

Constraints on Constitutional Amendment Powers  
Oran Doyle\*

changed, changed utterly  
A terrible beauty is born.  
WB Yeats, *Easter 1916*

## I Introduction

There exists a widespread practice of constraining constitutional amendment powers through rules or standards that determine the validity of constitutional amendments. These rules and standards arise both from constitutional texts and judicial decisions.<sup>1</sup> This practice raises significant concerns about the distribution of power both between generations and between political actors. The fundamental question is whether the values served by constraints on amendment powers can justify a contemporary majority being subject to a past generation or a judicial elite. The literature mostly fails to address this question directly, focusing instead on the quantum of change introduced by constitutional amendments. Eliding different understandings of the word ‘constitutional’, problematic amendments are identified by the extent to which they depart from the moral value of constitutionalism, or the extent to which they go beyond what is claimed to be a proper conceptualisation of constitutional amendment, or by some combination of these approaches.

In this chapter, I suggest a different approach. Four cross-cutting distinctions establish a typology of ways in which the power of constitutional amendment can be constrained. This typology focuses attention on how constraints disempower contemporary majorities in favour of past generations or judicial elites, thus providing a baseline against which we can assess whether those constraints are justified. Constraints that seek to serve majoritarian values pose the relatively simple question of whether the detriment to majoritarian values in the here and

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<sup>1</sup> For a comprehensive and insightful account of this practice, see Y Roznai, ‘Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea’ (2013) 61 *Am J Comp L* 657.

now is justified by the protection of majoritarian culture over the medium to long term. Constraints that prevent change to the fundamental features of the polity are unjustified: there can be no objection to the current generation using constitutional processes to transform its polity. Constraints that seek to preserve counter-majoritarian values are the most difficult to assess, raising as they do a competition between the incommensurable values of majoritarian democracy and the protection of minorities from unjust laws.

## **II A Doctrine of Unconstitutional Constitutional Amendments**

### A Unconstitutional Amendments: Positive, Moral and Conceptual Claims

The literature largely revolves around the question of whether particular legal systems have or should have a judicial doctrine of unconstitutional constitutional amendments, as well as the appropriate parameters of such a doctrine. This literature obscures and elides critical differences between positive, moral and conceptual senses of unconstitutional constitutional amendments. In the positive sense, an amendment is an unconstitutional amendment if it fails to meet standards posited by the constitutional text. In the moral sense, an amendment is an unconstitutional amendment if it fails to respect the value of constitutionalism, understood as the value of constraining governmental power.<sup>2</sup> In the conceptual sense, an amendment is an unconstitutional amendment if it purports to make a change that falls outside the concept of constitutional amendment. Recognition of these different senses allows us to make sense of the otherwise self-contradictory ‘unconstitutional constitutional amendment:’ an amendment may be constitutional in one sense but unconstitutional in another sense.

Positively unconstitutional amendments are nearly always considered to be invalid. Indeed, it is linguistically unusual—although not senseless—even to refer to a positively unconstitutional amendment as a constitutional amendment at all.<sup>3</sup> The claim of those who argue for a doctrine of unconstitutional constitutional amendments is that an amendment, regardless of what the constitutional text requires, should be deemed positively unconstitutional if it is unconstitutional in the moral sense or the conceptual sense. In other words, constitutional actors (including courts, absent a special rule on non-justiciability) should neither enforce nor

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<sup>2</sup> There are different understandings of constitutionalism but the one that pervades this literature is the value of controlling government, what Barber terms negative constitutionalism. Nick Barber, ‘Constitutionalism: Negative and Positive’ (2015) 38 *Dublin U L J* 249.

<sup>3</sup> De Gaulle’s use of a referendum to amend the Constitution of the Fifth Republic in 1962 is arguably an example of a positively unconstitutional constitutional amendment that is still considered to be a constitutional amendment.. See discussion of Jean-Philippe Derosier ‘The French People’s Role in Amending the Constitution’, in this volume.

respect an amendment that is unconstitutional in a moral or conceptual sense, irrespective of whether it is constitutional in the positive sense.

The literature framed in terms of ‘unconstitutional constitutional amendments’ is problematic for three related reasons. First, there is a tendency to elide the three different meanings of ‘constitutional,’ thereby obscuring the precise claim being made. Secondly, both the moral and the conceptual approaches often use the quantum of constitutional change introduced by an amendment as a proxy for determining whether an amendment is morally or conceptually unconstitutional. As well as further obscuring the difference between moral and conceptual approaches, this move—since lawyers are conveniently well placed to measure that quantum of constitutional change—deflects attention from the extent to which judges are politically empowered by a doctrine of unconstitutional constitutional amendments. Thirdly, the power of constitutional amendment involves moral values that have nothing to do with the value of constitutionalism: it is difficult to situate these values in a debate that focuses on whether a constitutional amendment is ‘constitutional.’

## B Morally Unconstitutional Constitutional Amendments

The moral value of constitutionalism could—in principle—provide grounds for constraining the power of constitutional amendment. However, it is problematic to focus exclusively on constitutionalism to the exclusion of other values. This value-monism leads to an interpretative approach that seeks to construct the best meaning of the moral value of constitutionalism rather than directly address the justification of constraints on the power of constitutional amendment. In this vein, Landau writes that the doctrine of unconstitutional constitutional amendments suggests ‘a more substantive conception of constitutionalism—one that states that a constitution is *not really constitutional* unless it actually works in certain ways and adheres to certain fundamental principles.’<sup>4</sup> Walter Murphy adopts such an interpretative approach, suggesting that amendments that would destroy or cripple the values of constitutional democracy are invalid. Murphy argues that a polity that violates its fundamental principles destroys its justification for existence and its public officials lose their authority to speak as agents of the people. Any change that would transform the polity into a totalitarian or authoritarian political system would be illegitimate, in the sense of not being grounded in the

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<sup>4</sup>D Landau, ‘Abusive Constitutionalism’ (2013) 47 *UCDL Rev* 189, 260. Emphasis added.

existing system's fundamental normative principles.<sup>5</sup> Murphy here elides two discrete issues: the extent to which the amendment departs from the value of constitutionalism and the extent to which the amendment is inconsistent with the constitution's fundamental principles, i.e. the quantum of change introduced by the amendment.

