Lucchese (n 54) 5.
[134] Machiavelli (n 50) III.17, 455.

democratic rather than *republican* principles.[135] However, the republican fear of tyranny and corruption is ancient and the belief that all human beings and human institutions are corruptible is clearly republican. Keeping open the possibility of constitutional reform and replacement was a shield against such degradation and corruption (at least to republicans of this variety). Additionally, this attitude of mutability was not solely based on a cynical view of human nature; it was also open to the possibility of human progress. While Machiavelli seemed motivated by scepticism towards human virtue, Jefferson came to the same conclusion on mutability from the *opposite* view of human nature. It was partially his optimistic attitude about the potential for progress in human reason that grounded his openness to the full scope of constitutional change – why should future generations, having advanced beyond the limited rationality of their predecessors, be bound by a constitution written in comparative darkness and ignorance?

On one level, there seems to be common ground between the constitutionalism of these early modern republicans and that of unamendability doctrines. Republicanism's open posture to constitutional change could be read as simply an openness to constitutional amendment – something that virtually all constitutionalists accept as a necessity.[136] Thus, the argument they present, when applied to modern constitutions, could be seen as pushing against an open door. The crucial question is whether, in the midst of this amendment potential, there are some core principles that are too important to be touched. In this vein, one could choose to read Machiavelli and Sidney's idea of original 'first principles' as compatible with unamendability doctrines. Perhaps a constitution's first principles could be seen as akin to a constitution's unamendable 'basic structure' or 'minimum core'.[137] After all, without these first principles, a state could not exist; in a modern context, this could easily imply unamendability.

Some of this can be attributed to mistranslations of 'first principles' which, in their original Italian, also mean beginning, starting point, or origin. This latter understanding need not imply any *substantive* principles but simply a re-foundation of the state, re-birth, or re-volution.[138] It can also be partly attributed to Sidney himself, who seemed to presume (likely in error) that Machiavelli was talking about substance.[139] But even if we assume that first principles imply some unalterable substance, Sidney's writing shows us that such substantive principles *are not*

[135] If we choose to see republicanism and democracy as distinct traditions.
[136] Gabor Halmai, 'Internal And External Limits Of Constitutional Amendment Sovereignty' <https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutional-Amendment-Power.pdf> accessed 21 May 2025.
[137] See David Landau, Rosalind Dixon, Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8(1) Global Constitutionalism 40; Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' International Journal of Constitutional Law 2015
[138] See Arendt (n 69) 36-37.
[139] Arum (n 64) 528n.

the same as their constitutional/institutional expression – the immutability of the former *cannot* imply the immutability of the latter. Further (and more importantly), the concept of first principles cannot be divorced from the *purpose* for which both men invoked it. They invoked the concept of first principles as a motivation for large-scale, root-and-branch constitutional renovation – not to prevent such renovation. It would completely pervert the intention of this idea to invoke it in a conservative, legalistic way in order to shield positivised constitutional forms from change.[140]

Theorists of unamendability argue that its presence in a constitution does not actually close off the scope of constitutional reforms, only that some reforms are too fundamental to be accommodated within an existing constitution; if they are to be pursued, they should occur *under a novel constitution*.[141] Unamendability can thus be understood as a shield for *the people's* final determination:[142] they can stick to the existing constitution and respect unamendable features, or change them through a new settlement. Within unamendability literature, such acts of constituent power are generally treated as rare occurrences reserved to the formal enactment of a new constitution. However, republicans of this tradition understand constituent power as central to everyday political life.[143] Rather than being confined to moments of formal constitution-making, the people's capacity to remake their constitution is expressed through ongoing, continuous social and political struggle. Constituent power is not a discrete act, but a permanent feature of the life of a republic. Its *agonistic* and *contestatory* character – built on struggle between social groups and the capacity for revolt against rulers – is essential to self-government and allows a constitution to be *continually* renewed and sustained. From this perspective, the *democratic* defence of unamendability loses credibility.

3.4 Contestability in neo-republicanism

As part of the general revival of intellectual interest in republicanism in the late 20th century, 'neo-republicanism' has developed as a comprehensive political philosophy grounded on the idea of freedom as non-domination.[144] A large degree of the 'republican revival's' energy has been spent on constitutional theory. In 1988, for instance, Michelman argued that the US Constitution must be read in a republican light.[145] It is notable how central the notion of

[140] ibid, 545.
[141] See part 7.3.5 of this thesis.
[142] Beatrice Monciunskaite, 'Unconstitutional Constitutional Amendments' *Max Planck Encyclopedia of Comparative Constitutional Law* (July 2024) paras 35-37 https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e840 accessed 31 March 2025.
[143] Del Lucchese (n 54) 3.
[144] See Skinner (n 9) and Pettit (n 8).
[145] Michelman (n 38).

constitutional *impermanence* was to his republican account: 'to trace a constitution's validity as the people's law to its republican origins would evidently imply that constitution's impermanence' and 'a constitution cannot retain its claim to republican validity without changing in response to historical change in the people's composition and values, identity'.[146] In this vein, he criticised US Constitution's Article V for being too constrictive; the very fact that this article attempts to describe/constrain the amendment process is itself an encroachment on republican citizenship.[147] Michelman's approach resembles that of Amar, who argued that the people of the United States had an implicit right to amend their Constitution *outside* Article V.[148]

Philip Pettit, arguably the leading contemporary neo-republican, does not address constitutional amendment in a focused way, but his broader theory offers a clear position. Following Machiavelli, he maintains that constitutional constraints are essential and should be more difficult to amend than ordinary laws.[149] However, the principle of *contestability* – so central to his understanding of democracy and legitimacy – pushes against constitutional permanency. Simply put, contestability requires that all public decisions and laws remain open to revision. As with Machiavelli, Sidney, and Jefferson, Pettit conceives of constituent power as a continuous, active capacity embedded within the constitutional order, and contestability is central to how this power is exercised. In his view, a constitution derives its legitimacy from the people's ongoing capacity to amend it; rendering any part of it unchangeable would therefore undermine that legitimacy.

3.4.1 Philip Pettit's republican democracy

Philip Pettit's republicanism is based on freedom as non-domination – the desire to reduce the scope of arbitrary power as much as possible. Emphasising the old ideal of the mixed constitution, he sees the achievement of non-arbitrary, non-dominating rule as dependent on three constitutionalist conditions: 1) the 'empire-of-law' condition (the rule of law not the rule of men);[150] 2) the 'dispersal of power' condition (i.e. separation of powers); and 3) the 'counter-majoritarian' condition.[151] The resulting constitutional architecture includes many features associated with modern liberal democracy such as a democratic legislature and executive, an apolitical judiciary which has the power to review actions that breach the constitution, as well as various technocratic checks on state power.

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[146] ibid, 1517.
[147] ibid, 1519 (fn 106).
[148] Akhil Reed Amar, 'Philadelphia revisited: amending the Constitution outside Article V' (1988) 55(4) University of Chicago Law Review 1043. See part 6.4.2 of this thesis.
[149] Pettit, *Republicanism* (n 8) 182.
[150] When setting out the empire-of-law condition, Pettit cites with approval the 'rule of law theorists' such as Lon Fuller. Pettit (n 8) 174.
[151] Pettit (n 8) 172-182.

Democratic rule is a key pillar of Pettit's republicanism. His understanding of democracy is not a straightforward case of univocal popular direction in which the people are a homogenous or majoritarian agent with a singular will, but rather a complex web of institutions and rules through which 'the people' influence and control the direction of the republic. Pettit's constitutional proposal can be summarised as a 'multi-dimensional, multi-centred system of popular interaction and decision-making' through which democracy – or 'equally shared popular control' – is maintained.[152] Within this, *contestability* is the key for a law's legitimacy – instead of requiring that citizens express clear consent for the law or policy in question, citizens must have the means through which they can contest (i.e. challenge with the possibility of changing) this law or policy. Contestability is the necessary precondition which all0ows a political community to be self-ruling:

> The self-ruling individual may run on automatic pilot much of the time, acting on beliefs and desires that originate in forgotten times and pressures. What makes them self-ruling is the fact that they are never just the victim of those beliefs and desires: they are able to examine them at will and, depending on how the examination goes, able to maintain or amend them. By analogy, the self-ruling demos or people may also often run on automatic pilot, allowing public decision-making to materialize under more or less unexamined routines. What makes them self-ruling or democratic is the fact that they are not exposed willy-nilly to that pattern of decision-making: they are able to contest decisions at will and, if the contestation establishes a mismatch with their relevant interests or opinions, able to force an amendment.[153]

Like Schwartzberg's account of democracy,[154] Pettit's republican democracy is premised on legal and political *mutability* – put simply, an individual or political community is free to the degree that they can change the laws under which they live.

While institutions are vital to maintaining a republican democracy, it also depends on more informal 'commonly avowable norms'.[155] These norms are 'points of reference that are manifestly pertinent or relevant, by everyone's lights, to issues of public policy'.[156] When engaging in democratic debate, citizens will naturally argue for their various, often directly antagonistic, positions on the basis of these norms, so as to make them more acceptable to their fellow citizens. The effect of these norms would be to render some policy choices more likely of acceptance and others unthinkable. Their content would be different in each society and would not be set in stone – as part of the public political culture, they would continuously evolve.[157] Importantly (and contrary to Pettit's critics), they do not mandate common acceptance

[152] Pettit (n 5) 286.
[153] Pettit (n 8) 186.
[154] Melissa Schwartzberg, *Democracy and Legal Change* (OUP 2007). See part 2.3 of this thesis.
[155] Pettit (n 5) 255.
[156] ibid.
[157] ibid, 257.

by all citizens of basic norms of justice.[158] These are informal norms, not rigid legally-enforceable rules.

3.4.2 Contestability and entrenchment

As stated already, Pettit believes that a polity's democratic legitimacy comes from the *contestability* of all public actions. Contestability means the ability to challenge/change any law, order, or decree from any public body. It is a key element in ensuring that laws and public decisions are not acts of arbitrary rule (domination) but rather reflections of popular control.[159] Contestation can occur through political means (e.g. elections, referendums, political parties), public means (e.g. civic advocacy, public campaigns, protests), judicial means (e.g. through constitutional or rights-based judicial review), as well as by individual or collective means.[160] This is the basis for Pettit's democratic argument: the law can be said to be legitimate, to be 'the people's law', to the extent that they can change it and choose not to. According to Pettit, 'a government will be democratic […] to the extent that the people individually and collectively enjoy a permanent possibility of contesting what the government decides'.[161] Making any law or enactment *incontestable* would therefore diminish the polity's democratic character. Contestability is also the basis of Pettit's defence of judicial review – it is an *individualised* process of contestation.[162]

Not only should all laws be contestable and subject to political debate, but so too must the very constrains that define the constitutional system. In Pettit's words:

> [This] account of constitutionalist requirements, is a *provisional*, theoretically driven story about the shape that a successful republic is likely to take. But once a contestatory democracy is in place, then […] *everything is up for grabs*. If the operation of that democracy leads to the emergence of different aims […] or if it forces a rethinking of constitutionalist constraints, then it is obviously the dictates of that democratic process that should prevail. Again, if the operation of that democracy occasions a restructuring of the paths of contestation itself, then again the democratic process must prevail.[163]

It should be noted here that the phrase 'once a contestatory democracy is in place…' precedes this open scope. This could imply that contestation can only occur *after* the proper constitutional framework of contestatory democracy has been established – in other words, perhaps the foundations of contestatory democracy may not be open to contestation. However, the final sentence explicitly acknowledges the possibility of reforming the paths of contestatory democracy.

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[158] Tom Hickey, 'Legitimacy—not Justice—and the Case for Judicial Review' (2022) 42(3) Oxford Journal of Legal Studies 893, 905.
[159] Pettit (n 8) 183.
[160] ibid, 195-196.
[161] ibid, 185.
[162] Pettit (n 5) 213-215.
[163] Pettit (n 8) 201 (emphasis added).

Pettit also argues that the constitution must place certain issues off the popular agenda: rights relating to democratic contestation, for example, should not be subject to simple majoritarian amendment.[164] Daly interprets this as Pettit rejecting the amendability of these rights.[165] However, this interpretation is arguably inaccurate. Pettit is clear that constitutions should necessarily be more difficult to change than ordinary laws. People should, in his words, be 'entrenched in their enjoyment of the basic liberties'.[166] But though rights should not be subject to 'simple majoritarian amendment', this does not mean that such rights should be impossible to amend. Pettit is also clearly of the view that '[e]very law must be capable of being amended … since there is no guarantee, even with the most plausible of laws, that they will continue to make republican sense'.[167] While it is not entirely clear whether he includes the constitution in this category of 'laws', following his logic expressed in the extended quotation above suggests this.

A more pertinent statement by Pettit which may touch on unamendability comes from the introduction to *On the People's Terms*. He says that his position:

> entails a commitment to democracy that, paradoxically, is not itself subject to the democratic proviso. A society that makes decisions on a democratic basis, with everyone sharing equally in control of government, could in principle decide on a permanent renunciation of democratic rule, denying future generations the right to shape their institutions on an equally shared basis. The population might vote unanimously, to take an extreme example, to deny votes to women. Since such a possibility would be anathema from a republican viewpoint, it follows that we ought to exempt the recommendation to do things democratically, and that recommendation alone, from the democratic proviso. We ought not to recommend that our society should give people and equal share in control of government, provided this proposal is itself democratically endorsed. We ought to recommend that our society should give people and equal share of control, period. This, in Wittgenstein's image, is where the spade turns. This is bedrock.[168]

Perhaps every democracy requires an *a priori* commitment to democracy to actually exist, otherwise this democracy would presumably implode. Taking Pettit at his word here, it certainly implies a limitation on the scope of democratic action – presumably this includes the amending power too. If so, it seems to contradict his earlier statement on the need for contestability all the way down, even to the constitutional foundations. It also begs the question of who or what would be tasked with enforcing this absolute limit on democratic action, and how we could prevent it from becoming an excessively powerful body.

However, the context of this passage undermines this interpretation. It is made as a rejoinder to the argument that a democracy can only be implemented pending a democratic vote. This

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[164] Pettit (n 5) 217.
[165] Eoin Daly, 'Republican themes in the Irish constitutional tradition' 41(2) Études irlandaises 163, 171-172.
[166] Pettit (n 5) 299.
[167] Pettit (n 8) 180.
[168] Pettit (n 5) 25.

passage is a statement of the normative republican case or 'recommendation', to quote Pettit,[169] not really a piece of constitutional theory. It should not be controversial to say that republicanism, like every belief system, has a core essence without which it would not be republican. Pettit is putting forth a recommendation to his audience on what kind of constitutional order should be used. He is recommending to them that society should be democratic, not that society should be democratic pending a democratic vote to enact democracy democratically – a scenario which would create an infinite logical regress from which a republican could never escape. 'This is where the spade turns.' It should not be controversial to say that a society would cease to be republican the moment it decides to institute some form of arbitrary rule or denies an equal share of control to some groups.

Contestability, though often invoked to defend specific forms like judicial review,[170] can be applied to the whole of the constitution itself. If a part of the constitution were incontestable, this would mean that this aspect was not under the people's control. It would thus be an undemocratic imposition – though perhaps a beneficent one – on the people. Paraphrasing Lincoln, it may be 'for' the people, but it would not be 'by' them.[171] This brings us to how Pettit understands 'the people' within his republican proposal.

3.4.3 *Constituting* people and *constituted* people

Pettit's most relevant contribution to constitutional theory is his distinction between what he calls the '*constituting people'* and the '*constituted people'*. This is a conscious reworking of Sieyes' distinction between 'constituent power' and 'constituted power'.[172] The constituting people are 'the members of the population acting as citizens to determine how things are to be set up and run.'[173] Bearing in mind how Pettit conceives of popular control generally, we can also describe the constituting people as the *contestatory citizenry*. They rule themselves to the extent that it is *their* influence and direction that shapes how they are governed. 'All political decisions emerge from them' and they have an '*active'* presence:[174] they 'assume a *direct presence* in elections and referenda' as well as a *representative presence* in offices of government, the judiciary, and social movements. In contrast, the constituted people stands for 'The People' as a single, corporate agent and is equivalent to 'the state'. Here, Pettit invokes Rawls' description of the state as 'the political organisation of the people'.[175] In the dichotomy between constituting and constituted

[169] Republicanism is, after all, one normative stance among many.
[170] See Bellamy's criticism of the concept in Richard Bellamy, 'Which Republicanism, Whose Freedom? Review Symposium: *On the People's Terms* by Philip Pettit' (2016) 44(5) Political Theory 669.
[171] Pettit (n 5) 252.
[172] ibid, 286.
[173] ibid, 286.
[174] ibid, 286.
[175] ibid, 287.

people, the former have priority at all times over the latter and can do away with the form and structure of the latter at any time.[176]

Theorising an unlimited constituting power against a limited constituted power is not novel – it is the basis of a large bulk of modern constitutional theory. The novelty of Pettit's approach is in the *continual* role he ascribes to the constituting people. Under standard constituent power theory, the constituting people/constituent power is only expressed during the formal enactment of a constitution, after which it becomes dormant only to be reawakened when a new constitution is needed.[177] In contrast, Pettit's constituting people are a *living, active* presence throughout a democratic society. Pettit describes their influence and control using an aquatic analogy: though various channels are created, they ultimately create a river of popular influence and control that 'washes into every corner where decisions are taken in [the people's] name'.[178] Not only are the various branches of the state/constituted powers authorised and legitimised by the constituting people through the constitution (again, as standard constituent power theory holds), it is the living constituting people that continuously give these institutions and offices life and vitality.

So as to further distinguish each 'people's' respective power, Pettit considers the degree to which they can be described as 'sovereign'. The *constituted* people (the state) is sovereign in two senses: 1) in international relations, and 2) as an entity that is the source of all laws but 'not itself subject to the laws'.[179] However, it is not sovereign in any sense that reduces the importance of the constituting people; it 'cannot push back against those very individuals' that brought it into being. It is in this context that Pettit deals directly with constitutional amendment:

> If the constitution is rejected by the constituting people – if the constitution is changed but not under any existing articles of amendment – then the constituted people ceases to exist and, assuming a new constitution emerges, is replaced by a distinct corporate entity'[180]

Pettit does not believe that this process would return the people to a state of nature 'since the constituting people can retain enough coordination […] to manage a smooth transition' to a new constitution.[181] Most importantly, he says that the people (both in the constituting and constituted senses) can be *responsible* for a constitution '*insofar as they have the power to change it and choose not to do so'*.[182] The constituted people 'will be responsible for the shape of the constitution to the degree that they can change it under constitutional rules of amendment'; the constituting

[176] ibid, 289.
[177] Emmanuel Joseph Sieyès, 'Second Thermidorian Intervention' in Lebcke and Weber (n 42) 177.
[178] Pettit (n 5) 286.
[179] ibid, 290.
[180] ibid, 291.
[181] ibid.
[182] ibid, 292.

people will be responsible for it to the degree that not only can they change it under those rules of amendment, they can also change it by non-constitutional means'. Changing the constitution by non-constitutional means would, to Pettit, replace the old constitution with a new one, creating a novel state and a novel constituted people. Pettit cites approvingly Amar's argument for amending the US Constitution outside Article V and does not see such a possibility as a democratic crisis.[183] In essence, he seems ambivalent about whether fundamental constitutional changes should happen through an amendment, through ignoring the amending process, or through a full replacement.

Contestability is clearly the guiding principle in all this. Just as Pettit presents contestability as an alternative to consent as the basis for law's legitimacy, so does he use constitutional amendability as an alternative to constitutional authorship by the people for a constitution's legitimacy. It is, of course, self-evident from constitutional history that 'the people' did not author their constitutions without representatives or officials acting on their behalf. As well as this, the legitimacy of this singular moment over all others is dubious. Because the constituting people's role in a democracy is constant, there need not be a founding moment to legitimise a constitution.[184] The important part is that the constitution, through its amendment process, is contestable. It can be described as their constitution to the extent that they freely choose to keep it in whole or in part.

As we have seen, the distinction between the 'constituting people' and the 'constituted people' mirrors Sieyès' distinction between 'constituent power' and 'constituted powers'.[185] Under both theories, the former is the people's ultimate power to create a constitution and the latter is the state and its various branches. Under Pettit's model, the former has 'priority' over the latter; under constituent power theory, the former is unlimited while the latter is limited. Taking a particular interpretation of constituent power theory, Roznai argues that the amending power is a 'secondary constituent power' which is subordinate to the unlimited 'primary constituent power'.[186] Given this mirroring, there may be a way to read unamendability as consistent with Pettit's republicanism. The constitution is the creation of the constituting people and is secondary to their ultimate power. The constitution's amending article is a creation of the constitution – a power, we may say, of the *constituted* people – therefore, it is limited. As Pettit says, 'The constituted people will be responsible for the shape of the constitution to the degree that they can change it *under constitutional rules of amendment*.'[187]

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[183] ibid, (fn 30).
[184] ibid, 310.
[185] Sieyès cited in Pettit (n 5) 286.
[186] See Argument 1 in part 2.2 of this thesis.
[187] Pettit (n 5) 292.

Could such 'constitutional rules of amendment' include *substantive* limits, explicit or implicit? Perhaps amendments that seek to subordinate the constituting people's power to the constituted people's power (i.e. the state's power) would be unconstitutional, in the same manner that amendments by the 'secondary constituent power' that seek to replace the role of the 'primary constituent power' would be unconstitutional. Perhaps some changes, due to their substantive content, require full constitutional replacement by the constituting people rather than through the existing rules of amendment. However, taking Pettit at his word here, substantive limits like this would lessen the amount of responsibility that the constituted people would have for the constitution, which would be undesirable.

While Pettit does not speak directly to this point about substantive limits as part of amendment rules, the emphasis he places on the people's freedom to choose either constitutional or non-constitutional means for change should lead us to an obvious conclusion: substantive limits on amendability, even if they theoretically exist, are ultimately irrelevant. Indeed, *procedural* limits are likely irrelevant too, if we take him at his word.[188] For the other side of this theory is that the constituting people are responsible for the constitution to the degree that they can change it through *non*-constitutional means. This brings us to the same position as that of Michelman and Amar:[189] if the people wish to change the constitution – by constitutional or non-constitutional means – they are at liberty to do so. Even if we presume that there are substantive limits on the constituted people's ability to amend the constitution, these can always be superseded by the constituting people's ability to work outside the constitution. As alluded to, this is akin to Roznai's insistence that unamendable clauses which limit the secondary constituent power can be changed by the primary constituent power. Unamendable aspects of the constitution can and should be done away with if the people wish to part with them.

The approaches of Albert or Ackerman could be applied:[190] if the people decided to make fundamental or radical changes to the basic structure of the original constitution, this would be the *de facto* creation of a new constitution, notwithstanding the *de jure* continuation or otherwise of the old one. The constituting people would always have the right to do this, but perhaps, for clarity, we should conceptualise these as distinct entities. Pettit gestures at this interpretation,[191] though because the people (constituting or constituted) should have full control and responsibility over the constitution, there need not be a founding or transformational 'moment'

[188] See part 6.4.2 of this thesis.
[189] See Michelman (n 38) and Amar (n 148).
[190] See Bruce Ackerman, *We the People, Volumes 1-3* (Harvard University Press 1991, 2000, 2014); Richard Albert, *Constitutional Amendments* (OUP 2019).
[191] Pettit (n 5) 291-292.

in which fundamental change occurs – the constitution is the people's to the degree that they can change it and choose not to. Their power is constant.

This brings us to the most crucial distinction between Pettit's theory and the UCA doctrine: the role of the constituent power in everyday democracy. To repeat, under the UCA doctrine, the primary constituent power emerges at moments of constitutional creation and recreation.[192] Because this is the people's power, and because constituted entities are delegated with limited powers, constituent power emerges at rare, exceptional moments. The amending power, as a constituted entity, can never *fully* embody the people in the true sense, and thus it is incapable of making changes which are reserved for the primary constituent power.[193] This understanding of constituent power is totally different to Pettit's. In his understanding – one he shares with Machiavelli, Sidney, and Jefferson – the constituting people do not depart the stage when the constitution is established. Rather, they have a continuing *'active'* presence. Though the various branches of the state are granted authority by the constitution, it is the constituting people that give these institutions and offices continual life and vitality.

While there is a normative democratic attraction in using unamendability to protect a dormant 'primary constituent power', there is less attraction to using unamendability to protect a living constituent power which is alive and kicking within the constitutional system. It is not clear why this living constituent power would need a watchdog (judicial or otherwise) to protect their interests in such a situation, since it is their power that ultimately gives life to the whole constitution in the first place. Thus, the ostensibly democratic motivation for unamendability loses credibility. Far from saving important constitutional issues to the people themselves, limiting the scope of legitimate change of the constitution represents an attempt to fetter the people's powers since they are already active and present within and without the constitution. Unamendability would be deleterious to a republican democracy since there would be absolute limits on the scope of legitimate contestation by citizens. Constitutional replacement would be the only option available; while Pettit is open to this in theory, he is agnostic on whether the people choose to act through existing amendment rules, through formal replacement, or to ditch all of these procedural rules.

3.4.4 Pettit and early modern republicans on conflict

A comparison of Pettit's republicanism and that of the early moderns we considered in Part 3.3 will quickly reveal a chasm, not only in tone but in disposition. Early modern republicans were not just agonistic but *antagonistic* in their openness not only to social conflict but political and

[192] See Roznai (n 4) ch 4.
[193] See Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) 15-16 Indian Year Book of International Affairs 347.

revolutionary violence. While Pettit is not averse to revolution in the technical sense of replacing one constitution with another, he does not share an openness to political violence, or even tumultuous political and social conflict. His desired basis of political debate (if viewed in a less than generous way) could strike one as exceedingly idealistic, built on the idea of shared norms, peaceful deliberative debate, and good faith between citizens. The early modern republicans did not put the same weight on commonly avowable norms or anything like them as the basis of political debate. This is a large gap in their respective republican politics, and may have implications in terms of constitutional change.

Three clarifications may help to draw Pettit's republicanism and that of the early moderns closer together. Firstly, while Pettit sees commonly avowable norms as a core part of republican deliberation, it does not necessitate consensus or agreement about substantive issues.[194] If any consensus exists, it is a naturally-occurring consensus of a community of political equals who naturally generate a set of commonly avowable norms upon which to ground debate. It is not legally-imposed nor does it rule out the possibility of fundamental disagreement. Secondly, these norms are arguably no more demanding than the ancient republican requirements of citizens to be virtuous and politically engaged – in fact, they are probably *less* demanding. To demand *nothing* of the citizenry for constitutional maintenance is arguably to fall into a classical liberal/libertarian position that non-interference is the ultimate social good – republicanism is not concerned with creating a polity of purely self-interested private individuals who play no role in self-government.

Thirdly, contestation *begets* conflict to some degree; sometimes it forces disparate groups and movements to divide, in Pettit's words, 'bitterly into opposing factions'.[195] We must remember that for Pettit, democracy is realised through a multilayered, multi-institutional, and inter-checking set of mechanisms.[196] While his proposal is not as tumultuous as the avenues for change envisioned by the likes of Jefferson (*the tree of liberty being washed with the blood of patriots* etc), it does not equate to consensus or excessively sensible deliberative democracy either. As Pettit puts it himself, democratic life 'has to have an agonistic – perhaps better, an *antagonistic* – character.'[197] This is not, as Pettit points out, reserved for the 'branches of government' (though these are important) – it can also include political parties, social movements, and individual

[194] Pettit (n 5) 278.
[195] Pettit (n 5) 266.
[196] This description is that of Hickey summarising Pettit; Tom Hickey, 'Popular Sovereignty in Irish Constitutional Law' (2017) 40(2) Dublin University Law Journal 147, 163.
[197] Pettit (n 5) 226 (emphasis added).

citizens who choose to contest government actions and laws.[198] The contestatory citizenry *is* the constituting people, and contestation necessarily involves struggle and conflict.

Pettit's vision of constitutionally-conducive conflict and contestation is more pacified and 'constitutionalised' than that of Machiavelli, Sidney, or Jefferson, and is perhaps more in keeping with the basic principles of contemporary liberal constitutionalism than earlier shades of republicanism (as many of his detractors argue).[199] However, this makes Pettit's work *more valuable* to contemporary discussions – for how change actually occurs in the 21st century. Revolutionary upheaval and virtuous violence and bloodshed are not on show, but when we look below the surface we can see that the principles that motivate them among the early moderns are equally present in Pettit's work.[200] The need for constant, vigilant contestation by citizens and for an open scope of constitutional change maps onto the principles at the heart of Machiavelli, Sidney, and Jefferson's republicanism. And the core advantage of Pettit's approach is that it allows us a scope of revolutionary change without the costs – in terms of bloodshed, instability, upheaval – that these revolutionary moments have historically entailed.

3.4.5 Amendability and legitimacy

In setting out his account of republican democracy, Pettit makes a distinction between 'legitimacy' and 'justice'.[201] Where the justice of a law can only be assessed on a personal moral level,[202] the legitimacy of a law depends on the process through which it was created. To Pettit, a constitution's benchmark must be legitimacy, not justice.[203] While all constitutions in the real world will proclaim certain principles of justice, constitutions are, according to Hickey, *repositories* for these principles, and the content of this repository can change.[204] If a constitution is wedded permanently to certain moral values by making them unamendable, it would detract from that constitution's long-term legitimacy. For it would permanently close off avenues of contestation for those who disagree with these values – creating a potentially dangerous anti-constitutional element in society and thereby detracting from the constitution's efficacy. On the other hand, keeping the scope of amendability open allows all relevant political actors to be constitutionalists, at least in the proceduralist sense. In this way, amendability – the ability to alter all of a constitution's content – secures a constitution's legitimacy. All the while, the

198 Pettit (n 5) 225-231.
199 Vergara (n 57) 49.
200 Pettit (n 5) 173-174, 304-305.
201 See Pettit (n 5) ch 3.
202 ibid, 136.
203 ibid, 149, 153.
204 Hickey (n 158) 913 (fn 104).

principles of justice which prevail in society exist at the level of commonly avowable norms. As understandings and applications of these principles shift, so too must the constitution.[205]

This position is summarised well by the Venice Commission, who argue that a constitution's legitimacy depends on its amendability:

> the very legitimacy of a given constitutional system rests on the premise that the present day electorate can amend and change it. This has been emphasized by Holmes and Sunstein, who argue that "political legitimacy in liberal systems ultimately depends upon the option to bring about change, *used or held in reserve*. The legitimacy of a liberal constitution has a similar foundation, paradoxically, in its liability to revision. *It is accepted, or deserves to be accepted, partly because it can be changed*".[206]

The defining feature of republican democracy is the permanent contestability of public power, including constitutional power. The ability to contest the constitutional order is what allows citizens to regard themselves as self-governing. What Holmes and Sunstein describe as the people's 'reserve' power to alter the constitution is not merely dormant or exceptional within a republic; it is continuous, active, and *constitutive* of political life. The contestatory citizenry – the collection of citizens who can challenge every exercise of public authority – *are* the constituent power, and within a republican system, that constituent power never departs the stage.

3.5 Conclusion

This chapter traced the republican attitude to constitutional change on two levels – one historical, centring on a thread of early modern republican thought, and the other on the work of Philip Pettit. Both strands of republican constitutionalism are built on the same ontological ground: that the people's constituent power is constant and active within the constitution, not one whose power is exhausted in the formal making of a constitution. In early modern terminology, this power is embodied in constant political struggle (peaceful or otherwise), while in Pettit's terminology, it is embodied in the contestatory power of a republic's citizenry. Building on this, early modern republicans emphasised the *mutability* of constitutions: as human creations, they attempt to constrain political power and embody principles of justice, but they can only do these imperfectly and will inevitably decay and corrupt if not frequently tended to through reform. The maintenance of self-government demands that the scope of possible reforms is not limited to a constitution's edges, but must include the entirety of a constitution – for we cannot know how a constitution could corrupt in the future. This is articulated by Pettit as the principle of *contestability* – an individual can only be legitimately bound by a law or a

[205] ibid, 913.
[206] Venice Commission, Report on Constitutional Amendment (Strasbourg 19 Jan 2010) CDL-AD(2010)001 para 86 (emphasis added).

constitution insofar as they can challenge it with the possibility of *changing* it. A community of free citizens always maintains the reserve power to undo the constitution in whole or in part.

Many constitutionalists today treat constituent power as a kind of black box: since it is supposedly extra-legal and extra-constitutional, it is imperceptible and impervious to law;[207] and because one can never be sure what this all powerful entity may decide to churn up, *it is dangerous*. It is the raw power of the mob, the tyranny of the majority.[208] This is why constitutionalists going all the way back to Sieyes, while recognising its revolutionary and creative potential, immediately try to close the door to constituent power once it has done its supposed job of constitution-making.[209] The UCA doctrine is but the most recent exemplar in this long trend.

But to the republicans in this chapter, this political power is what powers a constitutional democracy day-after-day. And though it *can* be extra-legal and extra-constitutional (because it can remake laws and constitutions), it is *not* a black box. Simply put, constituent power *is* the contestatory citizenry – no more, no less. Awareness of, engagement with, and participation in this contestatory political sphere (the essence of republican liberty, according to many) allows one to understand its impulses and influence its direction. For republicans are not neutral on how this living constituent power is exercised – they want civic virtue, the minimisation of domination throughout society (particularly from the state), and rule-based governance. They are secured *through politics*, not by treating politics/constituent power as a frightening entity with perpetually anti-constitutional impulses.[210] They are made efficacious year-after-year, age-after-age by constantly renewing what Sidney called the constitutional 'superstructure' through alterations, and they are made legitimate by surviving repeated rounds of contestation.

We began our consideration of historic republicanism by discussing the relative weight which republicans placed on the notions of *constitution* and *virtue*. All republicans we considered here were clear: constitutional governance and restraints are essential to the maintenance of freedom. At the same time, civic virtue was something which they all, in their own ways, acknowledged as a pre-requisite for the maintenance of liberty. The degree to which republicans emphasised either constitution or virtue was dependent on the political context in which they lived. The ancient Romans emphasised *virtue* because their constitution was comparatively strong, and the

[207] Roznai (n 4) 116; Martin Loughlin, 'The concept of constituent power' (2013) 13(2) European Journal of Political Theory 218, 222.
[208] Loughlin (n 207) 222.
[209] Martin Loughlin, *The Idea of Public Law* (OUP 2003) 111. See generally Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2008); Joel-Colon Rios, *Weak Constitutionalism* (Routledge 2012); George Duke, 'Inherent Constraints on Constituent Power' (2020) 40(4) Oxford Journal of Legal Studies 795.
[210] Loughlin (n 133) 157.

most pressing need was to maintain adherence to republican virtues among citizens. Machiavelli emphasised *constitution* because he saw it as the most pressing need for Florence and Italy.

Today, written constitutions and the distinction between ordinary and constitutional law are largely the norm rather than the exception (at least on paper). Despite this, 'democratic backsliding' and anti-constitutional authoritarianism are real and growing threats.[211] But the response to this from republicans must be clear: *this is an issue of virtue*, not of constitution. While constitutional constraints seen in many countries are very often not the problem and ought to be maintained, neither will they be the solution. The solution must be the proper inculcation, at a civic and popular level, of republican virtues – to ensure that the values of the constitutional system are alive in the hearts of the people they attempt to govern. As Madison said, 'To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.'[212] Constitutional governance can only be maintained if citizens are minded to maintain it.

What precisely these virtues consist of will likely be different in each society. In every case, they require civic education so that the virtues of each constitutional system are inculcated in the hearts and minds of citizens from an early age. But more importantly, as Honohan argues, civic virtues are more likely to be adopted by citizens *through* engagement with the procedures that a republican constitution provides[213] – through democratic deliberation and debate, through contestatory avenues such as those Pettit outlines, and through popular movements – to eventually, and hopefully, arrive at a point where citizens *would never dream* of enacting changes that would diminish their democratic rights. The very acknowledgement of the power which full amendability grants to the political community would be a vital lesson: 'this is your power, *use it wisely'*. The maintenance of the constitution's essential features would thus be their collective civic responsibility, as would the responsibility to assess whether these features are worthy of maintenance.

[211] See Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding? (2024) 16 Hague Journal on the Rule of Law 315.
[212] James Madison, 'Judicial Powers of the National Government, 20 June 1788' Founders Online <https://founders.archives.gov/documents/Madison/01-11-02-0101> accessed 22 May 2025.
[213] See Honohan (n 2002) 216-217.

4. IRELAND: AMENDABILITY AND SELF-DETERMINATION

'Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.'

- Article 46.1, Constitution of Ireland

'No man has the right to fix the boundary to the march of a nation. No man has the right to say to his country, 'Thus far shalt thou go and no further" [1]

- Charles Stewart Parnell, 1885

4.1 Introduction

Since Bunreacht na hÉireann (the Constitution of Ireland) was adopted by referendum in 1937, its scope of constitutional amendability has been fully open – Article 46 makes clear that *any* part of the Constitution may be amended through the procedure it lays out for amendment, namely by referendum.[2] The insistence of Irish courts that the scope of amendability is unlimited is based not only on the text of Article 46, but the more general principle of popular sovereignty, which the courts have treated at various points as a kind of *Grundnorm* for the entire Constitution.[3] Article 6 states:

> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the state and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.[4]

The people freely adopted the Constitution by referendum and so retain the full power to alter it by referendum, so the judicial thinking goes. However, constitutional amendability was not always so open; Ireland's previous constitution, the Constitution of the Irish Free State (1922), imposed clear limits on amendability – its amending article prohibited any alteration to the Treaty settlement with Britain, which had granted the 26 southern counties of Ireland limited independence. In this way, unamendability went hand-in-hand with the limitation of the new state's sovereignty. The *full* scope of amendability provided by the Constitution of 1937 should thus be understood as part of a wider constitutional project to assert full Irish independence and vindicate the principle of self-determination expressed in Article 1:

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[1] Charles Stewart Parnell (1885) quoted from Robert Kee, *The Green Flag* (Penguin 2000) 365.
[2] Constitution of Ireland 1937, art 46.1.
[3] *Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7 [31] (Hogan J).
[4] Constitution, art 6.1.

> The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.[5]

Self-determination came to prominence in the aftermath of the First World War, when it was invoked as a justification for the dissolution of empires and the creation of new states in Europe.[6] While its precise legal status is contested, Article 1 captures it well: the right of a people or national group to freely determine their own form of government and political status without external interference, particularly from imperial powers.[7] It is defined as a human right in international law, enshrined in the United Nations Charter and the international bill of human rights.[8]

The plain meaning of Article 1 and the use of the words 'inalienable' and 'indefeasible' suggests a *permanent* right. The strength of this natural rights language, found also in the fundamental rights of Articles 41-43, could imply a substantive limit on amendability if interpreted liberally by judges. Instead, the courts have emphasised that the principle of popular sovereignty means that the people cannot be constrained in what they can amend through the referendum process whenever judicial challenges to the constitutionality of amendments have arisen. Though popular sovereignty is a principle commonly found in the texts of democratic constitutions, Irish courts hold that this principle is most purely embodied in the referendum to amend the Constitution.[9]

This chapter argues that the pre-eminence of popular sovereignty expressed through full amendability should be understood in light of Article 1, and thus the principal aim of those who created the 1937 Constitution: vindicating what they regarded as the Irish people's right to self-determination. Presuming that this right exists, it had been most recently curtailed by the terms of the 1922 Constitution and before that by centuries of British rule. Further, the 1922 Constitution left virtually all amending power in the hands of the legislature, allowing the executive which controlled it to become hegemonic and making the Constitution redundant as a constraint on government power. In attempting to fashion a Constitution which was fully independent of Britain *and* which limited government power, the final appeal over constitutional

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[5] Constitution, art 1 (emphasis added).
[6] See further: Tom Sparks, *Self-Determination in the International Legal System* (Hart 2023) 13-14.
[7] See Sparks on what he calls 'polity-based self-determination'; Sparks (n 6) 20.
[8] Charter of the United Nations (1946), art 1(2); International Covenant on Civil and Political Rights (1966), art 1(1) and International Covenant on Economic, Social and Cultural Rights (1966) art 1(1): 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.
[9] *Coughlan v Broadcasting Complaints Commission and RTÉ* [2000] 3 IR 1, 43; see generally Eoin Daly, 'Constitutional Identity in Ireland: National and Popular Sovereignty as Checks on European Integration' in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019).

amendments was given to the people through referendum with no substantive limitations on what they could approve or reject.

Part 4.2 examines the constitutional amendment rules of the Irish Free State Constitution of 1922 and the limits they placed on amendability, as well as the drafting process of the 1937 Constitution. Part 4.3 analyses Irish jurisprudence on amendability, with particular attention to the suggestion that natural law might operate as a substantive limitation on amendability and the courts' rejection of this suggestion. Part 4.4 analyses the relationship between popular sovereignty, amendability, and self-determination within the 1937 Constitution.

4.2 Limited amendability under the 1922 Constitution

Understanding the unlimited scope of amendability under Ireland's current Constitution requires a grounding in Irish constitutional history. Before 1922, Ireland was an integral part of the United Kingdom along with Britain. Although gaining an unprecedented level of independence in 1922, the new Free State's Constitution declared the Anglo-Irish Treaty – and thus many British imperial symbols and institutions – to be beyond the scope of the Constitution's amending power. Unamendability was thus directly tied to the new state's constitutional subordination to Britain and lack of full sovereignty. At the same time, the 1922 Constitution effectively gave all amending power to the legislative branch, allowing the executive that controlled it to rewrite the Constitution virtually at will. This undermined the Constitution's role as a check on political power. In this section, we consider how both problems were addressed by the new Constitution of 1937. Enshrining the referendum as the final hurdle for all amendments under the new Constitution, had the effect of addressing the drafters' two major objectives in one solution: i) self-determination and ii) placing the government *under* the Constitution.

4.2.1 British Rule, pre-1922

An Irish Parliament existed from the 13th century during English and later British control of Ireland.[10] However, 'Poynings' law' allowed England's Parliament at Westminster to override any law made by the Irish Parliament[11] and the Declaratory Act 1719 gave Westminster the power to legislate for Ireland. In 1782, the Irish Parliament gained legislative independence when these statutes were repealed.[12] However, following the 1798 Rebellion which pushed for total Irish independence, the Irish Parliament was merged with that of Britain in 1800. The Irish

[10] The monarchs of England and later Great Britain had claimed lordship over Ireland since 1171.
[11] Kee (n 1) 29.
[12] ibid, 33.

nationalist movement of the 19th century attempted to claw back a degree of autonomy for Ireland through 'home rule', in which Westminster would devolve some powers to an Irish legislature, while Ireland would remain within the UK.[13] The home rule movement – endorsed by Irish majorities in UK elections from 1870-1910 – was repeatedly delayed and frustrated, being eclipsed in popularity by the more radical notion of an 'Irish Republic' after 1916. Following the Sinn Féin party's victory in the 1918 election, their representatives elected to the British Parliament established an alternative *Irish* parliament – Dáil Éireann – in 1919, which declared the Irish Republic's independence from Britain.[14] Following a two year war, negotiations between British and Irish representatives led to the Anglo-Irish Treaty of 1921.[15]

This Treaty laid the ground for the 'Irish Free State', a self-governing dominion of the British Empire. Crucially, the six north-eastern counties of the island which had a local unionist pro-British majority remained in the UK. This unionist majority was overwhelmingly Protestant in contrast to the overwhelmingly Catholic population of the Free State. While a large Catholic nationalist minority existed in Northern Ireland, partition had the effect of creating a largely homogenous Catholic population in the Free State in which minorities were proportionally small. Partition meant that the Irish state did not have to confront the constitutional challenges that a *united* Ireland would likely have posed, such as the requirement to accommodate and protect a large minority community. Instead, the new state was able to develop as a relatively homogeneous polity centred on a Gaelic and Catholic conception of Irish identity.[16] Constitutional identity was shaped more by the principle of national self-determination than by the need to balance competing communal identities or minority protections.

4.2.2 Constitution of the Irish Free State, 1922

In contrast to the home rule model, the Irish Free State was a *state* in international law, was admitted to the League of Nations in 1924, and was effectively independent.[17] The Free State's Constitution established a parliamentary democracy and an independent judiciary, as well as features more novel to British constitutionalism such as a bill of rights, strong-form judicial review of legislation, and referendums. As Cahillane outlines, the Constitution's drafters were keen to establish that sovereignty lay with the people – asserted in Article 2 – as opposed to the 'Crown in Parliament' under the British Constitution.[18] Providing a role for constitutional

[13] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis*, (Hart Publishing 2018) 4-5.
[14] Dáil Éireann, Declaration of Independence (21 January 1919) www.oireachtas.ie/en/debates/debate/dail/1919-01-21/8 accessed 2 September 2023.
[15] Articles of Agreement for a Treaty Between Great Britain and Ireland (6 December 1921).
[16] Doyle (n 13) 24-27.
[17] Dermot Keogh and Andrew McCarthy, *The Making of the Irish Constitution 1937* (Mercier Press 2007) 39-40.
[18] Cahillane, *Drafting the Irish Free State Constitution* (Manchester University Press 2016) 98. According to Emmet Larkin, 'The Irish had not only evolved a doctrine of popular sovereignty as opposed to parliamentary sovereignty, but they had opted for a radical rather than a liberal view of the nature of consent as being delegatory rather than

referendums was a way of demonstrating this.[19] Article 50 outlined the constitutional amendment procedure: a bill to amend the Constitution must be approved in both houses of the Oireachtas (parliament) followed by the people through referendum. Article 50 also allowed for amendment by ordinary legislation for an eight-year period to correct any 'latent defects' in the Constitution due to hasty drafting.[20]

However, as with all British dominions, the scope of action of the Free State was limited.[21] As a part of the British Empire, British constitutional theory held that the Free State was still subject to Westminster's sovereignty.[22] The committee that drafted the 1922 Constitution had to work within the stipulations of the Treaty signed the previous year, with the British vetoing early drafts and even threatening to resume hostilities if the Constitution was not brought in line with their wishes.[23] Statutorily, the Constitution was the *First Schedule* to the 'Constitution of the Irish Free State (Saorstát Éireann) Act 1922'; it was textually subordinated to the *Second Schedule*, which was the Treaty. Section 2 of the Act read:

> The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed (hereinafter referred to as "the Scheduled Treaty") which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, *it shall, to the extent only of such repugnancy, be absolutely void and inoperative* and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.[24]

Article 50 reiterated that amendments were only possible '*within the terms of the Scheduled Treaty*'.[25] The terms of this Treaty included the symbols of continued British supremacy: the oath of 'fidelity' to the British monarch,[26] the Governor-General as the monarch's representative in the new State,[27] and the appeal to the Judicial Committee of the Privy Council in London.[28] Although these were arguably symbolic constraints,[29] they were enough to plunge the new state into civil war from 1922 to 1923. Though the Treaty settlement was acknowledged by most to

representative.' Emmet Larkin, 'The Irish Political Tradition' in T.E. Hachey and L.J. McCaffrey (eds), *Perspectives on Irish Nationalism* (Lexington 1989); quoted in Cahillane (n 18) 99.

[19] Cahillane (n 18) 87.

[20] Laura Cahillane, 'Popular sovereignty under the 1922 Constitution' in Maria Cahill, Colm Ó Cinnéide, Seán Ó Conaill, and Conor O'Mahony (eds), *Constitutional Change and Popular Sovereignty* (Routledge 2021) 29.

[21] Gerard Hogan, *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy 2012) 1.

[22] Irish Free State Constitution Act 1922, s 4; Donal Coffey, 'The need for a new Constitution: Irish constitutional change 1932-1935' (2012) 48 Irish Jurist 275, 280-281.

[23] Cahillane (n 18) 51-52

[24] Constitution of the Irish Free State (Saorstát Éireann) Act 1922, s 2 (emphasis added).

[25] ibid, sch 1 art 50.

[26] ibid, sch 2 art 4.

[27] ibid, sch 2 art 3.

[28] Article 2 of the Treaty (n 15) specified that the Free State would have the same constitutional status as Canada. From 1867 to 1949, Canada's court of final appeal was the Judicial Committee of the Privy Council.

[29] Hogan (n 21) 1.

have majority support in the 1922 general election, an anti-treaty leader, Éamon de Valera, argued that 'the people have no right to do wrong' by accepting this 'surrender' of the Republic.[30]

In order to grasp the limitations on the Free State's Constitution amendment powers, it is important to outline two different views of its legal origin.[31] The *Irish* view was that the legal origin point was the first Dáil, as the parliament of the 'Irish Republic' in 1919. The Free State was the legal successor of the Irish Republic because its *third* Dáil, acting as a 'Constituent Assembly', passed the 1922 Constitution.[32] This Assembly prohibited any amendment to the Treaty's terms, making the Treaty superior to the Constitution itself. The *British* view was that Westminster created the Free State through *their own statute*.[33] It retained the power to legislate for internal matters of the Free State, as it did for all other British dominions and territories. This latter view was not shared by Irish jurists. If one accepted the Irish view, the Treaty was unamendable and cemented the British connection; if one accepted the British view, Westminster's supremacy remained over the Free State. Either way, the Free State did not have a full scope of independent constitutional action. But the British Empire into which the Free State was born was in flux. In the 1931 Statute of Westminster, the British Parliament renounced its right to legislate unilaterally for the dominions.[34] From the British view, this allowed the Free State to undo the terms of the Treaty if it wished.

In reality, the 1922 Constitution was infamously easy to amend. Although Article 50 originally envisaged an eight-year window in which the Oireachtas could amend the Constitution without a referendum, the Oireachtas extended this window for *another* eight years in 1929.[35] This hollowed out the promise of the referendum as an embodiment of Article 2's popular sovereignty principle.[36] No referendum was ever held during the life of the 1922 Constitution. The Constitution was thus no more rigid than ordinary legislation. This also rendered the judiciary's power to review legislation for constitutionality obsolete; the Irish courts interpreted legislation that contradicted the Constitution as an 'implied repeal'.[37]

The Free State government used this plenary lawmaking power to pass strict national security legislation. The most notorious example of this was the introduction of 'Article 2A'.[38] This was

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[30] Colum Kenny, *A Bitter Winter: The Irish Civil War 1922-23* (Eastwood 2022); extract from RTÉ (22 Nov 2022) https://www.rte.ie/culture/2022/1128/1336914-de-valeras-warnings-read-an-extract-from-a-bitter-winter/ (accessed 3 March 2026).
[31] Coffey (n 22) 280; see also Hogan (n 21) 18-19.
[32] Brian Farrell, 'From First Dáil through Irish Free State' in in Brian Farrell (ed.) *De Valera's Constitution and Ours* (Gill and Macmillan 1988) 18-32.
[33] Irish Free State Constitution Act 1922.
[34] Statute of Westminster 1931, ss 2(1) and 4.
[35] Inserted into the 1922 Constitution by the Constitution (Amendment No. 16) Act 1929.
[36] Cahillane (n 18) 35-36.
[37] *R (Cooney) v Clinton* [1965] IR 245 (decided 23 May 1924).
[38] Constitution (Amendment No. 17) Act 1931.

designed to suspend the ordinary functioning of the judiciary for prescribed offences with the establishment of military tribunals during an emergency, declared by the government whenever it deemed necessary. It opened the door for draconian interference with fundamental rights: trials were conducted without juries, and section 7 allowed for the use of the death penalty whenever a tribunal felt it was necessary. Additionally, Article 2A stipulated that the rest of the Constitution had to be read harmoniously with it. Described by a contemporary judge as 'a state of intermittent martial law',[39] it represented 'the most rigorous public safety statute which Ireland had known in a long history of coercion.'[40] The Constitution's role as a protector of rights or a constraint on government power was now crippled.[41]

With the coming to power of Éamon de Valera in 1932, the Free State's government was on course to dismantle parts of the 1922 Constitution originally understood as unamendable. Having fought with the vanquished anti-treaty faction of the Civil War, de Valera's government attempted to transform the Free State from within, first by abolishing the oath to the British monarch in 1933. To do this, the Constitution (Removal of Oath) Act 1933 also abolished Section 2 of the Constituent Act which established the supremacy of the Treaty, as well as Article 50's limitation of the amendment power.[42] The same year, the appeal to the Privy Council was abolished.[43] Amidst the British abdication crisis of 1936, all reference to the monarch as a feature of the Free State's internal Constitution was removed.[44]

4.2.3 Drafting a new Constitution, 1934-37

Due to repeated amendments by both pro- and anti-treaty governments, by the mid-1930s the Constitution was, in Farrell's words, 'a thing of shreds and tatters.'[45] Prompted by the abolition of the upper house, opposition politicians demanded new constitutional safeguards. In response, de Valera established a constitutional review committee in 1934. His motivations for this review were both *political* and *legal*: the political desire to remove the Constitution's British characteristics and to make the Irish state fully independent; and the legal desire to make this renewed constitution more robust. The terms of reference for the review committee were originally not to draft a *new* constitution but to find:

> (a) A selection within the framework of the present Constitution of those Articles which should be regarded as fundamental
> and

[39] *State (O'Duffy) v Bennett* [1935] IR 70 86; Hanna J quoted in Hogan (n 21) 10.
[40] Earl of Longford and Thomas O'Neill, *Eamon de Valera: A Biography* (Boston 1971) 273.
[41] Doyle (n 13) 8-9.
[42] Constitution (Removal of Oath) Act 1933.
[43] Constitution (Amendment No. 22) Act 1933.
[44] Constitution (Amendment No 27) Act, 1936.
[45] Farrell (n 32) 30.

(b) A recommendation as to how these should be rendered immune from alteration by ordinary legislation.[46]

The difficulty that the review committee faced was that removing the British features of the 1922 Constitution was impossible if the terms of that Constitution were taken seriously. While there was a desire on the part of the committee to entrench certain parts of that Constitution from easy change, the aspects that they *did* want to change were *unamendable*. This was held unanimously by the Supreme Court in *State (Ryan) v Lennon*. To quote Fitzgibbon J:

> [The Constituent Assembly] expressly denied to the Oireachtas the power of enacting *any* legislation, by way of amendment to the Constitution or otherwise, which might be "in any respect repugnant to any of the provisions of the Scheduled Treaty," and it reiterated this position in Article 50, which empowered the Oireachtas to make "*amendments of this Constitution within the terms of the Scheduled Treaty*."[47]

The Supreme Court held *obiter* that the amendment to remove the supremacy of the Treaty was invalid as the Oireachtas did not have the power to amend the Constituent Act[48] – the Oireachtas was a *creation* of that Act. However, while the Court was unanimous on the limited nature of the amendment power under the 1922 Constitution, Fitzgibbon and Murnaghan JJ (Kennedy CJ dissenting) held that the aforementioned Article 2A *was* constitutional.[49] The 1922 Constitution thus cemented the Treaty and was next to useless as a guarantor of fundamental rights.

This was to accept the Irish theory. In *Moore v Attorney General of the Irish Free State*,[50] the Privy Council in London stated the British theory, holding that the abolition of the appeal to the Privy Council was constitutional because the Statute of Westminster allowed dominion parliaments to undo British parliamentary acts as they related to their own legal systems. Because the Free State Constitution was a creation of Westminster, and since Westminster had just handed over the keys to unlock the laws it made for dominions, Irish authorities were entitled to abolish this and any other part of the Treaty. This created a paradox: under the British theory, the Free State could abolish any aspect of the Treaty it wanted; under the Irish theory (according to the Irish Supreme Court), the Free State could not do so because this was specifically prevented by its own Constitution. As Casey explained:

> Mr de Valera was thus in a kind of legal limbo. He must of necessity have accepted the Supreme Court's view [in *Ryan*] on the Constitution's root of title; anything else would have been a denial

[46] NAI, DT S2979 'Memorandum by Michael McDunphy' 31 May 1934; quoted from Hogan (n 21) 54-55. The explanatory memorandum (17 May 1935) recited de Valera's instructions as 'to place the said Articles in a specially protected position, i.e. to render them unalterable *save by the people themselves or by an elaborate constitutional process*'; quoted from Hogan (n 21) 154 (emphasis added).
[47] *State (Ryan) v Lennon* [1935] IR 170, 226 (emphasis added).
[48] ibid.
[49] ibid, 227, 241.
[50] [1935] IR 73.

> of his previous career. On the other hand, the Judicial Committee's conclusion [in *Moore*] was eminently acceptable – but unfortunately it was based on an inadmissible premise.[51]

Despite originally intending to strengthen and 'republicanise',[52] rather than replace, the 1922 Constitution, the drafters 'could never escape its basis in British law'.[53] A new constitution was needed under which no external authority would be able to limit Ireland's scope of action and in which fundamental principles would be more robustly entrenched. Amendment and amendability were central to this project of constitutional renewal; it had become wrapped up with the issue of Irish independence ever since the 1922 Constitution copper-fastened the terms of the Treaty. In addition, the Constitution's greatest practical flaw was that it could be amended too easily by the Oireachtas. It was in one respect *too easy* and in another *too difficult* to change.

Early drafts of a new constitution envisaged tiered amendment difficulty in which aspects considered 'fundamental' like personal rights could only be changed through referendum; other articles could be altered by the Oireachtas.[54] By the final drafts, it had been decided that *every* amendment to the new Constitution would require a referendum with approval by simple majority.[55] To de Valera, his government, and the review committee, the referendum was a sufficient entrenchment of the entire Constitution, as made clear by Minister Seán McEntee:

> Under the new Constitution, there is a quite definite attempt to secure […] a balance of power in the State that the people will always be supreme and that no one organ, whether it be the Government, as it is called in the new Constitution, the President, the Seanad or the Council of State, will be able to get outside the terms of that Constitution and violate the liberties of the people, *unless the people themselves are misguided enough,* as a result of a referendum, to place […] dictatorial powers in the hands of the President, the Taoiseach, the Government or the Legislature.[56]

The government seemed fully aware of the implications of handing an open scope of amendability to the referendum process, with this minister believing that if the people wished to adopt a dangerous or tyrannical amendment, it was their right to do so. In contrast to de Valera's 1922 dictum that 'the people had no right to do wrong', his government believed that, constitutionally speaking, *they did*.[57]

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[51] James Casey, *Constitutional Law in Ireland* (3rd edn, Round Hall Sweet & Maxwell 2000) 20-21; quoted in Hogan (n 21) 19.
[52] 'Republicanise' in the Irish political sense of removing any element of British sovereignty or control.
[53] Longford and O'Neill (n 40) 289; quoted from Keogh and McCarthy (n 17) 62.
[54] UCDA P150/2370 'Preliminary Draft of Heads of a Constitution for Saorstát Éireann' 17 May 1935; quoted from Hogan (n 22) 184. UCDA, P150/2375 'Summary of Main Provisions of the Constitution [No. 2]' 5 Nov 1936; quoted from Hogan (n 21) 301.
[55] Hogan (n 21) 271.
[56] Dáil Deb 11 May 1937, vol 67(1) (Seán McEntee) (emphasis added). www.oireachtas.ie/en/debates/debate/dail/1937-05-11/29/ accessed 24 May 2023.
[57] De Valera stood by his comment on the people having no right to do wrong as late as 1933, as evinced in the Dáil debate on the abolition of the oath.

While the desire to entrench fundamental principles was evident from early drafts, there seems to be no evidence that *permanent* entrenchment was considered through an eternity clause. At one level, this is unsurprising since eternity clauses only became common in continental European constitutions after World War II.[58] The clearest statement regarding this possibility was given by de Valera in a Dáil debate in 1934. With the upper house of parliament on the verge of abolition, opposition politicians proposed putting fundamental rights beyond the Dáil's power to amend.[59] In reply, de Valera tackled the idea of unamendability head on:

> [W]e have to ask ourselves is it or is it not right that there should be … a continuing power to change the Constitution? For a moment to dream of having *a cast-iron Constitution which could not be changed would be heading straight for revolution*. What you want is to have reasonable security that changes will not be made without proper consideration; that these changes cannot be arbitrarily made and that the proposals will have a fair discussion. […]
>
> There were certain Articles in the [1922] Constitution which were forced upon the people of this country. There are certain Articles which represent democratic ideals…These Articles ought, with all possible speed, be examined, and be made as lasting as it is possible for anything to be made lasting, in a Constitutional way, without the danger of a cast-iron Constitution which, as I said, is always a temptation to revolution.[60]

This offers a window into de Valera's thinking on the value of constitutions generally: they should be more rigid and long-lasting than ordinary legislation, but they should not be so rigid as to suffocate a political community's ability to act according to its own judgement. Constitutional permanency would, counterproductively, create the risk of a constitutional overthrow because it would place a wall in front of the political community which could only be overcome through either ignoring or destroying the constitution. Indeed, such a scenario was, at the moment he spoke, beginning to happen – a 'constitutional revolution' partially in reaction to the unamendable features of the 1922 Constitution. The terms of that Constitution clearly prohibited what his government was about to do, but he was doing it anyway. Unamendability was not only futile, it was self-defeating for those wishing to preserve a constitutional order.

Instead of choosing to make fundamental parts of the new Constitution more difficult or impossible to amend, the choice was made to take the final say over constitutional reform away

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[58] Casey notes that various European constitutions written after World War II have routinely listed one or more provisions as unamendable; Casey (n 51) 709. Neither the Weimar not US constitutions, which were influential on the 1937 Constitution's drafting, include unamendable clauses. The contemporary French Constitution (Third Republic) did have an eternity clause, the earliest in the word, protecting the republican form of government from amendment. Of current European constitutions, 16 include some form of unamendable provision; www.constituteproject.org accessed 30 May 2023.

[59] The Fine Gael party did not propose unamendability but that an act proposing to alter fundamental rights could only have effect once the government that proposed it was re-elected following a general election; Dáil Deb 17 May 1934, vol 52(9) (John A Costello) www.oireachtas.ie/en/debates/debate/dail/1934-05-17/11/ accessed 22 May 2023.

[60] ibid (Éamon de Valera); quoted in Keogh and McCarthy (n 17) 65.

from the legislature (and therefore the executive) and give it to another entity: *the people for the purposes of referendums*.[61] The effect of leaving the final say in the hands of the legislature since 1922 was a hegemonic, uncontrolled government and 'martial law' instead of the rule of law.[62] Whatever the strengths of parliamentary sovereignty (i.e. the supremacy of the legislature within the constitution) in Britain, *it was not working in Ireland*. Moving the final say away from the legislature to the referendum established a clear distinction between ordinary law and the Constitution, allowing the judiciary to review the former for compatibility with the latter. This allowed real constitutional supremacy to take hold.

Unlike every other constitution considered in this chapter, this Constitution was not created by a constituent assembly, but a small number of men. The most important of these individuals was Éamon de Valera, whose primary motivation for this new Constitution is arguably encapsulated in Article 1 – the amendment process which the Constitution established ought to be read in light of this provision. De Valera wanted to unshackle the Irish state from what he felt was an imposed subordination to Britain and to create a constitution that was as an indigenous creation of Irish hands. The referendum had the benefit of solving both of de Valera's constitutional priorities, self-determination and entrenchment, in one solution. It placed the government under a comparatively rigid Constitution beyond its power to alter, but it was also able to satisfy Irish nationalist sentiment: the final appeal over constitutional change rested with the people rather than any external body. This gave weight to the principle of self-determination now enshrined in Article 1. Bunreacht na hÉireann was presented to the people in a referendum on 1 July 1937 and passed by a narrow majority of 56.5% to 43.5%. In a radio address introducing the draft Constitution prior to the referendum, de Valera emphasised popular sovereignty as its primary value:

> By the votes of the people the President of the State will be chosen, by them the House of Representatives will be elected, and on the nomination of that House the responsible Government will be appointed. By the people only, through the Referendum, can the National Constitution be amended. The sovereignty resides in them as their inalienable and indefeasible right. Every elector who casts his vote in favour of the adoption of this Constitution will in effect be subscribing his name to the proposition that in this country the people and the people alone are the masters.[63]

4.3 Full amendability under Bunreacht na hÉireann

[61] See Seán Rainford, 'Constitutional Amendment and the Final Say in Ireland and India' (2026) International Journal of Constitutional Law (forthcoming).
[62] *State (O'Duffy) v Bennett* (n 39).
[63] NAI, DT S9868 'Transcript of radio broadcast by Eamon de Valera'; quoted from Hogan (n 21) 536.

Article 46 requires constitutional amendment proposals to pass both houses of the Oireachtas before being put before the people in a referendum. The threshold for approval in this referendum is a simple majority of votes cast and the electorate for referendums is limited to Irish citizens.[64] Article 46.1 says that 'Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.'[65] Separately, Article 34 establishes the courts' power to review legislation that contravenes the Constitution.[66] They have also interpreted a power to review executive actions on the same basis.[67] However, the courts have held that they *do not* have the power to review amendments to the Constitution on their substance; they can only intervene to ensure that the amendment process is followed correctly.[68] This is grounded not only in the text of Article 46.1, but the theory that 'the people', effectively being the constituent power, are entitled to amend the Constitution as they wish.

But there are other fundamental principles enshrined in Bunreacht na hÉireann, most notably natural law and natural rights. The relationship between those provisions using natural law language and popular sovereignty was, for a time, unclear. Natural law theory proved to be the most consistent basis on which to argue that amendability under the Irish Constitution was limited. Since a core aspect of natural law is the supremacy of a higher moral law over man-made positive laws,[69] the question for judges was: could an amendment that violated the natural law be constitutional?

This chapter suggests that full amendability in Ireland is related to the principle found in Article 1, namely the right to self-determination. Before considering the courts' treatment of natural rights vis-à-vis constitutional amendability, it is worth clarifying the judicial status of Article 1 itself. Despite its emphatic natural law-based terms, Article 1 has rarely been applied directly by Irish courts as an *operative* right. Instead, it functions mostly as a background political principle informing broader doctrines of popular sovereignty and constituent power.[70] Kearney argues that Article 1's 'right' to self-determination is therefore 'unconvincing from a positivist legal perspective'.[71] However, the open scope of amendability afforded by Article 46.1 and the courts'

[64] This is a more restrictive franchise than for Dáil elections (which includes British residents in Ireland) and for local elections (which includes all residents).
[65] Constitution, art 46.1.
[66] Constitution, art 34.3.2°.
[67] *Boland v An Taoiseach* [1974] IR 338.
[68] *McKenna v An Taoiseach (No 2)* [1995] IR 10.
[69] Thomas Aquinas, *Summa Theologica* II Question 95 Article 2.
[70] Hogan et al, *Kelly: The Irish Constitution* (5th ed Bloomsbury 2021) paras 31.08-3.1.14.
[71] Michael Kearney, 'Self-determination, the Good Friday Agreement, and the Irish constitutional framework' in Maria Cahill, Colm Ó Cinnéide, Seán Ó Conaill, and Conor O'Mahony (eds.), *Constitutional Change and Popular Sovereignty* (Routledge 2021) 43.a

corresponding insistence on this open scope is, I argue, the principal way in which Article 1 is made legally effective.

4.3.1 A natural law limit on amendability?

Article 41.1 recognises the family as a moral institution possessing 'inalienable and imprescriptible rights, *antecedent and superior to all positive law*.'[72] The more recently introduced Article 42A recognises the 'natural and imprescriptible rights of all children'.[73] Article 43.1 states that 'man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.'[74] As we saw, Article 1 also uses this kind of language. Natural law had a stronger and more visible influence on the drafting of the 1937 Constitution than that of 1922,[75] coming from scholastic natural law theology as well as liberal Enlightenment ideas of natural rights.[76] A number of Roman Catholic clergymen were consulted in the drafting of the Constitution, with some urging the drafters to explicitly declare natural law as supreme over positive law.[77] These suggestions were not adopted; the present Articles 41-43 expressed a more limited version of natural law language. However, de Valera himself was a strong believer in natural law theology and the *pre-political* nature of certain rights, including that of self-determination. Even this right of the people, he claimed, was limited by the injunction not 'to do wrong', which he asserted as late as 1933.[78] Could the people, through a constitutional amendment, violate natural law?

The aforementioned *Ryan* case (1934) saw the earliest judicial invocation of natural law in the context of amendability, in the dissenting judgement of Hugh Kennedy CJ.[79] As mentioned, the case involved a challenge to the constitutionality of Article 2A of the 1922 Constitution. Fitzgibbon and Murnaghan JJ both agreed that while there were limits on what the Oireachtas could amend in this Constitution, this *did not* include the two amendments that created Article 2A. Kennedy CJ disagreed, asserting that there were four limitations on the power of amendment under the 1922 Constitution: 1) natural law';[80] 2) the Anglo-Irish Treaty;[81] 3) the

[72] Constitution, art 41.1.1° (emphasis added).
[73] Constitution, art 42A.1.
[74] Constitution, art 43.1.1°.
[75] Thomas Mohr, 'Natural Law in Early Twentieth Century Ireland: State (Ryan) v Lennon and its Aftermath' (2021) 42(1) Journal of Legal History 8-10.
[76] Oran Doyle and Tom Hickey, *Constitutional Law: Text, Cases and Materials* (2nd edn, Clarus Press 2018) 473.
[77] UCDA, P150/2393 'Jesuit Constitution Committee's 'Suggestions for a Catholic Constitution" 18 Oct 1936; quoted from Hogan (n 21) 247.
[78] Dáil deb Vol 47(4) 3 May 1933 (Éamon de Valera) https://www.oireachtas.ie/en/debates/debate/dail/1933-05-03/27/ (accessed 3 Mar 2026).
[79] Kennedy CJ's dissent was widely cited in the 1973 *Kesavananda Bharati* case which introduced the basic structure doctrine to Indian constitutional law; see part 5.3 of this thesis.
[80] *State (Ryan) v Lennon* (n 47) 204-205.
[81] ibid, 205.

principles declared 'immutable' and 'absolute';[82] and 4) Article 50's eight-year window for amendment by ordinary legislation.[83] In his view, the *Constituent* Assembly which adopted the 1922 Constitution – superior to the Free State Oireachtas 'which it, in fact, created'[84] – permanently entrenched these parts of the Constitution. Because the Constituent Assembly acknowledged God as the source of 'all lawful authority', Kennedy CJ believed that the principles of natural law constituted an 'over-all limitation' of constitutional amendment.[85] Any proposed amendment would need to adhere to natural law principles to be constitutional:

> It seems clear that, if any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against that acknowledged ultimate Source [God] from which the legislative authority has come through the people to the Oireachtas, as, for instance, if it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative.[86]

By this measure, Article 2A was a gross violation of the natural law – retroactive penalisation and application of the death penalty whenever the tribunal thought expedient were but two grounds for this. Kennedy CJ's lone moral stance against this legislation earned his judgement a celebrated status among those who taught constitutional law under the new Constitution in later decades.[87] The return of natural law jurisprudence came in the era of most pronounced judicial activism during the 1960s and 1970s. In *McGee v Attorney General*,[88] the Supreme Court held that married couples had an unenumerated constitutional right to marital privacy and were thus entitled to access artificial contraception, declaring the ban on such contraception unconstitutional. One of the judges, Brian Walsh J, invoked natural law when referring to the Constitution's fundamental rights:

> Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that *justice is placed above the law* and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights *over which the State has no authority*; and the family, as the natural primary and fundamental unit group of society, has rights as such *which the State cannot control*.[89]

Accordingly, Walsh J held that legal positivism was explicitly rejected under the Irish Constitution. Not only were law and justice inseparable under the Constitution, but it was clear that the latter must take precedence over the former. Citizens' rights were not created by the Constitution but merely recognised by it. Further in his judgement, he clarified what he meant by 'natural law' and which definition was applicable to the Constitution.

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[82] ibid, 208.
[83] ibid, 210.
[84] ibid, 203.
[85] ibid, 205.
[86] ibid, 204-205.
[87] Donal O'Donnell, 'The Sleep of Reason' (2017) 40(2) Dublin University Law Journal 191, 193.
[88] [1974] IR 284.
[89] ibid, 310 (emphasis added).

> There are many to argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of the law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the acknowledgement of Christianity in the preamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category[90]

Here, Walsh J was not only endorsing natural law in general, but a definition which corresponds closely to Thomistic Catholic philosophy. If a right protected by the Constitution has its origin point with God (referenced in the preamble and Article 6) and his eternal law, one may reasonably assume that a constitutional amendment which attempted to abolish it would be unconstitutional.

4.3.2 'The will of the People is sacrosanct'

In 1972, *Byrne v Ireland* clarified what the courts interpreted as the constitutional structure of the State after 1937.[91] The issue was whether the 'prerogative' of the Free State government had carried over into the new Constitution in 1937 and specifically, whether the State could be sued for personal injuries in its own courts. Following a very strict application of constituent power theory,[92] the courts held that the State and its institutions were *created* by the Constitution which was, in turn, *created* by the people. An executive prerogative would be a breach of popular sovereignty; the State could thus be sued. Walsh J grounded this in Article 6, Article 46 and 47 outlining the people's amending power, and the preamble. To quote him directly:

> It appears to me abundantly clear from those provisions that the State is the creation of the People and is to be governed in accordance with the provisions of the Constitution which was enacted by the People and which can be amended by the People only, and that in the last analysis the sovereign authority is the People.[93]

A consequential application of popular sovereignty came with the *Crotty* case,[94] where a majority in the Supreme Court held that if the Government wished to derogate an aspect of its foreign policy-making power to a European body, it would need approval from the people in a referendum. 'The essential nature of sovereignty' was, according to Walsh J, '*the right to say yes or to say no.*'[95] This led to an understanding that all major European treaties which bring about fundamental shifts in European integration must be approved via referendum in Ireland. The concept of constituent power outlined in *Byrne* can be seen throughout this jurisprudence: as a consequence of Articles 1 and 6, the courts hold that 'the people' are sovereign over the state;[96] they created the Constitution and through it they give certain powers to constituted bodies such

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[90] ibid, 317-318.
[91] [1972] IR 241.
[92] Neither Sieyès' work nor 'constituent power' are not mentioned in the judgement.
[93] Byrne (n 90) 261-262.
[94] *Crotty v An Taoiseach* [1987] IR 713.
[95] ibid, 781.
[96] *Byrne* (n 90) 296.

as the Oireachtas, the Government, and the judiciary. Each are limited by the Constitution and any changes to their powers must be approved by referendum.[97] While these institutions and the State itself are limited, *the people are not*. Because the people are held to be present in the act of constitutional amendment, the courts have consistently held that not only are there no substantive limits on what they can amend.[98] Irish courts do not make the distinction between *original* and *derived* constituent power made by superior courts in many other jurisdictions.[99] The referendum to amend the Constitution is of *equal legitimacy* to the referendum that adopted the Constitution in 1937.

In *Finn v Attorney General*,[100] the plaintiff argued that the proposed amendment to prohibit abortion and establish a constitutional right to life for unborn children was unconstitutional because such a right was implied in the Constitution already. He argued that reiterating something already extant in the Constitution was not a 'variation, addition, or repeal' under Article 46. In the High Court, Barrington J rejected this, holding that 'the people intended to give themselves full power to amend any provision of the Constitution'[101] including clarifying anything already included. The phrases 'variation, addition, or repeal' were meant to illustrate the *broad scope* of the amending power which the people had reserved to themselves, rather than its limitation.[102] The Supreme Court upheld this decision. In *Slattery v An Taoiseach*, the Supreme Court held that 'a proposal to amend the Constitution *cannot per se be unconstitutional*.'[103]

But where stood Walsh J's natural law amidst this belief in unlimited popular sovereignty? Was natural law not supreme in the Constitution, even over and above the people's amending power? In the wake of the *X case* (1992)[104] in which the Supreme Court upheld a limited right to abortion in certain circumstances, constitutional amendments were passed by the people to allow individuals to travel to access abortion service abroad and information about such services. In a 1993 legal article, O'Hanlon J responded extrajudicially by arguing that the natural law precluded such amendments as the most fundamental natural right was the right to life,

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[97] Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers-État?* [What is the Third Estate?] (1789); republished in Oliver W. Lembcke and Florian Weber (eds) *Emmanuel Joseph Sieyès The Essential Political Writings* (Brill 2014).
[98] See Eoin Daly and Tom Hickey, *The political theory of the Irish Constitution: Republicanism and the basic law* (Manchester University Press 2015) 26.
[99] See Brazilian jurisprudence to this effect i.e. ADI 939; part 6.2.3 of this thesis.
[100] [1983] IR 154.
[101] ibid, 163-164.
[102] ibid. As mentioned in part 5.3 of this thesis, the phrase 'addition, variation, or repeal' was inserted into the Indian Constitution's Article 368 in 1971 by the Indian Parliament in an attempt to remove any substantive obstacles to their amending power, illustrating this *broader* view of this phrase shown by Barrington J.
[103] [1993] 1 IR 268.
[104] *Attorney General v X* [1992] 1 IR 1.

including that of the unborn.[105] The State was founded on a Constitution which acknowledged that all lawful authority came from God. According to O'Hanlon:

> It would appear to follow, as affirmed by Chief Justice Kennedy and Mr Justice Walsh, that no law could be enacted, no amendment of the Constitution could lawfully be adopted, no judicial decision could lawfully be given, which conflicted with the Natural Law (which we recognise as being of divine origin).[106]

Such a view was not unique; in the immediate decades after its adoption, natural law was seen as *the* defining feature of Bunreacht na hÉireann by many.[107] In the *Abortion Information Case* (1995),[108] the Supreme Court addressed this apparent inconsistency head on. This case concerned a bill on foot of the 14th Amendment which would allow for information about abortion services outside the State to be made available, despite the 8th Amendment which prohibited abortion. In the case, those arguing against the Amendment's validity invoked natural law arguments. Hamilton CJ summarised their argument as follows:

> It is fundamental to this argument that, what is described as 'the natural law' is the fundamental law of this State and as such is antecedent and superior to all positive law, including the Constitution and that it is impermissible for the People to exercise the power of amendment … as permitted by Article 46 of the Constitution unless such amendment is compatible with the natural law and existing provisions of the Constitution and if they purport to do so, such amendment had no effect.[109]

The Court was quick to reject this argument. Hamilton CJ clarified that:

> The Courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject *and at no stage recognised the provisions of the natural law as superior to the Constitution*. The People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amendment by the Fourteenth Amendment is the fundamental and supreme law of the State representing as it does the will of the People.[110]

The *Abortion Information Case* is generally seen as a fork-in-the-road moment for the Irish judiciary.[111] It was forced to make a final judgement on the Constitution's source of legal validity – natural law or popular sovereignty.[112] Judgements that followed also took this strong popular sovereignty line. In *Hanafin v Minister for the Environment*, Hamilton CJ said that 'The will of the people as expressed in a referendum providing for the amendment of the Constitution is

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[105] Roderick O'Hanlon, 'Natural Rights and the Constitution' (1993) 11 Irish Law Times 8; cited from Doyle and Hickey (n 61) 47.
[106] ibid, 10.
[107] Mohr (n 62) 30; Declan Costello, 'Natural Law and the Irish Constitution' (1956) 45 Studies: An Irish Quarterly Review 403; Séamus Henchy, 'Precedent in the Irish Supreme Court' (1962) 25 Modern Law Review 544, 550; quoted from Gerard Whyte, 'Natural Law and the Constitution' (1996) 14 Irish Law Times 8.
[108] *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
[109] ibid, 38.
[110] ibid, 43.
[111] Doyle and Hickey (n 76) 50.
[112] See Oran Doyle, 'Legal Validity: Reflections on the Irish Constitution', (2003) 25 Dublin University Law Journal 56.

sacrosanct and if freely given, cannot be interfered with.'[113] Similarly in *Riordan v An Taoiseach*, Barrington J said that 'There can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional.'[114] He later asserted in *Coughlan v Broadcasting Complaints Commission* that 'under our Constitution, a referendum to amend the Constitution is not a mere public opinion poll. *It is the ultimate act of sovereignty*.'[115]

Apart from natural law, the only serious suggestion of an implied limit on amendability was based the theory of popular sovereignty itself.[116] In 1984, the 9th Amendment was passed to allow certain non-citizens to vote in general elections. During the Dáil debate on the amendment bill, Minister Liam Kavanagh TD stated why this right to vote was *not* being extended for referendums:

> The import of the advice available […] is that the basic concept of a Constitution is that of a fundamental law given by citizens to themselves. To give non-citizens the right in the Constitution to change the fundamental law enshrined in it would be contrary to this basic concept. To do so would be inappropriate and could constitute an *in-built contradiction in the Constitution itself*.[117]

This question of whether non-citizens can be extended the right to vote in referendums to amend the Constitution has never been tested in court. The theory, based on Attorney General advice to the Government, is that only that category of voters who had the right to vote in the 1937 referendum to adopt the Constitution – Irish citizens – *can ever* have the right to vote in constitutional amendment referendums. Irish citizens, 'the people', gave the Constitution to themselves; to amend the Constitution to extend this right to non-citizens would be unconstitutional because non-citizens are not 'the people'. However, an Attorney General's interpretation of the Constitution is not infallible, and the dictum of Barrington J from *Finn* arguably refutes it. Why should 'the people' be permanently prohibited from expanding their self-definition for the purposes of referendums?

4.3.3 Underlying coherence

The Supreme Court's assertion in the *Abortion Information Case* that it had 'at no stage recognised the provisions of the natural law as superior to the Constitution' seems wrong due to Walsh J's statements in *McGee*.[118] If natural law and natural rights are antecedent and superior to *all* positive law, that surely must include the Constitution as well. However, if we assume that this is true,

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[113] [1996] 2 IR 321, 425 (emphasis added). While courts refuse to review the substance of amendments, they can review amendments on procedural grounds.; *McKenna* (n 68).
[114] *Riordan v An Taoiseach (No 1)* [1999] 4 IR 321, 330.
[115] *Coughlan* (n 9) 43 (emphasis added).
[116] I am grateful to Oran Doyle for highlighting this 1984 Dáil statement to me.
[117] Dáil deb, 11 Apr 1984 Vol 349(10) (Liam Kavanagh) https://www.oireachtas.ie/en/debates/debate/dail/1984-04-11/3/ (emphasis added) (accessed 25 Feb 2026).
[118] Doyle (n 14) 195; Doyle and Hickey (n 76) 47-48; Whyte (n 106) 41.

was this such a radical thing for Walsh J to say? There are many things that are superior to positive law. Natural law may be one of them, but so, in a sense, are politics, society, and cultural norms – insofar as they form, influence, and change constitutions and laws.[119] Constitutions and all other pieces of positive law are creations of the culture in which they exist. While it would be wrong to describe rights as pre-political, there is a sense in which they must be *pre*-constitutional; otherwise where would the notion of protecting them in the Constitution come from?

As Kavanagh argues, there may not be as much of an inconsistency here as some commentators suggest.[120] Though Hamilton CJ's statement seems wrong, the broader point that he was trying to make was correct: the courts never explicitly recognised natural law *as a limitation on amendability*. There is, of course, a logical paradox inherent in Walsh J's thinking on the supremacy of natural law over positive law: he invoked a piece of positive law (the Constitution) to establish this supremacy.[121] However, Walsh J's dictum need only imply that some moral considerations ultimately supersede positive law and that these should, in his view, be taken into account when a judge is interpreting which rights are protected by the Constitution – this was the central issue in *McGee*, not amendability.

A non-judicial but nonetheless significant statement about amendability was given in 1996. The Constitution Review Group was established to analyse every article of the Constitution and make recommendations for alteration where it felt appropriate. When it came to Article 46 on the amending power, the Review Group's report considered the issues with Ireland's unlimited scope of amendability. Importantly, it addressed natural law and human rights arguments which argued for limitations:

> For historical reasons, some continental constitutions have Articles which are declared to be immutable … Moreover, some people propose that there are primal laws, such as the natural law, whose pervasive, formative influence must be recognised by, and reflected in, all man-made law and whose principles cannot be modified − and that therefore they and their eternal, transcendent character should be asserted in the Constitution. Others propose that some of the more fundamental human rights provisions should be put beyond the reach of constitutional amendment.[122]

On the issue, the Review Group endorsed the thrust of judicial thinking. It recommended no change to Article 46.1, grounding its endorsement of open amendability in Jeffersonian as well as Thomistic principles we considered in §2.3:

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[119] See generally Martin Loughlin, *The Idea of Public Law* (OUP 2003) ch 6.
[120] Aileen Kavanagh, 'The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice' (2012) 48 Irish Jurist 71, 93-94.
[121] See Doyle (n 111).
[122] *Report of the Constitution Review Group* (1996) 373.