Jacobsohn makes a similar elision in reverse, moving from a quantum-of-change approach to a moral value of constitutionalism approach. He argues for a Burkean criterion of constitutional identity to determine whether a constitutional amendment is legitimate.<sup>6</sup> An amendment can only be legitimate if the old constitution survives without loss of identity.<sup>7</sup> This criterion of identity focuses not on the degree of change *per se* but rather 'the content of this change insofar as it implicates the question of constitutional identity.'<sup>8</sup> The difficulty here is that no argument is made as to why stability of constitutional identity is a value that should constrain the amendment power. For such an argument to be analytically discrete, it would have to be ambivalent as between benign and malign constitutional identities. But it is impossible to conceive of an argument as to why the power of constitutional amendment should be constrained in order to preserve a malign constitutional identity. For instance, the Nineteenth Amendment to the US Constitution is not objectionable simply because it changed the constitutional identity of the US by allowing women to vote. Nor is it an answer to suggest that the only solution to a malign constitutional identity should be the replacement of the entire constitution. The purpose of a constitutional amendment power is to allow for constitutional improvement; there is no reason why improvements to constitutional identity should be prohibited.

Jacobsohn seeks to avoid the problem of malign constitutional identities by drawing on the moral sense of constitutionality. He argues that a rulership that fails to meet the minimum requirements of Fuller's internal morality of law has no constitutional identity in the first place: 'certain attributes of the rule of law ... are necessary for generic constitutional governance.'<sup>9</sup> In this guise, 'constitutional identity' is no longer an empirically observable feature of a constitution but rather a moral assessment of whether a positive constitution conforms to the

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<sup>5</sup> W Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, 1995) 163, 173 and 178–80.

<sup>6</sup> GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *Int'l J Const L* 459.

<sup>7</sup> *ibid* 483.

<sup>8</sup> *ibid* 485.

<sup>9</sup> *ibid* 481. This solution is only partial because it fails to grapple with less fundamental ways in which a constitutional identity could be malign.

value of constitutionalism. Even as a moral assessment, however, it is lacking since there are many ways in which a constitution's identity might be malign (for instance, through the legitimisation of chattel slavery) without offending any of Fuller's desiderata of the rule of law.

Although the value of constitutionalism could justify a constraint on the power of constitutional amendment, it is problematic not to consider competing values. Most relevantly, all constraints on the power of constitutional amendment come at a cost to the value of democratic majoritarianism, the right of contemporary majorities to choose their own form of government. Murphy's suggestion that public officials lose their authority to speak where a polity violates its fundamental principles seems to imply a judicial power to disregard amendments that judges perceive to be illegitimate in this sense. However, that judicial power is not separately justified: it is just taken to follow from the fact that too great a change is being made to the constitution. The focus on quantum of change—an assessment that is well suited to the skillset of judges—obscures the extent to which judges are politically empowered by this doctrine. Jacobsohn is ultimately reticent about such a judicial power, not for moral reasons but rather due to a prudential concern that judicial intervention might be ineffective or might make things worse by causing people to leave these concerns to the judiciary.<sup>10</sup> He also suggests that the degree to which judges should have a judicial review power over constitutional amendments depends on the relative ease or difficulty of altering the document.<sup>11</sup>

Yap more directly addresses this competition of values. For him, the best justification of constraints is that they may be necessary 'to prevent a temporary dominant authoritarian political party/coalition from harnessing the amendment process' to secure its own position indefinitely.<sup>12</sup> However, this must be weighed against 'the dangers of any judicial abuse that may follow from unelected judges enforcing a nebulous "essential features" doctrine that can frustrate legitimate constitutional revisions designed to meet changing times.'<sup>13</sup> Despite recognising the competition in values, Yap's resolution is similar to that of Jacobsohn: for malleable constitutions, judges should interfere with the substance of an amendment only where it would 'substantially destroy the pre-existing constitution' by being manifestly

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<sup>10</sup> Jacobsohn (n 6) 486.

<sup>11</sup> *ibid* 487.

<sup>12</sup> PJ Yap, 'The conundrum of unconstitutional constitutional amendments' (2015) 4 *Global Constitutionalism* 114, 128. Yap limits his consideration to judicially recognised implicit constraints on amendment powers, but the justification that he identifies is of broader application.

<sup>13</sup> *ibid* 131.

unreasonable.<sup>14</sup> The criterion of 'substantial destruction,' however, means that quantum of change (rather than the moral value of constitutionalism) re-emerges as the touchstone of legitimacy..

### C Conceptually Unconstitutional Constitutional Amendments

Conceptual approaches claim that, irrespective of what a constitution says, there are certain types of change to a constitutional order that cannot be made through any amendment procedure prescribed by the constitutional text.<sup>15</sup> Some conceptual approaches focus on how amendment is different from revision or replacement. For instance, Murphy has argued that the word 'amend' cannot mean 'to deconstitute and reconstitute' or 'to replace one system with another or abandon its primary principles.' Such changes, for Murphy, would not be amendments at all, but revisions or transformations.<sup>16</sup> But it is difficult to see why the concept of amendment *necessarily* precludes revisions or transformations. There are at least instances of constitution-drafters understanding the concept of amendment very broadly.<sup>17</sup>

Although there is a conceptual distinction between replacement and amendment, this undermines rather than supports the claim that some significant amendments should actually be characterised as constitutional replacements: if it is an amendment, it cannot be a replacement. The Columbian Constitutional Court's constitutional replacement doctrine illustrates the difficulties in drawing any distinction between amendment and replacement at any point short of the formal replacement of one constitution with another.<sup>18</sup> The Court now holds that an amendment amounts to a replacement if it replaces an essential element of the constitution. Although the Court provides some structural guidance for establishing what provisions might be essential, it does not, as noted by Bernal, make clear what an essential

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<sup>14</sup> *ibid* 132.