> The Review Group considers that the right which one generation gives itself to write, amend, or replace a constitution can be reasonably and readily claimed by another. Furthermore, while ideas may be eternal and perfect, the form in which they are expressed cannot be, and *it is futile to seek to endow any form of words with an immutable character*.[123]

The report's reasoning is difficult to fault and states the normative case for full amendability succinctly. It addresses the natural law argument far more coherently than Hamilton CJ did in the *Abortion Information Case*. Such reasoning echoes an idea expressed by Walsh J himself – that prevailing ideas of natural law are conditioned by the passage of time and that 'no interpretation of the Constitution is intended to be final for all time.'[124]

The judicial position on the relationship between popular sovereignty, amendability, and natural law seems to be the following. Natural law is an indispensable feature of the Constitution; it is acknowledged as transcending positive law and even the Constitution itself; it therefore cannot be ignored if the terms of the Constitution are taken seriously.[125] However, this does not mean that these terms are immune from alteration by the people who, under Article 46, give themselves full scope of amendability and who, under Article 1, assert a natural pre-constitutional right to self-determination. Taking *this right* seriously demands that the positive legal formulation of supraconstitutional principles must be capable of alteration.

4.4 Commentary and future prospects

4.4.1 Popular sovereignty and self-determination

The strong emphasis by Irish courts on popular sovereignty has been the subject of much academic commentary. Jacobsohn describes the 'quasi-religious' significance that Irish courts place on the people's sovereign authority to amend the Constitution in any way they like.[126] The most trenchant and repeated critique of the popular sovereignty doctrine points to the wide gap between rhetoric and reality: rhetorically, the people are sovereign under the Constitution; in reality, they play a relatively small role. They do not initiate amendment proposals, the Government does;[127] the Government mostly formulates the wording of proposals and passes them through the Oireachtas; the people are then asked in a very constrained way to give their answer in a binary choice – 'yes' or 'no'. Daly says judicial language of popular sovereignty 'has an air of unreality, to say the least' and is 'empirically and sociologically unfounded.'[128] According

[123] Ibid (emphasis added).
[124] *McGee* (n 87) 319.
[125] See Richard Humphreys, 'Interpreting Natural Rights' (1993) 28 Irish Jurist 221.
[126] Gary Jacobsohn, 'An unconstitutional constitution? A comparative perspective' (2006) 4(3) International Journal of Constitutional Law 460, 469.
[127] Constitution, art 46.2.
[128] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability' (2019) 15(4) European Constitutional Law Review 619, 625.

to O'Cinneide, '[t]he people may formally remain the masters, but their agents (like members of the Oireachtas, judges, the civil service) wield the power.'[129]

For Hickey, judicial eagerness to locate popular sovereignty *solely* in the amendment referendum places too much weight on this mechanism and not enough on the rest of the Constitution. He argues that '[t]he Constitution hardly came from the people. Neither was it imposed upon them. It was something in between.'[130] Employing a republican frame of living constituent power from Pettit,[131] he argues that popular sovereignty is also present in general elections, the Government's accountability to the Dáil, and the general 'inter-checking institutional mechanisms' that ensure 'popular control' throughout the political system. He points to Article 6's phrase 'to decide all questions of national policy' as support for this: 'national policy' cannot be limited to amending the Constitution; it refers to day-to-day politics which people influence through elections.[132]

Academic critique understandably focuses on the constrained nature of the referendum in the amendment process. The referendum is a fettered, narrow, constituted mechanism limited by numerous provisions and regulations. 'The people' only enter the picture at the *end point* of an amendment process, not the beginning – the right of initiation of an amendment being effectively reserved to the Government that commands a majority in the Dáil. Further, what constitutes 'the people' must also be interrogated. As Doyle points out, 'the people' for the purposes of the referendum is an entity constructed from Articles 2, 16.1, and 47.3[133]. The composition of 'the people' was itself amended in 2004 when Ireland moved from *jus soli* to *jus sanguinis* citizenship.[134]

However, of more significance than the constraints on the process or the composition of 'the people', I argue, is the *content* of the amendments themselves. While the process is constrained and subject to judicial review, the subject matter of a given amendment is not. If we accept Hickey's argument that popular sovereignty is expressed through numerous mechanisms like elections and executive responsibility to the Dáil – if we define 'the people' less directly as the voters for the purposes of referendums and more broadly as the political community made up of all those who participate in these mechanisms – we can see a *composite* picture of popular sovereignty within the totality of the amendment process. As we saw in Chapter 3, constituent

[129] Colm O'Cinneide, 'The people are the masters: the paradox of constitutionalism and the uncertain status of popular sovereignty within the Irish constitutional order' (2012) 48 Irish Jurist 249, 273.
[130] Tom Hickey, 'Popular Sovereignty in Irish Constitutional Law' (2017) 40(2) Dublin University Law Journal 147, 162.
[131] See part 3.4.3 of this thesis.
[132] ibid, 162-163.
[133] Doyle (n 111) 67.
[134] Twenty-seventh Amendment of the Constitution Act 2004.

power need not be confined to the act of constitutional replacement nor, in the Irish case, to the discrete occurrence of referendums. For this power to be meaningful, *no aspect* of the Constitution can be beyond its reach. 'Popular sovereignty', 'living constituent power', and 'self-determination' describe the same underlying principle: the autonomy of the existing political community to constitute and reconstitute their political and constitutional order.[135] Full amendability allows the Constitution to be the product of and the vehicle for self-determination. In this way, Article 46.1's open scope gives efficacy to Article 1's right to self-determination.

This state of affairs did not exist pre-1937. It had been attempted in the 1922 Constitution to endow the Treaty settlement with an immutable character. Although the Supreme Court held *obiter* that the Treaty could not be amended, the important thing is that they *were* changed, arguably by extra-constitutional means on the part of the executive and legislature. (The achievement of Irish independence in 1922 was largely the result of extra-constitutional, violent means.) This reminds us that unamendable provisions (and constitutions more broadly) cannot stop a sufficiently strong political movement with popular support from enacting its will (whether this will is good or bad is irrelevant). The advantage of the 1937 Constitution over that of 1922 was that it incorporated this reality *directly into its amendment process*. It has been accepted actively and tacitly by the population as the source of political and legal legitimacy largely because it is a fully malleable document which can be altered and transformed to accommodate different political priorities.[136]

When writing about African postcolonial constitutionalism, Gebeye argues self-determination provides a distinct kind of logic for constitutions: whereas liberalism implies a set of normative pre-commitments, self-determination necessitates a free scope of action on the part of a people. Because of this, unamendability is simply '*anathema* to a constitution founded on and committed to self-determination.'[137] The Irish case supports this, especially given that its experience of unamendability was directly tied to its *lack* of full self-determination. While it would be too far to say that self-determination is incompatible with unamendability wherever it exists, it does suggest that unamendability cannot be accommodated within a constitution where self-determination is its highest governing principle. The same can be said of popular sovereignty (as demonstrated in French constitutional law).[138] Every democratic constitution probably needs to swear fidelity to the idea of popular sovereignty to some degree, but this often runs alongside

[135] See Martin Loughlin, 'The concept of constituent power' (2013) 13(2) European Journal of Political Theory 218.
[136] See part 3.3 of this thesis.
[137] Berihun Adugna Gebeye, 'Jurisdemocracy: An Approach to Constitutionalism in the Postcolony' (2026) International Journal of Constitutional Law (forthcoming) 35 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6149510 accessed 11 May 2026 (emphasis added).
[138] See part 6.4 of this thesis.

other substantive principles.[139] Which principle takes precedence is a question of constitutional design and hinges largely on who holds the intra-constitutional final say.[140]

4.4.2 Legitimacy, contestability, and constitutional politics

Though the referendum through which it was adopted was divisive, the 1937 Constitution garnered a much larger degree of public and political acceptance than its predecessor. Whether acceptance by the public is active or tacit (remember the *narrowness* of the majority that approved the Constitution in the 1937 referendum), it has allowed political democracy and a functioning legal system to work *through* its procedures in a way that was essentially impossible before. A major factor in why the 1937 Constitution has garnered far more popular acceptance is because it is a *contestable* document – its procedures allow any and all of its substance to be changed and adherence to these procedures does not require adherence to its substance.

This dynamic is evident in the evolution of Irish republican politics after independence. The Irish state created in 1922 included 26 of the 32 Irish counties – the other six remaining in the UK. The calculation of the first Free State government – which included many who fought in the war of independence against Britain – was that the Treaty and the 1922 Constitution could be used procedurally to achieve a greater measure of independence (and perhaps Irish unity). The anti-treaty Fianna Fáil party disagreed, but nonetheless used the 1922 Constitution's amending power to undo the Treaty and then replace the Constitution altogether. Once this occurred and the 1922 Constitution's unamendable features were removed, it allowed procedural constitutionalism to take root, with many republicans who previously rejected the legitimacy of the Irish state as a partitioned entity opting to work through its constitutional politics and even entering government. The 1998 Good Friday Agreement which ended the Northern Ireland Troubles arguably displayed a version of this procedural constitutionalist logic – both Ireland and the United Kingdom explicitly recognised the partition of Ireland as an *alterable* constitutional arrangement which could change in the future,[141] allowing all significant political players to engage in Northern Ireland's new political institutions.[142]

This also applied to movements which opposed the substance of the Constitution on other grounds. As originally drafted, the 1937 Constitution instilled an ethos of social conservatism,

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[139] Though the German Basic Law expresses popular sovereignty in Article 20, Heun argues that the people are bound by constitutional supremacy like any other organ. Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 32.
[140] See Rainford (n 61).
[141] i.e. through concurrent referendums in the Republic of Ireland and Northern Ireland.
[142] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland 1998 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf accessed 25 May 2026.

which was (and still is) opposed by social progressives.[143] Amendments in the 2010s to legalise same-sex marriage[144] and abortion[145] and to remove the offence of blasphemy[146] reflect the general move from social conservatism to social liberalism.[147] Had natural law been held by the courts to be a substantive limit on amendability, it is very possible that these amendments would have been struck down as unconstitutional. Achieving this kind of reform would have required not just amendment but constitutional replacement.

Instead, the full amendability of the Irish Constitution allows those opposed to the *substantive* constitution (on whatever grounds) to work through the *procedural* constitution to achieve their objectives. No viewpoint is outside the scope of 'constitutional politics':[148] politicians are not required to swear any oath to the Constitution and no political objective is ruled-out by an eternity clause. This enables all political actors to be *constitutionalists*. It was this provisional, amendable, *contestable* quality that garnered the 1937 Constitution a level of legitimacy that the 1922 Constitution could never enjoy, for the former's explicit terms made some of its substance incontestable and in doing so, ensured that a significant minority would never view it as legitimate. From a civic republican perspective, when something is incontestable (e.g. through unamendability) it necessarily detracts from legitimacy – this is the lesson of the 1922 and 1937 Irish constitutions.

4.4.3 A 'procedural' to 'substantive' constitutional identity?

Due to the role that the popular sovereignty doctrine has held in the Irish judicial imagination, Daly suggests that this principle effectively functions as Ireland's constitutional identity. As this is an identity associated with a *process* (the referendum), it necessarily inhibits the development of a *substantive* identity based on specific institutions, principles, or a clear hierarchy of values.[149] However, this may be changing due to recent judicial willingness to define constitutional identity substantively, most notably in *Costello v Ireland*.[150] The case concerned the constitutionality of Ireland's planned ratification of the CETA trade agreement between the EU and Canada.[151] A

[143] See the recently proposed 39th and 40th Amendment bills that would have redefined the Constitution's definition of the family and removed the 'woman in the home' clause of Article 41.2. Both proposals were rejected in 2024 referendums.
[144] Thirty-fourth Amendment of the Constitution (Marriage Equality) Act 2015.
[145] Thirty-sixth Amendment of the Constitution Act 2018.
[146] Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Act 2018.
[147] See Eoin Daly, 'From sovereignty to social liberalism: Two new dimensions of constitutional identity in Ireland' (June 10, 2023). Available at SSRN: https://ssrn.com/abstract=4475488 or http://dx.doi.org/10.2139/ssrn.4475488
[148] This can be contrasted to Germany, where all political parties must adhere to the principles of the 'free democratic basic order'; Basic Law for the Federal Republic of Germany 1949, art 21.2.
[149] Daly (n 9) 185-186.
[150] See further Seán Rainford, 'Costello v Ireland and an Irish Constitutional Identity' (2023) 7(1) Irish Judicial Studies Journal 70.
[151] *Costello v Government of Ireland* [2022] IESC 44.

slim majority of the Supreme Court held that CETA would breach Ireland's 'juridical sovereignty' because its investor tribunal system would create a parallel system of justice whose awards of damages would have automatic enforcement in the domestic legal system. However, Hogan J outlined a solution to CETA's unconstitutionality: the relevant Irish statute could be amended to clarify that the enforcement of an award of damages by a CETA tribunal could be refused by the Irish High Court if it 'materially compromised the constitutional identity of the State or fundamental principles of our constitutional order'.[152]

There are three notable aspects about this proposal. The first relates to its practical effect: unlike *Crotty*, though *Costello* held that the international agreement was unconstitutional, it did not result in the need for a constitutional amendment to ratify it. Remembering Daly's observation that *procedural* popular sovereignty, embodied in full amendability through referendums, is Ireland's constitutional identity, it is significant that the first instance of 'constitutional identity' being used by Irish courts is as a tool to *avoid* the need for a referendum on an unconstitutional international agreement. The second is the power of interpretation that the judiciary would presumably have in defining Irish constitutional identity. No specific definition of constitutional identity was given. If adopted word for word, the High Court would decide whether an award of damages compromised constitutional identity – in other words, the judiciary would define the barriers of this identity. The third is the centrality of *domestic judicial power* to this constitutional identity. To MacMenamin J, the substance of constitutional identity included 'judicial independence' and 'the finality of judgments'.[153] This is largely due to the matter at hand in the case, but it indicates a willingness to define this identity substantively rather than simply based on procedure. This would mean defining certain parts of the constitutional order as more fundamental than others.

Bearing this in mind, it is significant that both *Costello* judgements which engage with constitutional identity focus on Article 5 ('Ireland is a sovereign, independent, democratic state').[154] Constitutional identity is understood less as the people's sovereign power of amendment (Article 6 with Articles 46 and 47)[155] but in terms of the *basic integrity of democratic institutions* (Article 5) – such institutions understood broadly as including not just the referendum but also the judiciary. Hogan J in particular has made use of a substantive understanding of constitutional identity in a number of cases since *Costello*, repeatedly emphasising Article 5.[156] As

[152] ibid, [233] (Hogan J) (emphasis added).
[153] ibid, [163] (MacMenamin J) (emphasis added).
[154] ibid, [9] (MacMenamin J); [213] (Hogan).
[155] It should also be acknowledged that Hogan J also stated that popular sovereignty as expressed in r Articles 46 and 47 is 'the theory upon which the Constitution is founded.' Costello (n 151) [61] (Hogan J).
[156] *DPP v Noonan* [2025] IESC 22 [4] (Hogan J); *Delaney v Personal Injuries Board* [2024] IESC 10 [38] (Hogan J); *Re Article 26 & Judicial Appointments Commission Bill 2022* [2023] IESC 34 [11]: *Heneghan* (n 3) [38] (Hogan J).

a potential repository for constitutional identity, Article 5 gives the judiciary far more scope for thick, substantive definitions of democracy than the conceptually-bounded referendum procedure. However, it is worth noting that this emphasis on constitutional identity seems to be mostly reserved to Hogan J; other judges seem generally less willing to apply broader frames of constitutional interpretation such as this.[157]

Judges defining a substantive constitutional identity does not in itself entail unamendability. However, as Jacobsohn observes, though a constitutional identity can change, it is 'resistant to its own destruction'.[158] This is why substantive constitutional identities are often intimately related to unamendability.[159] In this context, the main barrier to an Irish 'basic structure doctrine' will likely be the text of Article 46 itself rather than any pre-existing judicial doctrine. However, while the word 'any' and decades of caselaw are very difficult to interpret away, these kinds of barriers to unamendability have not been insurmountable in other jurisdictions (see part 5.3 of this thesis). It has been argued in this chapter that full amendability in Ireland should be understood in light of Bunreacht na hÉireann's purpose to secure national self-determination. Perhaps as this historical context fades in importance, the importance of full amendability will also fade. Perhaps if Northern Ireland and the Republic of Ireland move towards some form of unification, this will cause other principles, such as those underpinning the 1998 Good Friday Agreement, to replace popular sovereignty as the central ethos of the Constitution.[160] And perhaps, as Ireland moves towards ever closer union with the EU, Irish courts will feel the need to define substance to our constitutional identity in order to protect its unique features.[161] Whether these will impact on full amendability is something only time will tell.

4.5 Conclusion

This chapter argued that when considering the Irish rejection of *un*amendability and embrace of *full* amendability, the prior historical context should be considered: namely that unamendability existed under Ireland's previous Constitution and was intimately tied up with the question of Irish independence. Therefore, full amendability ought to be understood in light of the 1937 Constitution's principal political aim: securing national self-determination and

[157] See Oran Doyle and Conor Casey, 'Charter or Higher Law: The Constitution under the New Supreme Court' (2024) 44(1) Dublin University Law Journal 1.
[158] Gary Jacobsohn, *Constitutional Identity* (OUP 2010) 7.
[159] Suteu (n 125) 124. See further Oran Doyle, 'Constitutional Identity and Unamendability' in Ran Hirschl and Yaniv Roznai (eds) *Deciphering the Genome of Constitutionalism* (CUP 2024).
[160] See Oran Doyle, David Kenny, and Christopher McCrudden, 'The Constitutional Politics of a United Ireland' in Oran Doyle, Aileen McHarg, and Jo Murkens (eds) *The Brexit Challenge for Ireland and the United Kingdom* (CUP 2021).
[161] Oran Doyle, 'Trojan Horses and Constitutional Identity' *Verfassungsblog* (23 Nov 2022) https://verfassungsblog.de/trojan-horses-and-constitutional-identity/

sovereignty. By ensuring that no part of the Constitution would be beyond the reach of the amending power, Article 46 gives legal effect to Article 1's right to self-determination. This chapter also traced a consistent thread of judicial interpretation which rejects any judicial review of amendments and upholds the finality of referendum results.

The Irish judiciary's conceptualisation of popular sovereignty can rightly be described as a kind of myth-making – the direct role of 'the people' (i.e. for the purposes of referendums) is peripheral, episodic, and highly conditioned. However, full amendability allows the Irish Constitution to satisfy two salient republican principles set out in Chapter 3. The Constitution's *contestable* and provisional nature gives it a functional legitimacy even among those who oppose aspects of its substantive content. It allows the political community to continuously work *through* its procedures (including but not limited to referendums) rather than against them. And though it loudly proclaims its adherence to immutable values of natural law, the amendability of even these provisions reminds us that this Constitution is *mutable* to its core, subject to inevitable change whether formal or informal.

Full amendability is open to abuse, regardless of the amendment procedure that is in place. Perhaps the referendum veto makes democratic backsliding less likely in Ireland than elsewhere, but referendums can and often are used for anti-constitutionalist ends. Therefore, the possibility exists that full amendability could be misused to destroy the Irish Constitution's basic democratic architecture. In this scenario, the Irish judiciary could try to interpret limits on amendability – the tools for such interpretation are latent in every constitution, so argue unamendability theorists. However, we should be clear about what would be lost if such a doctrine was introduced into Irish constitutional law. Above any of its substance, the fact that the Irish Constitution can be fully amended is a (perhaps *the*) core explanation for its relative longevity.

5. INDIA: BASIC STRUCTURE CONSTITUTIONALISM

'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity.'

- YV Chandrachud CJ, *Minerva Mills v Union of India* [1980] 3 SCC 625, para 16.

5.1 Introduction

The basic structure doctrine is the most famous and influential aspect of Indian constitutional law and remains the oldest exemplar of implied unamendability in the modern constitutional world. It is, in many ways, the living embodiment of the unconstitutional constitutional amendments idea. It is therefore a vital case to assess in any evaluation of unamendability. In simple terms, the doctrine holds that the amending power (in the Indian case, Parliament) cannot destroy the 'basic structure' or 'essential features' of the Constitution. While it is empowered to amend the Constitution, these aspects of the Constitution must survive post any amendment it makes. The basis of this doctrine is not found in any explicit provision of the Constitution, but is a product of judicial innovation in response to real threats to constitutional governance and judicial power in the 1970s.[1]

Under Article 368,[2] amending power is vested in India's Parliament. Most of the Constitution can be amended with a two-thirds majority in both houses of Parliament; some other parts require the same as well as approval from a majority of legislatures from India's states; a small number of other articles can be amended by a simple parliamentary majority. This collection of amendment procedures was designed to strike a balance between constitutional rigidity and flexibility,[3] to ensure the effectiveness and supremacy of the Constitution while allowing politicians sufficient room to develop 'social revolutionary' policies. However, in the actual working of the Constitution, these amendment rules proved to be insufficiently entrenching, and allowed the executive which controlled Parliament to enact self-aggrandising amendments in the 1970s, leading to an intense battle for supremacy between Parliament and the judiciary, and the 'Emergency'. In response to this threat to judicial power, the judiciary developed the basic structure doctrine ('BSD').

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[1] For an overview of the Indian Constitution's amendment rules and basic structure doctrine, see Madhav Khosla, 'Constitutional Amendment' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

[2] Constitution of India 1950, art 368.

[3] Constituent Assembly Debates, 17 Sept 1949, vol 9, BR Ambedkar https://www.constitutionofindia.net/debates/17-sep-1949/ accessed 28 April 2024.

Although the precise boundaries and extent of the basic structure have been somewhat elusive, the BSD has been primarily motivated by a desire to clip the wings of Parliament and, by extension, the executive branch. This is in keeping with a general effort to ensure *constitutional supremacy* against the political desire for *parliamentary sovereignty*. The basis of the doctrine is the belief that because Parliament is a creature of the Constitution, enacting amendments that destroyed the Constitution's basic structure would be beyond its limited remit. However, a crucial effect of the doctrine is that it gives the final say over constitutional interpretation and reform – in other words, *the final say over the entire Constitution* – to the judiciary. Considering the doctrine's theoretical basis and legitimacy forces us to consider judicial supremacy and even *judicial sovereignty*.

In this chapter, we consider the development of India's constitutional amendment rules in the Constituent Assembly and early caselaw on amendability. We then consider in detail the majority and minority judgements in the *Kesavananda Bharati* case of 1973 which introduced the notion of an unamendable basic structure. This is followed by recounting the events of the Emergency (1975-77) and its related caselaw, as well as political developments and proposals for reform. The chapter concludes with a theoretical discussion about 'final say sovereignty' and the BSD, the contextual factors, particularly the threat of authoritarianism, that necessitated the doctrine's arrival, as well as a critical evaluation of the doctrine's role in India's constitutional democracy.

5.2 Early amendment rules

This section covers the Constituent Assembly's approach to constitutional amendment and early caselaw on amendability leading up to the *Kesavananda Bharati* case of 1973. Before doing so, it is necessary to lay out the procedure to amend the Indian Constitution. Article 368 vests amendment powers in the Indian Parliament: the Lok Sabha (the directly elected, more powerful lower chamber) and the Rajya Sabha (the upper chamber elected by the legislatures of each Indian state).[4] Article 368 specifies that a constitutional amendment can only be enacted once both houses pass it as a bill by a simple majority of each house's total membership and two-thirds of those present and voting. Amendments to articles concerning India's federal structure must follow the same process, along with approval by a majority of state legislatures. Apart from the Article 368 process, Articles 4, 169, and 239A, paragraph 7 of Schedule 5, and paragraph 21 of Schedule 6 each provide that they can be changed by a simple majority vote in both houses of Parliament. This is distinct and separate from Article 368 and is not technically defined as an 'amendment power'. Nonetheless, the Indian Constitution effectively includes three tiers of

[4] Constitution, art 368.

amendment difficulty: 1) a simple parliamentary majority of those specific provisions just mentioned, 2) a two-thirds majority and simple majority of total membership of each house, and 3) the same plus approval by a majority of state legislatures. Most of the Constitution can be amended under the second method.

5.2.1 Amendment rules at the Constituent Assembly

In 1858, the British crown assumed sovereignty over India from the East India Company. Britain's new colony in India was referred to as the 'British Raj'.[5] The Raj was a complex system of both direct British administration and 'princely states' whose rulers pledged fealty to the British monarch. Its undemocratic and imperialistic nature motivated a growing movement for Indian home rule and independence. The Government of India Acts 1919 and 1935 were designed to devolve more power and governing responsibility to native Indians, while remaining a crown colony of Britain.[6] By 1946, the British government had decided to prepare India for full independence. A Constituent Assembly was established to develop a constitution for an independent India. With the passing of the Indian Independence Act 1947, 'British India' was partitioned into India and Pakistan.[7] India became a fully independent republic upon the coming into force of its new Constitution in 1950.

India's new Constitution was intended to fulfil a number of political aims. Some are familiar to other constitutions, such as securing national sovereignty and protecting individual rights. But more unique was that this new Constitution was supposed to facilitate a 'social revolution':[8] India was and remains a nation mired by deep poverty and social injustice; many felt that the new regime would only be worthwhile if it allowed for a significant level of redistribution and empowerment of ordinary Indians.[9] For this reason, the 'directive principles of state policy' were added to the Constitution, directing the legislature to enact policies towards the creation of a welfare state.[10] In addition, a strong federal system in which states and panchayats could act without oversight from the centre could impede development and carried the potential for discrimination, particularly on the basis of caste difference, to continue by stealth. This is partly the reason for the highly *centralised* nature of Indian federalism. In contrast to other federations, India's central government is extremely powerful vis-à-vis the states.[11] Competences for the

[5] DD Basu, *Introduction to the Constitution of India* (26th edn, LexisNexis 2022) 3.
[6] MP Singh, *VN Shukla's Constitution of India* (14th edn, EBC Publishing 2022) A5-A12.
[7] The Constituent Assembly established in 1946 thus did not apply to Pakistan.
[8] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (OUP 1999) 6.
[9] Constituent Assembly Debates, 22 Jan 1947, vol 2, Jawaharlal Nehru (2.14.15) https://www.constitutionofindia.net/debates/22-jan-1947/ accessed 11 May 2026.
[10] See Constitution, arts 36-51. As with the Irish 'directive principles of social policy', these are non-justiciable.
[11] Austin (n 8) 560-561; Tripurdaman Singh, 'The Authoritarian Roots of India's Democracy' (2023) 34(3) Journal of Democracy 133.

state and federal legislatures are determined within the national Constitution itself,[12] the centre is empowered to create/dismember states at will,[13] and can override state authorities through 'President's rule'.[14] For this reason, the Constitution was not just drafted as a *check* on political power, but a *channel* for political action.[15]

On the other hand, one of the most salient parts of the new Constitution was Part III which lists citizens' fundamental rights. These include Article 14, the right to equality, Article 19, freedom of speech, and Article 21, the right to life and liberty. These three articles have been described by the Indian judiciary as the 'golden triangle' of the Constitution when it comes to protecting human dignity and freedom.[16] Preceding all of these rights is Article 13, which guarantees the supremacy of fundamental rights over all other laws:

> (1) All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of [Part III], shall, to the extent of such inconsistency, be void.
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

Article 32 makes this protection effective by guaranteeing that the Supreme Court has the jurisdiction to grant remedies for breaches of fundamental rights. This was described by Ambedkar as the 'most important' article in the Constitution, 'without which [it] would be a nullity'. The enforcement of fundamental rights through judicial review was, for Ambedkar, the 'soul of the Constitution and the very heart of it'.[17]

A constitutionally-entrenched bill of rights was longstanding aim of the Indian nationalist movement. Partially inspired by the young Irish Free State, its dominion status, its Constitution and bill of rights, Motilal Nehru's 1928 report for the Indian National Congress ('Congress party') recommended a similar arrangement for India. For Nehru, the protection of fundamental rights was central to India's independence: 'it is obvious that our first care should be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances*.'[18] Just like Ireland (and unlike the other 'white' British dominions), India could not depend on the British parliamentary sovereignty system to guarantee its rights, it needed to enumerate them explicitly. Prime Minister Jawaharlal Nehru echoed his father when stating to

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[12] Constitution, art 245; 7th schedule.
[13] Constitution, arts 2 and 3.
[14] Constitution, art 356.
[15] See discussion in Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) 35-38.
[16] See *Minerva Mills v Union of India* [1980] 3 SCC 625
[17] Constituent Assembly Debates, 9 Dec 1948, vol 7, BR Ambedkar (7.70.172) https://www.constitutionofindia.net/debates/09-dec-1948/ (accessed 28 April 2024).
[18] Motilal Nehru *et al,* 'The Nehru Report' 89-90. 1928 1975 (New Delhi: Michiko & Panjathan 1975) https://archive.org/details/in.ernet.dli.2015.212381/mode/2up accessed 29 July 2024.

the Constituent Assembly in 1947 that fundamental rights should be '*something that you want to make permanent in the constitution*.'[19]

The following year, however, Nehru asserted to the Assembly that 'there is *no permanence* in Constitutions' and that '[i]f you make anything rigid and permanent you stop a Nation's growth.'[20] A perennial debate of Indian politics between Parliament's ability to enact social reform and judicial enforcement of individual rights was beginning to raise its head. Although the courts would undoubtedly be empowered to strike down unconstitutional laws, Nehru believed that ultimately Parliament would be sovereign in the new India. Foreshadowing the constitutional battles in which his daughter, Prime Minister Indira Gandhi, would be embroiled in future decades, Nehru asserted that the courts could not veto the will of the people expressed through their Parliament:

> [N]o judge and no Supreme Court can make itself a third chamber. No Supreme Court and no judiciary can stand in Judgment over the sovereign will of Parliament representing the will of the entire community… in the ultimate analysis, where the future of the community is concerned, no judiciary can come in the way. And if it comes in the way, *ultimately the whole Constitution is a creature of Parliament*… ultimately the fact remains that the legislature must be supreme and must not be interfered with by the courts of law in such measures of social reform.[21]

The Constituent Assembly debated the draft Constitution's amendment rules on 17 September 1949. The amendment article roughly reflected the tiered amendment difficulty seen in the current Article 368. Modifications were proposed, including proposals to include mandatory referendums for amendments.[22] However, many others wanted an arrangement in which Parliament could amend the Constitution at will, akin to the British Parliament's powers – this was motivated by the feeling that it would be wrong for the Assembly to tie the hands of future Parliaments which, being elected by a universal franchise, would have a greater claim to democratic legitimacy.[23] Following the Irish Free State Constitution example, Nehru proposed that for its first ten years the Constitution should be amendable by a simple parliamentary

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[19] Constituent Assembly Debates, 30 April 1947, vol 3, Jawaharlal Nehru (3.19.146) https://www.constitutionofindia.net/debates/30-apr-1947/

[20] Constituent Assembly Debates, 8 November 1948, vol 7, Jawaharlal Nehru (7.51.113) https://www.constitutionofindia.net/debates/08-nov-1948/ accessed 18 June 2024.

[21] Constituent Assembly Debates, 10 Sept 1949, vol 9, Jawaharlal Nehru at 1197 https://sansad.in/ls/debates/historical?1 (emphasis added).

[22] Constituent Assembly Debates, 17 Sept 1949, vol 9, Brajeshwar Prasad https://www.constitutionofindia.net/debates/17-sep-1949/ accessed 28 April 2024.

[23] See comments by Mr Justice Rohinton Nariman in a public lecture 'Doctrine of Basic Structure under Indian Constitution: Madras High Court Bar Association at Madurai' Justice Nariman Official Channel <https://www.youtube.com/watch?v=cvUf9ZeEe8Y&list=PLsCEaa5X6b9Aa0HJByLXpZlfDTlRwlNSK> accessed 1 Feb 2025.

majority.[24] Many members felt that the drafting committee's decision to make amendment more difficult than was placing too many fetters on parliamentary sovereignty.[25]

In response to these pleas, BR Ambedkar – the chair of the Assembly's drafting committee – highlighted the ease with which the Constitution could be changed, emphasising that it had 'eliminated the elaborate and difficult procedures such as a decision by a convention or a referendum' and instead left the amending power with the legislature 'central and provincial'.[26] He further illustrated the ease with which the new Constitution could be amended by comparing it to other countries' amendment processes – Canada, Australia, Ireland, Switzerland, and the United States – all examples of rigid constitutions which could not be changed by the legislature.[27] He then outlined the three levels of amendment difficulty that the Constitution would include. His broadest point was that the Indian Constitution was attempting to strike a delicate balance between rigid entrenchment and excessive flexibility. For him, given that amending a constitution would conceptually need to be more difficult than changing ordinary legislation, the committee's proposal was attempting to create the most logically flexible procedure. A two-thirds parliamentary majority was all that was required to amend most of the Constitution; it was, according to Ambedkar, 'difficult to conceive a simpler method of amending the Constitution'.[28]

In his final address to the Assembly on 25 November 1949, Ambedkar again defended this amendment procedure. After endorsing Jefferson's maxim that one generation should not be allowed to constitutionally bind another, he rebuffed critics of the new Constitution by highlighting the *ease* at which amendment could be done:

> The Assembly has not only refrained from putting a seal of finality and infallibility upon this Constitution by denying to the people the right to amend the Constitution as in Canada or by making the amendment of the Constitution subject to the fulfilment of extraordinary terms and conditions as in America or Australia, but has provided *a most facile procedure* for amending the Constitution. I challenge any of the critics of the Constitution to prove that any Constituent Assembly anywhere in the world has, in the circumstances in which this country finds itself, provided such a facile procedure for the amendment of the Constitution. If those who are dissatisfied with the Constitution have only to obtain a 2/3 majority and if they cannot obtain even a two-thirds majority in the parliament elected on adult franchise in their favour, their dissatisfaction with the Constitution cannot be deemed to be shared by the general public.[29]

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[24] Arun Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Hart 2017) 212-213.
[25] CAD 17 Sept 1949 (n 22) PS Deshmukh (9.143.466), Acharya Jugal Kishore (9.143.552), BR Ambedkar (9.143.585).
[26] Constituent Assembly Debates, 4 Nov 1948, vol 7, BR Ambedkar (7.48.249) (emphasis added) <https://www.constitutionofindia.net/debates/04-nov-1948/> accessed 1 Feb 2025.
[27] CAD 17 Sept 1949 (n 22) BR Ambedkar (9.143.586-9.143.590).
[28] CAD 4 Nov 1948 (n 26) BR Ambedkar (7.48.249) <https://www.constitutionofindia.net/debates/04-nov-1948/> accessed 14 May 2026.
[29] Constituent Assembly Debates, 25 Nov 1949, vol 11, BR Ambedkar (11.165.313) https://www.constitutionofindia.net/debates/25-nov-1949/ accessed 14 May 2026.

The following day, 26 November 1949, the Constitution of India was ratified by the Constituent Assembly, coming into force in January 1950. As Khosla points out, the amendment process adopted was 'striking for its ease' – most of the Constitution could be amended without approval from the states.[30] Although the process could have been easier, large-scale transformation of the Constitution through the amending power was possible. The opportunity this presented to Parliament was invoked almost immediately with the 1st Amendment of 1951. When defending the amendment, Prime Minister Nehru emphasised that the Constitution was a work-in-progress, not a tablet of stone. In doing so, he made many of the same points against constitutional permanence that his fellow nationalist leader Éamon de Valera made in Ireland in 1934:[31]

> [T]his great Constitution of ours, over which we laboured for so long, is not a final and rigid thing, which must either be accepted or broken. A Constitution which is responsive to the people's will which is responsive to their ideas, in that it can be varied here and there, they will respect it all the more and they will not fight against, when we want to change it. Otherwise, if you make them feel that it is unchangeable and cannot be touched, *the only thing to be done by those who wish to change it is to try to break it*. That is a dangerous thing and a bad thing. Therefore, it is a desirable and a good thing for people to realise that this very fine Constitution […] is good in so far as it goes but as society changes, as conditions change we amend it in the proper way. It is not like the unalterable law of the Medes and the Persians that it cannot be changed, although the world around may change.[32]

The 1st Amendment created a mechanism by which certain laws – either by the federal Parliament or by state legislatures – would be immunised from judicial review.[33] Article 31A was inserted to ensure that laws passed for the purpose of land redistribution could not be challenged on grounds that they violated the right to private property found in Part III. Article 31B went further, immunising *any* federal/state laws placed in the new Ninth Schedule of the Constitution from rights-based judicial review. The socio-political context of these reforms was the desire to undo the highly unequal distribution of land in India.[34] Notwithstanding the clear socio-political justifications for these measures, the effect of this amendment was to place a large amount of power in the hands of the legislative branch and, by necessary extension in most parliamentary systems, in the federal executive branch. Parliament not only had the sole authority to amend the Constitution, but it also had the power to immunise its own legislative actions from judicial oversight through Article 31B.

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[30] Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) 157.
[31] See part 4.2.3 of this thesis.
[32] Parliamentary Debates, Constitution (First Amendment) Bill (16 May – 2 June 1951), 2 June 1951; Jawaharlal Nehru, *Selected works of Jawaharlal Nehru Vol 16 Pt I* (OUP 1994) 239 https://nehruarchive.in/documents/the-constitution-first-amendment-bill-2-june-1951-go79gx accessed 13 May 2026; quoted in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, para 1419.
[33] Constitution (First Amendment Act) 1951, s 5; Constitution, art 31B.
[34] MP Singh, *VN Shukla's Constitution of India* (14th ed, Eastern Book Company 2022) 309.

5.2.2 Early amendment caselaw

The first case that dealt with the issue of substantive limits to amendability came soon after the Constitution's adoption with the *Shankari Prasad* case of 1951.[35] Here, the aforementioned Articles 31A and 31B, designed to immunise some laws from judicial review, were challenged as unconstitutional. It was argued that these articles and the amendment that created them were a violation of Article 13's guarantee that any law which violated fundamental rights would be void. The Supreme Court held that these were not 'laws' for the purposes of Article 13. Therefore, rights *could* be amended by Parliament. In 1965, the Supreme Court reiterated this stance in the *Sajjan Singh* case by a 3:2 majority.[36] The majority was of the view that if the Constituent Assembly had wished to limit amendability, they would have explicitly done so. However, the two dissenting judges raised doubts about this. Mudholkar J questioned whether the Constituent Assembly had given Parliament the power to destroy what he called the 'basic features' of the Constitution through the amendment article.[37]

These dissenting judgements evinced shifting attitudes in Indian legal circles at this time. The same year, a German academic, Dietrich Conrad, gave a lecture to the law faculty of the Banaras Hindu University outlining his theory of 'implied limits on amending powers'. The transcript of this lecture was delivered to MK Nambyar, a leading Indian constitutional lawyer.[38] Following Sieyès' theory, Conrad distinguished between *constituent power* and *amending power* – the former being the unlimited power to *create* a constitution and the latter being the limited power to *amend* a constitution.[39] 'Amendment' meant improvements, alterations, and tweaks but not fundamental replacement of the constitution. His argument regarding India was that since the body vested with the power to amend the Indian Constitution – Parliament – was itself a creation of the Constitution – a *constituted* body – its amending power was necessarily limited.[40] Only the constituent power – the people or a constituent assembly acting on their behalf – had the ability to fundamentally transform a constitution.

Conrad's main exemplar was his native Germany which was used to show the dangers of giving a parliament untrammelled amendment powers. The Constitution of Weimar Germany had an amendment mechanism very similar to India's present one: a two-thirds majority approval in

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[35] *Shankari Prasad v Union of India* (1951) SCR 51.
[36] *Sajjan Singh v State of Rajasthan* (1964) SCC OnLine SC 25.
[37] ibid, para. 55 (Mudholkar J).
[38] See AG Noorani, *Constitutional Questions and Citizens' Rights: A omnibus comprising Constitutional Questions in India and Citizens' Rights, Judges and State Accountability* (Oxford University Press 2006) ch 1.
[39] Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) 15-16 Indian Year Book of International Affairs 347, 389-390.
[40] ibid, 413-414.

both houses of parliament.[41] The Weimar Constitution was effectively destroyed by Hitler and the Nazis in the 1930s through constitutional amendments passed by the Reichstag.[42] The most egregious of these amendments was Enabling Act 1933 which allowed a constitutional democracy to transform into a totalitarian dictatorship. Such amendments struck at the heart of what the Weimar Republic was originally supposed to protect, and allowed Nazi Germany to exist within the shell of 'legality' that the Weimar Constitution continued to provide.[43]

For Conrad, whether the amendment process can embody the constituent power was important in assessing its limitations. A process based on mandatory referendums, such as Ireland's Article 46, could be called a 'fusion of revising power and constituent power' and was, in his estimation, *less likely* to face substantive limits.[44] In contrast, it was clear that arrangements like India's Article 368 did not embody the constituent power – therefore, it faced limits.[45] The legislature could not undo the foundations of its own authority – the basic structure of the constitution. Any alternative would be akin to a man sitting in a tree sawing off the branch on which he sits.

This idea of implied limits was first seriously engaged with in the *Golaknath* case of 1967.[46] The case concerned the same kind of challenge seen in *Shankari Prasad* and *Sajjan Singh*: it was argued that Article 13 prohibited amendments to Part III's fundamental rights. Overturning their 1951 and 1965 decisions, the Supreme Court held that amendments were 'laws' for this purpose and that amendments to fundamental rights were thus *ultra vires*. According to the Court, Parliament's amending power actually stemmed from Article 245 (the power to make laws); Article 368 merely *described* the process of making a special kind of law – a constitutional amendment.[47] Thus, a constitutional amendment was merely a species of the wider genus of 'law'. MK Nambyar, an advocate in this case, used Conrad's manuscript to argue in favour of implied limits. The Court did not specifically pronounce on whether Conrad's theory of implied limits was correct, but noted that such a question – and the wider one about the precise boundaries of the amending power – should be answered by a larger court.[48]

[41] ibid, 382-383.
[42] ibid, 387.
[43] See part 6.3 of this thesis.
[44] Conrad (n 39) 412.
[45] Conrad (n 39) 413.
[46] *Golaknath v State of Punjab* (1967) 2 SCR 762.
[47] *Golaknath* (n 46) para 162 (Subba Rao CJ).
[48] ibid, para 14 (Subba Rao CJ).