<sup>15</sup> I suspect this must rest on a stronger conceptual claim that a constitution necessarily cannot prescribe a procedure for change (whether called amendment, revision or replacement) greater than its own amendment, understood in this limited way. However, as the more contentious issue in the literature is whether 'amendment' powers are necessarily constrained, I shall focus on that weaker claim.

<sup>16</sup> Murphy (n 5) 177.

<sup>17</sup> For instance, Art 46 of the Irish Constitution allows any provision to be amended, by way of variation, addition or repeal.

<sup>18</sup> This discussion draws on the account provided by Bernal. See C Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 11 *Int'l J Const L* 339.

element is.<sup>19</sup> This reflects the core problem: there is no threshold at which an amendment becomes a replacement before it actually (in the most ordinary sense) replaces the constitution. Bernal offers a conceptual and normative justification for the replacement doctrine.<sup>20</sup> His conceptual justification relies on the claim that constitutions, at least in civil law systems, necessarily imply the protection of constitutional rights, the rule of law, and the separation of powers. A power to amend the constitution cannot include a power to alter its nature. However, this does insufficient work: one could still replace a constitution with a fundamentally different constitution provided that it is still a 'constitution'. In truth, the force of Bernal's conceptual justification relies on the force of the *normative arguments* in favour of the protection of constitutional rights, the rule of law and the separation of powers. These normative arguments cohere with his openly normative justification, namely that amendments are only permissible if they seek to preserve or improve the political system originally chosen by the constituent power, in Columbia's case one based on deliberative democracy. However, these claims need to be assessed on normative grounds; they are not a plausible elaboration of any distinction between replacement and amendment.

Rather than focus on the conceptual limits of amendment *per se*, some of the literature draws on a radically different intellectual tradition to explore limits on the concept of *constitutional* amendment. This revolves around the force of popular sovereignty and the distinction between constituent power and constituted power. The idea of popular sovereignty emerged in Britain at the time of the Civil War as a means of grounding political authority in opposition to the divine right of kings.<sup>21</sup> Loughlin presents this as the birth of constituent power.<sup>22</sup> During the French Revolution, Sieyès introduced the distinction between constituent and constituted power: 'In each of its parts a constitution is not the work of a constituted power but a constituent power. No type of delegated power can modify the conditions of its delegation.'<sup>23</sup> For Sieyès, the nation was the constituent power.

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<sup>19</sup> *ibid* 344.

<sup>20</sup> *ibid* 352.

<sup>21</sup> ES Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (WW Norton & Company, 1988) 36–37.

<sup>22</sup> M Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2008) 32–38.

<sup>23</sup> Sieyès, *Political Writings: Including the Debate between Sieyès and Thomas Paine in 1791* (Michael Sonenscher tr, Hackett Publishing Company Inc, 2003) 136.

As Thomaz Pereira argues in this volume, Sieyès should be understood as making a political argument directed towards particular goals in the context of the French Revolution.<sup>24</sup> Carl Schmitt generalised Sieyès' distinction between constituent and constituted power into a constitutional theory. Schmitt alternates between characterising the constitution-making power as an entity<sup>25</sup> and as a capacity born by an entity.<sup>26</sup> For Schmitt, the constitution-making power might be (or be borne by) the people or the monarch.<sup>27</sup> A constitution is valid because it derives from the will of a constitution-making power or authority; the word 'will' denotes an actually existing power as the origin of a command.<sup>28</sup> The constitution-making power is 'the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.'<sup>29</sup> This conception of constitutions leads Schmitt to distinguish between the constitution-making power and constituted powers, leading to constraint on all amendment powers:

The boundaries of the authority for constitutional amendments result from the properly understood concept of constitutional change. The authority 'to amend the constitution', granted by constitutional legislation, means that other constitutional provisions can substitute for individual or multiple ones. They may do so, however, only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.<sup>30</sup>

Schmitt's claim that constituted authorities can only exercise the powers that they are given is not unusual. His distinctive claim is that restrictions on amendment result not from a decision of the bearer of the constitution-making power but rather 'from the properly understood concept of constitutional change.' Importantly, this is a claim of conceptual limits on the constitution-making power, not on the constituted powers.<sup>31</sup> At the moment of constitution-making, the bearer of the constitution-making power cannot grant a power to a constituted entity to make fundamental changes to the constitution. Later, once a constitution is established, the bearer of the constitution-making power is unable to make fundamental changes through the existing constitutional processes—it can only establish a new constitution.

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<sup>24</sup> T Pereira, 'Constituting the Amendment Power', in this volume.

<sup>25</sup> C Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press, 2008) 64.

<sup>26</sup> *ibid* 77.

<sup>27</sup> *ibid*.

<sup>28</sup> *ibid* 64.

<sup>29</sup> *ibid* 121.

<sup>30</sup> *ibid* 150. Schmitt notes that there may be differences between power and authority in some contexts but contends in a note that the distinction need not be elaborated for the exposition of his constitutional theory; *ibid* 458.

<sup>31</sup> For a presentation of this argument see Yap (n 11) 116 and Roznai (n 1) 690–93.

It is very difficult to articulate any theory of legitimate authority that can justify such a restriction. If Schmitt is right that constitutions derive their authority from the brute force of political will, a claim that he repeatedly asserts rather than justifies, the bearer of the constitution-making power simply could not be circumscribed in the way that Schmitt claims in respect of constitutional amendment. Such a powerful entity must have the power at the moment of enactment to create an unfettered amending power; it must later have the power to act in any way through the prescribed amendment power, should it so choose. Notwithstanding the widespread acceptance of Schmitt's arguments, the distinction between constitution-making powers and constituted powers does not imply any constraints on the power of constitutional amendment.<sup>32</sup>

#### D A Problematic Rubric

One of the great ironies in the literature is how the work of Schmitt, who had at best a questionable commitment to the values of liberal constitutionalism, appears to fit so well with the liberal constitutionalist concerns of commentators such as Murphy, Jacobsohn and Bernal. This happens through the elision of conceptual and moral understandings of unconstitutional amendments. The elision is facilitated by the way in which conceptual and moral approaches converge on the same question: does the amendment introduce too much change? Amendments are claimed to be conceptually unconstitutional if they introduce so much change that they are *really* a revision *or* a replacement *or* beyond the scope of constituted power. Amendments are claimed to be morally unconstitutional if they depart too much from the value of constitutionalism generally presupposed to be adequately instantiated by the existing constitution. Such elision makes it more difficult to ascertain the discrete merits of the conceptual and moral approaches. It also facilitates a further elision with the positive sense of an unconstitutional amendment, whereby an amendment is unconstitutional if it makes too much change by reference to what the constitution actually permits. This elision obscures the crucial move of the doctrine of unconstitutional constitutional amendments, namely the empowerment of constitutional actors to treat amendments that are claimed to be morally or conceptually unconstitutional as if they were positively unconstitutional.

For all of these reasons, the rubric of unconstitutional constitutional amendments impedes rather than facilitates analysis. It elides critical differences between moral and conceptual

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<sup>32</sup> For further criticisms of Schmitt see M 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 *Int'l J Const L* 411, 419–21.

claims while obscuring the empowerment of judges to transform moral or conceptual claims into claims about positive law. Conceptual claims about constraints on the power of constitutional amendment are unfounded and cannot be rescued by shifting the focus to the moral value of constitutionalism. Moral claims about constraints on the power of constitutional amendment may be justified but they are not limited to the value of constitutionalism and must be assessed against potentially competing values. This cannot be achieved if we limit ourselves to the value-monist question of whether the amendment is morally constitutional.

For those who design or develop constitutions, the important questions are whether constraining a constitutional amendment power would serve important values, and whether that constraint undermines other important values. More specifically, do the constraints serve important values that justify the subjection of the present generation to the decisions of a past generation, alongside the empowerment of a judicial elite? These concerns percolate through the literature, but in a diluted and dispersed way. In order to address these concerns properly, we need a framework of analysis that allows us to focus directly on the values that are served and damaged by the constraint of constitutional amendment powers. Before that, however, it is necessary to explore in more detail the idea of constraint on constitutional amendment powers.

### **III Constraint and Powers of Constitutional Change**

Constraint involves a limitation or fetter on action. A person constrained from  $\phi$ -ing is in some sense unable to  $\phi$ . We might say that a person is constrained from  $\phi$ -ing if she is coerced not to  $\phi$  or is physically unable to  $\phi$ . Constraint in this empirical sense correlates with Albert's notion of constructive unamendability: the constitutional politics that make certain provisions of the US and Canadian constitutions effectively unamendable through the formally prescribed amendment process.<sup>33</sup> These empirically observable constraints are not the concern of this chapter.<sup>34</sup> Our concern is normative constraints—obligations. The central case of obligation is moral obligation, the obligation that truly applies to people. I follow Joseph Raz in treating obligations as exclusionary or protected reasons for action. If X is under an obligation to  $\phi$ , then

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<sup>33</sup> R Albert, 'Constructive Unamendability in Canada and the United State' (2014) 67 *Sup Ct L Rev* (2d) 181.

<sup>34</sup> Of borderline relevance are constraints that arise from another legal order (such as the European Union or international law) or from constitutional conventions (in the Canadian sense). I shall not complicate the analysis by adding these dimensions to the discussion.

X has a reason to  $\phi$  that simultaneously excludes the force of other reasons.<sup>35</sup> A legal obligation is an obligation claimed by law—an obligation that the law claims to have imposed on X.<sup>36</sup> The law's claim may be mistaken: it may lack authority to make any claims at all, or it may lack authority to make the claim in question. Nevertheless, at least where there is a functioning legal system, law's claims demand special attention. They tend to be respected by powerful figures and therefore have significant real-world effects.

A constitutional obligation is an obligation claimed by the constitution, a species of legal obligation. When a constitution states (or is authoritatively interpreted to state) that X cannot  $\phi$ , then there is a legal obligation on X not to  $\phi$ . A constitution contains its own rules of change that both empower a constitutional legislator to amend the constitution but simultaneously constrain it only to amend the constitution according to a particular procedure. At least some procedural constraints are necessary corollaries of any power to change the constitutional rules since procedurally only the constitutional legislator may make the amendment. Typically, constitutions distribute the power of amendment among a number of collective actors who must follow prescribed processes. The greater the procedural constraints, the more difficult amendment becomes. A rule of change could also constrain the constitutional legislator from including certain content in constitutional amendments. These rules of change that empower and constrain the constitutional legislator are reflected in a rule of recognition that imposes a duty on political actors—and judges unless there is a non-justiciability rule—to recognise as constitutional law only those changes that respect the constraints.