5.3 *Kesavananda Bharati v State of Kerala* (1973)

Golaknath and the *Kesavananda Bharati* case both concerned the issue of land reform in the state of Kerala. Since the right to private property was a fundamental right, and since *Golaknath* had held such rights to be unamendable, could the federal or state government pursue land reforms which impacted the rights of property owners? This question was of central importance to Prime Minister Indira Gandhi and her Congress party which was pursuing a socialist programme of land redistribution. Parliament attempted to overturn *Golaknath* through the 24th Amendment by clarifying that Parliament's amendment power was unfettered, that any provision of the Constitution could be amended 'by way of addition, variation or repeal'.[49] It also amended Article 13 to specify that amendments did not classify as 'laws'. The 25th Amendment added 'Article 31C', which prohibited judicial review of laws meant to further the aims of the directive principles.

These amendments (among others) were challenged in the Supreme Court in *Kesavananda Bharati* on grounds of unconstitutionality. Swami Kesavananda Bharati, a Hindu religious leader in Kerala, objected to attempts by the state government to acquire his monastery's property. In making his case, he challenged the addition of the Kerala Land Reforms Act 1969 to the Ninth Schedule and the recent constitutional amendments passed by Gandhi's government. The 13 judge bench of the Supreme Court was the largest ever assembled for an Indian legal case; it had 11 individual judgements and spanned to almost 800 pages in total ('a demonstration of self-indulgence over self-discipline', as Austin called it).[50] The core outcome of this highly nuanced case was that Parliament *could* amend any provision of the Constitution, including fundamental rights, thus overturning *Golaknath*. However, this power could only be exercised provided the 'basic structure' of the Constitution survived. The challenged amendments were thus upheld, but the 25th Amendment's restriction of judicial review was held unconstitutional. Khanna J held that '[t]he word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change', the old Constitution here meaning 'the retention of [its] basic structure or framework.'[51]

5.3.1 The 'majority'

The majority in *Kesavananda* is generally thought to be 7:6: six judges favoured the idea of 'implied limits' to the amending power; six judges did not; Khanna J did not favour the specific

[49] Constitution (Twenty-fourth Amendment) Act 1971, s 3.
[50] Austin (n 8) 276.
[51] *Kesavananda* (n 32) para 1480 (Khanna J). As explained by Krishnaswamy, Khanna J's conclusion rested almost exclusively on his interpretation of the word 'amendment'. The other majority opinions in this case and in subsequent basic structure cases were not so constrained in grounding of the basic structure doctrine; Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2011) 179.

idea of implied limits but did favour the idea of the basic structure, thus tipping the balance of the court.[52] However, determining the ratio or precise number of the majority is unclear: Khanna J said the majority was seven judges; Reddy J said the majority was eight;[53] a summary statement signed by nine judges, annexed to the judgement itself, effectively clarified that the position of the Court was that fundamental rights could be amended, that *Golaknath* had been decided incorrectly, but that the Supreme Court had the power to review constitutional amendments for compatibility with the Constitution's basic features.[54]

Sikri CJ's was the leading judgement for the majority. His approach to the BSD was holistic and started with understanding the principles found in the Preamble. Under this rubric, he believed that the following basic features were clear:

> (1) Supremacy of the Constitution; (2) Republican and Democratic form of Government; (3) Secular character of the Constitution; (4) Separation of powers between the Legislature, the executive and the judiciary; (5) Federal character of the Constitution. The above structure is built on the basic foundation, i.e., the dignity and freedom of the individual. This is of supreme importance. This cannot by any form of amendment be destroyed.[55]

As with almost all other judges, Sikri CJ held that *amending* the Constitution must mean something less than *replacing* the Constitution. However, the precise meaning of 'amendment' under Article 368 need not entail stultifying or excessively restricting political development; it could allow radical political action, but only within the confines of the Constitution's broader purpose:

> In my view that meaning would be appropriate which would enable the country to achieve a social and economic revolution without destroying the democratic structure of the Constitution and the basic inalienable rights guaranteed in Part III and without going outside the contours delineated in the Preamble.[56]

Slightly incoherently, although Sikri CJ insisted on the inalienability of Part III's fundamental rights and their root in natural law, he did not include fundamental rights in his list of essential features. As with the rest of the bench, he held that Part III could be amended subject to the basic structure limitation.

In Thiruvengadam's view, the BSD was a product of comparative law, principally because of the influence of Conrad whose work was engaged by judges in the case,[57] but also because of the extensive attention paid by judges to foreign caselaw. One of the most cited foreign cases

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[52] Khosla (n 1) 240.
[53] Austin (n 8) 268.
[54] Though the legal validity of this statement has been called into question; see Sanjay Jain, 'Kesavananda Bharati – A watershed in the evolution of jurisprudence of judicial review in India' in Sanjay Jain and Sathya Narayan (eds) *Basic Structure Constitutionalism: Revisiting Kesavananda Bharati* (Eastern Book Company 2011) 10.
[55] *Kesavananda* (n 32) paras 316-317 (Sikri CJ).
[56] ibid, para 225 (Sikri CJ).
[57] ibid, paras 979-982 (Ray J), para 1485 (Khanna J), paras 2069-2070 (Beg J).

was Ireland's *State (Ryan) v Lennon*. While Sikri CJ argued that Article 368 was distinct from the Irish 1922 Constitution's Article 50, he declared his alignment with the dissenting judgement of Kennedy CJ, that the Irish Oireachtas could not expand its amending power.[58]

Where Sikri CJ took a holistic approach looking to the Constitution's ethos and principles, Reddy J's judgement focused directly on Article 368.[59] He held that in order to determine the proper meaning of 'amendment' under Article 368, it was necessary to understand the provision's place within the wider constitutional structure. Believing that the Constitution's binding force stemmed from the sovereignty of the Indian people, this meant that 'no state need have unlimited power and indeed in Federal Polities no such doctrine is sustainable.'[60] Every power established by the Constitution is limited by the Constitution itself – therefore, the amending power is limited.

5.3.2 The minority

Palekar J's judgement was a forthright defence of an open-ended amending power.[61] Since the purpose of amending powers was to allow for *orderly* constitutional evolution, it made no sense to limit this power to 'unessential features'; the logic for an amending power was to allow *all* features to evolve, otherwise the population would resort to extra-constitutional revolution.[62] In contrast to the prevailing mood of the Court, he held that it was irrelevant to the case at hand whether 'amendment' under Article 368 entailed 'replacement' or full repeal of the Constitution. Article 368 was a plenary power and he endorsed the 24th Amendment's language of 'addition, variation or repeal'.[63] Palekar J also believed that the directive principles and fundamental rights were not in conflict; it was only *through* the achievement of the directive principles that fundamental rights could actually be enjoyed by the mass of ordinary citizens.[64] Nonetheless, Austin notes that Palekar J signed the summary statement in favour of the BSD (apparently by mistake).[65]

Ray J also rejected the majority decision, holding that the scope of Article 368's amending power was wide and unrestricted. He rejected the idea that some parts of the Constitution were essential and others were not; the proper position was that *all* of the Constitution's content was essential and it was not for the Court to determine what was essential or unessential.[66] Perhaps

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[58] ibid, para 405 (Sikri CJ).
[59] Sanjay Jain and Amit Pai, '6 Justice P. Jaganmohan Reddy' in Jain and Narayan (n 54) 56.
[60] *Kesavananda* (n 32) para 1165 (Reddy J).
[61] ibid, para 1264 (Palekar J).
[62] ibid, para 1289 (Palekar J); Sanjay Jain, Amit Pai, Rohit Saboo, '7 Justice D.G. Palekar' in Jain and Narayan (n 54) 67.
[63] *Kesavananda* (n 32) para 1291 (Palekar J).
[64] Sanjay Jain, Amit Pai, Rohit Saboo, '7 Justice D.G. Palekar' in Jain and Narayan (n 54) 67.
[65] Austin (n 8) 264n, 268.
[66] *Kesavananda* (n 32) para 949 (Ray J).

most significant is what he said about the amending power's role in the wider system of checks and balances: as long as the amending power had an open scope of action, the delicate balance of constitutional democracy between *co-equal* branches was maintained:

> [I]f the power of amendment of the Constitution is co-extensive with the power of the judiciary to invalidate laws, the democratic process and the co-ordinate nature of the great departments of the State are maintained. The democratic process is maintained because the will of the people to secure the necessary power to enact laws by amendment of the Constitution is not defeated. The democratic process is also respected because when the judiciary strikes down a law on the ground of lack of power, or on the ground of violating a limitation on power, it is the duty of the legislature to accept that position, but if it is desired to pass the same law by acquiring the necessary power, an amendment validly enacted enables the legislatures to do so and *the democratic will to prevail*. This process harmonises with the theory of our Constitution that the three great departments of the State, the legislature, the judiciary and the executive are co-ordinate and that none is superior to the other. The normal interaction of enactment of law by the legislation, of interpretation by the courts, and of the amendment of the Constitution by the legislature, *go on as they were intended to go on*.[67]

The problem with a doctrine of basic structure or implied limits was that it would undo this delicate balance. Whereas ordinarily the amending power could, if it so willed, overturn a problematic judicial interpretation of the Constitution, a basic structure doctrine would prevent this – judicial interpretation would become final and incontestable. For Ray J, this was incompatible with democracy. In a democracy, Ray J believed that 'the democratic will [should] prevail' or have the last word.

When looking to foreign caselaw, Ray J concluded that it was legitimate for an amending power to increase its own powers – the majority ruling in the Irish *Ryan* case being evidence for this.[68] The amending power was not a constituted entity which must be locked into material boundaries; by its nature, it was necessarily enabled to *change* the boundaries of the Constitution, including those relating to its own power. Rather than being a necessary danger that must be tolerated through implied limits, the amending power was *central* to achieving the Constitution's objectives:

> The framers of the Constitution did not put any limitation on the amending power because the end of a Constitution is the safety, the greatness and well being of the people. Changes in the Constitution serve these great ends and carry out *the real purposes of the Constitution*.[69]

While Ray J's judgement presented many compelling arguments against unamendability, it concluded by offering a rather incongruous concession to the majority. In line with the prevailing mood of the Court, he said that 'amendment' cannot mean replacement or abolition of the existing Constitution; it must 'leave an organic mechanism providing the Constitution

[67] *Kesavananda* (n 32) para 984 (Ray J).
[68] *Kesavananda* (n 32) para 965 (Ray J).
[69] *Kesavananda* (n 32) para 987 (Ray J).

organisation and system for the State.'[70] Ray J thus conceded the main point that the pro-basic structure majority argued: that amendment meant something less than replacement. If this was correct, the idea of *some constitutional content* beyond the scope of the amending power was conceded too, even if (presumably) what Ray J's understanding of unamendable content was smaller than that of Sikri CJ or Reddy J, for example. In this way, Ray J essentially conceded the argument for the BSD.

5.3.3 Khanna J

The judgement of Hans Khanna J is generally thought to be decisive in the birth of the BSD: six judges apparently believed in 'implied limitations'; six did not, and Khanna J's nuanced defence of the basic structure idea tipped the balance in favour of the former.[71] Despite this role, some of the strongest and most compelling writing *against* the idea of unamendability can be found in his judgement.[72] Khanna J emphasised the central importance of an amending power for any constitution. He reasserted Ambedkar's remarks on the importance of open-ended amendability,[73] as well as invoking Jefferson, Madison, and others who believed that, ultimately, limits on amendability were futile as 'the people' would always be able to exert their political will. When considering the *Ryan* case, he thought that Kennedy CJ was clearly wrong and that the Irish Oireachtas could expand its amending power.[74] He agreed with the sentiment that an unamendable constitution was not only the worst tyranny of time, but '*the very tyranny of time*.'[75]

Whereas in *Golaknath*, the Supreme Court suggested that fundamental rights could only be changed by a new constituent assembly,[76] Khanna J went further, saying that if ever the people wished to do away with the Constitution entirely – *by any means they saw fit* – they could do so. The Supreme Court could not prescribe a method of doing this, as this was beyond their capacity. It was something in the realm of popular sovereignty, not law:

> [T]here [is] no provision in the Constitution giving authority for drafting a new and radically different Constitution with different basic structure or framework. This fact, in my opinion, would not show that our Constitution has a lacuna and is not a perfect or a complete organic instrument, for it is not necessary that a Constitution must contain a provision for its abrogation and replacement by an entirely new and different Constitution. The people in the final analysis are the ultimate sovereign and if they decide to have an entirely new Constitution, *they would not need the authority of the existing Constitution for this purpose*.[77]

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[70] *Kesavananda* (n 32) para 1107 (Ray J).
[71] Khosla (n 1) 239.
[72] For this reason, it has been queried whether his judgement should instead be categorised with the minority; Austin (n 8) 268.
[73] *Kesavananda* (n 32) para 1417 (Khanna J).
[74] *Kesavananda* (n 32) para 1507 (Khanna J).
[75] *Kesavananda* (n 32) para 1445 (Khanna J).
[76] *Golaknath* (n 46).
[77] *Kesavananda* (n 32) para 1487 (Khanna J).

Despite this defence of an open-ended amending power, Khanna J's judgement is most famous for its *ratio*: that the amending power *cannot* alter whatever it wants. His defence of a limited amending power was nuanced. Rather than arguing that certain amendments would be so intrinsically wrong that they could never be legally enacted by any authority, Khanna J's belief in limited amendability had a more modest basis: what he took to be the meaning of the word 'amendment' in Article 368. Similarly to Reddy J, 'amendment' meant modifications to a constitutional order *that continued to exist*. The power could not be used to subvert the identity of the Constitution that granted that power in the first place. Some basic features would have to survive. But apart from this basic requirement, anything was contestable:

> *Subject to the retention of the basic structure or framework of the Constitution*, I have no doubt that the power of amendment is plenary and would include within itself the power to add, alter or repeal the various articles including those relating to fundamental rights. During the course of years after the Constitution comes into force, difficulties can be experienced in the working of the Constitution. It is to overcome those difficulties that the Constitution is amended … All these measures, in my opinion, would lie within the ambit of the power of amendment. The denial of such a broad and comprehensive power would introduce a rigidity in the Constitution *as might break the Constitution*. Such a rigidity is open to serious objection in the same way as an unamendable Constitution.[78]

Ultimately, Khanna J's view on amendability was defined by two principles: 1) the people ultimately have constituent power to overthrow the Constitution at will (popular sovereignty); and 2) as long as the Constitution is in force, 'amendment' is a limited, circumscribed power. In this vein, Khanna J explicitly Conrad's argument that '[a]ny amending body organized within the statutory scheme, howsoever verbally unlimited its power, cannot *by its very structure* change the fundamental pillars supporting its Constitutional authority'.[79] Although he believed that certain features were beyond the scope of the amending power, this was only within the confines of the Constitution itself. If people seriously wanted to replace an essential feature, they could do so through *another constitution*.

While the arguments in these judgements differ in degree – whether on the meaning of 'amendment' or 'implied limitations' – they do not really differ in kind or substance. Each judgement in favour of the BSD is structuralist or foundationalist rather than strictly normative. In other words, their arguments are not that an amendment destroying *Essential Feature X* would violate the natural law and therefore be unconstitutional, but rather that the amending power under Article 368 is not legally empowered to make this amendment. Though wielding something which, since the 24th Amendment, is called 'constituent power' in Article 368, the argument of the judges is that Parliament is in essence a constituted entity, a creature of the Constitution. Article 368's power is also a constituted one. It is therefore prohibited from

[78] *Kesavananda* (n 32) para 1488 (Khanna J).
[79] *Kesavananda* (n 32) para 1485 (Khanna J).

destroying the basis of its own authority: the basic structure, the essence of the Constitution that must survive any amendment, until the people choose to adopt a new constitution. In this way, despite semantic disagreement on the nature of Conrad's 'implied limits' idea, the Court endorsed Conrad's main argument.[80]

5.4 Consolidating the Basic Structure Doctrine

5.4.1 The Emergency, 1975-77

Although *Kesavananda* upheld the constitutionality of the land reforms in question and held that fundamental rights *could* be amended, Indira Gandhi was furious with the decision. When the decision on replacing the Chief Justice arose shortly after, her government rewarded Ray J (a minority judge) with the position, passing over three more senior majority judges.[81] Tensions between the government and the judiciary came to a head in June 1975 when Gandhi's election to the Lok Sabha was challenged in the Allahabad High Court. This state-level court declared that electoral fraud and corruption had taken place, that Gandhi's election was null and void, and that she had no right to sit in Parliament.[82] Large demonstrations calling for Gandhi's resignation were held, prompting her to advise the President to declare a state of emergency throughout India on 25 June 1975, citing threats to national security. This emergency lasted until March 1977 and saw the detention of political opponents, the curtailment of freedom of speech and assembly extrajudicial killings and torture, and mass forced sterilisations.[83]

That year, Parliament passed the 39th Amendment which removed the judiciary's power to rule on the legality of a Prime Minister's election. The Supreme Court later unanimously held this amendment to be unconstitutional for breaching the basic structure.[84] Free and fair elections were essential to democracy, and *democracy* was a basic feature of the Constitution. While *Kesavananda* was a slightly hesitant articulation of the basic structure idea, the 'Election Case' was the Supreme Court's full-throated deployment of the doctrine.[85]

In 1976, at the height of the Emergency, Parliament passed the 42nd Amendment.[86] Often called the 'mini-constitution' due to its sheer size and effect, this was the most radical overhaul of the

[80] See Noorani (n 38).
[81] Thiruvengadam (n 24) 125.
[82] Thiruvengadam (n 24) 126.
[83] Thiruvengadam (n 24) 55; Austin (n 8) 310-326.
[84] *Indira Nehru Gandhi v Raj Narain* [1976] 2 SCR 347; See generally Prashant Bhushan, *The Case that Shook India* (Gurgaon: Penguin 2018).
[85] SP Sathe, 'Limitation on Constitutional Amendment', in R Dhavan and A Jacobs (eds), *Indian Constitution: Trends and Issues* (NM Tripathi 1977) 183; quoted in Krishnaswamy (n 51) 221.
[86] Constitution (Forty-second Amendment) Act 1976.

Constitution to date and aimed to make the Indian federation even more centralised, akin to a *de facto* unitary state.[87] It strengthened Article 31C (protecting laws furthering the aims of the directive principles from judicial review) as well as Article 368 itself. The latter alterations included the addition of clauses (4) and (5): clause (4) removed *any* jurisdiction from the courts to challenge *any* aspect of an amendment, including its procedure; clause (5) reiterated in stronger language the unfettered ability of Parliament to amend whatever it saw fit in the Constitution, attempting to textually rule out any notion of basic structure limitations.

5.4.2 The 1977 election and aftermath

Once the Emergency was lifted, Gandhi's Congress party was voted out of government for the first time in Indian history and was replaced by the opposition Janata Party. During the election campaign, the Janata Party pledged to undo the constitutional abuses perpetrated by Gandhi and restore the *status quo ante*.[88] This was to be achieved through restorative constitutional amendments that would strengthen the Constitution prevent the democratic backsliding that characterised 1970s Indian politics – including by reforming the amendment procedure under Article 368 to undo the 42nd Amendment's expansion of powers. In addition, the new government also sought to remove the right to private property – the acute cause of the 'great constitutional conflict'.[89] This right was removed from Part III and moved to a new Article 300A.[90]

While wishing to undo the damage of the 42nd Amendment and restore constitutionally-limited governance, the new Law Minister Shanti Bhushan did not want the judiciary to have the sole right to define the Constitution's basic structure.[91] He feared that, under the guise of protecting a vaguely defined basic structure, judges could strike down any amendment they wished. In this spirit, he proposed an arrangement somewhat similar to the Irish one in which the Constitution's essential features – rather than remaining unamendable – could be amended *following approval in a referendum*. This would have effectively added a *fourth* step of amendment difficulty, alongside the three existing ones, where a referendum would be required for any amendment:

> (i) impairing the secular or democratic character of the Constitution; or
> (ii) abridging or taking away the rights of citizens under Part III; or
> (iii) prejudicing or impeding free and fair elections to the House of the People or the legislative assemblies of states on the basis of adult suffrage; or
> (iv) compromising the independence of the judiciary; or

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[87] Austin (n 8) 371.
[88] Basu (n 5) 199
[89] Rajeev Dhavan, 'Amending the Amendment; The Constitution (Forty-fifth Amendment) Bill, 1978' (1978) 20(2) Journal of the Indian Law Institute 249, 260; Austin (n WADC) 171.
[90] Constitution (Forty-fourth Amendment) Act 1978, s 34.
[91] Austin (n 8) 420.

(v) altering these basic features and referendum provisions.[92]

This proposal faced significant political and academic opposition.[93] In the view HM Seervai, a noted authority on Indian constitutional law, the referendum proposal was itself a violation of the BSD: referendum approval could not undo the unamendability of the basic structure; the basic structure of the Constitution was unamendable, *period*.[94] In the midst of negotiations and compromises between government and opposition parties, the referendum proposal was lost; as the Janata party did not command a large enough parliamentary majority, many of the Emergency-era enhancements to Article 368 remained in place.

5.4.3 Later caselaw

As the political system could not agree on an updated (and perhaps more effective) amendment procedure, it was left to the judiciary in the 1980 *Minerva Mills* case to undo the damage done by the 42nd Amendment.[95] Here, the Supreme Court unanimously invalidated Clauses (4) and (5) of Article 368, and, by a 4:1 majority, aspects of the change to Article 31C. It was held by the Court that judicial review itself was an integral part of the basic structure. Chandrachud CJ (originally a dissenting judge in *Kesavananda*) emphasised the discrete and limited nature of the amendment power that the Constitution bestowed on Parliament:

> Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power. Indeed, a limited amending power is one of the basic features of our Constitution and therefore, the limitations on that power cannot be destroyed. In other words, Parliament cannot, under Article 368, expand its amending power so as to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. *The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one*.[96]

Despite the turmoil and political upheaval produced by the battle for supremacy between the judiciary and the Gandhi government, the Court was determined to cement the decision it reached in *Kesavananda*. Chandrachud CJ summarised the core outcome of that case, underscoring both Parliament's undoubted power of amendment as well as constitutional identity:

> The theme song of the majority decision in [*Kesavananda*] *Bharati* … is: 'Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore, you cannot destroy its identity'.[97]

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[92] Constitution (Forty-fifth Amendment) Bill 1978 clause 45; quoted in Dhavan (n 89) 269.
[93] Dhavan (n 89) 269; Austin (n WADC) 423-424.
[94] Austin (n 8) 421n.
[95] *Minerva Mills v Union of India* [1980] 3 SCC 625
[96] ibid, para 17.
[97] ibid, para 16.

Minerva Mills consolidated the BSD in Indian constitutional law from that point onward. While the Constitution has continued to be amended, the Supreme Court has never retreated from the doctrine. In subsequent decades, its content and application was further clarified by the Supreme Court. In *Waman Rao* (1981), the Supreme Court heard basic structure-based challenges to Articles 31A and 31B and the Ninth Schedule.[98] While upholding the constitutionality of these provisions, the Court held that though these provisions were designed to avoid judicial review of entries to the Ninth Schedule, basic structure review still applied to entries made after the date of the *Kesavananda* judgement (entries *prior* to this date were automatically constitutional). This ensured that the judiciary's power to review legislation could not be completely bypassed by Parliament. The Court emphasised the importance of the land reform issue and the historical origin of the 1st Amendment, being passed a year after the Constitution's adoption. In a curious turn of phrase, the Court said that it ought to be seen '*as part and parcel of the Constitution itself*'.[99] (One would generally think that a constitutional amendment is always 'part of the Constitution itself'.)

In *IR Coelho* (2007), the Supreme Court further clarified the applicability of basic structure review to legislation placed in the Ninth Schedule, as well as the place of fundamental rights within the BSD.[100] Because the Court had held since 1973 that Article 368 gave a limited power of amendment, Article 31B correspondingly gave a limited power to circumvent judicial review. In this vein, it articulated two tests for judging the constitutionality of entries to the Ninth Schedule: the 'rights test' and the 'essence of rights' test.[101] The former considers the direct impact and effect of the entry to the Ninth Schedule to fundamental rights; the latter considers the more general principles of Part III. The Supreme Court reiterated what it believed was the qualitative difference between the power that created the Constitution (the constituent power) and the Article 368 amending power. Its theoretical basis was identical to that of UCA theorists like Roznai and Conrad, distinguishing between the:

> making of a Constitution by a Constituent Assembly which was not subject to restraints by any external authority as a plenary law making power and a power to amend the Constitution, a derivative power derived from the Constitution and subject to the limitations imposed by the Constitution. […] The power for amendment cannot be equated with such power of framing the Constitution. *The amending power has to be within the Constitution and not outside it*.[102]

[98] *Waman Rao and Others v Union of India and Others* [1981] AIR SC 271.
[99] ibid, para 26.
[100] *IR Coelho (dead) by L.Rs v State of Tamil Nadu* [2007] AIR SC 861.
[101] See further: Virendra Kumar, 'Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance' (2007) 49(3) Journal of the Indian Law Institute 365, 390-391.
[102] *IR Coelho* (n 100).

This being the case, the Court asserted why *it* must have the final say over amendments – any alternative would create a 'parliamentary hegemony':[103]

> constitutional amendments are subject to limitations and if the question of limitation is to be decided by the Parliament itself which enacts the impugned amendments and gives that law a complete immunity, it would disturb the checks and balances in the Constitution. *The authority to enact law and decide the legality of the limitations cannot vest in one organ*. The validity to the limitation on the rights in Part III can only be examined by another independent organ, namely, the judiciary.[104]

The doctrine has also been applied by the judiciary to contexts unrelated to land reform or fundamental rights. In *L Chandra Kumar* (1997), the Supreme Court invoked the doctrine in striking down parts of an amendment which sought to move some judicial authority to newly created alternate tribunals.[105] In the *NJAC* case (2015), the Supreme Court struck down the 99th Amendment which sought to replace the 'collegium' system of judicial appointments (under which the existing judiciary controls appointment) with a 'National Judicial Appointments Commission' (which would have brought more political influence).[106] The Court held that the new scheme infringed judicial independence, a basic feature of the Constitution. Further, the BSD is increasingly invoked in cases unrelated to constitutional amendments,[107] such as in *SR Bommai* (1994) which concerned the constitutionality of imposing 'President's Rule' on a state.[108] In *Raja Ram Pal* (2007), the Supreme Court stated that '[t]he judicial organ of the State has been made the *final arbiter of Constitutional issues* and its authority and jurisdiction in this respect is an important and integral part of the basic structure of the Constitution'.[109]

On the 50th anniversary of *Kesavananda*, Vice President Jagdeep Dhankhar (of the ruling BJP party) said that the judgement was bad precedent and that the only basic feature of the Constitution was the sovereignty of Parliament. He said that if any authority could overturn Parliament's power to amend the Constitution, it would be difficult to say that India was 'a democratic nation'.[110] In public remarks shortly thereafter, India's then Chief Justice DY Chandrachud described the BSD as the 'North Star' that guides the interpreters of the Constitution when the path ahead is unclear.[111]

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[103] ibid.
[104] ibid, para 103; quoted in Kumar (n 101) 375 (emphasis added).
[105] *L Chandra Kumar v Union of India* [1997] AIR SC 1125.
[106] *Supreme Court Advocates-on-record Association v Union of India* [2016] 5 SCC 1.
[107] For a critique of this expansive application, see Pratap Bhanu Mehta, 'The Inner Conflict of Constitutionalism' in Zoya Hasan, Eswaran Sridharan, and Ramaswamy Sudarshan (eds), *India's Living Constitution* (Anthem 2005) 180; for a defence, see Krishnaswamy (n 51), 43-69.
[108] *SR Bommai v Union of India* [1994] 2 SCR 644.
[109] *Raja Ram Pal v The Hon'ble Speaker, Lok Sabha & Ors* [2007] 3 SCC 184, para. 24.
[110] Ammol Jain, '50 Years of Kesavananda Bharati' *Verfassungsblog* (9 May 2023) https://verfassungsblog.de/50-years-of-kesavananda-bharti/ accessed 9 November 2023.
[111] Jain (n 110).

5.5 The legitimacy of the Basic Structure Doctrine

The content of the basic structure doctrine has never been comprehensively defined by the Supreme Court, being defined instead on a case-by-case basis.[112] According to Singh, its structural content likely include republicanism, federalism, parliamentarianism, the 'unity of the nation', judicial independence, and the basic structure limitation itself; its 'values' content is outlined in the Preamble, namely sovereignty, secularism, democracy, justice, liberty, equality, fraternity, and the dignity of the individual. However, the content of the doctrine is arguably secondary to its primary purpose: *ostensibly*, to ensure constitutional supremacy over all of India's institutions; *practically*, to ensure judicial oversight over all other constituted entities. In essence, if a given amendment is, in the view of the judiciary, so incongruous with the rest the Constitution so as to undermine it, they reserve the right to strike it down. In the handful of cases in which the Supreme Court has struck down an amendment, almost all have involved some alleged threat to judicial power.[113] This reminds us that the doctrine's origins lie in an intense battle for supremacy between politicians and judges – a battle which left scars on individual citizens as well as the body politic. However, this position of supremacy – this final say position, what I argue is a form of sovereignty – deserves special attention.

5.5.1 Amendment is not replacement

Before assessing this position of final say sovereignty, it is important to address the theory behind the BSD. On what basis can Indian courts claim that an unamendable basic structure exists? Textually, Article 368 gives a plenary amending power to Parliament and no part of this provision (or any other) declares content to be unamendable. There is also very little grounds on which to argue that the Constituent Assembly intended to limit the scope of this amending power.[114] So the basis of the BSD cannot be found in either the text or origin of the Constitution. Instead, it is justified on the basis of 'Argument 1' we considered in Chapter 2: the power to *amend* is not the power to *replace*. The Constitution was adopted by the Constituent Assembly

[112] Rohinton Nariman, 'Doctrine of Basic Structure under Indian Constitution: Madras High Court Bar Association at Madurai' *Justice Nariman Official Channel* (12 April 2022) <https://youtu.be/cvUf9ZeEe8Y?si=Q34csHXUhmEEzJVK> accessed 10 June 2024.
[113] Moiz Tundawala, 'Can 'Kesavananda Bharati' Save India From Becoming a Hindu Rashtra?' *The Wire* (24 April 2023) https://thewire.in/law/kesavananda-bharati-50-years-hindu-rashtra accessed 15 May 2026.
[114] See CAD 25 Nov 1949 (n 29) Ambedkar.

acting on behalf of the sovereign people; it delegates limited authority to each power within it – the judiciary, the government, Parliament etc. To this list the judiciary adds the amending power. As Reddy J held in *Kesavananda*, the Constitution does not create *any* unlimited power, therefore the amending power must be materially limited too.[115] Any alternative is akin to saying that Parliament can use its Article 368 power to replace the Constitution if it wishes – a suggestion which is treated by the judiciary as an absurdity. Global constitutional theory today is very familiar with this kind of argument. And because it is based on a *generalised* theory on the nature of an amending power – rather than a specific one relating to the nature of the *Indian* Constitution – it is not surprising that the BSD has migrated to other jurisdictions, from Bangladesh to Belize.[116]

This argument does not mean that *no power* could alter the basic structure; as Krishnaswamy says, 'the Supreme Court has time and again recognized that the basic structure […] may be undone by the 'people' and thereby preserves an override by popular sovereign action.'[117] Under this view, the BSD is not only compatible with popular sovereignty, it is a vital defence of popular sovereignty by supposedly reserving some decisions to the people themselves. For its advocates, this provides democratic legitimacy to the BSD. An exemplary defence in this regard is offered by Mehta, who argues that the doctrine embodies what he calls 'deeper democracy'.[118] Constitutions have a deeper democratic legitimacy than ordinary law because they are the product of the people's *considered* will rather than fleeting parliamentary majorities that come and go.

However, the supposedly higher democratic authority of the Constituent Assembly is empirically shaky. The fact is that the Constituent Assembly was *less* democratically representative than the Parliaments that followed it: the former was indirectly elected by provincial legislatures, the latter were elected under a universal franchise. This made the Assembly (using Conrad or Roznai's terminology) *less reflective* of the constituent power (the people) than Parliament. It is thus problematic to attribute to the Assembly the *unique* ability to speak on behalf of the people while granting less to subsequent Parliaments which were – factually speaking – *more* reflective of the actually-existing people's political wishes.

Ambedkar's counter-argument to this was that the Assembly had higher legitimacy than subsequent Parliaments because it was supposedly less partisan; in quasi- or proto-Rawlsian logic, its members could consider what was in the best interests of India in isolation from day-

[115] *Kesavananda* (n 32) para 1165 (Reddy J).
[116] Anwar Hossain Chowdhary vs. Bangladesh; 41 DLR 1989; *Bowen v Attorney General* BZ 2009 SC 2; *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70.
[117] Krishnaswamy (n 51) 199. This is evident in Khanna J's *Kesavananda* judgement.
[118] Mehta (n 107) 193.

to-day politics.[119] However, this is undermined by the fact that the Assembly was India's ordinary legislature between 1947 and 1950. Additionally, there was no referendum or anything like it after the Constituent Assembly endorsed the Constitution. Referendum approval is, of course, not strictly necessary for a constitution's legitimacy, but its absence in the Indian case undermines the argument that the Assembly had some *higher* legitimacy than the legislatures which were elected afterwards and which, under the terms of Article 368, enjoyed the express power to amend the Constitution. This legitimacy problem is only compounded by the basic structure doctrine.

5.5.2 Final say sovereignty

Thiruvengadam describes the power to assess the validity of constitutional amendments as 'the greatest power any institution can enjoy in a constitutional democracy' – a power which he says the Indian Supreme Court enjoys.[120] Any analysis of amending powers or constitutional amendment rules must address this question: *who has the final say within a constitution?* When constitutional amendment regimes are assessed by scholars, this question is often overlooked; instead, focus is often on how rigid/flexible amendment rules are or how closely they mirror the constituent power. But assessing who *has* the final say and who *should* have the final say within a constitution is vitally important – while holding this power does not mean its holder is all-powerful, it does mean that they hold a vital veto position within the constitutional system. They decide whether a proposed change can be made or not. This can be called 'final say sovereignty'.

This is to employ Daly's use of the term 'sovereignty' i.e. a position of unaccountability or finality within a constitutional system, *not* a position of 'command', 'omnipotence', or constituent power.[121] Daly uses the British example to illustrate this, and grounds it in a Diceyan understanding of the 'legal sovereignty' enjoyed by Britain's Parliament, as opposed to the 'political sovereignty' of the people.[122] To Dicey, there was a 'positive' and 'negative' side to Parliament's sovereignty:

> Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation [positive]. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament [negative].[123]

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[119] CAD 4 Nov 1948 (n 26) BR Ambedkar (7.48.250).
[120] Thiruvengadam (n 24) 229.
[121] Eoin Daly, Translating Popular Sovereignty as Unfettered Constitutional Amendability (2019) 15(4) European Constitutional Law Review 619, 633.
[122] ibid, 637. See also James Kirby, 'A. V. Dicey and English constitutionalism' (2019) 45(1) History of European Ideas 33.
[123] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915; republished Liberty Fund 1982) 24.

Britain's Parliament is a constituted entity and its power is limited to the legislative domain. It is a cliché to observe that it is not as powerful as the executive branch which generally controls it. But its sovereignty is due to its unaccountability *within* the British constitution; no other body can overturn its decisions, notably the courts. In the Irish context, Daly argues that while the people cannot initiate or develop the amendment proposal they are asked to consider, they hold an absolute veto over whether it is enacted – their decision cannot be second-guessed by another institution. The referendum process can be described as the final say sovereign to this extent.

Whether the Indian Supreme Court holds this same kind of sovereignty because of its basic structure review power requires scrutiny. Gardbaum defines 'judicial supremacy' in four ways – interpretive, attitudinal, decisional, and political;[124] the Indian Supreme Court arguably holds supremacy under each definition. Whether it is 'unaccountable' when it engages in basic structure review depends on how one defines the term. In some sense, it must 'account' for its decisions to strike down amendments insofar as it must show how this amendment would damage the basic structure. It is also bound by the rules and conventions of common law precedent. In this sense, Dicey's 'positive' side of sovereignty is lessened as the Supreme Court is confined in its ability to approve or reject a given amendment.[125] However, the crucial part about sovereignty-as-unaccountability is whether one can be held accountable *by another body* (Dicey's 'negative' side of sovereignty). The Supreme Court cannot be held 'to account' by any other institution when it engages in basic structure review. It is sovereign *to this extent*.

One may reject the term 'sovereign' and instead opt for 'supreme' without losing any of the weight of this claim. As stated, this sense of sovereignty is distinct from 'constituent power' in the extra or super-constitutional sense of making/destroying constitutions, sovereignty in international relations, and the general idea of sovereignty as omnipotence. In India, the government (i.e. the executive-legislature) is still the most powerful constitutional organ; however, it cannot be described as sovereign or supreme because it does not fully control the process of constitutional change. It may also be countered that the BSD provides not for (constituted) judicial sovereignty, but simply the sovereignty and supremacy of Constitution.[126] Under this view, Indian courts are enforcing a system that already exists, rather than developing it through their own power. However, it is the supremacy of the Constitution *as interpreted by the judiciary*. There is no intra-constitutional way to overturn the judiciary's interpretation of the

[124] Stephen Gardbaum, 'What is judicial supremacy?' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018) 21.
[125] Krishnaswamy (n 51) 212 argues that these limitations undermine any sense in which the judiciary is sovereign through the BSD.
[126] See Kumar (n 101) 395.

basic structure. The judiciary is sovereign is we accept the idea of sovereignty-as-unaccountability.

5.5.3 The battle for final say sovereignty

When we consider the context in which the BSD arose and the circumstances that made its emergence necessary, we see that the 'great constitutional conflict' between politicians and judges was essentially a battle over final say sovereignty. From the adoption of the Constitution until *Golaknath*,[127] the Indian Parliament held this position. This was as a result of the express terms of Article 368 (even before it was amended) as well as the judiciary's refusal to review constitutional amendments. In the 1970s, the government asserted the principle of parliamentary sovereignty to expand its own power: because the power to amend the Constitution was left with Parliament, and possibly as a hangover influence from the British,[128] many political leaders saw the whole notion of judicial review as illegitimate. Parliament, as the representative of the people's will, was supreme and should not be second guessed by the judiciary.[129]

While parliamentary sovereignty developed as Britain's apex constitutional value through centuries of history, custom, and convention, the Indian Constitution was barely 20 years old when the conflict between the government and judiciary broke out. None of the conventional or historical safeguards that surrounded the use of parliamentary sovereignty in Britain were present – this left open the possibility that this power could be abused by a government with authoritarian tendencies. The consequences of final say sovereignty in Parliament's hands were, it is fair to say, *disastrous*: the suspension of rights, arbitrary arrests and detentions of opposition politicians and critics of the government, self-serving cynical amendments designed to protect the prime minister to name but a few. The BSD ensured that the final say was no longer held by politicians – it would need to be held by those (ostensibly) divorced from politics and committed to the maintenance of the Constitution's ethos.

Parliament holding final say sovereignty would also have meant the end of effective judicial review, something which was deliberately established by the Constituent Assembly.[130] The 1st Amendment created a mechanism to bypass rights-based review of ordinary laws; the various amendments of the 1970s (e.g. the 25th, 39th, and 42nd) were designed to further limit the scope of this judicial power. Had the BSD not been applied by the courts, their ability to scrutinise legislation for constitutionality or compatibility with fundamental rights would have

[127] i.e. the moment the judiciary began reviewing constitutional amendments.
[128] Krishnaswamy (n 51) 219.
[129] CAD 10 Sept 1949 (n 29) (Nehru).
[130] CAD 9 Dec 1948 (n 17) (Ambedkar).

been perhaps fatally weakened. The doctrine is best viewed as the judiciary's pragmatic response to this threat. The choice facing the Indian judiciary was Manichean: either judicial review would be effectively meaningless because Parliament could override it at will, or the judiciary would need the power to review *all* of Parliaments' actions, including constitutional amendments.

It was the circumstances of this battle – the events of the 1970s, the Manichean choice between judicial and legislative supremacy, as well as the Emergency – that secured what Krishnaswamy calls 'sociological legitimacy' for the basic structure doctrine.[131] While many lawyers and academics were sceptical of the doctrine in the immediate wake of *Kesavananda*,[132] those sceptics are, according to Ramachandran, 'far fewer in number' today.[133] However, despite becoming a 'settled part of Indian constitutional law',[134] it would be too far to say it has unanimous elite endorsement. Criticisms do still arise, though many centre on how and when the doctrine is used,[135] not the principle of the doctrine itself.

5.5.4 The inadequacy of Article 368

In the end, the original problem that eventually created the need for the basic structure doctrine was that, whatever the intentions of the Constituent Assembly, the real-world working of Article 368 proved insufficient for ensuring constitutional supremacy.[136] That a significant amount of the Constitution can be amended solely by a large enough parliamentary majority meant that a party or coalition could regularly alter the Constitution as often or as extensively as it wished. This is made easier through the first-past-the-post electoral system (which generally makes overall majorities more frequent), the fact that national parliamentary majorities often mirror those in the states, as well as the Congress party's frequent large majorities during the vital early years of the Constitution's life. Alongside this is the highly precise, lengthy nature of the Indian Constitution. With nearly 400 articles and a long list of scheduled legislation, it sets the direction of national and state policy at a high level of detail. Constitutional amendment is often required if this direction is to be changed.[137]

It was in the absence of more rigid amendment rules that the judiciary developed the BSD. It has not stopped important amendments from taking place, nor has it significantly slowed their pace – as of August 2024, the Indian Constitution has been amended *106 times*. The doctrine

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[131] Krishnaswamy (n 51) 227.
[132] See for example: Ramesh Garg, 'Phantom of Basic Structure of the Constitution' (1974) 16(2) Journal of the Indian Law Institute 243. Thiruvengadam (n 24) 228; Krishnaswamy (n 51) 225-227.
[133] Raju Ramachandran, 'Review: Sudhir Krishnaswamy: Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine' (2009) 13(3) Indian Journal of Constitutional Law 213, 214.
[134] Jürgen Bast, 'Review: Sudhir Krishnaswamy: Democracy and Constitutionalism in India – A Study of the Basic Structure Doctrine' (2011) 44 Verfassung und Recht in Übersee VRÜ 273.
[135] See Mehta (n 107).
[136] Basu (n 5) 200.
[137] This is replicated in the lengthy Brazilian Constitution; part 6.2.4 of this thesis.

has allowed the Constitution to develop according to contemporary needs while ensuring a sufficient amount of judicial scrutiny over parliamentary actions.[138] Without it, Parliament could add large amounts of legislation to the Ninth Schedule, immunising it from rights-based judicial review. Following *Waman Rao* and *IR Coelho*, these actions are also subject to basic structure review.[139]

Leaving aside the theoretical validity or otherwise of the doctrine, we must remember its practical *structural* effect: removing the final say over amendments from Parliament and giving it to the judiciary. The Supreme Court has reiterated that only they can have the last word about constitutional reforms; leaving this last word with Parliament would be akin to violating the legal maxim of *Nemo iudex in causa sua* (no one can be judge in their own case). However, regardless of whether or not leaving final say sovereignty in the hands of a legislature is a good principle of constitutional design, the simple fact is that the Constitution given to India by the Constituent Assembly deliberately decided to give this power to Parliament through Article 368. Even granting that this was a fault – and certainly that events would later prove it to be a fault – *it was a fault of constitutional design*. The BSD was a judicial innovation to address this design flaw, but it was akin to judges second-guessing the Constituent Assembly itself. Judges reconsidering who should hold the final say in a constitution is a monumental decision, and undermines the judiciary's claim that it is only concerned with maintaining the 'basic structure' given to India by the Constituent Assembly.