All of these constraints are contained (explicitly or implicitly) in the posited rules of the legal system. Constraints can be asserted from outside the legal system also. For instance, irrespective of what a constitution says, it could be argued that it is impermissible to amend that constitution in a way that contravenes the will of God. In precisely the same way, it could be asserted that it is impermissible to amend a constitution in a way that offends the moral value of constitutionalism. These constraints, if they are true in the sense of imposing real moral obligations, are relevant to those who write constitutions and to those who evaluate constitutions. However, they are not immediately relevant to the officials of the legal system who, provided the legal system is generally just, are under an obligation to apply every rule that

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<sup>35</sup> See J Raz, *Practical Reason and Norms*, 2nd edn (Oxford University Press, 1990) and J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1994) 210–37.

<sup>36</sup> J Gardner, *Law as a Leap of Faith* (Oxford University Press, 2012) 125–28.

is not radically unjust.<sup>37</sup> This qualification is important because it suggests that there may be circumstances in which it is appropriate for judges to impose a new constraint on the amendment power. In doing so, however, judges exercise a very different power from when they apply the law. Indeed, in one sense, they act against the law. Their actions, which redistribute power among political actors, must be assessed with reference to the same sort of moral arguments that we would consider when deciding what textual constraints to include in a constitution in the first place. However, the threshold for justification is greater since judges, when they create new constraints, act against the law and can claim no direct authority from majoritarian democracy.

This account provides us with a clearer picture of constraints on constitutional amendment powers: whether they relate to the process for changing the constitution or the permissible content of a change, constraints make amendment more difficult. The fundamental question is whether and to what extent it is justified to make constitutional change more difficult. Rather than address that question at best indirectly by measuring the quantum of constitutional change in various ways, we should address it directly. This requires us to consider the full range of potential constraints on the power of constitutional amendment, rather than jump straight to the question of whether it is permissible for judges to declare positively valid constitutional amendments to be unconstitutional.

#### **IV The Types of Constraint on Constitutional Amendment Powers**

##### **A Process or Content**

Constraints on the amendment power affect either the process for exercising the amendment power or the content of amendments.<sup>38</sup> As noted above, amendment powers necessarily constrain the process of amendment since only the assignee of the amendment power may exercise that power. In this sense, Article 368 of the Indian constitution that empowers the Indian Parliament to amend the Constitution is a process-constraint on the amendment power since that procedure must be followed for an amendment to be effective. Where several actors are involved, the effect of the process-constraint is greater. For instance, Article 41 of the Canadian Constitution establishes an amendment procedure for certain matters that requires

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<sup>37</sup> This is a slight development of Finnis's account of the moral obligation to obey the law. See J Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980), chs XI and XII.

<sup>38</sup> Process is the best word here but there is still potential confusion. What is meant is the process through which amendments are adopted, not the content of an amendment prescribing another constitutional process.

approval by both Houses of the Federal Parliament and by the Legislative Assembly of each Province.

Some process-constraints are more obviously *constraints* in that they can be characterised as extraneous to the identification of the constitutional legislator. Temporal limitations are one example of this. Albert identifies deliberation provisions that set upper or lower limits on the amount of time for which an amendment can be considered and safe harbour provisions that protect provisions from change for a certain period of time.<sup>39</sup> We might also include dual-approval provisions that require the relevant body to approve the amendment twice, often with an intervening general election.<sup>40</sup> Temporal limitations can turn on uncertain events, such as a preclusion of amendment during a time of war,<sup>41</sup> or a state of emergency.<sup>42</sup>

An example of a content-constraint is the prohibition in the Honduras constitution on the removal of term limits for the President.<sup>43</sup> Sometimes, process and content constraints can intersect. For instance, Article V of the US Constitution precluded the adoption of any amendment to the constitutional provision preventing Congress from prohibiting the importation of persons until 1808. This constrained the amendment power from being exercised in respect of certain content for a certain period of time and was thus both a content- and process-constraint. Indeed, as illustrated by the Canadian example considered above, any constitution that prescribes different amendment processes for different types of amendment combines process- and content-constraints in this way.<sup>44</sup> For analytical purposes, however, we can still distinguish between the different types of constraint combined in the one provision.

## B Rule or Standard

Constraints can be formulated either through rules or through standards.<sup>45</sup> The distinction points us to a spectrum between the most formal rule and the most informal standard. Between these two extremes, rules have increasing levels of vagueness and standards increasing levels of

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<sup>39</sup> R Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 *Wake Forest L Rev* 913, 952–54.

<sup>40</sup> Art 29 of the Icelandic Constitution.

<sup>41</sup> Art 191 of the Belgian Constitution.

<sup>42</sup> Art 152.3 of the Romanian Constitution.

<sup>43</sup> Arts 4, 237 and 274.

<sup>44</sup> See T Kahana, 'Canada' in D Oliver and C Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing Ltd, 2011) 9.

<sup>45</sup> For a helpful account of the distinction between rules and standards and the reasons for using them to formulate normative directives, see F Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009), ch 10.

precision. There is no precise boundary between the two but the spectrum is clear. I use 'rule' and 'standard' as shorthand to connote their orientation on this spectrum. The value of legal certainty suggests that process-constraints that identify the constitutional legislator should take the form of rules: it is important that there be little doubt as to whether the relevant entity has purported to exercise the amendment power. Once this is clear, there is more scope to formulate process-constraints in the form of standards. For instance, the Irish Supreme Court has created a rule that referendum processes must be fair, prohibiting the government from spending public money to support just one side of the campaign.<sup>46</sup>

Content-constraints can likewise be formulated as rules or as standards. The US slavery provision considered above was a rule, not a standard. In contrast, Article 79 of the German Constitution (with reference to Article 1) imposes the standard-constraint of prohibiting amendments that violate human dignity. Article 121 of the Norwegian Constitution employs an even vaguer standard-constraint, allowing only amendments that do not 'contradict the principles embodied' in the Constitution and that do not 'alter the spirit of the Constitution.'

### C      Legislator or Court

This distinction has been anticipated by some of the examples above: constraints may be imposed by the constitutional legislator, whether in the original constitution or in an amendment, or by the body charged with applying the constitution, usually a court. The distinction is clouded because a court has both a law-application and law-making role and judges may be mistaken about or indifferent to which role they are performing.<sup>47</sup> Where a standard-constraint (such as respect for human dignity) is imposed, the import of the constraint is determined partly by the legislator and partly by the court. One can expect courts to claim that they are merely interpreting a standard or perhaps identifying an implicit constraint rather than creating a new constraint. Whether this claim is justified depends on the constitutional text in question and the norms of interpretation that govern judicial activity in that jurisdiction. Nevertheless, there is always the conceptual possibility that a court has created a new constraint rather than interpreted an existing constraint.

This distinction between constraints that are created by courts and constraints that are created by legislators is more analytically useful than a distinction between explicit and implicit constraints. The distinction between explicit and implicit constraints cannot bear on the

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<sup>46</sup> *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

<sup>47</sup> Gardner (n 35) 79–80.

legitimacy of the court's decision: if the constraint is implicitly constitutionally endorsed, the court is under a presumptive obligation to apply it. As noted above, however, greater justification is required for any decision by a court to create a new constraint since this involves acting against the law. Our set of distinctions must capture this important difference.

These issues are illustrated by the Indian basic structure doctrine.<sup>48</sup> In *LC Golak Nath v State of Punjab*, the Indian Supreme Court had held that constitutional amendments were 'laws' that could be reviewed for their compatibility with fundamental rights.<sup>49</sup> Parliament sought to put the scope of the amending power beyond doubt by amending Article 368 as follows:

Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

Nevertheless, in *Kesavananda Bharati v State of Kerala*, the Indian Supreme Court held that Parliament's amendment power did not extend to amendments that destroyed or emasculated the basic or fundamental features of the Constitution.<sup>50</sup> The textual justification offered for the Court's decision was the limitation inherent in the concept of amendment. However, this is difficult to support in light of the historical background to the new provision, as well as its sheer breadth—precisely the same wording has been held by the Irish courts to lead to a substantively unlimited amendment power. Following *Kesavananda*, Parliament again amended Article 368 explicitly removing any power on the part of the courts to review constitutional amendments and declaring that there was no limitation on the constituent power of Parliament to amend the Constitution. In *Minerva Mills Ltd v Union of India*, the Supreme Court held that these amendments were themselves unconstitutional on the basis that they upset the balance of power between the constitutional organs and allowed the Constitution to become uncontrolled.<sup>51</sup> This more structuralist justification supports the view that the basic structure doctrine must be viewed as a court-constraint on the amendment power.

#### D Values Served by Constraint: Foundational, Majoritarian, or Counter-Majoritarian

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<sup>48</sup> For general discussion, see MP Jain, *Indian Constitutional Law* (LexisNexis Butterworths Wadhwa Nagpur, 2010), 2341–82 and P Bhanu Mehta, 'The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure"' in Z Hasan, E Sridharan and R Sudarshan (eds), *India's Living Constitution: Ideas, Practices, Controversies* (Permanent Black, 2002) 179.

<sup>49</sup> AIR 1967 SC 1643.

<sup>50</sup> AIR 1973 SC 1461.

<sup>51</sup> (1980) 3 SCC 625.

Constitutions, at least in liberal democracies, typically perform three functions. They establish or specify the parameters of a polity, whether ethnically, nationally, federally or territorially. They establish some form of majoritarian government. And they protect some fundamental rights. In this way, constitutions limit and channel the power of political actors to change certain features of their polity; they set the domain and rules of the game that political actors must follow. The constitutional settlement of these foundational, majoritarian and counter-majoritarian issues is open to revision unless there are constraints on the amending power.

Article 152.1 of the Romanian constitution provides an example of a foundational content-constraint: territorial integrity may not be the object of a constitutional amendment. The Constitution of Honduras provides a good example of a majoritarian content-constraint. Articles 4, 237 and 274 secure that the president can serve only one term and this rule cannot be changed by constitutional amendment.<sup>52</sup> This protects against the concentration of power in one person's hands, irrespective of current majoritarian support, in order to ensure that majoritarian processes can continue. The Indian basic structure doctrine has been applied to protect majoritarian values. For instance, in *Indira Nehru Gandhi v Raj Narain*, the Supreme Court held that the Thirty-Ninth Amendment offended the basic structure in the way that it *both* voided a High Court decision that set aside the election of Mrs Gandhi *and* immunised the election of the Prime Minister from judicial scrutiny.<sup>53</sup> The US Constitution provides a good example of a counter-majoritarian content-constraint: the rule that prohibited Congress from banning slavery until 1808 prevented Congress from imposing a majority view against slavery.

The examples in the previous paragraph were all content-constraints, but process-constraints can also reflect these three values. For instance, although the Republic of China (Taiwan) claims authority over the territory of the People's Republic of China and Mongolia, the first additional article (2005) of its Constitution provides that electors of 'the free area of the Republic of China' may vote on a legislative proposal to amend the Constitution or alter the national territory. This provision, itself an amendment, constrains the process through which certain foundational decisions in Taiwan's constitution can be changed. The Irish rule that the Government cannot spend public money supporting just one side of a constitutional referendum is a majoritarian

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<sup>52</sup> For a detailed consideration of these provisions of the Honduras Constitution, see R Dixon and V C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48 *Wake Forest L Rev* 149.

<sup>53</sup> (1975) Supp SCC 1. See discussion in M Khosla, 'Constitutional Amendment' in S Choudhry, M Khosla and P Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (Oxford University Press, 2016) 241–42.

process-constraint, designed to ensure that the real 'will of the people' is ascertained.<sup>54</sup> I take Halmai to argue for a majoritarian process-constraint when he criticises the Hungarian Constitutional Court for not considering whether the extreme haste and lack of deliberation with which a constitutional amendment was passed undermined the validity of that amendment.<sup>55</sup> Article 182.3 of the Cypriot Constitution requires that amendments to that Constitution receive a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community. In allowing a minority of each community to block constitutional change, this imposes a counter-majoritarian process-constraint.