There were opportunities, especially in the immediate wake of the Emergency, when this legitimacy problem could have been addressed by politicians in a deliberate way. What was required was an amendment process that would not have left so much power in the hands of Parliament and the government that controlled it. An amendment process which took the final say from Parliament but which was still procedurally democratic would have rendered the BSD unnecessary on its own terms. The Janata government toyed with the idea of mandatory referendums for certain amendments – giving final say sovereignty to the people of India – but this was lost in political negotiations. There are, of course, compelling reasons why a brute majoritarian process like a referendum would be unattractive in the Indian context – the fear that Dalits or religious minority groups could be subject to the arbitrary will of a hostile majority being just one. But other solutions were possible, such as requiring state legislative consent for *all* amendments, issue-specific constituent assemblies, or intermittent elections. These would have provided the Constitution with an entrenchment device separate from both the

[138] Singh (n 6) 987.
[139] *Waman Rao v Union of India* (1981) 2 SCC 362; *IR Coelho* (n 120). See Kumar (n 121).

government and the judiciary. When this opportunity for a new 'constituent moment' passed, India was left with the *ad hoc* entrenchment device of the basic structure doctrine.

Whether it has been effective on its own terms – of maintaining the essence of Indian constitutional democracy – is a question which generates multiple answers.[140] I highlight just one to conclude: that of Moiz Tundawala, who argues that the doctrine has failed to prevent India's BJP-led government from creating a *de facto* Hindutva state.[141] The folly of the basic structure doctrine, in his view, is in presuming that authoritarianism will come in the form of a nefarious constitutional amendment (as it did in the 1970s). But the reality today is that democratic backsliding comes through more underhanded means for which judicial doctrines like these are ill-suited. This indicates that when constitutionalism becomes totalising over all politics – as the basic structure doctrine demands – the effect is not the prevention of anti-constitutional politics, but the politicisation of constitutionalism itself.[142]

[140] William J Dobson and Tarek Masoud, 'Is India Still a Democracy?' (2023) 34(3) Journal of Democracy 119.
[141] Tundawala (n 113).
[142] See also Moiz Tundawala and Anuj Bhuwania 'India's Basic Structure Doctrine: Past, Present, and Future: In Conversation with Moiz Tundawala and Anuj Bhuwania' RevDem Podcast (12 July 2023) https://revdem.ceu.edu/2023/07/12/indias-basic-structure-doctrine/ accessed 15 May 2026.

6. ETERNITY CLAUSES

6.1 Introduction

The most straightforward way to establish unamendability in a written constitution is to explicitly declare that some of that constitution's content cannot be amended. These are often called 'eternity clauses'. While not ubiquitous, eternity clauses are commonly found in the written constitutions of Europe and Africa. The specific content protected by these clauses varies from constitution to constitution: they can be broad in scope or narrow, long or short, precise or vague. Often their content is directly related to the given country's political history, a result of borrowing from other countries,[1] or of intense political negotiation and compromise.[2] Eternity clauses are as varied as the global array of constitutions and often go to the heart of a constitution's identity and values.

In this chapter, we consider the eternity clauses found in the constitutions of Brazil, France, and Germany. Brazil's eternity clause – referred to in Brazilian literature as the 'petrous' or 'stone' clauses – is lengthy, relatively specific, and enables expansive judicial interpretation of unamendability. Germany's eternity clause is similar in scope and meaning to Brazil, yet its apex constitutional court treats unamendability more restrictively. France's eternity clause protects one principle from amendment – the 'republican form of government' – and is the most common found eternity clause in the world.[3] However, the French Constitutional Council refuses to review the substance of constitutional amendments for compatibility with the eternity clause.

Brazilian and German unamendability bear many of the hallmarks of the Indian basic structure doctrine we considered in Chapter 3, the difference being that the Brazilian or German 'basic structure' is written down rather than a product of judicial innovation. As with India, this unamendable core can be enforced by the judiciary against the amending power (in both cases, the federal legislature). However, a key distinction between these approaches and that of India is that in Brazil, Germany, and France, there *likely* exists a legitimate constitutional method of altering these supposedly unalterable clauses. In Brazil, this is likely achievable through referendum; in Germany, this is likely achievable through the replacement clause of Article 146; in France, since the eternity clause is non-justiciable, this is achievable by the ordinary amending

[1] Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017) 35.
[2] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 51; Richard Albert, 'Constitutional Handcuffs' (2010) 42(3) Arizona State Law Journal 663, 666–7.
[3] Roznai (n 1) 235-274.

power. This makes a huge difference in how we should understand explicit unamendability. From this chapter's short survey, it suggests that the distinction between explicit unamendability and heightened amendment difficulty (when something is more difficult but not impossible to amend) is not so great. [4]

The theoretical distinction between original and derived constituent power appears in the constitutional doctrine of each country. However, this theory is applied and interpreted differently in each country. In Brazil, while it provides a ready justification of judicial review of amendments, it also leads many jurists to conclude that the unamendable clauses can be amended by a participatory process like a referendum. In France, the distinction appears, but the legal conclusion that many draw from it – that the derived constituent power is limited in its scope – does not arise because the original constituent power is never understood to have left the stage; the sovereignty of the people is the constituent power and remains active within the constitution. In Germany, the power of the original constituent power to replace the Basic Law is acknowledged openly in the constitutional text (Article 146); however, German unamendability rests on a discomfort with constituent power. It is justified as a bulwark against constituent power – to deny it the use the Basic Law for purposes contrary to the eternity clause.

Part 5.2 examines Brazil's 'stone clauses', placing them in their historical context and addressing key doctrinal questions surrounding their unamendability, including whether they can be altered through a referendum. Part 5.3 turns to the eternity clause in Germany's Basic Law, exploring its primary historical purpose – ensuring that the Basic Law cannot be used as a 'mask of legality' by an anti-constitutionalist regime – alongside relevant case law. Part 5.4 focuses on France's republican eternity clause, a feature of its constitutional tradition since 1884, which is treated as non-justiciable by the French judiciary. The chapter concludes with some brief final observations.[5]

[4] See part 7.5.1 of this thesis.
[5] (Translations from Brazilian, French, and German-language materials were through DeepL translator unless otherwise stated in footnote.)

6.2 The stone clauses of Brazil

No proposal of Constitutional Amendment shall be subject to deliberation if it has the tendency towards abolishing the: (I) federalist form of the State; (II) direct, secret, universal and periodic suffrage; (III) separation of powers; (IV) individual rights and guarantees.[6]

- *Article 60.4, Constitution of the Federative Republic of Brazil.*

As a post-authoritarian and 'programmatic' charter,[7] the 1988 Brazilian Constitution spells out in significant detail the direction of travel for the country at institutional and public policy levels. In addition, amending the Constitution is not difficult – the National Congress has amended it over one hundred times since 1988.[8] In this context, the *cláusulas pétreas* – the unamendable 'stone' or 'petrous clauses' – and their enforcement by the Federal Supreme Court (*'Supremo Tribunal Federal',* 'STF') become important. When the flexibility of Brazil's Constitution is placed alongside the STF's open-ended power to review amendments, the STF becomes a political 'super power', giving it 'decisional sovereignty' on all constitutional issues.[9] As a longstanding feature of Brazilian and Lusophone constitutionalism, the stone clauses' unamendability has been debated for decades. One influential line of doctrine holds that while the ordinary amending power cannot amend these clauses, a participatory process like a referendum can.

6.2.1 Constitutional amendment and Article 60.4

Initiative power for amendment proposals is granted to 'at least one-third of the members of the Chamber of Deputies or Federal Senate' (the two houses of the National Congress), the President of Brazil, or 'more than one half of the State Legislatures of the federal entities, each of them expressing itself by a simple majority of its members'.[10] Proposals must be approved in two rounds of voting by a three-fifths majority in both houses of Congress. There are two circumstantial limits on the amending power: amendments cannot be proposed during a 'federal

[6] Constitution of the Federative Republic of Brazil 1988, art 60.4. See generally: Virgílio Afonso da Silva, *The Constitution of Brazil: a contextual analysis* (Hart 2019).
[7] Juliano Zaiden Benvindo, 'Brazil in the Context of the Debate Over Unamendability in Latin America' in Richard Albert, Bertil Emrah Oder (eds) *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 349-350; Jairo Lima, 'How unamendable is the Brazilian constitution?' (2025) 63 Revista Derecho del Estado 161, 167.
[8] Benvindo (n 7) 354.
[9] Conrado Hübner Mendes, 'Judicial Review of Constitutional Amendments in the Brazilian Supreme Court' (2005) 17(3) Florida Journal of International Law 1, 460; Nicola Tommasini, Pedro Riccetto and Yaniv Roznai, 'When Backlashes & Overrides Do Not Scare: The Power to Review Constitutional Amendments and the Case of Brazil's Supreme Court' (2021) 8(1-2) International Journal of Human Rights and Constitutional Studies 80, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3599798 accessed 21 May 2026.
[10] Constitution, art 60.

intervention, state of defence or state of siege'; and the same failed amendment proposal cannot be reproposed in the same legislative session.[11]

Article 60.4 list the material limits on the amending power: no proposal to amend the Constitution 'shall be subject to deliberation if it has the tendency towards abolishing the: (I) federalist form of the State; (II) direct, secret, universal and periodic suffrage; (III) separation of powers; (IV) individual rights and guarantees.' Stone clauses have been a feature of Brazilian constitutions since 1891.[12] Inspired by the French example of 1884,[13] the stone clause of 1891 protected 'republicanism' and 'federalism' from amendment.[14] There is a tradition of Lusophone constitutional mirroring on this front: the first Brazilian stone clause influenced Portugal to include such a clause in its first republican constitution in 1911,[15] and Article 60.4 was, in turn, influenced by the stone clauses found in Article 288 of the Portuguese Constitution – the latter being the longest eternity clause in the world.[16] Most Portuguese-speaking states have similarly lengthy eternity clauses in their constitutions.[17]

The precise content of the stone clauses can be vague. For da Silva, the most notable aspect of Article 60.4 is 'if it has the *tendency* towards abolishing…'.[18] Even *gradual* erosions of protected principles are unconstitutional, not merely their formal abolition (this contrasts with the German Constitutional Court's interpretation of their eternity clause).[19] Clause II is fairly straightforward in what it protect: 'direct, secret, universal, and periodic suffrage'.[20] Clause IV 'individual rights and guarantees' is more open-ended and has been interpreted liberally. The STF has held that constitutional rights are not limited to those explicitly listed in Article 5's bill of rights or the wider Title II;[21] thus, clause IV of Article 60.4 protects implicit rights as well as enumerated rights.

6.2.2 National Constituent Assembly, 1986-1988

As Scotti observes, Brazil experienced only 16 years of democracy in the 166 years between its independence from Portugal and the adoption of the 1988 Constitution[22] – from the mid-20th century to the 1980s, Brazil was ruled by dictatorships, sometimes existing within the legal shell

[11] Constitution, art 60 paras 1 and 5 respectively.
[12] Constitution of the Republic of the United States of Brazil 1891, art 90.4; Adriano Sant'Ana Pedra, 'Reflexões sobre a teoria das cláusulas pétreas' (2006) 43(172) Revista de informação legislativa 135, 138.
[13] See part 6.4 below.
[14] Constitution of the Portuguese Republic 1976, art 288.
[15] Roznai (n 1) 36.
[16] ibid, 36-37.
[17] ibid, 36.
[18] Da Silva (n 6) 227.
[19] See part 6.3.3 below.
[20] Da Silva (n 6) 227.
[21] ibid, 229.
[22] Valentina Rita Scotti, 'Constitutional amendments and constitutional core values: the Brazilian case in a comparative perspective' (2018) 5(3) Revista de Investigações Constitucionais 59, 66 33f.

provided by a *de jure* democratic constitution.[23] In 1979, the regime passed an Amnesty Law which gave legal immunity both to the regime's leaders and its opponents. Following the opposition's victory in the 1985 elections, a Constituent Assembly was summoned to draft a new constitution. However, the Amnesty Law was excluded from the new Assembly's remit.[24] The 1988 Constitution, drafted by the Constituent Assembly from 1986-1988, was a 'transformative' or programmatic constitution – its length and level of detail, often regarding quite specific areas of social and economic policy, mirrors that of India.[25] The constitution-making process also included significant levels of genuinely popular participation.[26] However, da Silva also highlights an anti-political strain in the Assembly's deliberations; he goes as far as to say that 'the rationale during the Constituent Assembly had frequently been that only what is entrenched is truly protected.[27] Because of this and perhaps the wider frequency of amendments since 1988, 'there is certainly a belief that *only what is protected by eternal clauses is actually guaranteed*.'[28]

Although 1988 was the year of the Constitution's adoption, this constituent moment stretched to 1993. The Constituent Assembly created an annex – the Transitional Constitutional Provisions Act (ADCT) – to govern the transitional period between the old Constitution and the new one as well as regulating the legal situation before and after constitutional amendments. Article 2 ADCT provided for referendums in 1993 on the 'form of government' (republic v monarchy) and the 'system of government' (presidentialism v parliamentarianism). In these referendums, the people chose the status quo of republicanism and presidentialism respectively. Article 3 ADCT also provided that five years after the Constitution's adoption, it could be revised by a simple majority in a joint sitting of the National Congress (in contrast to the 3/5 majority ordinarily required for constitutional amendments). In the event, just six amendments passed through this procedure.[29]

6.2.3 Amendment jurisprudence

The STF insists on its power to review the content of amendments vis-à-vis Article 60.4 based on logical inference: it is described as the 'guardian of the Constitution' in Article 102; the stone clauses are part of the Constitution; therefore, it must be able to control constitutional amendments for compatibility with the stone clauses.[30] However, unlike its capacity to review legislation, the Constitution does not expressly grant it the power to review constitutional

[23] Da Silva (n 6) 20.
[24] ibid, 22-23.
[25] ibid, 2.
[26] ibid, 23-24.
[27] ibid, 29.
[28] ibid, 229 (emphasis added).
[29] ibid, 2-3.
[30] Lima (n 7) 179.

amendments; the repetitive strain from Brazilian superior courts since 1926 that 'there is no doubt' of their power to do this betrays the fact that *they did need to justify it*.[31] This jurisdiction was reiterated under the present Constitution in ADI 466 (1991).[32] In the run-up to the 1993 referendums, the ADCT was amended to bring forward the referendums' scheduled date. Three separate 'direct actions of unconstitutionality' ('ADI's) were taken against this – while the STF reiterated its jurisdiction to review amendments, it held that there was no unconstitutionality.[33] Celso de Mello J stated that:

> there is no doubt that, given our constitutional system, this court is competent to, in diffuse or concentrated control, examine the constitutionality, or not, of constitutional amendments – as it happens in this case – challenged for violating explicit or implicit unamendable clauses.[34]

In 1993, an amendment authorised the federal government to levy a tax on financial transactions in the same year as this tax was approved by Congress. However, levying taxes in the same financial year as its legislative enactment is prohibited by Article 150.3 (b). In *ADI 939*, the STF interpreted Article 5.2 as encompassing an unwritten right of tax payers – the 'principle of anteriority'. Since Article 60.4 prohibits amendments 'tending to abolish' individual rights, and since the amending power was attempting to abolish this unenumerated tax right, the STF held that the amendment was unconstitutional. In the course of its ruling, the STF described the amending power as a '*derived* constituent power', not original constituent power which created the Constitution.[35] This was the first case in which the STF struck down a constitutional amendment.

These rulings raise a number of theoretical questions which have been the subject of academic and juristic debate. In getting to the heart of eternity clauses' nature and durability, they are relevant to other constitutions which include such clauses. Some of the most important questions include:

i) Whether Article 60.4 is an *exhaustive* expression of the Brazilian Constitution's unamendable principles or whether any unamendability extends beyond it;
ii) Whether Article 60.4 itself can be amended (the 'double-amendment thesis');
iii) Whether the principles protected by Article 60.4 can be amended outside of the ordinary amendment process (i.e. by referendum).

[31] Mendes (n 9) 456.
[32] Lima (n 7) 177.
[33] Lima (n 7) 177. ADIs 829, 830, and 833.
[34] ibid (Lima's translation).
[35] ADI 939.

i) Is Article 60.4 exhaustive of unamendability?

Answering this question ultimately depends on how one approaches constitutional theory generally. If one accepts the distinction between original constituent power and derived constituent power (i.e. the amending power), it follows that the latter has less scope of action than the former.[36] If this is true, then every amending power has some material limits to how far it can remake the constitution. This theory *is* endorsed by the STF – presumably, then, the Constitution's amending power would always have material limits whether they were spelled out explicitly in stone clauses or not. Most scholars agree on one concrete example of an implicit stone clause: that Article 60.4 itself cannot be amended. We shall discuss this below regarding the 'double-amendment thesis'.

Since the Brazilian Constitution does include stone clauses, the question of implicit unamendability is of less relevance, though the STF openly acknowledge the existence of 'implicit stone clauses'.[37] As with the German Constitutional Court, STF decisions regarding unamendability are linked to the text of Article 60.4 rather than more vague principles.[38] The extent of the protection to clause IV 'individual rights and guarantees' has been defined expansively by the STF. For example, since the STF recognises unenumerated rights, some of these rights are also defined as unamendable; such as the right in ADI 939. Whether clause IV protects socio-economic rights is an issue of scholarly disagreement.[39]

The extent to which unamendability can creep beyond what Article 60.4 envisages is something that can only be determined judicially, though the STF tends towards a hermeneutic interpretation to determine these limits. In *ADPF 33/PA*, Gilmar Ferreira Mendes J invoked the BVerfG's hermeneutic interpretations of Germany's Article 79.3 to justify a similar approach regarding Article 60.4, while also emphasising the need to maintain a link back to constitutional text:

> […]the effective content of 'eternity guarantees' can only be obtained through an hermeneutic effort [which is] the only activity [that] can reveal the constitutional principles which, though not expressly embraced by the unamendable clauses, *carry a narrow link* with the principles protected by them and thus covered by the immutability guarantee therein.[40]

ii) Double-amendment?

An influential (if controversial) line of legal reasoning holds that the stone clauses *are* amendable, but that the substance of what is protected by these clauses require two steps of amendment

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[36] See 'Argument 1 – amendment is not replacement' in Chapter 2.
[37] ADI 829.
[38] Benvindo (n 7) 362.
[39] Benvindo (n 7) 361; Da Silva (n 6) 228; Yaniv Roznai and Letícia Regina Camargo Kreuz, 'Conventionality control and Amendment 95/2016: a Brazilian case of unconstitutional constitutional amendment' (2018) 5(2) Revista de Investigações Constitucionais 35.
[40] ADPF 33/PA; quoted in Benvindo (n 7) 361 (emphasis added).

rather than one.[41] Instead of the normal route whereby the amending power directly amends the clause it wishes to change, amending stone clauses requires a two-step procedure: first, amend Article 60.4 to remove the relevant principle from its protection, and then amend the principle directly. This argument was put forward by Portuguese constitutional scholar Jorge Miranda[42] as well as Brazilian constitutional scholar Manoel Gonçalves Ferreira Filho. (Separately, Filho believed that the 1988 Constitution was only an amendment to the preceding Constitution, rather than a clean break of constitutional continuity.)[43] Part of Filho's argument was that 'constituent power' was a flawed theory – some constitutions are created in uniquely democratic moments and others less so. This meant that then normative supremacy of Constituent Assembly representatives over ordinary parliamentary representatives was unfounded.[44] Thus, the former could not legitimately constrain the latter and the amending power *could* amend the stone clauses like any other provision. Filho is also notable as a defender of the legitimacy of the dictatorial regimes which the 1988 Constitution sought to move past.[45]

There is precedent for double-amendment to sidestep eternity clauses, though not from Brazil. The Portuguese Constitution of 1976 (originating in a similar context to Brazil's) includes the longest eternity clause in the world.[46] Article 288 (f) of the Portuguese Constitution originally protected the 'common ownership of the means of production', a stone clause which constitutionalised the nationalisation of major industries as well as that Constitution's commitment to socialism.[47] This stone clause was amended in preparation for Portugal's entry into the EEC in 1989. No case was brought before the Portuguese Constitutional Court on this matter. This Portuguese chain of events gives credence to the double-amendment thesis, at least from a comparative perspective. As Suteu notes, though double-amendment has the potential to appear 'sleazy', it has the advantage of preserving the *existing chain of legal continuity* rather than forcing the amending power to push for constitutional replacement with all of the associated costs and dangers.[48]

However, the double-amendment thesis is rejected by most Brazilian scholars and jurists.[49] It is based on a very textualist and formalist reading of Article 60.4 rather than a hermeneutic or interpretive one. Opponents argue that it breaches the spirit of Article 60.4 and the Constitution as a whole. Double-amendment would be illogical to the very purpose of Article 60.4. Further,

[41] See generally, Virgílio Afonso da Silva, 'A Fossilised Constitution?' (2004) 17(4) Ratio Juris 454, 455-458.
[42] Pedra (n 12) 142; Benvindo (n 7) 352.
[43] Benvindo (n 7) 353
[44] ibid, 353.
[45] ibid, 351.
[46] Constitution of Portugal 1976, art 288; Roznai (n 1) 36.
[47] Suteu (n 2) 242.
[48] Suteu (n 2) 243.
[49] Scotti (n 22) 73; Benvindo (n 7) 354.

the 'derived constituent power' concept used by the STF rules out the possibility of double amendment. Since the amending power is only a *derived* power (i.e. *delegated* from the original constituent power to the amending power *through* the Constitution) it cannot undo the terms of its own delegation, of which the stone clauses are a part. It cannot convert its limited scope into an unlimited one. As the STF held in ADI 981 MC, '[a]mendment or revision, as processes of change in the Constitution, are manifestations of the established [i.e. derived or 'created'] constituent power and, by their nature, limited.'[50] This would seem to rule out the possibility of double-amendment.

iii) Referendum?

While one camp argues that stone clauses definitively limit the scope of the amending power and another argues that the amending power can always amend the stone clauses, a third position is that stone clauses are only *relative* material limits – they limit the ordinary amending power (i.e. the National Congress) but not an *extraordinary* amending power.[51] While there is original constituent power (exercised by the National Constituent Assembly), and derived constituent power (the National Congress), there can also be 'hybrid' constituent power. As put by one constitutional commentary, 'modification of the [stone clauses] can be done through consultation with the holder of [constituent] power – the people – by means of a plebiscite or referendum.'[52] An extraordinary amending power/hybrid constituent power must be a more direct expression of the original constituent power of the people. According to this reasoning, given that the Constitution itself was legitimised by the original constituent power, and given that this is based on the principle of popular sovereignty, it stands to reason that a direct expression of popular will through a referendum could overturn even the most fundamental provisions of the Constitution.[53]

Gilmar Ferreira Mendes, a constitutional scholar and later STF judge, is an advocate of this position. His argument is clearly distinct from the double-amendment thesis: stone clauses *are* binding, but they are not binding on the power that legitimised the Constitution in the first place – the people. He argues that the traditional dichotomy between 'constitutional amendment' and 'revolution' leaves out a third option: 'constitutional replacement'. In his view, replacement can maintain the legal continuity provided by the existing constitution – he cites European examples

[50] ADI 981 MC.

[51] Pedra (n 12) 145; Nelson Nery Júnior, Rosa Maria de Andrade Nery, *Constituição Federal Comentada* https://www.jusbrasil.com.br/doutrina/secao/art-60-subsecao-ii-da-emenda-a-constituicao-constituicao-federal-comentada/1153089225#a-A.60

[52] Nery (n 51) para 3.

[53] Cármen Lúcia Antunes Rocha, 'Constituição e mudança constitucional: limites ao exercício do poder de reforma constitucional' (1993) 3(120) Revista de informação legislativa 159, 182 available at https://www2.senado.leg.br/bdsf/handle/id/176171 accessed 21 May 2026.

like Germany's Article 146 which provides for a 'legal' replacement of the Basic Law to illustrate his point. This permits unamendable provisions to be overcome in an orderly, legal manner. He concludes: 'The petrous clauses or eternity guarantees do not infallibly ensure the continuity or permanence of a given constitutional order, nor do they exclude the possibility that this order contains a transition clause to another regime or model.'[54]

> If it were understood […] that the total revision or partial revision of the petrous clauses is implicit in the Constitution itself, one might consider – *through the use of a special process involving the participation of the people* – even amending the constitutional provisions relating to the constitutional amendment process with the aim of making explicit the idea of total revision or specific revision of the petrous clauses, thus making it possible to legally regulate the alteration of petrous clauses or even the replacement or overcoming of the current constitutional order by another.[55]

The 1993 referendums give credence to this argument. The people chose republicanism and presidentialism in these referendums. Although it is not specified in the Constitution, it stands to reason that a future proposal to change to the parliamentary system or monarchism would require further referendums. Republicanism and presidentialism are not mentioned in Article 60.4 because when the Constitution was adopted, these referendums were still five years away. Article 60.4 entrenches fundamental principles of Brazil's constitutional system – federalism, the separation of powers, and democratic rights. Republicanism and presidentialism are arguably just as fundamental as those mentioned in Article 60.4. (Indeed, all of Brazil's earlier stone clauses made republicanism unamendable.) Though not explicitly included as a stone clause, it is logical to assume that they constitute an *implicit limit* on the amending power.[56] However, given that the people made a determination on these issues through a referendum, republicanism and presidentialism arguably *remain amendable through a referendum*. If this is so, then why should federalism or another principle mentioned in Article 60.4 not be amendable in the same manner? As Mendes argues, any constitution founded on the popular sovereignty principle should endorse this kind of approach.[57]

However, the STF's interpretation of constituent power theory could lead to the conclusion that such referendums are just as 'derived' and thus limited in scope as the ordinary amending power.[58] A referendum is constrained in how and when it is called, it does not determine the question which it is asked, and it can be used in manipulative ways by those in power. As many constitutional scholars assess, these factors make referendums one constituted mechanism

[54] Gilmar Ferreira Mendes, 'Cláusulas Pétreas ou Garantias Constitucionais?' (1997) 1(12) Revista Consulex 48, 50.
[55] ibid.
[56] Pedra (n 12) 139
[57] Mendes (n 54) 48.
[58] See Yaniv Roznai, 'We the Limited People? On the People as a Constitutional Organ in Constitutional Amendments' (2023) 110 Supreme Court Law Review (2d) 103 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4206373 accessed 20 May 2026.

among many,[59] and this can naturally lead a court to determine it to be constrained in scope. What exactly it is bound by would be interpretive – would it be bound by the positive legal text of Article 60.4? The theory outlined already suggests not; referendums could probably alter the positive enumeration of unamendable principles. However, they could be bound by other, more opaque principles like a 'basic structure' or constitutional 'minimum core'. Perhaps Article 60.4 encompasses some of these principles, but they would not be dependent on the positivised text of these clauses.[60]

6.2.4 Analysis

The longer, more detailed, and more all-encompassing a constitution is, the more contestable it becomes, increasing the possibility of constitutional change. As Arantes and Couto state, 'if a constitution constitutionalizes a governmental agenda, subsequent governments are compelled – regardless of their ideology or public policy programmes – to make changes to the constitutional framework.'[61] Brazil is a prime example of this. In this context, any apex court would be eager to place some guardrails on how far a constitution-amending legislature can go when constitutional amendment is such a core part of everyday politics – the risk of democratic or constitutional backsliding is too great otherwise. This judicial instinct is also evident in India (and even among one 1930s Irish judge)[62] and would be more strongly felt when there is no realistic possibility of constitutional replacement or of strengthening the amendment process. Unamendability is a court's last refuge to prevent hegemonic power.

Despite the common judicial motivations, Brazilian unamendability can be distinguished with Indian unamendability on two grounds. Firstly, it is textually defined, meaning that Brazil's basic structure is laid out for all to see in the Constitution itself. It is something that the courts have to engage with rather than define from scratch. Secondly, when the textual nature of Brazilian unamendability is combined with the STF's elaborate articulation of constituent power theories, this leads some jurists to conclude that these clauses are not really unamendable, but amendable in a different way: by referendum. If this is true, the distinction between unamendability and tiered entrenchment disappears (at least in Brazil).

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[59] Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) 15-16 Indian Year Book of International Affairs 347, 405.

[60] See Jónatas EM Machado, 'The Portuguese Constitution of 1976: Half-life and decay' in Xenophon Contiades (ed) *Engineering Constitutional Change* (Routledge 2013); Catarina Santos Botelho, 'Some Distinctive Traits of the Portuguese Constitutionalism' in A S P Oliveira, & P Jerónimo (eds), *Liber Amicorum Benedita Mac Crorie Vol 1* (UMinho 2022) <https://doi.org/10.21814/uminho.ed.97.12>
https://doi.org/10.21814/uminho.ed.97.12

[61] Rogério B Arantes and Cláudio G Couto, 'Constitutionalizing Policy: The Brazilian Constitution of 1988 and Its Impact on Governance' in Detlef Nolte and Almut Schilling- Vacaflor (ed., *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012) 203, 208; quoted in Silvia Suteu, Eternity Clauses in Democratic Constitutionalism (OUP 2021) 182.

[62] See part 4.3.1 of this thesis.

Whatever about the nature of unamendability in Brazil, its effect on the wider constitutional structure is clear – to give the STF the final say within the Constitution. The degree of judicial activism by the STF is debatable.[63] The textual nature of Brazilian unamendability makes it more self-contained than that of India, but clauses such as clause IV give the STF a large degree of interpretive latitude. While it often shows degrees of restraint,[64] this does not change the fact that it holds what Hübner Mendes calls 'decisional sovereignty'.[65] In the view of Tommasini *et al*, this supremacy frees the STF from the threat of legislative override of its judgements:

> ordinarily, when overrides threaten the court, judges will search for second-best solutions; however, in Brazilian case, it is the court that has the last word, so it is the legislative body who is prompted to reach compromises and second-best solutions.[66]

When this is combined with 1) the detailed and lengthy nature of the Constitution itself and 2) the ease at which various political actors can access the STF, this court becomes a 'super power'. As Hübner Mendes summarises:

> The arrangement adopted by the 1988 Constitution places the [STF] as the last link in the state decision chain […] After a long circuit, the Court has the last word, and may end any dialogue creating a situation which can only be reversed, in the words of Marco Aúrelio J, 'by a revolution, in which the might of weapons, and not that of the law, prevails'.[67]

6.3 Germany: legality constraining the constituent power

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

- *Article 79.3, Basic Law for the Federal Republic of Germany.*

Article 79.3 of the German Basic Law (*'Grundgesetz'*), known as the 'eternity clause' (*'Ewigkeitsklausel'*), protects the principles of federalism and human dignity from amendment and sets out the core essence of Germany's postwar constitutional order. As in India and Brazil, the Federal Constitutional Court ('BVerfG') can review constitutional amendments for compatibility with Article 79.3. However, the biggest difference between German unamendability and that of India or Brazil is in how it is framed. The objective of the eternity clause is to create a wellspring of legality which can only be used by a substantively democratic and constitutional regime; it cannot be used by anti-constitutional movements in the way that Germany's previous Constitution was used by the Nazi regime. However, as with Brazil, there

[63] Da Silva (n 6) 106-109.
[64] Benvindo (n 7) 361
[65] ibid, 362
[66] Tommasini et al (n 9) (page 9).
[67] Mendes (n 9) 456.

is a possibility that German unamendability could be overcome through Article 146's constitutional replacement clause.

6.3.1 Article 79.3 – the eternity clause

Under Article 79, constitutional amendments to the Basic Law must be approved by two thirds of the members of the Bundestag (the directly elected chamber) and two thirds of the members of the Bundesrat (the chamber made up of representatives of state governments). Article 79.3 reads as follows: *'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.'* It is important to explain 'the principles laid down' in Articles 1 and 20. Article 1.1 states that 'Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' The rest of Article 1 acknowledges 'inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world' and states that the 'following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.' Articles 2 to 19 then list the Basic Law's bill of rights. Article 20.1 describes Germany as a 'democratic and social federal state'. Article 20.2 states the principle of popular sovereignty: 'All state authority is derived from the people.' Article 20.3 states the *Rechtsstaat* (roughly 'legal state') principle of the rule of law: 'The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.' 'Republicanism' is sometimes mentioned as one of Article 20's protected principles.[68]

One cannot assess Article 79.3 in isolation from Article 146: *'This Basic Law, which, since the achievement of the unity and freedom of Germany, applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.'* This is unusual in that it is a *constituted* provision which expressly allows the *constituent* power of the people to replace the entire constitution. In its original form when the Basic Law was adopted in 1949, it was intended to provide a legal means for future German reunification to take place,[69] allowing the Basic Law – which initially applied only to West Germany – to be replaced by a constitution for a reunified Germany. Article 146 betrays the quasi-provisional status which was afforded to the Basic Law by those who drafted it, conscious that it would only serve as a constitution for *part* of Germany (the term 'Basic Law' rather than 'Constitution' also speaks to this).[70] When German reunification was achieved in 1990, political leaders decided not to invoke Article 146 and

[68] Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Hart 2011) 46-47; Ulrich Preuss, 'The Implications of "Eternity Clauses": The German Experience' (2017) 44 Israeli Law Review 429, 440.
[69] Monika Polzin, 'Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law' (2016) 14(2) International Journal of Constitutional Law 411, 430; Heun (n 68) 12.
[70] Heun (n 68) 10.

instead amended the Basic Law to reflect the fact that reunification had occurred and that it was now the constitution of a united Germany. However, Article 146 is still operable, keeping open the option for full legal replacement of the Basic Law.

Article 79.3 can be assessed on three broad levels based on its text: i) the division of the federation into states, ii) the participation of states in the federal legislative process, and iii) the principles laid down in Articles 1 and 20.

i) Plurality of states

In simple terms, the Basic Law cannot be amended so that Germany becomes a federation of one state; there must be multiple states. This does not mean that the current number (16), boundaries, or existence of states is immutable. Whether Germany can be a federation of two is theoretically uncertain, though Dreier argues that this would detract from the diversity and plurality which the Basic Law intends.[71] A minimal level of states autonomy is also protected by Article 79.3. It would detract from the spirit of federalism if multiple states continued to exist but where all real political power was held by the centre. According to the BVerfG, each state must retain 'a core of its own tasks as 'domestic property' that cannot be withdrawn', including 'the free determination of its organisation, including the basic organisational decisions contained in the Land constitution, as well as the guarantee of the constitutionally binding allocation of an appropriate share of the total tax revenue in the federal state'.[72]

ii) States' participation in federal legislative process

The states' direct involvement in the process of federal law-making is an immutable principle of the Basic Law. Currently, this is provided through the Bundesrat – a federal legislative chamber made up of representatives from each state government. This gives each state's executive leaders a direct role in federal legislation and distinguishes the Bundesrat from other 'upper chambers'. According to Dürig, Herzog, and Scholz, the existence of the Bundesrat generally or in its current composition is *not* unamendable; it could, hypothetically, be replaced with a 'senate-like' upper chamber seen in India or Brazil.[73] However, they caution that there would probably need to be alternative procedures provided for state *governments* to have a direct role in federal law-making; the current level of power afforded to state governments through the Bundesrat could not diminish.

[71] Dreier, 'Art. 79(3)' in *Grundgesetz Kommentar* (3rd edn, Mohr Siebeck 2015) para 21. I am grateful to Dr Niels Kirst and Dr Frederick Pechan for providing me with Basic Law commentary textbooks.
[72] BVerfGE 34,9; cited in Dreier (n 71) para 22.
[73] Dreier (n 71) para 24.

iii) Human dignity and the principles of Articles 1 and 20

Article 1 refers to the principle of human dignity and the inviolability of human rights. Article 20 refers to Germany's status as a democratic, federal, and social state (20.1), as well as the principle of popular sovereignty (20.2) and the rule of law (20.3). The right of the German people to resist forces seeking to abolish the constitutional order (20.4) was inserted into Article 20 by an amendment in 1968 – most observers agree that because it was not *originally* part of Article 20, it is amendable.[74] The extent to which these principles can be restricted or amended has not always been clear from BVerfG caselaw. As Dürig, Herzog, and Scholz summarise, the position is that these principles are not removed from the remit of the amending power, but they are protected *as principles*. Their core content cannot be affected, but they can be modified for what the Court calls 'appropriate reasons'.[75]

Since Article 1 also states that the rights listed from Articles 2-19 'shall bind the legislature, the executive and the judiciary as directly applicable law', the issue becomes whether these rights are part of the 'principles laid down' in Article 1 and therefore unamendable under Article 79.3. Dürig argued that the Basic Law's bill of rights derived in its entirety from the human dignity principle and thus unamendable. However, the BVerfG tends to treat the 'essence of a basic right' (Article 19.2) as that right's 'dignity content'; it is this content which cannot be abolished. Rights guarantees are protected from amendment 'insofar as they are indispensable for the maintenance of Articles 1.1 and 1.2'.[76] This does not bar the way to some rights being abolished completely.[77]

Taken together, the principles of Articles 1 and 20 reflect the concept of the 'free democratic basic order' which appears repeatedly in the text of the Basic Law.[78] Though not explicitly defined as unamendable, it can be understood as the minimal core that must survive whatever political evolution that Germany experiences. As Dürig, Herzog, and Scholz put it, the 'material limits of permissible political struggle are only exceeded when the objectives pursued go beyond the scope of the power to amend the Basic Law.'[79] The eternity clause ensures that the Basic Law can only legitimise a certain scope of political movements, struggles, and regimes. This

[74] Suteu (n 2) 244.
[75] BVerfGE 30; 'Art 79' in Roman Herzog et al (eds) *Dürig/Herzog/Scholz: Grundgesetz* (106th edn Beck 2024) para 110.
[76] BVerfGE 84; *Dürig/Herzog/Scholz* (n 75) para 115.
[77] BVerfGE 94,49.
[78] Basic Law arts 10, 11, 18, 21, 73, 87a.
[79] *Dürig/Herzog/Scholz* (n 75) para 87.

reminds us that, as the BVerfG have held from the beginning, the Basic Law is an 'objective order of substantive values', not just a collection of legal procedures.[80]

6.3.2 The birth of the eternity clause

The German Basic Law was not created by an unlimited omnipotent constituent power; its drafting was a constrained process from the start. After 1945, Germany was occupied by four victorious Allied powers after its defeat in World War II. When the three Western Allies (US, UK, France) decided to combine their occupation zones to create 'West Germany', they laid out parameters in which a new constitution could be created. These were set out in the 'Frankfurt Documents' stipulating that a constituent assembly – which met as the Parliamentary Council – must draft a constitution based on the principles of federalism, democracy, and protection of individual rights.[81] In the drafting process, the Allies mostly intervened to ensure that West Germany would be sufficiently decentralised.[82] These interventions never demanded the inclusion of an eternity clause, but may have influenced the inclusion of federalism within the eternity clause.[83]

By the time that this new constitution was being constructed, the new constitutions of individual West German states were already in effect.[84] Almost all of these state constitutions included an eternity clause,[85] and much of their language would be recycled for Article 79.3. The Basic Law's first draft declared that amendment proposals that went against the 'free democratic basic order' would be inadmissible.[86] Amendments to the federal structure or states' participation in federal legislation was protected by an entrenched (though technically amendable) clause.[87] Members of the Parliamentary Council had a variety of views on the draft eternity clause. Many thought such declarations of unamendability were superfluous and redundant – after all, how could a form of words actually stop a revolution? One member, Rudolf Katz, implied that the very inclusion of a provision with such little practical value would suggest that the drafters of the Basic Law 'were not serious people'.[88] 'It would', he said:

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[80] Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn Duke University Press 2012) 746 n56.
[81] Heun (n 68) 10.
[82] ibid, 11.
[83] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 158-159.
[84] These states' legislatures elected the Parliamentary Council's members.
[85] Hauke Möller, *Die verfassungsgebende Gewalt des Volkes und die Schranken der Verfassungsrevision* [The constituent power of the people and the limits on constitutional revision] (LLD thesis, Hamburg University, 2004) 121-124.
[86] Herrencheimse draft art 108.
[87] Herrencheimse draft art 107.
[88] 'Meeting of the Federal Organisation Committee, 3 November 1948' in Edgar Büttner und Michael Wettengel (eds), *Parlamentarischer Rat 1948-1949 Akten und Protokolle*, *Band 13 Vol II* (German Bundestag and Federal Archive 2002) 717. I am grateful to Dr Niels Kirst and Dr Frederick Pechan for providing me with records of Parliamentary Council debates.