## **V      Distribution of Power and the Justification of Constraint**

A power of constitutional amendment typically empowers a contemporary majority in some form. Constraints on the power of constitutional amendment empower others at the expense of that contemporary majority. Across time, there is a distribution of power between past generations ( $T_1$ ), the present generation ( $T_2$ ) and future generations ( $T_3$ ). Within the present generation, there is a distribution of power between those whose power of amendment is constrained and those who either create new constraints or interpret and enforce the existing constraints. The set of distinctions analysed in section IV allows us to pinpoint the different ways in which constraints on amendment powers distribute power along these two dimensions.

All legislator-constraints on amendment power necessarily empower past generations at the expense of present generations. However, there is a significant variation depending on whether the constraint is formulated as a rule or a standard. Rule-constraints, such as that prohibiting the US Congress from banning the importation of persons for 20 years, leave little discretion to constitutional interpreters. In contrast, standard constraints, such as the German provision about human dignity, grant considerable power to constitutional interpreters. Standard-constraints therefore empower the past generation at the expense of the present generation far less than rule-constraints since the meaning of the standard (e.g., human dignity) remains to be assessed by the current generation. Justiciability, while not affecting the normative claim of law, has significant implications for the distribution of power. If standard-constraints are justiciable,

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<sup>54</sup> *McKenna v An Taoiseach (No2)* [1995] 2 IR 10. The temporal limitations considered above are further examples of majoritarian process constraints.

<sup>55</sup> G Halmai, 'Constitutional Courts as Guardians of the Constitution' (2012) 19 *Constellations* 182, 195.

the current constitutional legislator loses power both to the generation that enacted the constraint and (perhaps more significantly) to the court that interprets the constraint. If the standard-constraint is non-justiciable, however, the current constitutional legislator may adopt its own interpretation of the constraint, perhaps rendering the constraint meaningless.<sup>56</sup> In contrast, non-justiciable rule-constraints are, because of their clarity, more difficult to breach with impunity and therefore may succeed in empowering the past at the expense of the present.

The previous paragraph considered content-constraints. Process-constraints empower the past at the expense of the present because they make constitutional change difficult. In principle, process-constraints disempower the current generation less than content-constraints: they do not limit *what* can be done but rather *how* it can be done. However, it is easy to imagine how a particular process-constraint could—in practice—constrain more than a particular content-constraint. The Canadian unanimity requirement, for example, is a greater constraint on the amendment power than a content-constraint that imposed a trivial restriction.

Court-constraints tend to represent an empowerment of courts at the expense of legislators. Although it is conceptually possible that a court could create a constraint on the amendment power and then deem it non-justiciable, this seems to be an unlikely (if not quite contradictory) exercise of judicial power.<sup>57</sup> The constitutional legislator could agree with the content of a court constraint or might rely on the constraint as a way to avoid politically unpopular decisions. Nevertheless, the constraint does affect the distribution of political power. The question of whether court-constraints empower the past at the expense of the present is more complicated. At the moment of creation ( $T_2$ ), court-constraints typically constrain the current generation with reference to decisions of the past generation as interpreted by the courts. Although the Indian basic structure doctrine, on my analysis, was a judicial creation, it protected values endorsed by India's founding generation ( $T_1$ ) in the constitutional text as interpreted by the courts at ( $T_2$ ).

At first blush, process-constraints that protect majoritarian values remove less power from the current generation than do constraints that protect foundational or counter-majoritarian values. Majoritarian process-constraints, such as a rule requiring fairness in amendment processes, aim to ensure that the amendment made at time ( $T_2$ ) really represents the will of the

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<sup>56</sup> This might be described as constructive amendability, the converse of *Albert's* constructive unamendability. Provisions that appear unamendable in law become amendable in fact. *Albert*, (n 32). Of course, courts retain some power to the extent that they can alter justiciability rules.

<sup>57</sup> The constitutional conventions recognised by the Supreme Court of Canada in *re Patriation Reference* [1981] SCR 753 are arguably examples of this.

current generation ( $T_2$ ). Double-approval requirements and deliberation requirements create a period of time around ( $T_2$ ) that moderately empowers the future at the expense of the present. Although these observations are valid, they are subject to the qualification that to the extent that the constraint just makes amendment more difficult, it actually empowers the past generation that made the decision. Thus double-approval requirements and deliberation requirements could, depending on how difficult they make constitutional change in practice, be characterised as empowering either the past or the future generation at the expense of the present generation.<sup>58</sup> As the empowerment of a future generation is more distinctive from other process-constraints, I shall focus on that possibility in the rest of this chapter. In contrast, majoritarian content-constraints unequivocally empower the future generation since what they protect are constitutional processes that will continue to allow the majority will to be ascertained into the future.

## **VI Justification of Constraints on Constitutional Amendment Powers**

### **A Parameters of Justification**

Constitutions serve competing values. The value of majoritarianism derives from the proposition that laws should serve the needs of those whom they govern and that those subjects are collectively the best judges of their own needs. Foundational values derive from the proposition that a political community should be able to determine its own parameters and establish the relevant people for the purposes of majoritarian rule. Counter-majoritarian values derive from the proposition that there are some actions that are so wrong that a majority should not be permitted to require or allow them.

Constraints on amendment powers serve these values by distributing power away from contemporary majorities and towards past generations, sometimes future generations and judicial elites. Even constraints that serve majoritarianism in the medium to long run, through the protection of majoritarian procedures from majoritarian abrogation, do a disservice to majoritarianism in the here and now. The central question, therefore, is whether the disservice to majoritarianism can be justified by majoritarian, foundational or counter-majoritarian

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<sup>58</sup> These arguments do not cancel each other out: majoritarian-process constraints either empower the past generation or the future generation.