> [O]nly make sense if one imagined, for example, that, in the course of events, Stalin were to come to power in Germany and suspend certain laws. One would have to imagine further that, one day, Mr. Molotow [*sic*] comes pale-faced to Stalin and says: "It's not possible, because article so and so of the Bonn Constitution says this, that and the other. So we can't do that."[89]

Those in favour of the eternity clause readily accepted this point about ineffectiveness. However, to them, the value of such a clause was not its *ability* to prevent revolutions or *coups d'état*, but as a *clarificatory declaration* regarding constitutional and legal validity under the Basic Law. This new constitution could only legitimise some kinds of political regimes while in effect – under no circumstances could a totalitarian regime be legitimised by the Basic Law. In Thomas Dehler's words, it could not use the Basic Law as a 'mask of legality'. It is worth quoting an important portion of the debate between Katz and Dehler on this issue:

> Dehler: One can argue about the wording, i.e. whether the reference to these two articles is a good one. Perhaps we could choose a different formulation and state in the wording which democratic principles of the Basic Law are to be excluded from a constitutional amendment; in any case, I think it is necessary that we erect this barrier, not in the belief that we can thereby counter a revolution, but nevertheless with the will to remove the *mask of legality* from a revolution.
>
> Katz: I am in complete agreement with the spirit of Dr Dehler's motion, but I consider such a motion to be pointless or not appropriate to the circumstances. This motion says no more and no less than: Coups d'état and revolutions are inadmissible. In my opinion, it is not expedient to write such a provision into the constitution. No-one will be deterred from carrying out a coup d'état if they hear about this Article 108. *For this reason, such a formulation does not belong in the Constitution.*
>
> Schmid (Chairman): I agree with Mr Dehler. There is a difference between […] forcing someone to make an open revolution and giving him the opportunity to make an effective revolution under the protection of a sham legality without having to confess to it. In the latter case, he is more likely to get the stupid people behind him than if he has to say outright from the outset: I want to establish a tyranny and abolish democracy. - In addition, he will also be forced into illegality with all its disadvantages.[90]

Dehler and Schmid's argument becomes all the more compelling when we remember how Germany's last democratic constitution collapsed. While most observers accept that the Enabling Act of 1933 – an amendment to the Weimar Constitution allowing Adolf Hitler's government to make laws without parliament – effectively marked the end of the Weimar Republic and the beginning of the totalitarian Third Reich, the Weimar Constitution was never formally terminated or replaced.[91] Though formally a straightforward constitutional amendment, the Enabling Act allowed the Third Reich to exist under the umbrella of legality still provided by the Weimar Constitution right up to its defeat in 1945.[92]

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[89] Polzin (n 69) 423.
[90] 'No. 36 36th meeting of the Main Committee, 12 January 1949' in Michael F. Feldkamp *Der Parlamentarische Rat 1948 –1949 Akten und Protokolle Hauptausschuß Band 14 Vol II* (German Bundestag and Federal Archive 2009) 1118 (emphasis added).
[91] Conrad (n 59).
[92] *Dürig/Herzog/Scholz* (n 75) paras 64-65.

Though the Weimar experience was not explicitly addressed by the Parliamentary Council when discussing the eternity clause, it was undoubtedly material to their deliberations. To quote Preuss, the drafters of the Basic Law were 'traumatised by the near-defenceless collapse of the Weimar Republic and the unprecedented crimes of the Nazi regime'.[93] Council members did not want any future revolutionary/anti-constitutional movement to be able to use the Basic Law as legal cover. At the very least, such a movement would need to formally, positively, and explicitly *repudiate and replace* the Basic Law in order to carry out its anti-constitutional objective. The provision's ultimate value was to force the 'stigma of revolution' onto political movements which desired to undo the Basic Law's fundamental principles.[94] For the majority of the Parliamentary Council, this was sufficient reason to include an eternity clause, despite its factual or ultimate ineffectiveness in preventing undesirable outcomes.

The 'mask of legality' argument obviously reflected wider trends in global law and politics. This was the era which saw the birth of the United Nations system of international law and the adoption of the Universal Declaration of Human Rights. 'Legality', the 'rule of law', '*Rechtsstaat*', 'constitutionalism' could not be seen as merely procedural or morally-neutral concepts. If they were to have any meaning going forward – for Germany, Europe, or the world at large – they would have to include some basic respect for human dignity and the universal precepts of justice. The post-war and post-Holocaust world was simply less willing to tolerate the legal positivist view that 'law' had no essential moral content. The effects of that view were, in the eyes of many, writ large across the face of Europe.

6.3.3 The Federal Constitutional Court's approach to the eternity clause

Over the decades, the BVerfG has shifted between restrictive interpretations of the eternity clause and more expansive, even *supraconstitutional*, interpretations.[95] But even amidst these interpretive shifts, an amendment challenged under Article 79.3 has never (to date) been declared unconstitutional by the Court. As with Brazil's STF, it insists that its capacity to do so is part of its general role as guardian of the constitution. Broadly speaking, there have been two interpretive approaches towards the eternity clause. The first, more restrained, approach emphasises its role in preventing the *outright abolition* of its principles through the amending power. This goes back to the original motivation for the clause in denying the 'mask of legality' to a revolution.[96] In this light, while the content protected by Article 79.3 cannot be 'abandoned

[93] Preuss (n 68) 439. Preuss, however, argues that 'the collapse of the Weimar Republic cannot be attributed to a misuse of the amending power against which [Article 79.3] was intended to serve as protection. None of the Weimar Constitution's various amendments intended to annihilate or profoundly change the Weimar Republic's identity as a constitutional democracy.' Preuss (n 68) 441

[94] *Dürig/Herzog/Scholz* (n 75) para 60.

[95] See Moller (n 85) 136-151.

[96] See further Moller (n 85) 152-153.

in principle',[97] it can be extensively changed by the amending power. The second, more activist, approach emphasises the clause's role in preventing the *gradual* abandonment of these principles. Under this approach, demonstrated in a number of strong dissenting judgements, the thin-end-of-the-wedge represented by seemingly innocuous amendments must be stringently resisted if Article 79.3's promise is to be fulfilled.

The Southwest State case[98]

The Constitution of the state of Bavaria includes an eternity clause stating that 'Motions for changes of the Constitution which are opposed to the fundamental ideals of democracy of the Constitution shall be inadmissible.'[99] Article 184 states that 'the validity of laws which are directed against National Socialism and militarism or want to eliminate their consequences are neither touched nor restricted by this Constitution.'[100] This was to immunise 'denazification' measures from legal challenge. However, in a 1950 case,[101] the Bavarian Constitutional Court held that if Article 184 were inconsistent with fundamental constitutional principles, it would be void, even if it part of the Bavarian Constitution from the start:

> The [possibility] that a constitutional provision is itself void is not conceptually excluded simply because it is part of the constitution. There are constitutional principles that are so fundamental and so much an expression of a law that precedes even the constitution that they are binding on the constitutional legislator itself […] other constitutional provisions that do not have this status may be void because they violate them.[102]

It continued:

> if Article 184 meant that the legislator was permanently and absolutely dissolved from the obligations imposed upon him by the constitution and justice; if it provided that the people concerned could be permanently put beyond the pale of the constitution and the law, that article would be void because of its conflict with the idea of justice itself, with the principle of the Rechtsstaat, the equality norm and the basic rights, which are immediate reflections of the human personality.[103]

The Court held that such an interpretation was not necessary and that the provision was constitutional. However, it consciously opened the door to the possibility not only of unconstitutional constitutional amendments, but unconstitutional constitutional *provisions*. The following year, this approach was tested at the federal level. The state of Baden challenged the constitutionality of Article 118, a provision which allowed for the reorganisation of state

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[97] BVerfGE 30,1.
[98] BVerfGE 1,14; see further: Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) Connecticut Law Review 1381, 1393.
[99] Constitution of the Free State of Bavaria 1946, art 75.
[100] ibid, art 184.
[101] Decision of April 4, 1950, 2 Verwaltungs-Rechtsprechung No 65; cited in Gottfried Dietze, 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany' (1956) 42(1) Virginia Law Review 1, 15-16.
[102] ibid; quoted in BVerfGE 1, 14 para 77.
[103] Bavarian Constitutional Court (n 101); quoted from Dietze (n 101) (Dietze's translation).

boundaries without referendums, and which was being used to merge their state with two others. Baden argued that Article 118 was a violation of the Basic Law's 'inner unity' and the principles of democracy and federalism.[104] In its first major ruling – the *Southwest State case* of 1951 – the BVerfG dismissed the Baden argument but emphasised the Basic Law's internal coherence and unity. Following the Bavarian Constitutional Court's 1950 case, it defined the Basic Law as an *'objective order of substantive values'* rather than a formal or procedural entity.[105] Further, it explicitly endorsed the Bavarian Court's supraconstitutionalist stance – original provisions which violated basic constitutional principles could be voided – quoting the above passages approvingly. In essence, the BVerfG held that natural law could void formally enacted parts of the original constitution as well as amendments.

The Wiretapping case[106]

Article 10.1 states that 'The privacy of correspondence, post and telecommunications shall be inviolable.' In 1968, as part of the wider 17th Amendment to strengthen West Germany's security, the Bundestag and Bundesrat amended Article 10 to allow for secret monitoring of private communications without requiring the subject of surveillance to be informed and without recourse to judicial authorities. Though the amendment caused fierce political debate, its normative justification was grounded in the concept of 'militant democracy' – that a democratic state had the right and duty to protect itself from both external and internal undemocratic forces.[107] Fundamental rights could be restricted to maintain the free democratic basic order. However, militant democracy had another side: the maintenance of an essential core of democratic values from change. This was one of the original motivations for the eternity clause – the fear of democracy destroying itself.[108]

In the *Wiretapping case* (1970), the applicants argued that this amendment and the security statute passed on foot of it were unconstitutional under Article 79.3. Secret monitoring of communications affected Article 1's protection of human dignity and Article 19's protection of legal recourse. It was the closest the BVerfG ever came to declaring an amendment unconstitutional; the Court split 4-4 (under German law, a judicial review decision must have a clear majority for a law to be declared unconstitutional).[109] Both sides of this case could find justification in 'militant democracy'; it justified restrictions on rights and liberties in the name of

[104] See Kommers and Miller (n 80) 81-86.
[105] ibid 746 n56.
[106] BVerfGE 30,1.
[107] See Jan-Werner Müller, 'Militant democracy and constitutional identity' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018) 415.
[108] Schwartzberg (n 83) 157.
[109] Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 Journal of Civil Liberties 48, available from: https://pure.ulster.ac.uk/ws/files/11442558/Guardians.pdf accessed 20 May 2026.

protecting democracy, but its ultimate purpose was to protect the essence of this democracy from destruction.

Echoing the original motivation for the eternity clause among members of the Parliamentary Council, the prevailing four judges argued that the eternity clause should be interpreted narrowly as a legal prohibition on revolutionary action through the amending power:

> The purpose of Article 79 (3) as a barrier for the legislature amending the constitution is to prevent the existing constitutional order from being removed in its substance, in its foundations, by the formal-legalistic means of a law amending the constitution and from being misused for the subsequent legalisation of a totalitarian regime. The provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are not 'affected as principles' from the outset if they are generally taken into account and are only modified for a special situation in accordance with its special nature for evidently appropriate reasons. The formula that these principles 'may not be affected' therefore has no stricter meaning than the related formula in Article 19 (2), according to which a fundamental right 'may not be affected in its essential content' in any case.[110]

Further, they argued that a broader interpretation of Article 79.3 could negatively fossilise the Basic Law and restrict the amending power's ability to enact necessary constitutional reform:

> The restriction of the binding nature of the constitution-amending legislature in Article 79 (3) must be taken all the more seriously in interpretation, as it is an *exceptional provision* that must not […] lead to the legislature being prevented from modifying even elementary constitutional principles inherent in the system.[111]

The dissenting four agreed that such a weighty provision should not be interpreted excessively, but that 'it would be to completely misjudge its significance […] to see its purpose primarily in preventing the formal-legalistic route of a constitution-amending law from being used to subsequently legalise a totalitarian regime'.[112] The norms of Article 79.3 were the 'cornerstones of the constitutional order', and the amending power should not be permitted to dismantle them piece-by-piece through amendments like this.[113] They also argued that the term 'affecting' in Article 79.3 meant less than 'abandoning in principle'; they should rather be protected from decay – 'it must not be disregarded that the Basic Law legislator has chosen a different, and indeed substantively narrower formulation in Article 79(3) than in Article 19(2)'.[114] On the argument that the 17th Amendment was justified under militant democracy, the dissenting judges retorted that the objective of militant democracy was to prevent Article 79.3's principles from being dismantled – it would be incoherent to use militant democracy to justify the dismantling of these principles.

[110] BVerfGE 30,1 para 99.
[111] ibid, para 100.
[112] ibid, para 139.
[113] ibid, para 139.
[114] ibid, para 145.

Soviet expropriation case[115]

Further caselaw reflected the majority's deference. When German reunification took place in 1990, East Germany was admitted to the Federal Republic as five new states. Given the different political and legal system that existed in East Germany, a time-limited arrangement was agreed under the Unification Treaty which allowed different laws to apply even after unification. Article 143.1 states:

> The law in the territory specified under Article 3 of the Unification Treaty may deviate from the provisions of this Basic Law for a period extending no later than 31 December 1992 insofar and so long as disparate circumstances make full compliance impossible. Deviations may not violate paragraph (2) of Article 19 and must be compatible with the principles specified in paragraph (3) of Article 79.

However, the expropriation of property carried out by Soviet forces in East Germany after World War II was not reversed under the Treaty or the amendments to the Basic Law. Article 143.3 states:

> *Independently of paragraphs (1) and (2) of this Article*, Article 41 of the Unification Treaty and the rules for its implementation shall also remain in effect insofar as they provide for the irreversibility of acts interfering with property rights in the territory specified in Article 3 of the Treaty.[116]

In a 1991 BVerfG case, claimants argued that Article 143.3 was still subject to Article 79.3, as Article 143.1 had stipulated regarding other deviations. While the BVerfG reiterated that the principles protected by the eternity clause could not be abolished by the amending power, it held that the offending amendment was constitutional:

> In all of this, however, Article 79 (3) of the Basic Law only requires that the aforementioned principles are not affected. However, it does not prevent the legislature amending the constitution from modifying the *positive legal expression* of these principles for appropriate reasons.[117]

The Court also held that 'Article 143(3) of the Basic Law - like every constitutional amendment - must be examined in accordance with Article 79(3)'.[118] Möller interprets this as a shift away from the *Wiretapping* ruling: the minimalistic 'prohibition of revolution' function is not mentioned; while the 1970 ruling held that the unamendable principles could be amended for 'appropriate reasons', this ruling held that only the positive formulation of words could be changed, not the underlying principles.[119] However, the outcome of this case should not be forgotten: the Court accepted the validity of an amendment that legalised mass expropriation of property which was consciously excluded from Article 79.3. Further, the Court's language

[115] BVerfGE 84,90; see Moller (n 85) 142-144.
[116] This was a condition made by the Soviet Union for their agreement to the Unification Treaty.
[117] BVerfGE 84,90 para 131.
[118] ibid, para 130.
[119] Moller (n 85) 144.

that Article 79.3 does not prevent the amending power 'from modifying the positive legal expression' of protected principles could be read as quite a wide berth given that, ultimately, all that any lawmaker can ever do is make and revise the 'positive legal expression' of principles. This understanding of the phrase was given by the Court in a 2004 case.[120]

The Lisbon case[121]

In 2009, the constitutionality of the Lisbon Treaty – which reformed the European Union's ('EU') political structures and deepened European integration – was challenged in the BVerfG. Though the Court held that the Treaty was constitutional, it also held that the transformation of Germany into a constituent state of a *federal* Europe would be against German constitutional identity as encapsulated in Article 79.3. The Court held that the German people were free in principle to bring Germany into a federal Europe, but that this could only be achieved through Article 146 (constitutional replacement) not the amending power of Article 79.[122] Most revealingly, it hinted in *obiter* remarks at the possibility that the principles protected in Article 79.3 could be unamendable even under a new constitution:

> Whether the constituent power is also subject to this limitation due to the universal nature of dignity, freedom and equality, which would become relevant if the German people, in free self-determination, *but continuing in the tradition of legality of the order under the Basic Law*, adopted a new Constitution ([…]), need not be decided here. Under the order of the Basic Law, the fundamental principles that shape the state order and which follow from Art. 20 of the Basic Law – namely, democracy, rule of law, social state, republicanism, federalism and the substance of essential fundamental rights that is indispensable to ensure respect for human dignity – are, in their principal quality, beyond the reach of any amendment.[123]

The Court went on to say that the eternity clause 'also makes clear that the German Constitution, in line with international developments, particularly since the establishment of the United Nations, has a *universal core* that is not subject to amendment by positive law.'[124] As Suteu argues, the consequences of this judicial thinking are potentially profound,[125] and forces us to consider whether the eternity clause can restrict the power of constitutional replacement under Article 146. The Court's above remarks were suggestive, premised on the idea of *choice* by the constituent power. If the German people, using their constituent power and right of self-determination, *choose to continue* the Basic Law's 'tradition of legality', then the unamendable principles of Article 79.3 would remain unamendable. We may infer from the phrase 'continue'

[120] BVerfG NJW 2004, 999. Para 111; Moller (n 85) 147-151.
[121] 2 BvE 2/08, 30 June 2009 (Court's translation) https://www.bverfg.de/e/es20090630_2bve000208en accessed 19 May 2026.
[122] 2 BvE 2/08, 30 June 2009 para 179
[123] ibid, para 217.
[124] ibid, para 218.
[125] Suteu (n 2) 118.

that the constituent power chose to use Article 146 to enact a new constitution instead of acting outside it.[126]

However, when we consider it at face value, the Court's above suggestion could seem rather trite. On one level, it essentially says the following: if the constituent power freely decides to make the Basic Law's unamendable features unamendable in a new constitution, they would be unamendable – which is tautologous. On another level, perhaps the constituent power would be restricted in its scope by these unamendable principles because of the universality of dignity, freedom, and equality. While most right-thinking people would agree that all forms of power ought to respect these principles, the enforcement of these principles as embodied in the Basic Law's eternity clause in a scenario of constitutional replacement is highly questionable. For these reasons and others, many academic observers conclude that Article 79.3's unamendability *cannot* go beyond the existing Basic Law, and thus a replacement under Article 146 could not be restricted by it.[127]

6.3.4 Analysis

Unlike every other jurisdiction considered in this thesis, German unamendability is not so much justified from theories of constituent power as it is built on a *fear* of constituent power.[128] The constituent power of the German people is openly acknowledged in the Basic Law and is even provided a constitutionalised mechanism to express itself. None of the participants in the Parliamentary Council attempted to argue that an eternity clause could prevent the constituent power (or just *power* generally) from destroying what it protected. Instead, they argued that making these principles unamendable would define the fixed character of the Basic Law so that no future anti-constitutional movement or government could use it as a legal cover for its objectives. If such a regime wanted a source of legitimacy, they would have to look elsewhere. Regardless of what amendments were made, the font of legality provided by the Basic Law could only sustain a regime that respected federalism, human dignity, and a rights-based understanding of democracy. This is the one thing that the eternity clause can deny to the constituent power.

If we conclude that Article 146 is *not* subject to Article 79.3 (as many German jurists agree, despite the BVerfG's suggestions in *Lisbon*),[129] it is possible to say that there is a legal constitutional mechanism within the Basic Law to undo its unamendability – Article 146 acts as

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[126] Polzin (n 69) 429.
[127] Peter Huber, *Grundgesetz Kommentar* [Basic Law Commentary] (Michael Sachs ed., 6th ed. 2011); cited in Polzin (n 69) 430.
[128] See generally Christoph Möllers, 'We are (afraid of) the people': Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007) 87.
[129] Huber (n 127); Polzin (n 69) 430.

an *escape* clause to counter Article 79.3's *eternity* clause. To this extent, one can conclude that the German eternity clause is *contestable* through Article 146. However, as with India and Brazil, German unamendability affords final say sovereignty to the BVerfG, so any conclusions that this is the case are speculative until this supreme authority makes an authoritative ruling on the matter.

6.4 Unamendable republicanism in France

The republican form of government shall not be the object of any amendment.

- *Article 89, Constitution of the French Republic.*[130]

The oldest example of explicit constitutional unamendability is found in France: Article 89.5 of the French Constitution prohibits amendments to the 'republican form of government' and all French constitutions since 1884 have included a clause to this effect. This eternity clause contrasts to those of Brazil or Germany not only in its brevity, but most starkly in how it is treated by judicial authorities. France's supreme constitutional body, the *Conseil constitutionnel* ('CCF'), refuses to review amendments for compatibility with Article 89.5. This is despite the fact that 'constituent power theory' – so essential to so many unamendability doctrines – was born in revolutionary France.[131] In short, the people's democratic power at elections and referendums and the constituent power to make a constitution are treated as one-in-the-same; the constituent power is considered to be active and living (rather than dormant) within the French Constitution. A constituted body like the CCF cannot stand in judgement on what (or indeed *how*) the sovereign people decide to reform the Constitution. French judicial restraint in this area has its roots in an older attitude going back to the republican revolutionaries of the 18th century which treated amendment rules as *advisory* rather than mandatory.[132]

6.4.1 Constitutional amendment in France

The Constitution of the French Fifth Republic (1958) sets out its procedure for amendment in Article 89: amendment proposals can be initiated by members of the National Assembly (France's lower house of Parliament) or the President of France. As with the legislative process, the proposal stage of an amendment includes wide consultations including with the Council of State (the legal advisor to the executive and the court of last appeal in administrative law).[133] It

[130] Constitution of the French Republic 1958, art 89 line 5.
[131] Emmanuel Joseph Sieyès, *Qu'est-ce que le Tiers-État?* [What is the Third Estate?] (1789); republished in Oliver W Lembcke and Florian Weber (eds) *Emmanuel Joseph Sieyès The Essential Political Writings* (Brill 2014) 43.
[132] Mark Tushnet, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018) 317.
[133] Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Hart 2013) 241.

is introduced to either house of Parliament (the National Assembly or Senate) and must be approved in identical form in both houses. Final approval of the amendment is reserved for either a referendum or a 3/5 majority of a joint sitting of Parliament. There are also circumstantial limits on amendments: constitutional amendment is impossible during a period of territorial invasion; Article 7.6 forbids amendments from taking place when the President has resigned, died, or been impeached; the CCF has also interpreted an additional limit, that amendments are impossible while the President is using emergency powers.[134]

Article 89.5 lists the permanent material limit on amendability: *'The republican form of government shall not be the object of any amendment.'* Its language – born amidst decades of struggle between republicans, monarchists, and Bonapartists – is totemic of France's self-identification as a republic. Despite clearly limiting the scope of amendability, the CCF has repeatedly refused to review the constitutionality of amendments on principle. While the CCF's stance of non-justiciability has largely been based on its supposed lack of jurisdiction to review amendments, it is also grounded on the positive norm of *popular sovereignty* – a principle central to French republicanism since the Revolution. It is expressed in the first paragraph of Article 3: 'National sovereignty shall vest in the people, who shall exercise it *through their representatives and by means of referendum*'[135] as well as the 1789 Declaration of the Rights of Man and the Citizen. While the distinction between original and delegated constituent power originated during the French Revolution and is acknowledged by most French jurists,[136] French doctrine does not distinguish between a founding moment of constituent power and everyday popular democratic power. This partly explains why a judicial doctrine of unamendability has not developed.

In contrast to earlier French constitutions which entrusted constitutional protection to political bodies like the Senate, the 1958 Constitution entrusts this control power to the CCF. The Constitution does not mention 'judicial power'; though there was a desire for more judicial limits on the legislative power, the creation of an explicit 'constitutional court' with the power to review legislation was a leap which the drafters of the 1958 Constitution were not fully willing to embrace.[137] In this respect, the Constitution does not decisively break with the pre-1958 political constitutionalist culture. Nonetheless, the CCF effectively acts as France's court of final appeal and performs a function analogous to constitutional review. It generally applies its 'constitutional control' function prior to the enactment of law, however this has somewhat

[134] Decision no. 92-312 DC of September 2, 1992: Treaty on European Union :: "Maastricht II.
[135] Declaration of the Rights of Man and of the Citizen 1789, art 3.
[136] Roznai (n 1) 114.
[137] Boyron (n 133) 45.

changed after the 2008 suite of constitutional amendments.[138] As its chief function is to control what legislation is passed, it has been described as a 'cannon aimed at Parliament', not the President.[139] 'Guardian of the constitution' would probably not be an accurate description of the CCF.

6.4.2 French republican constitutionalism

Article 89.5 concerns the republican form of government, so it is useful to recall aspects of French history related to France's status as a republic. In the decades preceding the French Revolution, the political thought of Jean-Jacques Rousseau exerted a strong influence on French intellectual life. Building on earlier theorists like Bodin and his concept of sovereignty, Rousseau argued that the only legitimate foundation of law lies in its expression of the *general will* of the community.[140] This was the expression of the unselfish and unanimous consent of the people in a general assembly. Laws that genuinely reflect this will cannot be regarded as external impositions on citizens. These ideas shaped the political philosophy of revolutionary France and the conception of republicanism that emerged from it.[141] One of these ideas from Rousseau was that 'a nation is always at liberty to change its laws, even the best; for if it likes to injure itself, who has the right to prevent it from doing so?'[142]

Among its seventeen articles, the 1789 Declaration echoed Rousseau in asserting that 'The nation is essentially the source of all sovereignty' (article 3) and that 'The law is an expression of the general will' (article 6).[143] Sieyès also described his theory of constituent power at this time – that the nation held the sole power to make and remake a constitution, and that constituted entities had only delegated and limited powers.[144] Popular sovereignty, whether spoken about in Rousseauvian terms like the *'general will'* or Sieyès' *'pouvoir constituant'*, was the guiding principle of French revolutionaries. It was to secure and make effective the people's sovereignty that the Revolution was taking place.

While the 1789 Declaration was forthright in asserting popular sovereignty, it was principally an attempt to articulate the substantive rights of individuals. Popular sovereignty was built on the natural pre-constitutional rights that every person held inalienably. Further, article 16 stated that 'Any society in which the guarantee of rights is not assured, nor the separation of powers

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[138] Arthur Dyevre 'The French Constitutional Council' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (CUP 2017) 324; Boyron (n 133) 150-160.
[139] Dyevre (n 138) 324.
[140] Jean-Jacques Rousseau, *The Social Contract* (Wordsworth 1998) 37-39.
[141] Marie-Luce Paris, *Principles of French Constitutional Law* (Routledge 2025) 22-25; Derek Matravers, 'Introduction' in Rousseau (n 140) ix-x.
[142] Rousseau (n 140) (II,12) 54.
[143] Declaration (n 135) arts 3 and 6; Boyron (n 133) 40.
[144] Sieyès (n 131).

determined, *has no constitution*' – establishing, as Boyron highlights, a *substantive* understanding of constitutionalism within France.[145] Similarly, Sieyès held that the only thing above constituent power was natural law.[146] This tradition of substantive constitutionalism survives today in the *'bloc de constitutionalité'* which, according to the CCF, includes the 1789 Declaration as well as what the 1946 Preamble calls the 'fundamental principles recognised in the laws of the Republic'.[147]

France's first written Constitution was adopted in 1791 by the National Constituent Assembly. One week prior to its adoption, this Assembly debated a formula for future constitutional amendment.[148] Given the Rousseauvian idea of popular sovereignty and Sieyès' doctrine of unlimited constituent power, the logical problem that the Assembly faced was whether the Constitution could even set rules and procedures for its own revision? Could the Assembly delegate a form of constituent power *within* the Constitution that allowed for such reform? Could they *force* the people of France or future generations to abide by this method? Did not the people have an '*inalienable right to review, reform, and change its system of constitutional laws, or […] association*?.[149] If the people, by whatever representation, were forced to abide by a set procedure for constitutional reform, it implied that the popular sovereign was in some way limited (i.e. *not* sovereign). Their solution was expressed in Title VII of the 1791 Constitution which outlined the procedure through which assemblies of revision could be called to propose amendments. Title VII Article 1 emphasised its *advisory*, rather than mandatory, quality:

> The National Constituent Assembly declares that the Nation has the inalienable right to change its Constitution; and nevertheless, *considering that it is more in line with the national interest to use only the means provided for in the Constitution itself* to reform those articles whose disadvantages have been revealed by experience, decrees that this shall be done by a Revision Assembly in the following manner:[150]

This was what Tushnet calls a 'prudential recommendation' for how the Constitution *should* be reformed – the Assembly had the self-awareness to know that it could not *force* the popular sovereign to adhere to it, that this was ultimately the choice of the people, but that a procedure should be set out allowing revisions to take place in a limited, predictable way.[151] It is important to emphasise that this popular capacity for constitutional reform was conceived of *as a right* which ought to be vindicated by and through the constitution; it was not just a descriptive

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[145] Declaration (n 135) art 16.
[146] Sieyès (n 131) 89.
[147] Conseil constitutionnel [CC] N° 71-44 DC 16 Jul. 1971 Rec 29; Boyron 42-4; Denis Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (or the Absence Thereof)' (2008) 44 Israel Law Review 389, 411-412.
[148] For an overview of the debates of the National Constituent Assembly in English, see Tushnet (n 132).
[149] Isaac Le Chapelier quoted in Tushnet (n 132) 320.
[150] Constitution of 1791, Title VII Article 1.
[151] Tushnet (n 132) 333.

account of how a constitution or state was legitimised. Though the 1791 Constitution barely survived a year, the idea that constitutional amendment rules have an advisory rather than mandatory quality is one that arguably survives into French jurisprudence today.

The First French Republic survived a mere twelve years. It was replaced by Napoleon I's Empire (1804), reverted to the Bourbon (1815) and later Orléans (1830) monarchies, and was followed by the Second Republic (1848), the Second Empire (1852), the Third Republic (1875), Nazi occupation and the Vichy regime (1940), the Fourth Republic (1946), and the Fifth Republic (1958). It was amidst this constitutional oscillation that in 1884 the first republican eternity clause was added to the Constitution of the Third Republic.[152] At the time of this amendment, monarchists were still a significant faction in French politics. Though the political strength of French monarchism has since waned to the point of obscurity, this clause has remained in each successive French constitution.

The instability of the Fourth Republic (1946–58) – marked by a weak presidency, frequent legislative breaches of the Constitution, and political disorder – led to a crisis in 1958 when army generals in Algeria demanded continued French rule and the return to power of Charles de Gaulle, the leader of the French Resistance during World War II. The President declared the Fourth Republic to have failed and invited de Gaulle back to power, who agreed only if a stronger presidential constitution was created. On 3 June 1958, the National Assembly set guiding principles for a new constitution, including ministerial responsibility to parliament, separation of the executive and legislative branches, and judicial independence to protect the rights of the 1789 Declaration and 1946 Preamble. The resulting Constitution was approved by referendum, establishing the Fifth Republic with a stronger presidency and the creation of the CCF.

6.4.3 Cases and incidents

The 1962 ruling (de Gaulle's referendum)[153]

On 2 October 1962, President de Gaulle announced his intention to amend Articles 6 and 7 to change the method of electing the President from an electoral college to direct election by the people. Suspecting politicians would not endorse this change, he resorted to Article 11 – the mechanism which allows referendums to be held *on ordinary bills*, not constitutional amendments – to pass his proposed reform, bypassing Parliament. In response, the National Assembly withdrew its support for the Government on 5 October; four days later, de Gaulle dissolved the Assembly and called a general election.

[152] Constitutional Law of 25 Feb 1875, art 8.3; introduced through amendments of 14 Aug 1884, art 2.
[153] Decision no. 62-20 DC of November 6, 1962.

De Gaulle's proposal was approved by the people in a referendum on 28 October. However, this method of amending Articles 6 and 7 ignored the clear procedure set out for amendments in Article 89. The President of the Senate referred the bill to the CCF, but it refused to strike down the result of the referendum, stating that the people had given their verdict and that it was in no position, as a constituted entity with limited jurisdiction, to overturn their wishes. It also argued on procedural grounds that its jurisdiction did not cover referendums under Article 11.

> Considering that, although Article 61 of the Constitution entrusts the Constitutional Council with the task of assessing the conformity with the Constitution of organic laws and ordinary laws which, respectively, must or may be submitted to its examination, […] it follows from the spirit of the Constitution, which has made the Constitutional Council *an organ* regulating the activity of the public authorities, that the laws which the Constitution intended to refer to in article 61 are only those passed by Parliament and not those which, adopted by the People following a referendum, *constitute the direct expression of national sovereignty*.[154]

Despite the clear breach of Article 89, the principle of popular sovereignty – expressed through the non-reviewability of referendums[155] – took precedence. Notwithstanding the legal-constitutional implications of this ruling, its political implications were to cement a Gaullist/presidentialist understanding of the relatively young Constitution. As Baranger puts it, 'The author of the Constitution had not left the stage';[156] thus the CCF – which described itself as a mere 'organ' – was reluctant to stand athwart a popular mood which had just endorsed de Gaulle's constitutional vision.

The 1992 ruling (Maastricht II)[157]

The CCF was asked to rule on the constitutionality of the Maastricht Treaty – reforming the European Communities – three times in 1992, through Article 54 (the control process to ensure the constitutionality of international agreements). In '*Maastricht I*' (April 1992), the CCF ruled that the Treaty could only be ratified after the Constitution was amended. Despite the amending power having inserted Article 88.3 to allow ratification, the Treaty was again referred to the CCF – the claimants argued that the amending power failed to amend Article 3 of the Constitution and Article 3 of the 1789 Declaration which expressed the principle of national sovereignty. In its '*Maastricht II*' ruling, the CCF held that:

> Subject to the provisions governing the periods in which the Constitution cannot be revised (Arts 7 C and 16 C and the fourth paragraph of Article 89 C) and to compliance with the fifth paragraph of Art. 89 C ("The republican form of government shall not be the object of an amendment") the constituent authority is sovereign; it has the power to repeal, amend or amplify constitutional provisions in such manner as it sees fit; there is accordingly no objection to

[154] ibid, para 2 (emphasis added).
[155] Eoin Daly, 'Translating Popular Sovereignty as Unfettered Constitutional Amendability', European Constitutional Law Review 15 (2019) 619.
[156] Baranger (n 147) 393.
[157] Decision no. 92-312 DC of September 2, 1992: Treaty on European Union :: "Maastricht II

> insertion in the Constitution of new provisions which derogate from a constitutional rule or principle; the derogation may be express or implied.[158]

It reiterated:

> The constituent power is sovereign, *save only for the exceptions indicated above*; it has power to repeal, amend and amplify constitutional provisions in such manner as it sees fit.[159]

'Save only for the exceptions indicated above' suggested a *limited* constituent power, that 'the people' did not have a full scope of action in potential amendments. It also left open the possibility of the CCF enforcing these limits. This line of reasoning was repeated in the 1999 *New Caledonia* decision when the CCF stated 'there is nothing to prevent the constituent power, *subject to the provisions of articles 7, 16 and 89 of the Constitution*, from introducing into the text of the Constitution new provisions.'[160]

The 2003 ruling (decentralisation)[161]

In 2003, a constitutional reform to allow for more regional decentralisation across France was passed by a congress of Parliament convened under Article 89's amendment procedure. A group of parliamentarians referred this reform to the CCF for control under Article 61. In a brief judgement based solely on jurisdictional grounds, the CCF said that it had no jurisdiction to review the contents of the amendment:

> the competence of the Constitutional Council is strictly delimited by the Constitution; […] it may only be specified and supplemented by organic law in compliance with the principles laid down by the constitutional text; that the Constitutional Council cannot be called upon to rule in cases other than those expressly provided for by these texts; […][162]

> the Constitutional Council does not derive from article 61, article 89 or any other provision of the Constitution the power to rule on a constitutional revision[163]

The official CCF commentary on this ruling refers to the idea of '*lit de justice*' or 'bed of justice'.[164] This was a concept dating to the *ancien regime* describing the monarch's sovereign power to arrive into court proceedings and overturn the judge's decision. As the 20th century French jurist and CCF member Georges Vedel described it, 'the sovereign appears in majesty and comes, in a sort of bed of justice, to *break the judgments of the judges'*.[165] To Vedel, the amending power represented the *exact same* sovereignty. According to the CCF commentary, once their jurisdiction applied to the substance of amendments, the people's *lit de justice* would disappear, and would thus cease

[158] ibid, s.19 (Baranger's translation); Baranger (n 147) 395.
[159] ibid, s.34 (Baranger's translation); Baranger (n 147) 395 (emphasis added).
[160] Decision no. 99-410 DC of March 15, 1999: Organic law relating to New Caledonia, s.3.
[161] Decision no. 2003-469 DC March 26, 2003: Constitutional revision of the decentralized organization of the Republic
[162] ibid, s.1.
[163] ibid, s.2.
[164] Cahiers du Conseil constitutionnel, Cahier n° 15, Commentary on decision no. 2003-469 DC of March 26, 2003.
[165] ibid.

to be sovereign. As Favoreu put it, the constituent power of the people has the final word within the French Constitution, even over and above the rulings of judicial bodies.[166] The 2003 ruling settled any lingering interpretations that arose out of *Maastricht II* that the CCF could rule on the constitutionality of amendments.[167]

6.4.4 Analysis

The current position of the CCF is that while the republican eternity clause is a limit on the amending power, no constituted entity is empowered to enforce it. The responsibility for maintaining it is in the hands of politicians and the citizenry. If anything, it is a *political constitutionalist* constraint. As Carcassone remarked:

> in the absurd case in which the constituent power would want something other than what the Republic and democracy command, what the people agree with or what they consent to, in brief, if the constituent power went mad and denied the rule of law or national sovereignty, *the remedy to this folly could not be found in positive law*.[168]

Given the existence of Article 89.5, one could argue that any such act would mark the termination of the Fifth Republic's Constitution and replacement by a new one. If the amending power of France did change the political system in a way that substantively violated the 'republican form of government' (whether defined narrowly or broadly), Article 89.5 would probably stand as a marker for posterity that the Fifth Republic had lapsed and had been replaced by something else, regardless of whether this regime continued to use the 1958 Constitution as its source of legitimacy. This highlights Article 89.5's *declaratory* function.

Like Brazilian and Indian constitutional doctrine, French doctrine does distinguish between *original* and *derived* constituent power.[169] However, as Polzin observes, the CCF does not draw the same conclusion from this distinction as apex courts in our other case studies – that the derived constituent power is limited in scope. As Baranger argues, '[t]he gap between the 'original' constituent power and the 'derived' constituent power is […] bridged' through CCF jurisprudence.[170] To quote Vedel:

> The derived constituent power has the same nature as the initial constituent power: the constitution prescribes only a procedure (which can by the way be revised . . .), it cannot limit its exercise (since even the prohibition relating to the republican form of government in article 89, last paragraph, loses its validity if revised).[171]

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[166] Wanda Mastor and Liliane Icher, 'Constitutional amendment in France' in Xenophon Contiades (ed) *Engineering Constitutional Change* (Routledge 2012) 119.
[167] ibid, 118.
[168] ibid, 118.
[169] Polzin (n 69) 434.
[170] Baranger (n 147) 401.
[171] George Vedel, 'Schengen et Maastricht (à propos de la décision n°91-294 DC du Conseil constitutionnel du 25 juillet 1991) (1992) 8(2) Revue Francaise de droit administratif 173, 179 (Polzin's translation); quoted in Polzin (n 69) 434.

To constitutional scholars like Roznai and Baranger, this CCF position is incoherent – one cannot conclude on the one hand that a power is derived and at the same time say it is unlimited. However, it is only incoherent if we presume that the original constituent power is absent at the time of a constitutional amendment. But under French doctrine and republicanism, this presumption is wrong.[172] As Malberg pointed out, French public law:

> is based on the notion that *the people is present* during the making of statutes by the legislature as well as at the time of the enactment of the constitution by a constituent assembly (...); the legislature will be competent, as it represents the people, in order to interpret the will expressed by the people in the constitution.[173]

This can be summarised in an oft-quoted remark from Royer-Collard: '*Constitutions are not tents pitched for the people to sleep in'*.[174] While constitutional theory ordinarily treats original constituent power as a momentary event which subsequently disappears or goes into hibernation upon the adoption of the constitution, French doctrine holds that the constituent power that created the Constitution never disappeared or went to sleep – it continues to vivify French democracy in elections and referendums. Thus, constitutional amendments *are* expressions of popular sovereignty and cannot be reviewed by the CCF. The constituent power/popular sovereign is a living force immanent within the French Constitution. This brings French doctrine to the same theoretical position as Pettit in *On the People's Terms*.[175]

The French case also reflects Tushnet's suggestion that constitutional amendment rules are ultimately *prudential recommendations* rather than enforceable positive law. This is an attitude and tradition with deep roots going back to the French Revolution. It was in this context that constitution-makers set out an *advisory* amendment procedure. This suggests that in a political context which places normative weight on the popular sovereignty principle, eternity clauses should be treated as declaratory and non-justiciable. This need not diminish their importance, but it challenges the idea that unamendable parts of a constitution are where courts must apply their strongest interventions and remedies. The French example suggests, counterintuitively, that even when they enjoy the power of judicial review, this may be where courts should stand aside.[176] Such eternity clauses are best conceptualised as part of the 'political' rather than 'legal' constitution. This challenges the stance which holds that the judicial power to review

[172] See part 3.4.3 of this thesis.
[173] Raymond Carré De Malberg, *Expression de la volonté générale* (Economica 1984) 130-131 (emphasis added); quoted in Baranger (n 147) 406.
[174] Royer-Collard quoted Mastor and Icher (n 166) 119-120.
[175] Philip Pettit, *On the People's Terms* (CUP 2014) 286.
[176] Contrast this with Dixon and Yap's suggestion that when the democratic minimum core is threatened, courts should apply the strongest remedies and enforcements; Rosalind Dixon and Po Jen Yap, 'Responsive Judicial Remedies' (2025) Global Constitutionalism 1.

amendments is latent in all constitutions, or the slightly cynical stance that the only thing that succeeds in this area is success.[177]

6.5 Conclusion: altering the unalterable

The most significant observation about the eternity clauses of Brazil, Germany, and France is that despite their claims to unamendability, there likely exists a procedure under each existing constitution to alter each of them. In Brazil, a strong line of constitutional doctrine holds that the stone clauses could be altered through referendums; in Germany, Article 146 is a constituted mechanism to replace the entire Basic Law, and can likely undo the unamendability of Article 79.3; in France, since the republican eternity clause is non-justiciable, it can be amended by the ordinary amending power. However, in Brazil and Germany, notwithstanding the solid legal and constitutional grounds to argue that these eternity clauses can be altered in the ways described above, these are speculative since unamendability in these countries creates the same structural effect we observed in India: judicial supremacy. It it is ultimately for the courts to judge whether these constituted mechanisms can alter the Brazilian and German eternity clauses.

A prominent Brazilian jurist who argues that the stone clauses can be amended by referendum, Gilmar Ferreira Mendes, consciously draws a connection between this proposal and Germany's Article 146. To him, both are examples of 'hybrid' constituent power reemerging under the umbrella of the existing constitution. Their utility is in being able to alter unamendable clauses without breaking the existing chain of legal continuity. However, there is a tension here: this is precisely what the German eternity clause tries to prevent – the use of the Basic Law as legal cover for ends which are contrary to the eternity clause. While Ferreira Mendes sees the ability to revive constituent power for the sole purpose of undoing the stone clauses as attractive from the point of view of legal continuity, this values only *procedural legality*. The German eternity clause, on the other hand, values *substantive legality*. It is because of this that the BVerfG has hinted that if this chain of legality were maintained in a replacement, the principles of the eternity clause would continue to have effect (though how this would work is highly questionable).

This tension is reduced when we remember that the *functional* distinction between constitutional amendment and replacement is very blurry;[178] whether the original constitution's chain of legal continuity or source of legality survived after these respective mechanisms are used is open to

[177] See Richard Albert, Malkhaz Nakashidze, and Tarik Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 Hastings Law Journal 636.
[178] See David S Law and Ryan Whalen, 'Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) chapter 5.

interpretation. If, as the prevailing line of German doctrine seems to agree,[179] Article 79.3's unamendability does *not* apply to the scope of Article 146, this means that the substantive legality afforded by the eternity clause would lapse when the Basic Law is replaced through Article 146. The only meaningful legal continuity in the midst of this replacement would be purely procedural – as Ferreira Mendes seems to think. Thus, the difference between replacement and amendment is hard to establish – the constitution's legality may continue, but not its unamendability.

While the tension between Ferreira Mendes' position and the normative motivation for the German eternity clause should not be glossed over, the essential observation about these eternity clauses remains valid: there are strong legal arguments that each eternity clause is alterable through some process that *can* exist within each existing constitution. On the one hand, this is unremarkable; we know that under the UCA doctrine, eternity clauses can always be altered by the primary constituent power. However, the procedures by which these eternity clauses could be altered could be described as *constituted* mechanisms – in France, the ordinary amending power; in Brazil, the referendum. Even in the case of Germany's replacement clause, the degree to which this is truly 'the constituent power' is questionable – Article 146 is a *creation* of the Basic Law and was crafted for a specific political purpose. The only way one could argue that it is the primary constituent power would be by arguing that the power that acts *through this clause* is the primary constituent power.

But this raises a contradiction. If it is the true primary constituent power that acts through this clause, then why can it not act through another clause of the Basic Law? Why is this supposedly all-powerful entity forced to exert itself through one narrow avenue and not others? Most obviously, why could it not act through the amending article? If it cannot do these things, then the very idea of 'primary constituent power' loses its credibility. Article 146 can thus only be conceived of as a constituted mechanism. If so, it is a constituted mechanism which can undo Article 79.3's unamendability. If this is the case, then Article 79.3 is not really unamendable, but merely amendable through a different route. Again, as with Brazil, this blurs the distinction between explicit unamendability and tiered amendment difficulty.

This logical problem – why the primary constituent power should be forced to act through a specific mechanism and not others – is also applicable to the referendum in Brazil. France's approach to unamendability is the only approach in this chapter that does not face this problem. French doctrine does not suppose that primary constituent power is forced to act through one constitutional avenue and not others. Indeed, it does not even suppose that this power leaves

[179] Polzin (n 69) 430.

the stage only to return when the constitution needs to be replaced. Instead, it is understood that this power – what we might otherwise just call 'democratic power' – is always present within the Constitution. It is present at elections and referendums, at moments of constitutional amendment and constitutional replacement. It thus cannot be contained to one discrete article nor can its constituent actions be reviewed by the judiciary.

If the foregoing is correct, then each eternity clause is alterable in some constitutional way. Part of the explanation for this may lie in the textual and embodied nature of these clauses. In each case, a reader who picks up a copy of their constitution (whether a lawyer or not) can see clearly in the text what is amendable and what is unamendable. This is slightly speculative, but I submit that while a reader may read the eternity clause's content and agree that its principles are worthy of protection against amendments, the very fact that it is written down illustrates that *it was written*; because it was written, that means that it was *created*; and because it was created, there must be a way for it to be *recreated* (or destroyed). This cannot be replicated in the same way with a basic structure doctrine – though it is equally created, one cannot pick up a copy of *Kesavananda Bharati* as casually as one can pick up a copy of the *Grundgesetz* to read the *Ewigkeitsklausel*. With basic structure doctrines, it is not possible to see in black and white what is unamendable in one's constitution; its content and definition are controlled by judges, *not citizens*. By contrast, the form and content of an eternity clause is laid bare in front of the reader in the text of the constitution. Its attempt to embody important principles will no doubt be evident, but its *embodiment in text* also demonstrates its mutability. I submit that this is at least partly why in the constitutional doctrine of each country, there are strong grounds on which to argue that each eternity clause can be changed through some constitutional process.

7. A REPUBLICAN APPROACH TO UNAMENDABILITY

7.1 Overview

This thesis began by explaining the theoretical ground on which constitutional unamendability rests. It then considered the republican attitude to constitutionalism and constitutional change before considering how unamendability expresses itself in a select number of constitutions around the world. This chapter applies the republican principles garnered in Chapter 2 to the phenomenon of constitutional unamendability as it expresses itself in the cases studies in Chapters 3-5. It concludes that, at the level of pure principle, unamendability *cannot* be reconciled with a republican approach to constitutionalism. However, unamendability does not express itself in a uniform way, and consequently the chapter argues that under the right conditions, so-called 'eternity clauses' *can* be part of a republican constitution. This is dependent on a) these clauses being understood in a declaratory rather than justiciable way or b) a constitutional avenue being provided to contest these clauses and their content (and thus lessening the degree to which we can understand them as 'unamendable'). In contrast, judiciary-derived 'basic structure doctrines' cannot be reconciled with republicanism in any scenario, despite generally being motivated by principles shared by republicanism. The chapter goes on to discuss the practical effects of judicially-enforced unamendability – the granting to courts of 'final say sovereignty' – and why this is problematic for republican defences of judicial review. It concludes with some suggestions of what kind of alternatives to strong-form judicial enforcement of unamendability would look like such as declaratory review and interpretation clauses.

What follows in this chapter rests on this basic observation: from a republican perspective, unamendability is irreconcilable with the ability to amend a constitution – it is thus incompatible with the motivation to have an amending power at all. All amending powers are built on the mutability principle which we observed in Chapter 3 – that change is inevitable, that human beings are fallible, and that the endurance of a human creation through time depends on its capacity to be renewed and changed. The purpose of constitutional amendment is to adjust the constitution to changing times and circumstances so that it continues to have efficacy and relevance. Unamendability's folly is to presume that nascent within the positive legal form of the constitution is a kernel for which this mutability principle does not apply; that for some reason this kernel exists outside of time and space and is thus immune from the cycle of life and death to which all things in this world are subject. This folly is built on the false idea that because a positive form attempts to embody some perfect principle, that this somehow insulates this

form from alteration. But this is impossible. The amending power can only do its job properly if the scope of legitimate constitutional change is *fully* open.

7.2 The republican theoretical position in brief

This thesis tasked itself with answering the following major research question: from a normative republican perspective, should the scope of constitutional amendment powers be limited? Having considered the theoretical basis of unamendability, republican constitutionalism, and a range of practical approaches to this question in a number of jurisdictions, this chapter attempts to answer this question. In short, the conclusion of this thesis is that from a republican perspective, the scope of amendability ought not to be limited and should remain fully open. Though other normative accounts can provide normative grounding and justification for unamendability, I argue that a republican approach to constitutionalism cannot do so.

Before applying republican principles to our case studies, we must recount the principles themselves. The two most important republican principles relating to constitutional change are *mutability* and *contestability*. These are premised on the understanding that constituent power lies in the contestatory citizenry i.e. the collection of citizens who are capable of challenging every aspect of the state, from its policies to its government, from its laws to its constitution. This contestatory quality – the ability to alter the rules under which one lives – is a core aspect of republican freedom and citizenship, as well as the basis of how neo-republicans like Philip Pettit define democracy. An individual is free to the degree that they can challenge any laws under which they live;[1] a people is self-governing to the degree that they can resist and replace any form of government or constitution under which they live.[2] As this contestatory power is constant and ongoing and is expressed at multiple institutional and democratic levels (rather than at discrete moments), it never departs from the ordinary working of the constitution. Because of this, a rigid distinction between constituent and constituted power is inapplicable as it is this constituent power that continuously energises the constituted organs of the state.

As the Venice Commission pointed out, constitutions in their entirety, including any supposedly unamendable parts, will inevitably undergo change as a result of passing time.[3] This brings the possibility of degradation and corruption of what were perhaps perfect forms and principles when originally crafted. A republican response to this problem is based not on immutable law, but on a contestatory citizenry – the capacity of the political community to continuously challenge the strength of the constitution. While constitutional governance is a core tenet of

[1] Philip Pettit, *Republicanism* (OUP 1997) 184-185.
[2] ibid, 277-278.
[3] Venice Commission, *Report on Constitutional Amendment* CHL-AD(2010)001 (Strasbourg 19 Jan 2010) para 219.

republicanism, the value of constitutions is determined by how well they serve the objective of creating a republic in which citizens are free from domination. As such, constitutions are inherently mutable human creations which must be subject to civic, legal, and political contestation in order to conform with these republican goals. This demands an open posture to potential changes, including to fundamental principles.

Republicanism is not neutral about whether a constitution's basic republican structure should be maintained – it should be maintained! However, the ancient republican emphasis on civic virtue and the neo-republican emphasis on commonly avowable norms and civility illustrate that constitutional and democratic maintenance can only *sustainably* take place at this socio-political level i.e. the level that exists above or external to the positive legal constitution. Constitutions should, hopefully, provide a conduit through which these virtues or civic norms take root, but in the end, it can only ever do these *imperfectly* and *provisionally*. Safeguarding a constitution's basic structure is not a strictly legal or constitutional issue – it is a civic-political issue which demands the attention of all members of the contestatory citizenry. The hard yards of constitutional maintenance must be done at this deep socio-political, contestatory level rather than at the somewhat superficial level of the legal constitution.

To this extent, *amendability* is not only a republican virtue, we could call it an essential feature of a republican constitution. Republicanism is a normative perspective with its own fundamental principles. As we have seen, contestability is a core norm of the republican constitution which goes to the heart of how it understands human freedom and self-government. While every constitution has its essential features, its basic structure, its minimum core, the maintenance and protection of this core is a collective civic responsibility, not one reserved to one particular institution. More importantly, the decision of whether this core is even worth protecting is also a civic responsibility. To make any aspect of the republic, even its constitution, incontestable would detract from republican freedom, self-government, and citizenship.

While this renders unamendability incompatible with republicanism at the abstract level of constitutional theory, at the level of individual constitutions, unamendability can take a number of different forms and can have varying practical impact on law and politics depending on how it is treated by judicial and political authorities. Unamendability does not necessitate or imply its strict judicial enforcement.[4] For instance, though both the French and Indian constitutions include unamendability, the French attitude to unamendability is strikingly different to that of India. We thus must consider how *the practice of unamendability* corresponds to republican constitutionalism and assess the republican legitimacy or otherwise of this array of approaches.

[4] ibid, paras 225-226.

7.3 Assessing the case studies

Before applying these republican principles to our case studies, a short recap of the jurisdictions we considered is in order. Ireland stood as our exemplar of a constitution which not only lacks limits on amendability, but positively embraces full amendability. It was suggested that this is linked to the 1937 Constitution's nationalist ideal of self-determination. Though this was partially contingent on a homogenous national identity which cannot and perhaps should not be replicated elsewhere, the amendability of the Irish Constitution has been vital to its ongoing legitimacy amidst socio-political change. India stood as our exemplar of judicially-discovered and defined unamendability. The 'basic structure doctrine', which has been exported to many other jurisdictions, ensures that all government and parliamentary acts including constitutional amendments can be scrutinised by the judiciary, making the Indian Supreme Court the final arbiter within the constitutional system. This doctrine was a pragmatic response by the judiciary to executive empowerment. We then considered three constitutions which include an eternity clause. Germany's eternity clause ensures that the Basic Law can only legitimise a certain scope of regimes or alterations; it creates a source of legality which is substantive and normative. Brazil's petrous clauses make the federal judiciary the final arbiter over the Constitution, similarly to India, but it remains an open question whether these clauses can themselves be amended by referendum. Despite the French Constitution's eternity clause, its approach to amendability is very similar to Ireland's due to the Constitutional Council's refusal to enforce it against the amending power.

7.3.1 Full amendability in Ireland and France

How, then, do the approaches to amendability we considered hold up when viewed under the republican principles of contestability and mutability? The approaches that fit most clearly with these republican principles are those that lack unamendability, namely Ireland and France. This is because the entirety of each constitution is contestable, despite the latter's eternity clause. Underlying this full amendability is a republican understanding of popular sovereignty and constituent power on the part of both Irish and French judiciaries – that this power does not depart the stage upon foundation but continually influences and directs the constitution's development. For this reason, courts in both countries reject unamendability as incompatible with popular sovereignty.

The mutability principle can also be seen in both constitutions. Both declare fundamental principles which, if treated literally, could imply a limit on amendability: in Ireland, these are the natural law and natural rights provisions; in France, this is Article 89.5's declaration that

republicanism cannot be amended out of the Constitution. Indeed, in the latter case, constitutionalism has traditionally been quite substantive (think of the 1789 Declaration's statement that a state which does not protect rights or the separation of powers 'has no constitution').[5] And yet, full amendability holds sway, indicating that though there are fundamental non-derogable principles which every constitution must respect, this does not mean that they limit the extent to which the positive formulation of these principles can develop. Conceptualising these principles as unamendable would violate another republican norm – namely that the political community has the full right to redefine the constitutional constraints under which it lives.

Functionally, both approaches satisfy the republican principles of contestability and mutability. However, it remains the case that in France, amendability is formally limited while in Ireland, it is formally unlimited. Ireland's formal declaration of full amendability – 'Any provision can be amended…' – articulates a republican approach to amendability more clearly than that of France, but the French approach is no less republican. As long as an eternity clause is understood and treated in the manner of France's i.e. that it is declaratory and non-justiciable, it can be accommodated within republicanism. This illustrates that a proper republican approach would either a) keep amendability fully open by omitting unamendable clauses or b) render any eternity clause non-justiciable and declaratory, thereby keeping the *functional* scope of amendability open. Solely on the basis of clarity, option a) is preferable than option b).[6]

7.3.2 Providing an escape hatch – Brazil and Germany

In contrast to France, unamendability in Brazil and Germany is justiciable and enforceable against the amending power of each country – in both cases, the federal legislature. However, we observed that in both countries, there are *likely* constitutional avenues through which their respective eternity clauses could be altered or removed: referendums in Brazil and Germany's Article 146 replacement clause.[7] This makes a significant difference in terms of the republican legitimacy of this kind of unamendability, for it implies that eternity clauses need not represent a permanent limit on contestability, even if contestability must take a distinct form to the ordinary amendment process. To the extent that this is true – that these eternity clauses can be contested and changed in a specific constitutional way – they *can* be accommodated within a republican constitution. But in order for this to be the case, we must put to bed the idea that

[5] Declaration of the Rights of Man and the Citizen 1789, art 16. https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen accessed 16 May 2026.
[6] See part 3.5 of this thesis, that it is preferable for the political community to understand that 'this is your power, use it wisely'.
[7] Basic Law for the Federal Republic of Germany 1949, art 146; Nelson Nery Júnior, Rosa Maria de Andrade Nery, *Constituição Federal Comentada* https://www.jusbrasil.com.br/doutrina/secao/art-60-subsecao-ii-da-emenda-a-constituicao-constituicao-federal-comentada/1153089225#a-A.60 accessed 25 May 2026.

they are 'unamendable' and instead reconceptualise them as merely amendable in a different way. This somewhat blurs the lines between unamendability and tiered amendment difficulty (the latter being where some constitutional content requires a more difficult procedure to amend it compared to the rest of the constitution).[8]

Republicanism cannot provide one uniform means by which an eternity clause should be changed, but I suggest that a republican approach is *likely* to overlap with Albert's idea of 'mutuality' and Roznai's idea of the 'constitutional escalator'. The former is the idea that the most important parts of a constitution's structure should only be alterable by the process that originally brought that constitution into being.[9] The latter is the idea that the more fundamental a part of the constitution is, the more participatory the process to alter it should be.[10] It is not unreasonable to say that the method of altering 'unamendable' or fundamental provisions *should* be more difficult than the ordinary amendment process, and perhaps it should involve more public participation. The precise details of how these should be accomplished cannot be stated at an abstract level, but in all cases there should be a constitutional process by which these provisions can be changed. More importantly, determining the different levels of amendment difficulty should not be left solely to judges but should be explicitly constitutionally defined so as to maximise certainty and minimise judicial interpretive scope.[11]

The German replacement clause is, in theory, an example of a good approach. While not spelled out in Article 146, constitutional replacement would likely require a constituent assembly for the whole of Germany to be created to draft a new constitution. Under the rule of mutuality, it would need to be at least as democratic and participatory as the postwar Parliamentary Council. The Brazilian jurisprudence we considered on amending the eternity clauses by referendum is another good example. Just as the people were consulted on two constitutional questions in 1993, they could (so this argument goes) be consulted by referendum to alter the content of Article 60.4. However, both of these possibilities are highly contingent and are by no means universally accepted. As we saw in the *Lisbon* judgement, the BVerfG reserves the right to apply the unamendable principles of Article 79.3 to a new constitution even after Article 146 is used.[12] In Brazil, this referendum suggestion has never been tested in a case and represents but one constitutional interpretation. Whether to follow this argument would be an interpretive choice

[8] See part 7.5.1 below.
[9] Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43(1) Yale Journal of International Law 1, 6-7.
[10] See Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017) 164-168.
[11] See part 7.5.5 below.
[12] 2 BvE 2/08, 30 June 2009.

for the STF, just as it will presumably be for the BVerfG or its successor to decide whether to apply Article 79.3's norms to a new German constitution.

This illustrates that the logic of unamendability, once baked into a constitution through an eternity clause, is hard to undo, as is the position of supremacy that it grants to judiciaries. Whether an eternity clause has *bite* – whether it is enforced rigidly by the courts against the amending power or whether it transcends the constitution itself – is largely determined by how judges choose to apply them. Though each eternity clause jurisdiction we considered arguably has some mechanism to undo this unamendability, the effectiveness of this 'escape hatch' largely depends on the attitude taken by judges.

For this reason, a principled republican recommendation to constitution-makers would be to avoid including explicit or implied unamendability in a constitution altogether. However, a self-governing political community is free to include any kind of clause it likes, even a supposedly unamendable one. How republicanism should treat unamendable provisions where they exist is addressed in part 7.5.4 below. As already suggested, the most straightforward way to make an eternity clause compatible with republican constitutionalism is to render it non-justiciable. Another is to provide a constitutional mechanism of some kind which allows it to be altered – in theory, this could be achieved by something like Germany's replacement clause or Brazilian referendums. However, the latter of these possibilities is less attractive if its efficacy is determined solely by the judiciary.

7.3.3 Basic structure doctrines

While eternity clauses can, under the right conditions, be accommodated within a republican constitution, a basic structure doctrine ('BSD') as practiced in India cannot. This is because it inherently seeks to make an inherently contestable question – the basic foundations of a state's constitution – *in*contestable. It seeks to depoliticise what is a deeply political question and remove from citizens the ability to alter the essential features of the constitution. While eternity clauses can be altered provided there is a procedure in place to do so, the BSD rules out reform to the constitution's essential features for as long as that constitution is in force. From a republican perspective, whether to maintain the basic structure or essential features ought to be a decision for citizens, not for a select group of unelected officials who lack democratic accountability.

BSDs generally arise in constitutions which vest amending power in parliament.[13] Since parliamentary systems demand that the executive maintains majority support in parliament to

[13] Constitution of India 1950, art 368; Constitution of Belize 1981, art 69; Constitution of Bangladesh 1971, art 142.

survive, this lessens the ability of parliament to serve as an effective check on the executive. Depending on a given constitution's majority threshold for amendments and its electoral system, this often brings the government of the day within touching distance of being able to fully rewrite the constitution. In such a political context, judges are understandably eager to carve out a protection for judicial review and judicial independence. BSDs are, at their root, attempts to protect judicial power from politicians. As we saw in India, when an authoritarian government commanded the amending power, it led to deeply problematic developments that threatened judicial power before and during the Emergency. The BSD was an *ad hoc*, imperfect solution by the judiciary to ensure the survival of an effective judicial review. In this sense, it played a *pragmatically* positive role not only from the perspective of constitutionalism, but republicanism too. It ensures the continuation of the mixed constitution over arbitrary power and constitutional supremacy over parliamentary sovereignty.

However, by attempting to permanently remove certain issues from the scope of legitimate contestation within the existing constitution, the doctrine remains deeply problematic from a republican perspective. And while this power is infrequently used,[14] it hangs over Indian democracy like a sword of Damocles. Under the basic structure doctrine, political democracy can only go so far.

As stated at the outset, republicans do not deny that constitution have a basic structure, nor that it should be protected from change. However, they *do* deny that its definition and protection is the exclusive province of one branch of government – and, in particular, the most powerful *undemocratic* branch. While republicanism is not incompatible with limited instances of democratically unaccountable power,[15] it is incompatible with giving a democratically unaccountable power a position of absolute supremacy over all other institutions within a constitution. (We shall discuss this last point in part 7.4 below.) To republicans, defining and protecting a constitution's basic structure is a civic and political duty shared by all citizens, not just judges. Citizens ought to be able to contest the contours of a constitution's basic structure through the time-honoured republican acts of public debate, deliberation, petitions, movements, counter-movements, elections, plebiscites, and so on. In contrast, the BSD approach closes off these contestatory avenues – for it holds that the basic structure's definition is the exclusive province of the judiciary and that no act can be taken to diminish it for as long as the Indian Constitution is in force. If, for whatever reason, the judicially-defined basic structure becomes problematic, there is no *legal* way to remove it other than to replace the entire Constitution.

[14] Perhaps too infrequently/selectively; see Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?' (2024) 16 Hague Journal on the Rule of Law 315, 322-326.
[15] Philip Pettit, *Republicanism* (OUP 1997) 197; Pettit (n 1) 232-235.

Republicans are not averse to such replacement, but a self-governing political community *should* be able to pick and choose which parts of the constitution or its basic structure to keep or remove.

Though the development of BSDs around the world is generally a response to executive-legislative empowerment and an attempt to carve out a permanent space for judicial review, republican constitutionalism must look at these developments in the round, including at the level of initial constitutional design. Looking to India, we see that leaving the final say over amendments in the hands of the Indian Parliament was a design flaw and largely guaranteed a conflict with the judiciary at some stage. That being the case, the problems that led to the birth of the BSD ought to have been addressed at the same level of attention, detail, and emphasis as the birth of the Constitution itself; there are times when a republic must reconsider its constitution comprehensively in response to fundamental problems it presents. The opportunity to do this in India existed after the Emergency ended and a new government came to power, but alternative amendment procedures involving referendums were never implemented.[16] This was a major missed opportunity: while a constitution's basic structure ought never be easy to alter, there should have been some new conduit established to allow India's to develop and to be contestable. This would have allowed the BSD to hold the same legitimacy as the petrous clauses of Brazil where (presumably) referendums could be used to alter them. Referendums need not have been the solution to this problem, but some higher mechanism or threshold – even if very difficult to achieve – ought to have been provided to allow for the legitimate development and mutation of the basic structure.

The most obvious difference between eternity clauses and the BSD – that one is written down and the other is not – is important to discuss in more detail. Eternity clauses mean that the judiciary does not fully control what is unamendable in a constitution; BSDs mean that the basic structure's content is *fully controlled* by the judiciary. The doctrine's defenders argue that its content is clear from reading the Constitution, such as the preamble. But this is an interpretive exercise in which only one institution has the last word. In the Brazilian and German examples, the eternity clauses provide each country's judiciary with solid interpretive tools when assessing the constitutionality of amendments – they cannot come up with the principles themselves, but must (in theory, at least) be guided by what the text says. This is an in-built limitation on the scope of judicial power and gives (some) credence to the notion that judicially-enforced unamendability is simply an enforcement of constitutional supremacy. Further, and as I suggested at the end of Chapter 6, it may be that the act of writing or reading positive legal text

[16] See part 5.4.2 of this thesis.

renders it intrinsically alterable (*that because it was written, it can be rewritten*); this phenomenon is absent in India. As Schwartzberg observes on the difference between explicit and implicit unamendability:

> In the case of formally entrenched provisions, a constitutional court may strike down a proposed amendment in the presence of clear textual support for its illegitimacy: In other words, the presence of a textual standard provides at least some constraint on the court. A doctrine of implicit entrenchment, on the other hand, would give constitutional courts sweeping power to determine what are the essentially immutable features of a regime.[17]

There is one caveat to this advantage of eternity clauses over BSDs, and it relates to the language used in the clause's text. Broad, generalised, vague language will generally serve to empower judicial interpretation rather than restrain it. This is partly the reason for the comparative judicial activism in Brazil over Germany – though Brazil's STF tries as much as possible to ground its decisions in the text of Article 60.4, it can stretch the meaning of these provisions to suit their objectives (especially clause III on individual rights and freedoms).[18] The text can thus empower judges as well as constrain them, and this largely depends on the broadness/specificity of the clause's language. Further, the Italian example illustrates that though an eternity clause may express the constitution's unalterable principles, judges do not always treat this as exhaustive.[19]

7.3.4 The principle v the provision

I argued that the German approach provided the strongest normative basis for unamendability seen among any of the jurisdictions or constitutional theories considered in this thesis.[20] For this reason, it is useful to reconsider. To reiterate, German unamendability does not deny that 'constituent power' could overthrow the entire Basic Law or the specific eternity clauses if it wished. The eternity clause is justified as a *denial* to the constituent power – to tell it, in whatever guise it comes, that it cannot use the Basic Law for purposes which contradict its foundational principles, the most important being human dignity. As with Brazil and India, this is based on the presumption that constituent power is absent from the day-to-day operation of the constitution. Unamendability is built on an understandable *fear* of the people's constituent power to overthrow the Basic Law at a moment's notice and a determination to ensure that the legal order that this constitution provides will only legitimise a certain kind of political regime.

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[17] Melissa Schwartzberg, *Democracy and Legal Change* (CUP 2007) 15-16.
[18] See part 6.2.3 of this thesis.
[19] See the Italian Constitutional Court's ruling 1146/1988. See Tania Groppi, 'Constitutional revision in Italy: A marginal instrument for constitutional change' in Xenophon Contiades (ed), *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (Routledge 2012).
[20] See part 6.3.2 of this thesis.

German unamendability is justified not on the basis of its creation by a higher constituent power, but a *denial* to such power.

Despite this, the BVerfG permits alterations of things which are protected by the eternity clause based on its distinction between the *principles* of the eternity clause and the *positive legal formulation* of those principles. The Court thus gives the amending power some leeway to adjust the Basic Law in response to ongoing needs, but at all times the principles found in the eternity clause must survive. It makes this distinction in order to allow the amending power to do its job – to keep the Basic Law relevant, enforceable, and applicable to the needs of Germany today. As already discussed, this is the primary purpose of *all* amending powers. In this context, the standard case for unamendability is that amendments, while essential, represent something less significant than replacement, that they can tweak, adjust, and reorient constitutions but not fundamentally transform them.

However, bearing in mind the republican principle of mutability, we remember that ultimately all a constitution can ever give is a provision – a positive legal formulation – of a principle, not the principle itself. The principle exists elsewhere – in people's hearts, in culture, history, social norms etc – and all a constitution can do is put it into words and give it some imperfect institutional protection. Since all human creations – be they legal/constitutional provisions or otherwise – will inevitably undergo change and often for the worse, this conceptually and comprehensively rules out the possibility of unamendability. Put differently, if an amending power is established to keep the constitution relevant and applicable to the needs of the day, it makes no sense to place any substantive limits on this power if one wishes the constitution to survive. For as Sidney and Jefferson rightly argued, there is no way of knowing the needs of people in the future or the challenges they will face. What is essential to maintain and what must be adjusted can only be determined *by them, at that point in time.*

Defenders of the German eternity clause would likely say at this point, 'this may be true, but there is not a single scenario on Earth, past, present, or future, where violations of human dignity can be considered legal or constitutional.' Even in accepting this argument as correct, this still does not give unamendability the normative grounding we often assume it does. At its base, when we remember that positive legal constitutions are finite and mutable, all it amounts to really is the injunction that we should do good and avoid evil, which any right-thinking person would accept. More substantively, it may demand that certain basic features of legality must be present for a constitution to be legitimate. Again, this can be accepted but it does not mandate unamendability. If the basic principles of legality or those of the German eternity clause are essentially *external* to the Basic Law, then their definition and protection are not the exclusive province of the BVerfG – through a republican lens, these tasks fall on all citizens equally. If

the Basic Law's 'tradition of legality' is to survive after the Basic Law is replaced, this is a choice for the contestatory citizenry to make, not for the courts.

The German approach is that the principles of the eternity clause must remain unblemished after each and every amendment (and perhaps even replacement), but that the positive legal formulation of the provisions to protect these principles can change fully. While this sounds reasonable, when we remember that all a constitution can ever do is provide positive legal formulations, what it amounts to is a position of absolute, and perhaps eternal, judicial supremacy. As stated already, the definition and protection of these sacred principles cannot be the exclusive responsibility of the judicial branch, but must be a civic responsibility. We consider the republican position on judicial supremacy and its relationship with unamendability in Part 7.4. below.

7.3.5 Just replace the constitution!

The above subheading articulates one prominent defence of unamendability offered by many scholars as well as some judges in unamendability legal cases around the world.[21] The argument has arisen at numerous times during this thesis: unamendability is limited to the four walls of a given constitution; while you cannot achieve the desired change through amendment, you can achieve it through a new constitution. Therefore, unamendability is not an absolute barrier to contestability – the right of citizens to contest unamendable features is satisfied by their ability to push for constitutional replacement.

As we saw in Chapter 3, republicans both early modern and contemporary are not averse to the possibility of constitutional replacement – indeed, the capacity to replace a constitution goes to the heart of the constituting people's power and freedom.[22] Pettit does not believe that the interregnum between one constitution and another would be a war of all against all; the political community would retain some semblance of organisation and leadership even without a positive constitutional structure.[23] However, republicanism's openness to constitutional change explained in Chapter 3 – grounded in the principles of contestability, mutability, and living constituent power – applies across the board to amendment and replacement. Among all the republican theorists we considered, the distinction between amendment and replacement is blurry at best and substantively redundant. This renders its value as a defence of unamendability very weak. Following republican principles, the political community should be able to pick and choose which bits of the constitution to keep or remove – they should not have to ditch the

[21] Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2011) 199; *Kesavananda Bharati v State of Kerala* [1973] 4 SCC 225 para 1487 (Khanna J); Roznai (n 10) 229.
[22] See part 3.4.3 of this thesis.
[23] Pettit (n 1) 291.

entire constitution to achieve something that could, in reality, be done through the ordinary amending power. One should not have to use a sledgehammer to crack a nut.

There are at two other problems with the idea of replacement as a panacea to unamendability. The first is that replacement churns up significant legal and political uncertainty whenever it occurs. While an amendment may be more or less transformative depending on its content, replacement means *every* aspect of the constitution is suddenly up in the air. This brings significant dangers and the possibility of political exploitation by powerful political actors while the procedural rules and conventions provided by the old constitution are gone. For this reason, the defence by unamendability advocates that replacement can always undo unamendable content is incoherent and detrimental to their own objective – the maintenance of constitutional governance. Secondly, the distinction between amendment and replacement is, as already mentioned, conceptually blurry.[24] It is not obvious that amendment cannot or should not mean replacement or that a constitution cannot be transformed from top to bottom through the amending power. The blurriness of the distinction is demonstrated by the fact that a large number of unamendability advocates argue for substantive limits on replacement too.[25] Since anti-constitutional dangers exist at this level no less than at the level of amendments, judicially-enforceable limits on replacement are just as necessary. To this extent, the argument that unamendability's sharp edge is blunted by the possibility of replacement is disingenuous.

7.4 Judicial review and final say sovereignty

Much of the above analysis hinges on one central question: should judges have the final say on the legitimacy of constitutional amendments? Observing our various case study jurisdictions which employ unamendability, we see that in all but one (France) the supreme/constitutional court holds a position of finality within that constitution over and above the amending power – the *intra-constitutional final say*. In Germany, Brazil, and India, the final say over not only constitutional interpretation, but constitutional reform, rests with the judiciary. In making a general republican assessment of unamendability, we must dedicate some attention to this most important question in constitutional theory: who should have the final say within a constitution? We must consider the perspective of political constitutionalism – which holds that the intra-

[24] David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859, 860.
[25] ibid; see David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras' (2019) 8(1) Global Constitutionalism 40, 62-63; Yaniv Roznai, 'The Boundaries of Constituent Authority' (2021) 52(5) Connecticut Law Review 1381.

constitutional final say should rest in the political sphere – as well as wider republican attitudes to judicial power.

7.4.1 Final say sovereignty

It may well be asked at this stage, why is the intra-constitutional final say so important? Who cares if judiciaries hold this power? And why should this be a problem for republicans, especially if this final say power is protecting substantive republican principles and the constitution can always be replaced? In order to answer these questions, we must address the nature of this final say power. The intra-constitutional final say equates with a position of unaccountability or finality within a constitution – according to Daly, this position meets a traditional (if sometimes obscured) definition of 'sovereignty'.[26] For much of constitutional theory, sovereignty was/is equated with constituent power or a position of command and ultimate authority[27] – the raw power to transform any will into legitimate law.

Daly traces this first understanding of sovereignty as the position of unaccountability in the exercise of a given power.[28] Instead of this sovereign being understood as *extra* or *super*-constitutional, it should be understood as a *constituted* entity *within* the constitution. He grounds this theory in a Diceyan understanding of the 'legal sovereignty' as opposed to the 'political sovereignty' which Dicey believed resided in the people.[29] Importantly, this is not the same as the position of being the most powerful actor in a constitution, but simply holding a position within this institution's designated sphere which cannot be overturned by any other institution. The example he (and Dicey) uses is that of Britain's Parliament within the British Constitution: its power is limited to the legislative sphere, it is arguably not as powerful as the executive which controls it, but it is sovereign in the sense that no other person or institution can overturn its legislative acts. Daly invokes this concept to ground the idea of 'popular sovereignty' as it relates to referendums in Ireland and France. These referendums are constituted, limited procedures, but can be seen as sovereign to the extent that their outcomes cannot be second-guessed by any other institution. The constitutional referendum thus becomes the 'final say sovereign' in these countries.

This understanding of final say sovereignty can equally be applied judicial review. If the judiciary's interpretation of the constitution cannot be overturned through an amendment by the amending power – because of an eternity clause or a BSD – that judiciary is unaccountable

[26] Eoin Daly, Translating Popular Sovereignty as Unfettered Constitutional Amendability (2019) 15(4) European Constitutional Law Review 619, 633.
[27] ibid.
[28] ibid.
[29] ibid, 637. See also James Kirby, 'A. V. Dicey and English constitutionalism' (2019) 45(1) History of European Ideas 33.

within that constitution and becomes the final say sovereign. The retort to this point is that judicial decisions concerning unamendability can always be superseded through constitutional replacement, but this does not lessen the fact of *intra*-constitutional final say sovereignty – as long as the *existing* constitution is in effect, the judiciary is the final arbiter not only over constitutional interpretation, but also constitutional development.

7.4.2 Political constitutionalism

Three situations of final say sovereignty have been placed before us: a legislative final say (as in the UK), a referendum final say (as in Ireland or France), and a judicial final say (as in India, Brazil, or Germany). Once we ask the normative question of who *should* hold this final say sovereignty, we are forced to consider the perennial debate between 'legal' constitutionalism and 'political' constitutionalism. The distinction between these camps is often defined, as Kavanagh says, by 'theme rather than thesis'[30] and can sometimes be imprecise.[31] But as Mac Amhlaigh distils, the normative question of who should have the final say is really the key division:[32] it is assumed that in a legal constitution, the judiciary would have the intra-constitutional final say; in a political constitution, a political branch (i.e. the legislature) would have the intra-constitutional final say.

Political constitutionalism's most prominent theorist and advocate, Richard Bellamy, defends majoritarian and proceduralist democracy within the republican school and self-consciously challenges what he sees as the dominant 'counter-majoritarian' tendency within the republican revival.[33] He rejects the legitimacy of strong-form judicial review on republican grounds: the legislature, encompassing far more of the non-arbitrary, egalitarian, and democratic principles that republicans value than the judiciary, should have a supreme position over the judiciary within a constitution.[34] A judicial power to strike down democratically-enacted laws as unconstitutional has deleterious effects on republicanism. Bellamy centres his discussion about judicial review on the subject of rights and their enforcement. In contrast to legal constitutionalists who argue that human rights should be guarded jealously by the judiciary against the machinations of the legislature, Bellamy argues that the most effective and non-dominating way of protecting individual rights is through the political, legislative process. In a democracy, the precise contours of what justice and rights protection entails will be something

[30] Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 King's Law Journal 43, 61.
[31] Alexander Latham-Gambi, 'Political Constitutionalism and Legal Constitutionalism—an Imaginary Opposition?' (2020) 40(4) Oxford Journal of Legal Studies 737.
[32] Cormac Mac Amhlaigh, 'Friend of Foe? Bernard Williams and Political Constitutionalism' (2021) 27 Res Publica 219.
[33] Richard Bellamy, *Political Constitutionalism* (CUP 2007) 11-12.
[34] ibid, ch 6.

about which people will reasonably disagree.[35] Given this context of disagreement, the constitution takes on *procedural* value as a means of peacefully and legitimately resolving social and political disputes.[36] Indeed, according to Bellamy, the democratic process is the constitution.[37]

However, in centring his theory on legislative supremacy, Bellamy's political constitutionalism is restricted on two counts: 1) it does not account for alternative mechanisms to the legislature that are equally 'political' and 2) it does not adequately account for the possibility of constitutional amendment. Firstly, Tierney rightly argues that much of the legal v political constitutionalist debate is elite-focused (i.e. judges vs politicians), with a direct role for ordinary citizens through mechanisms like referendums often ignored.[38] But referendums, for example, are just as political as the legislature: they engage the public in debate on important issues, weigh every citizen's vote equally, and give the people the right to make the final determination on the issue at hand. Secondly, Bellamy argues that the possibility of amendment does not make a legal constitution acceptable as it is still based on a 'discredited' pre-commitment idea – that legal constitutions are legitimised by a past act of popular sovereignty which then constrains ordinary politics. Instead, Bellamy argues that constitutional issues ought to be part of everyday politics, for which the legislature is the best arena.[39] Constitutional amendments cannot replicate this; '[i]nstead, a people continuously reconstitute themselves and democracy through normal politics.'[40]

This instinct goes to the heart of what this thesis argues. However, Bellamy's argument is inconsistent on this point about amendability. In his earlier work, he discounts the degree to which amendment can accommodate this popular reconstitution. Mac Amhlaigh's recent evaluation of Bellamy's work as it concerns the European Convention on Human Rights ('ECHR') and judicial review is highly relevant here.[41] Bellamy argues that ECHR-based review is compatible with his political constitutionalism because the ECHR is amendable.[42] But as Mac Amhlaigh points rightly points out, constitutions are amendable too; it is curious that, for

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[35] ibid, 25.
[36] Richard Bellamy, 'The Republic of Reasons: Public Reasoning, Depoliticization, and Non-Domination' in Samantha Besson Samantha and José Luis Martí (eds) *Legal Republicanism* (OUP 2009) 106-107; Bellamy (n 33) 4-5.
[37] Bellamy (n 33) 5.
[38] Stephen Tierney, 'Whose Political Constitution? Citizens and Referendums' (2013) 14(2) German Law Journal 2185, 2188; Stephen Tierney, 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72(3) Modern Law Review 360.
[39] Bellamy (n 33) 135-136.
[40] ibid, 135-136.
[41] Cormac Mac Amhlaigh, 'Political Constitutionalism and the European Court of Human Rights: An Alternative View' University of Edinburgh School of Law Working Paper No 2026/03, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6152606 accessed 17 May 2026.
[42] Richard Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2014) 25 European Journal of International Law 1019.

Bellamy, amendability ameliorates ECHR-based review but it somehow does not ameliorate constitutional review.[43] The position taken by *this* republican thesis is that the ability to contest all aspects of the constitution is what is important and full amendability makes this possible. It can be argued that a constitution which is fully amendable and in which final say sovereignty rests with a political mechanism that is not a legislature is just as much a 'political constitution' as one based on legislative supremacy. This brings us to a *broader* political constitutionalism.

7.4.3 Republicans and judicial review

As we saw in our overview of Pettit' work, judicial review is at the very least an acceptable feature of *his* republican constitution – he does not see a legitimacy problem with the idea of judges striking down democratically-enacted laws for breaching constitutionalist constraints.[44] Honohan argues that judicial review can be a legitimate feature of republican self-government under the right conditions; she mentions amendability and constitutional flexibility as necessary conditions to make this acceptable.[45] Without this condition, judicial review can churn up significant legitimacy problems for republicans. Using Pettit's theories, Hickey also defends judicial review from political constitutionalist objections, centring judicial review's value in terms of enforcing the constitution as a source of political *legitimacy* rather than justice, the latter being mired by moral and political disagreement.[46] Similarly to Honohan, he emphasises that the legitimacy of judicial review is related to the relative flexibility of the constitution as a whole.[47] In addition, his defence is implicitly grounded on the notion of a fully amendable constitution. These republicans (Pettit, Honohan, and Hickey) all argue *contra* the political constitutionalists that judicial review can be a useful tool for ensuring non-domination, but that judicial review should not be seen as the last word. It is notable in this context that Hickey looks favourably on the 'new Commonwealth model of constitutionalism', in which judicial review is expressly *not* the last word on all issues and can be superseded by political actors.[48]

Political constitutionalists take issue with the way in which judicial review supposedly gives the last word over constitutional development and interpretation to judges. Therefore, their response to unamendability and, in particular, its judicial enforcement is not hard to imagine;

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[43] Mac Amhlaigh (n 41) 13-14

[44] Pettit (n 15) 177-180.

[45] Iseult Honohan, 'Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?' in Samantha Besson Samantha and José Luis Martí (eds) *Legal Republicanism* (OUP 2009) 84, 99.

[46] See Tom Hickey, 'The republican core of the case for judicial review' (2019) 17(1) International Journal of Constitutional Law 288; Tom Hickey, 'Legitimacy—not Justice—and the Case for Judicial Review' (2022) 42(3) Oxford Journal of Legal Studies 893, 913.

[47] Tom Hickey, 'Legitimacy—not Justice—and the Case for Judicial Review' (2022) 42(3) Oxford Journal of Legal Studies 893, 913-914.

[48] Tom Hickey, 'The republican virtues of the "new commonwealth model of constitutionalism"' (2017) 14(4) International Journal of Constitutional Law 794–816; see generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (CUP 2013).

political constitutionalists like Bellamy have not dedicated focused attention to limits on constitutional amendment, likely because being against strong judicial review in any guise, they would reject any possibility of this power being exercised legitimately in the content of amendments. Republican defenders of judicial review can retort to political constitutionalists that judicial review does not give judges the last word as long as the possibility of amendment remains open. It is one power centre among many – its chief role being to adjudicate on and clarify the meaning of constitutional text *as it stands* in order to aid the wider project of constitutional development. Amendments to the constitution can then take place on this basis.

The amending power thus plays an important role in being able to overturn unfavourable judicial decisions or constitutional interpretations.[49] If the judiciary decide that, for example, the legislature cannot pass a no-fault eviction ban because it violates a constitutional right to private property, the amending power can change the constitution to *make* such a measure constitutional. Although not always acknowledged with the weight which it deserves, this aspect of the amending power is vital in making the *democratic* case for judicial review, as well as for rejecting the political constitutionalist argument that the judiciary is supreme or has the intra-constitutional final say. If we conceptualise the amending power as a *constituted entity*, then it is *this entity* that has the intra-constitutional final say as long as judicial review does apply to the substance of its amendments.

However, once judges can review the content of amendments, this defence is removed – the arguments that many republicans offer to justify judicial review disappear and the arguments made by political constitutionalists against judicial review become stronger and more pronounced. Judicial oversight of the substance of amendments means that the judiciary *does* become supreme within the constitutional system – not even the amending power can supersede its decisions. An unelected branch becomes the final arbiter over not only constitutional interpretation, but *the very content of the constitution*. The value of democratic and electoral deliberation becomes downgraded below the normative values which the judiciary seek to protect through unamendability. At this point, there is no internal procedure that can overturn the judiciary's decision.

7.4.4 The republican problem with a *judicial* final say sovereign

All this begs the question: why would such a situation be problematic from a republican point of view? It is not enough to point to the judiciary's lack of direct democratic mandate. After all, Pettit mentions repeatedly in his work that unelected or technocratic power centres can play

[49] Roznai (n 10) 194. See Rosalind Dixon, 'Constitutional Amendment Rules: A Comparative Perspective', in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 96-98.

positive and helpful roles in a republic.[50] Why shouldn't the judiciary have the final say, especially given that republicans treat constitutions as finite creations of the constituting people which can be replaced whenever they wish? Further, if final say sovereignty must be located somewhere, why not the branch which, in the words of Hamilton, controls 'neither the purse nor the sword?'[51]

While republicanism takes a sceptical view of 'unaccountability' in general (linking it with arbitrariness and domination), we should nonetheless disentangle the ways in which unaccountability manifests itself in terms of final say sovereignty. The existence of an unaccountable final say sovereign as a position is not unrepublican *per se* (indeed, one could argue that every constitution has one, though its location may be unclear). Though the decisions of such a body would, by definition, be unaccountable in the sense that they could not be second-guessed by another body, such unaccountability can have a *sharp* or *blunt* edge depending on who wields this power.

The direct responsibility or answerability of a final say sovereign to the general public (democratic accountability) is still possible despite the unaccountability of this body's decisions. Since republicanism's motivation is to lessen the scope of unaccountable/arbitrary power across a society, blunting the final say sovereign through democratic accountability can make it more attractive. The most straightforward way to achieve this would be ensuring that those who exercise this power are elected by the public, either directly or indirectly. Another way of achieving this blunting effect is by maintaining a capacity for open legitimate contestation of this body's decisions i.e. a capacity for these decisions to be legitimately changed. But this would lessen the degree to which this body is unaccountable.

To be more concrete, let us suppose that the final say rests in the hands of a constitution's amending power e.g. through an elaborate parliamentary procedure or a referendum. In this scenario, while the amending power is unaccountable in that no other body can overturn its decisions, it is still accountable in some way to the electorate. Members of the public who disagree with an amendment can vote for representatives who promise to reverse it, can petition parliament to reverse it, or can vote to reverse it in a referendum. Although the amendment has been passed by an unaccountable body, it is still possible to alter this decision *through the same process*. In short, final say sovereignty remains an openly *political* power – with all of the democratic and contestatory principles that this entails.

[50] Pettit (n 15) 197; Pettit (n 1) 232-235.
[51] Alexander Hamilton, The Federalist No. 78 [1788] (*National Archives*) <https://founders.archives.gov/documents/Hamilton/01-04-02-0241> accessed 21 Aug 2025.

In a scenario where the final say rests with the judiciary, these ameliorating or blunting factors are absent. Again to be clear, every scenario of final say sovereignty entails unaccountability. But in this scenario, the effects of this unaccountability are considerably *sharper*. Because members of the judiciary are appointed rather than elected, there is no formal mechanism through which citizens can change judicial decisions regarding the validity of an amendment. Judges will not face direct consequences from the wider citizenry for what is, we must remember, a political decision. Citizens who are disgruntled with a judicial decision based on unamendable principles are left with three options: to push for constitutional replacement, to try to alter judicial interpretation, or to revoke their cooperation with the constitution altogether. None of these options are positive for a constitution. The first opens up the possibility of the constitution's destruction, which is counter-productive to the aims of unamendability. The second can arguably be seen in the context of the 'constructively unamendable' US Constitution, where decades of concerted political activism through deliberately politicised judicial appointments has resulted in constitutional change through new interpretation by the US Supreme Court. This detracts from judicial independence and the rule of law. The third would create a potentially dangerous anti-constitutional element in society that could render ineffective the constitution ineffective; this was arguably demonstrated in Irish politics in the 1922-37 period.[52]

The desire for political change, if it exists, will always find an outlet even if blocked by judicial decisions like these. The risk, from a republican point of view, is this energy being channelled into an institutional setting ill-equipped to handle it: final say sovereignty in the hands of the judiciary arguably creates such a situation because the standard conditions that republicans require of political institutions are, by the very nature of an independent judiciary, rightly absent. This ultimately carries the potential to undermine not only the ostensible value of judicial review, but also the integrity of the rule of law – a key condition for the achievement of non-arbitrary rule. If citizens wish to change a judicial doctrine which is protected by unamendability, they are *forced* to politicise the process of judicial interpretation and appointment in order to affect their desired outcome. These processes would become nakedly political exercises, but they would have none of the traditional qualities that republicans demand from political institutions.

As a result of this politicisation, the independence of the judiciary would wane. This would create the conditions whereby the law itself would lose not only its own legitimacy, but its *legitimising role* within the constitution. Legal and constitutional interpretation would rightly be viewed as a naked expression of partisan political preference rather than an apolitical statement on the meaning of the legal constitution as it currently stands. The rule of law would thus

[52] See part 4.2 of this thesis.

diminish. In setting out the importance of the rule of law for constitutional governance, Pettit mentions the danger of the judiciary becoming a source of arbitrary power in its own right:

> the administrators or judges who can choose at will to apply unpromulgated laws, or who can exploit the obscurity or inconsistency of the law for their own purposes, will represent an arbitrary regime. If the rule-of-law constraints are breached, then *the law becomes a playground for the arbitrary will of the authorities*.[53]

Political constitutionalists would, of course, argue that judicial review *in any guise* makes the law 'a playground for the arbitrary will' of judges, but at least when the possibility of overturning judicial decisions through amendment remains open, the danger that this brings is not as great. Once this possibility is closed through unamendability, the potential for judicial arbitrary rule is sharpened significantly. In this sense, judicial enforcement of unamendability – often invoked *in defence* of rule of law constraints – could well have the counterproductive effect of diminishing the integrity of the rule of law.

This does not mean that republicans would look favourably on *any* political institution holding final say sovereignty instead of the judiciary. A legislative final say sovereign arguably carries distinct but no less dangerous issues for republicans (or at least republicans like Pettit). If the constitution could be amended by a simple majority vote in parliament without the possibility of oversight from another body, this could have a hugely destabilising effect on the constitution and could create a centre of arbitrary power. Constitutional constraints are vital for non-domination and they should be more difficult to change than ordinary law. This is why considerable effort needs to be spent on developing an amendment process which 1) entrenches the constitution to a degree, 2) defines clearly who has the final say over the adoption of an amendment, and 3) keeps the possibility of amendment open and *reasonably* achievable so as to ensure contestability.

Republicanism is not monolithic and its attitude to particular constitutional forms is not uniform. As we know, some republicans favour strong-form judicial review while others find this intolerable. What I have tried to show in this section is that strong-form substantive review of constitutional amendments raises significantly more legitimacy issues for republicans as a whole, even those sympathetic to what is sometimes called 'legal constitutionalism'. At their strongest, republican defences of judicial review are sympathetic to 'dialogic' or 'collaborative' models of judicial review[54] – the arguments that judicial review represents but one contribution to a wider dialogue on constitutional interpretation and development.[55] The problem with judicial review of amendments, then, is that it is precisely this power that stops constitutional

[53] Pettit (n 15) 174.
[54] HickeyB (n 46) 913.
[55] See Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023).

dialogue dead in its tracks. Republicans can only seem to endorse strong-form review when it is *not* the final say on constitutional development, when the capacity for contesting judicial constitutional decisions remains open through the amending power.

7.5 Republican alternatives to unamendability

This chapter has so far made three observations: 1) that unamendability is, in principle, incompatible with republican constitutionalism, 2) that eternity clauses can only be accommodated within a republican constitution if they are non-justiciable or capable of being changed in some constitutional way, and 3) that under a republican constitution, the judiciary should not hold final say sovereignty. Given these observations, what kind of alternatives could exist to unamendability and its judicial enforcement that might be compatible with republican principles? As we have observed, any eternity clauses must be understood as declaratory and any judicial oversight role of amendments must be *one* contribution to a wider constitutional dialogue, not the final say. An obvious alternative to formal unamendability is *tiered entrenchment* – in which some parts of a constitution are more difficult to amend than others but remain amendable – which we have alluded to already in this chapter. The most straightforward judicial alternative mirrors the idea of a declaratory eternity clause – a *declaratory form of judicial review* (sometimes called 'soft-form' judicial review).[56] Another is an *interpretation clause* governing how the entire constitution, or amendments specifically, must be interpreted by the judiciary. How these alternatives could fit within republican constitutionalism is considered in this section.

7.5.1 Tiered entrenchment

Before dealing with the other suggested alternatives to unamendability, we must directly address a model which we have only considered in an indirect way so far – 'tiered' amendment difficulty or entrenchment. This is a common feature of constitutions around the world – it is where some parts of a constitution require a more difficult procedure to amend them than others. We saw an example of this already in India – Article 368 includes two tiers of difficulty and a certain number of other provisions can be amended by simple parliamentary majority.[57] It is also seen in the South African Constitution's Article 74 which includes three tiers of amendment difficulty.[58] Somewhat similar to tiered entrenchment is where a constitution explicitly declares which of its parts are 'fundamental'. This can often be accompanied by tiered entrenchment but it need not always. An example is the Italian Constitution, whose Articles 1-12 list its

[56] See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (CUP 2013).
[57] Constitution of India 1950: art 368; arts 4, 169, and 239A, sch 5 para 7 and sch 6 para 21.
[58] Constitution of South Africa 1996, art 74.

fundamental principles,[59] but which are amendable in the same manner as the rest of the Constitution.[60] The advantage of this approach is that it expressly declares the constitution's internal hierarchy of norms, giving guidance and constraints to judicial interpretation.

Tiered entrenchment is an alternative to unamendability commonly put forward by constitutional scholars as well as judges in relevant cases.[61] The advantage that Albert sees in it is being able to preserve what he considers the first, most important of civil rights – the right to fully amend one's constitution – while still rigidifying the constitution and its fundamental features.[62] Under the republican principles we have considered, tiered entrenchment is preferable to unamendability for this same reason. It does not close off the possibility of contestation and it recognises the principle of mutability. Some parts may be (extremely) difficult to amend, but the constitution recognises that they are amendable. As we saw in our discussion on Brazil and Germany, the possibility exists that these countries' eternity clauses could be amended via a set constitutional process – if this is true, it essentially equates to tiered entrenchment and does not present any substantive problems for republican constitutionalism.[63]

However, there is one notable downside or danger with tiered entrenchment, and it becomes most clear when we apply the principle of mutability. Though some parts of a constitution may be deemed less essential and therefore easier to change at the original point of constitutional adoption, it is hard to foresee the relative importance of one part of a constitution compared to another at this original point. A seemingly technical amendment to a seemingly innocuous part of the constitution can be quite transformational or, to put it negatively, can still do huge damage, just as much as an amendment to an expressly-declared essential feature. This reality is what often causes the emergence of basic structure doctrines, especially in contexts in which parliament holds amending power – it should be remembered that tiered entrenchment did not prevent the Indian Emergency of the 1970s, nor the democratic backsliding that India is currently undergoing.[64]

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[59] Constitution of Italy 1947, arts 1-12.
[60] ibid, art 138.
[61] Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 709; Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13(3) International Journal of Constitutional Law 606, 613. *Attorney General and 2 Others v David Ndii and 79 others,* Supreme Court Petition No 12 of 2021 (consolidated with petitions 11 & 13 of 2021), 31 Mar 2022, para 203 https://www.judiciary.go.ke/download/petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement/ accessed 17 May 2026.
para 201.
[62] Albert (n 61) 709.
[63] Or at least any problems that are relevant to the specific research question of this thesis.
[64] However, the basic structure doctrine is not preventing this backsliding either: see Silvia Suteu, 'Friends or Foes: Is Unamendability the Answer to Democratic Backsliding?' (2024) 16 Hague Journal on the Rule of Law 315, 322-326.

7.5.2 Declarations of incompatibility

A declaration of incompatibility or inconsistency is a judicial remedy whereby a court holds an offending law as incompatible with a given constitutional instrument. In contrast to strong-form review, this declaration does not render this piece of law unconstitutional or void – it does nothing more than declare it inconsistent with this other law. A judicial declaration that a particular amendment is simply incompatible with a given constitutional instrument or that it is so radical as to transform the old constitution into a new one may have value in terms of *de jure* clarity as a matter of law and perhaps for the political community as a whole. Because it could not stop the amendment from being ratified or strike it down as unconstitutional, it may allow wider dialogue and contestation on the given amendment to continue. This kind of remedy would reflect the fact that the constituting people always have the right and ability to ignore this declaration.[65]

Soft forms of judicial review seen in the UK and New Zealand are grounded in specific constitutional/legal instruments, namely the UK's Human Rights Act 1998 ('UKHRA')[66] (and consequently the European Convention on Human Rights, 'ECHR') and New Zealand's Bill of Rights Act 1990 ('NZBORA').[67] Under both acts, the respective courts are instructed to interpret and apply all laws passed by the legislature as compatible with these human rights instruments as far as possible.[68] This allows these instruments to have an all-encompassing efficacy. When this is not possible, these courts have the power to issue 'declarations of incompatibility' or 'inconsistency'[69] – they cannot strike down the offending law, but they simply declare it to be incompatible with the human rights instrument. At this point, the sovereign legislature can choose to rectify this incompatibility or ignore it.

Bringing us back to the issue at hand, what kind of written instrument could be the basis of a declaratory judicial review power over amendments? What could serve the interpretive role of amendments in the manner served by the UKHRA or the NZBORA? Could a judiciary ground a declaratory review power over amendments on the constitution's basic features or its human rights provisions? This would seem logically incoherent since the purpose of amendments is to change the substance of a constitution – in some sense, every constitutional amendment is

[65] However, the use of weak remedies in a context where strong-form judicial review is well-established may strike onlookers as incoherent given the weight and likely effect of problematic amendments. Dixon and Yap's proposal for 'responsive judicial remedies' – notable for its emphasis on the need for courts to adopt a pragmatic combination of weak and strong remedies – sees threats to the 'minimum core of democracy' through amendments as an example of where *strong* remedies are justified, not weak ones. Rosalind Dixon and Po Jen Yap, 'Responsive judicial remedies' (2025) Global Constitutionalism 1.
[66] Human Rights Act 1998.
[67] New Zealand Bill of Rights Act 1990.
[68] Human Rights Act 1998, s.3; New Zealand Bill of Rights Act 1990, s.6.
[69] Human Rights Act 1998, s.4; *Taylor v Attorney-General* [2015] NZHC 1706.

inconsistent with the constitution as it stands, otherwise why bother having an amendment? Instead, a declaratory review power must be grounded on something more specific.

7.5.3 Interpretation clauses

Since the declaratory review powers of the UK and New Zealand are grounded first and foremost interpretive legal instruments, an obvious grounding for a declaratory review power is a constitutional interpretation clause. This kind of clause aims to direct the judiciary (and other constitutional actors) in how they should interpret constitutional provisions. This kind of clause is common to many African constitutions; for example, Article 259 of the Kenyan Constitution states:

> This Constitution shall be interpreted in a manner that—
> (a) promotes its purposes, values and principles;
> (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
> (c) permits the development of the law; and
> (d) contributes to good governance.[70]

When applying this kind of clause, a court would have to give effect to its principles as far as possible, including with new amendments to the constitution. Perhaps when, in its judgement, it is not possible to interpret an amendment as compatible with these interpretive principles, it could issue a declaration to this effect.

Of even more relevance to amendments is schedule 2 paragraph 9 of Seychelles' Constitution. This provision specifically governs how constitutional amendments are to be interpreted:

> The alteration of any provision of this Constitution shall not—
> (a) revive anything that was not in force or existing immediately before the alteration took effect;
> (b) affect the previous operation of the altered provision or anything duly done or suffered under it;
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the altered provision;
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the altered provision; or
> (e) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceedings or remedy may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed, as if the altered provision had continued in force.[71]

This provision reflects broad common law principles of interpretation: the wording is lifted almost fully from the 'general savings' clause of UK Interpretation Act 1978 and is reflected in similar Indian and Irish legislation.[72] The broad principle is very basic: a repeal of a part of the Constitution shall not disturb previous or ongoing legal situations which depended on the pre-

[70] Constitution of Kenya 2010, art 259.
[71] Constitution of Seychelles 1993, sch 2 para 9.
[72] Interpretation Act 1978, s.15 (UK); Interpretation Act 2005, s.27 (Ireland); General Clauses Act 1897, s.6A (India).

amendment constitutional provision, and it shall not implicitly revive lapsed laws. In this sense, it articulates a very basic, minimal prohibition of retroactive laws – something which Fuller held was essential to law's 'inner morality'.[73]

In the context of constitutional amendment, this clause looks very like an eternity clause: it states that '…alteration of any provision of this Constitution *shall not*…' – something that could imply a limit on amendability. However, its placing in the Constitution is important, being part of the 'principles of interpretation' schedule rather than the amendment clause. The Seychellois Constitution lacks an explicit eternity clause and the above provision can be amended by referendum.[74] This indicates that it merely governs the interpretation and application of amendments once enacted rather than limiting what kind of amendments can take place. Further, its scope and content are significantly narrower and more specific than any of the eternity clauses that we considered; it does not cement high abstract principles. The practical usefulness of this clause in Seychellois law is not clear.[75] The Seychelles Constitution provides for strong-form judicial review,[76] and its Constitutional Court has even recently endorsed a version of the basic structure doctrine, though the above clause was not invoked in this ruling.[77] While the *general* interpretation principles of schedule 2 paragraph 8 are often invoked by the Court,[78] the *specific* interpretation principles for amendments are not.

Leaving aside its practical impact and assessing it at face value, perhaps a 'general savings' clause like this could serve as a useful textual alternative to hard unamendability in ensuring a degree of predictability and legal security amidst constitutional change. It need not be as narrow or specific as the Seychellois clause above, but could include broader interpretive principles which ought to be applied to amendments. Further, an instrument like this could ground a declaratory form of amendment review in the same way that the ECHR serves as the basis of UK declaratory review. As with the UKHRA, a court interpreting an amendment would have to give effect to its interpretive framework as far as possible. When this is *not* possible, that court could issue a declaration to this effect – not stating that the amendment in question violates the constitution's basic structure etc, but simply that it cannot be reconciled with the principles of

[73] See Lon Fuller, *The Morality of Law* (Yale University Press 1969) 42.
[74] Constitution of Seychelles 1993, art 91.
[75] See generally Mathilda Twomey, Legal Métissage in a Micro-Jurisdiction: The Mixing of Common Law and Civil Law in Seychelles (PhD thesis, University of Galway, July 2015).
[76] Constitution of Seychelles 1993, art 130.4.
[77] *Seychelles Human Rights Commission & Ors v Speaker of the National Assembly & Ors* (CS 07/2022)[2025] 9 Dec 2025, para [34]. https://www.seychelleshumanrights.com/images/downloads/Ruling_on_Preliminary_Objections_10th_amendment_case.pdf accessed 18 May 2026. Seychelles' judiciary has only once struck down legislation as unconstitutional since the Constitution's adoption in 1993; *Seychelles National Party & Ors. v Government of Seychelles & Anor* CS 03/2014 (unreported). See Twomey (n 75) 217.
[78] *Seychelles Human Rights Commission* (n 77) para [23]

the interpretation clause. As with the UKHRA, provision could be made for these declarations explicitly, as well as a mechanism allowing for the amending power to ameliorate the amendment's fault. But it would be for the amending power to decide whether or not to do this, not the judiciary – if it decided not to rectify the amendment, the courts would have to abide by this decision.

A Fullerian rule of law clause?

Republicans like Pettit and Lovett are clear that a republican constitution must be governed and implemented through law – this is an essential attribute of non-arbitrary governance.[79] The rule of law criteria listed by Fuller – that laws be general, public, prospective, coherent, clear, stable, and practicable[80] – are compelling to republicans.[81] While making this criteria unamendable would be problematic from a republican perspective, it has undeniable republican virtues and perhaps we ought to find a way to safeguard this minimum moral content of law from problematic amendments. Schedule 2 paragraph 9 of the Seychelles Constitution does this in its own, narrow way, but perhaps an interpretation clause could be included in a republican constitution which simply lists Fuller's criteria explicitly, specifying that constitutional amendments must continue to respect these criteria:

> (a) No amendment to this Constitution shall be construed to validate the enactment or enforcement of secret laws, the retroactive criminalisation or penalisation of conduct, laws imposing impossible or arbitrary obligations, or the selective or arbitrary application of laws.[82]
>
> (b) No amendment to this Constitution shall affect the previous operation of the altered provision or anything duly done or suffered under it.[83]
>
> (c) If the Constitutional Court is satisfied that an amendment to this Constitution cannot be reconciled with the criteria in subsections (a) or (b), it may make a declaration to this effect.
>
> (d) A declaration under subsection (c) ('a declaration of incompatibility') does not affect the validity, continuing operation, or enforcement of the constitutional provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made.[84]

This is an imperfect attempt to tie together Fuller's criteria with Seychelles' interpretation clause and the UKHRA's declaratory review power. A clause like this could have republican virtues in protecting Fuller's internal morality of law and the minimum content and principles of legality. As with the Seychellois clause, this kind of provision ought to be just as amendable as the rest of the constitution. Nonetheless, its alteration could serve as a powerful marker to the citizenry that a Rubicon had been crossed – for that reason, the citizenry should be resistant to its alteration. But this would not legally prevent its alteration.

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[79] See Frank Lovett, *A Republic of Law* (CUP 2016); Pettit (n 15) 174-177.
[80] Fuller (n 73) 39.
[81] Pettit (n 15) 174.
[82] This is a selection of some of Fuller's desideratum.
[83] This is a summary of the Seychelles Constitution's sch 2 para 9.
[84] Subsections (c) and (d) are paraphrased from the UK Human Rights Act 1998 s.4.

7.5.4 When eternity clauses exist – declarations of constitutional replacement

What guidelines can republicanism offer when a constitution does contain a supposedly unamendable clause? Again, the judicial approach ought to be guided by the principles already outlined, first and foremost that the judiciary does not hold the final say and that this power rests with the political branches of the republic. The capacity for the constitution to continually mutate according to the constituting people's direction must remain open. This suggests that eternity clauses ought to be treated as non-justiciable provisions which judges should not enforce against the amending power. The most clear example of this is France, where the clause protecting the republican form of government from amendment is rendered non-justiciable by the *Conseil constitutionnel* (CCF)'s reluctance to enforce it.

But what if an amendment unambiguously violated the French eternity clause by, say, reinstituting the French monarchy? Ought the CCF stand by and pretend that the Fifth Republic continued to exist amidst its evident destruction? Following the principles laid out already, a declaratory form of review would still be the only form of remedy available. Perhaps a declaration to the effect that the Fifth Republic's Constitution had been terminated by the amendment which restored the monarchy and consequently replaced the 1958 Constitution would serve as a useful legal Rubicon moment. It could indicate to the citizenry that the font of legality which the 1958 Constitution provided was now empty. However, similar to the other forms of declaratory review suggested above, the value and effectiveness of this power would be questionable – for instance, citizens could presumably figure out themselves that the republican Constitution had been terminated by this amendment without judges having to tell them this.

However, when comparing this with the original motivation for the *German* eternity clause, a 'declaration of constitutional replacement' does not seem so redundant. The drafters of the Basic Law never denied that the constituent power (or political power generally) could always ignore the eternity clause. Its value came from its clarification that only one kind of substantive legality could be offered by the Basic Law – one that respected human dignity, human rights, and federalism.[85] The constituent power could ignore this and create a constitution which did not respect these principles, but it could never use the Basic Law to achieve this. Bearing all this in mind and remembering the republican contention that constituent power has an ongoing active presence in a democracy, a declaration of constitutional replacement would match the declaratory objective of an eternity clause (i.e. to provide legal clarity). Relatedly, Dixon and Landau observe that unamendability's most realistic utility in the event of 'abusive

[85] See part 6.3.2 of this thesis.

constitutionalism' is as a speed-bump, not a brick wall which can actually stop the given amendment occurring.[86] Thus, if the constituting people can always supersede the decisions of constituted entities like courts, it is logical to provide a judicial remedy which acknowledges this reality while stating the legal reality that one constitution has been replaced by another.

One may criticise this kind of declaration as ineffective – all it would do is say that one constitution had been replaced by another by means of an amendment contrary to the eternity clause. What practical use could this have? But according to republicans and, crucially, those who designed the German eternity clause, this is all that such a clause could ever achieve anyway. An eternity clause would not have prevented the Weimar Republic's descent into Nazism, but it would have denied the Nazi regime the legal cover which the Weimar Constitution provided. A declaration of constitutional replacement could do precisely the same thing. It could indicate to the population of a state descending into totalitarianism that their legal obligations as they existed under the old constitution were now spent and that they ought now to choose how to interact with this new regime – whether to accept it or resist it.

7.5.5 A procedural UCA doctrine?

The foregoing discussion mostly considered alternatives to unamendability where judicial review of amendments would be comparatively weak and would not represent the final say on the validity of an amendment. Another growing alternative to the standard UCA doctrine is more procedural in orientation. This is seen in the recent work of Amal Sethi, Vicki Jackson, Adem Kassie Abebe, and others,[87] as well as in recent African caselaw. Sethi argues that courts should be able to strike down procedurally-correct amendments in order to demand a higher level of elite political consensus for the change proposed (the consent of the main opposition party should be required, for instance).[88] In a conscious departure from the UCA doctrine's focus on primary constituent power as the legitimiser of transformative amendments, Sethi uses what he calls 'equitable-elite bargaining' as the measure of legitimacy.[89]

Abebe uses a similar proposal, focusing on the criteria used in the *African Charter on Democracy* of achieving 'broad consensus' for constitutional amendments,[90] arguing that this provides the benchmark of legitimacy for constitutional amendments in Africa.[91] This requires amendment

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[86] Rosalind Dixon and David Landau, 'Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment' (2015) 13(3) International Journal of Constitutional Law 606, 613.
[87] Amal Sethi, 'When should courts invalidate a constitutional amendment?' ICL Journal 2024; 18(1): 25–57, ; Vicki Jackson, 'Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism' in Bäuerle et al (ed), *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde zum 70. Geburtstag* (Mohr Siebeck 2013) 47; cited in Roznai (n 10) 126; Adem Kassie Abebe, 'The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding' (2024) Asian Journal of Comparative Law 1-20.
[88] Sethi (n 87) 44.
[89] Sethi (n 87).
[90] African Charter on Democracy, Elections and Governance 2007, art 10.2
[91] Abebe (n 87) 10.

processes to be demanding, requiring the buy-in from both government and opposition parties, and inclusive of broad public consultation.[92] This benchmark allows judges to review amendments on both procedural and substantive grounds: that the proper procedure to enact the given amendment has not been followed; or that the substance of the proposed change is too radical to be done under the ordinary amendment process. The same kind of 'procedural' approach to unamendability is used by Jackson.[93] Judges can decide that the content of an amendment is unconstitutional, but this can be remedied by a higher level of socio-political consensus and deliberation. The possibility of achieving this amendment would still exist, just not under the existing amendment process. This approach is evident from many recent judgements from African courts, including the Kenyan Court of Appeal in 2021[94] and the Zambian Constitutional Court in 2025. In the latter case, the Court held that constitutional amendments cannot be initiated without wide public consultations.[95]

On one level, this approach does not raise the same concerns for republicans as straightforward unamendability since a procedure exists to amend the protected constitutional content in question. It allows this content to be contested, albeit in a different way to the ordinary amendment process. It is conceptually close to express tiered entrenchment we considered above. However, the catch is that it would preserve a judicial final say over the amendment process in a way that tiered entrenchment would not – judges would decide on substantive grounds which changes demand a higher level of approval/consensus, and they would decide whether the proposed process to enact it was acceptable. In this sense, though unamendability is not technically present, the judiciary would remain the final say sovereign. Though not *as* problematic as Indian-style judicially-enforced unamendability, it would remain problematic from a republican point of view.

Further, as judges in the subsequent Kenyan Supreme Court judgement highlighted, this approach is akin to the judiciary second-guessing the explicit amendment process that the constitutional text provides.[96] Courts deciding to add extra steps to the amendment process is functionally equivalent to a constitutional amendment itself. If the amendment process is to be revised, this ought to be done in a political democratic manner. If the existing process does not entrench the constitution adequately, this is a design flaw which courts are not empowered to remedy by themselves – they are, after all, a constituted entity like any other and their task is not

[92] ibid, 8.
[93] Jackson (n 87).
[94] See Gautam Bhatia, 'The Kenyan Court of Appeal's BBI Judgment – I: On the Basic Structure' (*Constitutional Law and Philosophy*, 23 Aug 2021) https://indconlawphil.wordpress.com/2021/08/23/the-kenyan-court-of-appeals-bbi-judgment-i-on-the-basic-structure accessed 17 May 2026; cited in Abebe (n 87) 8.
[95] *Munir Zulu v Attorney General* 2025/CCZ/009 para [55].
[96] *David Ndii* (n 61) para 201.

to rewrite the constitution to fit their purposes (well-intentioned as they often are). As with BSDs, it introduces a high degree of uncertainty into the constitutional system – all of a sudden, an express procedure for constitutional change, which all political actors and citizens could understand and depend on, is called into question.

7.6 Conclusion

This chapter began by restating the salient republican principles which relate to constitutional change. It set out why unamendability is, at the abstract level, incompatible with a republican approach to constitutionalism. This is based on the observations that constitutions are inherently mutable, that the ability to contest all aspects of a constitution is a core part of republican freedom, and that the contestatory citizenry of a republic who hold constituent power continuously influence the direction of the constitution. The chapter then went on to apply these principles to the case studies of Ireland, India, Brazil, France, and Germany.

On this basis, the practical approach to unamendability which is most faithful to republican principles is simply to keep the scope of amendability fully open – either explicitly declaring everything to be amendable (as in Ireland) or by omitting any limits on what can be amended. The next most compatible approach is to limit amendability through a non-justiciable declaratory eternity clause (as seen in France). If the decision is taken to include a *justiciable* eternity clause, it is preferable that a set constitutional mechanism to alter it should be provided – this effectively equates to tiered entrenchment and diminishes the extent to which it is truly 'unamendable'. This *may* be applicable to Brazil or Germany, but this is uncertain. On the whole, while unamendability cannot be conceptually squared with republicanism, the inclusion of an eternity clause in a constitution is not, in principle, problematic so long as it is either understood as purely declaratory or as alterable in a distinct way.

In contrast, basic structure doctrines, while well-intentioned from the perspective of the mixed constitution and preventing executive hegemony, are much more difficult to accommodate within a republican constitution. Neither basic structure doctrines nor fully justiciable, unamendable clauses can be accommodated because they *intentionally* violate the principle of contestability. Further, they cement the judiciary as the final say sovereign, undermining many republican defences of strong-form judicial review. Once this judicial final say sovereign is in place, the only options left for altering unamendable features involve violating or replacing the constitution. This latter situation is not one which republicans are averse to in principle, but the distinction between it and amendment is dubious and ultimately renders unamendability counter-productive.

While the most straightforward way for a constitution to adhere to republican principles on this topic is simply to omit unamendability altogether, this chapter finished by considering some alternatives that are conceptually close to unamendability. One alternative is tiered entrenchment, where some parts of a constitution are more difficult to amend than others, but are equally amendable. This would satisfy the requirement for contestability, but raises distinct problems. Judicial alternatives include declaratory remedies, and it was suggested that a combination of declaratory review with interpretation clauses could be accommodated within a republican constitution. When an eternity clause exists in a constitution, a 'declaration of constitutional replacement' by a judiciary would satisfy republican principles as well as the basic motivation for including eternity clauses – that while they cannot stop the amending power from changing them, they serve as declaratory signposts for the substantive existence of a constitutional order.

8. CONCLUSION

8.1 Fear and vigilance

Dietrich Conrad's 1965 lecture to the Banaras Hindu University was about as influential as an academic legal paper can hope to be. His theory of 'implied limits' to constitutional amendment powers influenced the development of one of the most consequential legal doctrines in the world. In the paper version, Conrad did not deny that his theory was, in some sense, an 'argument of fear' – the fear that the power of constitutional amendment would be used to destroy the constitution. 'To admit the possibility of abuse would … mean that the power is not boundless in scope and that beyond a certain line its use is no longer legitimate.'[1]

The argument of fear, conceptually close to Judith Shklar's 'liberalism of fear',[2] comes from the knowledge that democracy always hangs by a thread. The possibility that state power can be abused frightens every sane human being, for it carries the potential for arbitrary use of force and the violation of basic rights and liberties. The specific fear of constitutional amendment is justified, and it is one which republicans share. Here within a liberal democratic constitution lies a power which can be used to destroy the essence of liberal democracy. Such abuse of amending powers is not an abstract hypothetical – there are countless real-world examples of this happening not just historically but in the 21st century.[3] If every constitution contains a route to tyranny, it passes directly through the amending power.

The prevailing response to this fear by lawyers and academics has been the same as that offered by Conrad: to constrain the power of constitutional amendment and place it under the control of the judiciary. In essence, it claims that 'abusive' constitutional amendments would simply be *invalid*. And since the danger is not reserved to constitutional amendments but applies equally to constitutional replacements,[4] we see increasing calls for judicial control of these processes too.[5] Perhaps we should feel safer and sleep more soundly when we know that judges have the last word over politics at all times and in every instance.[6]

Even if we presume that this would be a desirable constitutional arrangement, it would extinguish neither the danger nor the fear. At some point, legal solutions run dry and we must

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[1] Dietrich Conrad, 'Limitations of Amendment Procedures and the Constituent Power' (1970) 15-16 Indian Year Book of International Affairs 347, 378

[2] Judith Shklar, 'The Liberalism of Fear' in Nancy L Rosenblum, *Liberalism and the Moral Life* (Harvard University Press 1989).

[3] See e.g. the 2008 and 2020 amendments to the Russian Constitution, the 2017 amendments to the Turkish Constitution, the 2015 amendments to the Rwandan Constitution, or the various alterations to the Hungarian Constitution under the Fidesz party.

[4] See e.g. the replacement of the Hungarian Constitution in 2011.

[5] See David Landau and Rosalind Dixon, 'Constraining Constitutional Change' (2015) 50 Wake Forest Law Review 859.

[6] See Ran Hirschl, *Towards Juristocracy* (Harvard University Press 2007).

rely on other safeguards. While republicanism *does* share the fear described by Conrad, a republican response must be different. It begins by acknowledging the power and danger posed by constitutional amendment, and *sitting* with the fear and discomfort it brings. It is only by doing so that the right solutions, at the right levels, can be garnered. I suggest that a republican response to this danger is the same that it offers to the threat of tyranny generally: a *virtuous, vigilant, contestatory citizenry*. It must be *virtuous* in the minimal sense of believing that the constitution is worth protecting; it must be *vigilant* in constantly being on guard for abuse and corruption of public power; and it must be *contestatory* in using all channels of contestation, individually or collectively, to challenge expressions of public power that do not match public norms.[7]

This is far more demanding than the prevailing legal constitutionalist response. Because this contestatory citizenry *is* the constituent power – the power that sustains the constitutional system – it is vital that individual citizens know that, ultimately, it is *their* responsibility to prevent the slide into tyranny and corruption. Part of this, I suggest, is the awareness that the constitution *is* amendable – *fully amendable* – that this is a vital power as well as a danger, and that it ought to be used in ways that further the ultimate end of republican politics: freedom from domination. This civic duty never ceases, since change is a constant factor in human affairs – this is why Curran said that the price of liberty was '*eternal* vigilance'.[8]

Further, as Suteu observes, unamendability is itself an expression of political power which can be used for good or evil.[9] As with nuclear weapons, we ought to ask ourselves whether we should want such a power lying around, ready for any political actor powerful-enough to use. The advantage of *amendability* over unamendability, in this context, is that it incorporates one salient truth about human affairs in a way that *un*amendability cannot – that all human creations are finite, and that the only way to maintain such a creation in the midst of an ever-changing world is through the embrace of change, not by fruitlessly trying to fend it off. This is, after all, the purpose of constitutional amendment.

8.2 A summary of this thesis

This thesis began by setting out two basic principles underlying constitutional unamendability, namely the argument that the amending power cannot replace the constitution, and the argument that a constitution must have some substance to be a constitution. In Chapter 3, it recounted two strands of republican thinking: one early modern strand and the other associated

[7] Philip Pettit, *On the People's Terms* (CUP 2014) 225-229.
[8] Patrick Gageby, 'The spirit of the law – An Irishman's Diary on pioneering barrister John Philpot Curran' (*Irish Times*, 5 Dec 2017) https://www.irishtimes.com/opinion/the-spirit-of-the-law-an-irishman-s-diary-on-pioneering-barrister-john-philpot-curran-1.3315389 accessed 24 May 2026.
[9] Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (OUP 2021) 3.

with Philip Pettit. From this, we saw that republicanism is grounded on the premise that the power that legitimises a constitution is ever present within a constitution – living constituent power. The two salient principles of mutability and contestability were then set out: mutability being the principle that all human creations will suffer corruption if not tended to through change; contestability being the principle that a law or constitution is legitimate to the degree that it can be changed by those who live under it.

Chapters 4-6 then considered the approaches to amendability and unamendability in five different constitutions. Ireland's Constitution not only lacks unamendability, but embraces full amendability, and it was suggested that this is linked to the fact that the previous Irish Constitution prevented amendments to the Treaty settlement with Britain (on paper at least). India stood as our exemplar of judicially-discovered and defined unamendability. The 'basic structure doctrine' ensures that all government and parliamentary acts, including constitutional amendments, can be scrutinised by the judiciary, making the Indian Supreme Court the 'final say sovereign' within the Constitution. This doctrine was a pragmatic response by the judiciary to executive empowerment. We then considered three constitutions which include an eternity clause. Germany's eternity clause ensures that the Basic Law can only legitimise a certain scope of political regimes. Brazil's petrous clauses make the Supreme Federal Court the final say sovereign, but it remains an open question whether these clauses can themselves be amended by referendum. Despite the French Constitution's eternity clause, its approach to amendability is similar to Ireland's due to the Constitutional Council's refusal to enforce it.

Chapter 7 then applied the republican principles of Chapter 3 to the case studies. It concluded that the Irish and French approaches most closely adhere to these principles. This is because they keep the channels of legitimate contestation and mutation open through fully amendable constitutions. The approaches of Brazil and Germany indicate that eternity clauses need not represent an absolute barrier to contestation as long as constitutional procedures exist to alter these provisions. The Indian basic structure doctrine, while well-intentioned, is problematic from a republican legitimacy perspective because, by its very nature, it restricts the scope of legitimate contestation of the Constitution.

It then explained what a republican approach to judicial supremacy in the context of constitutional amendments ought to be, centring on a 'broader political constitutionalism' which incorporates a judicial review power but which recognises the constitution's provisional and contestable character. While judicial review can be a feature of a republican constitution, this judicial power *cannot* apply to constitutional amendments – for it would put a finality on judicial decisions which is unhealthy in a republican democracy. This was concluded with an overview

of what kind of judicial approaches would be more tolerable under a republican constitution – it was suggested that a *declaratory* form of amendment review could have value in terms of legal clarity while recognising that the final say must rest within the political sphere.

8.3 Questions for future research

This thesis was only tasked with providing a republican approach to constitutional amendability *as a scope of action*, not as an approach to constitutional flexibility/rigidity. The points raised about mutability and contestability naturally raise questions about what a republican approach would be to this broader issue. It may be that a constitution which is officially fully amendable but which makes amendment excessively difficult would raise the same legitimacy concerns as unamendability proper. Or perhaps the mere existence of a contestatory avenue is sufficient, regardless of the difficulty of its procedures. This is a subject to which constitutional theorists have spent much time researching, but a republican account of this problem has yet to be applied.

As well as this, the theory of living constituent power raises another question for republicanism, one also raised by Tushnet and Pettit in their own ways[10] – whether amendment procedures are ever truly binding. If the constituent power of the people is alive in the various contestatory avenues of a constitution on a day-to-day basis, what does this say about amendment powers? A republican answer to this and to the related question of flexibility/rigidity could be the subject of future republican constitutional work.

[10] Mark Tushnet, 'Amendment Theory and Constituent Power' in Gary Jacobsohn and Miguel Schor (eds) *Comparative Constitutional Theory* (Edward Elgar 2018); Pettit (n 7) 292.

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