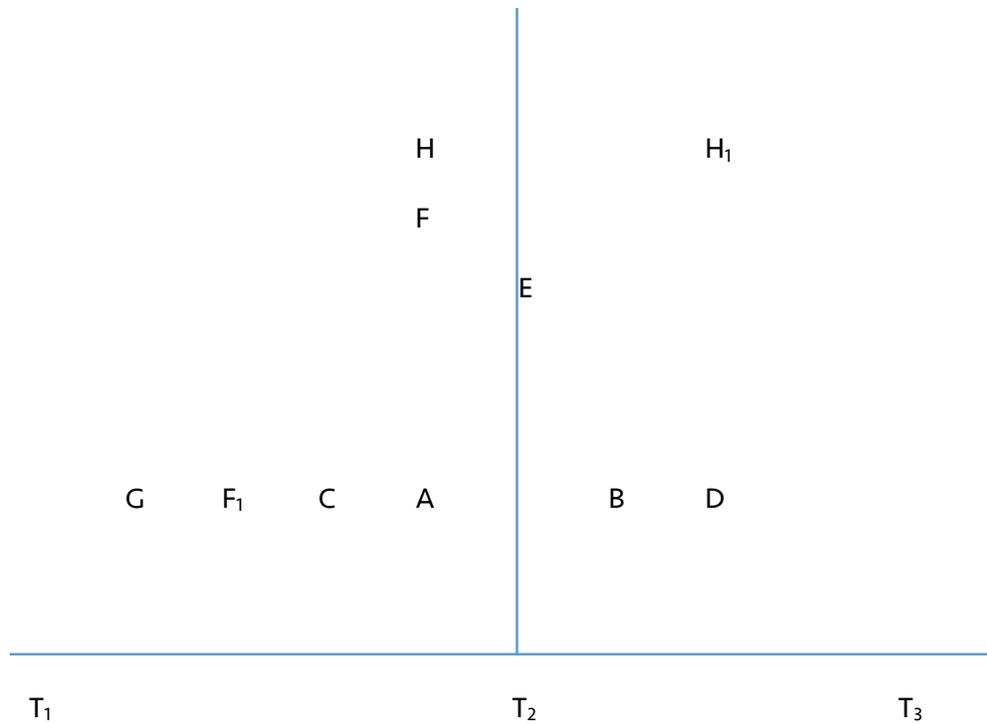
values.<sup>59</sup> Posing the question in this way is not to give priority to majoritarianism over other values. Rather, it simply recognises that since the structure of constraints necessarily undermines the value of majoritarianism, the best way to approach the question of justification is to identify precisely the loss to majoritarianism and then explore whether it is justified. It is far beyond the scope of this paper to engage in a full analysis of how these values should be reconciled or how all constraints on constitutional amendment powers should be evaluated. What follows, therefore, is an outline of the sort of arguments that are relevant.

## B Illustrative Schema of Constraints

The following diagram, building on the analysis in section V, presents in a schematic way the extent to which constraints on constitutional amendment powers disenfranchise contemporary majorities. The X-axis represents time and the Y-axis represents the distribution of political power between majorities and courts at the time of constitutional amendment. The assumption here, as throughout this chapter, is that we are concerned with constitutions that stipulate a broadly majoritarian process for their own amendment. The intersection of the X-axis and the Y-axis represents the point at which the contemporary constitutional legislator controls the amendment power. The further one moves from that point, the greater the justification that is required for a constraint on the amendment power.

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<sup>59</sup> This question resonates with how Dixon and Landau present the doctrine of unconstitutional constitutional amendments. They argue the doctrine is potentially justified as a guard against abusive constitutionalism notwithstanding the extent to which it impedes change through democratic processes. R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 *Int'l J Const L* 606, 609–14. However, my formulation of the issue is more open-ended as it does not limit itself to judicial doctrines, nor to substantive constraints; moreover, it remains open to the possibility of foundational and counter-majoritarian justifications, as well as majoritarian justifications. By keeping all values in view, we sharpen our sense of each values argument.



- A: legislator-process-rule-majoritarian, the Indian textual rules on amendment.
- B: legislator-process-rule-majoritarian, the Icelandic double-approval requirement.
- C: legislator-process-rule-majoritarian, the Irish referendum requirement.
- D: legislator-content-rule-majoritarian, the Honduras term limits rule.

Constraint-A is located closest to the intersection of the X-axis and Y-axis but not precisely at the intersection. The requirement of a parliamentary process to amend a constitution still constrains the power to a limited extent and, as such, distributes some power to the founding generation. Constraints-B and -C are similar. Both make it more difficult for the contemporary majority to amend the Constitution but they distribute power to future and past generations respectively. As my contribution with David Kenny to this volume illustrates, legally suboptimal rules are less likely to be changed if a referendum is required.<sup>60</sup> Constraint-D—in a more pronounced way than the process constraint-B—transfers power to a future generation by precluding amendments that undermine certain majoritarian processes.

- E: court-process-standard-majoritarian, the Irish rule on fairness in referendum campaigns.

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<sup>60</sup> O Doyle and D Kenny, 'Constitutional Change and Interest Group Politics', in this volume.

I have located this constraint directly above  $T_2$ : whatever amendment process is used, constraint-E tries to ensure that the outcome reflects the will of the contemporary generation. However, it also distributes power to the courts since they decide what is fair.

- F: legislator-content-standard-counter-majoritarian, the German human dignity provision (if justiciable).
- $F_1$ : the German human dignity provision (if non-justiciable).
- G: legislator-content-rule-counter-majoritarian, the US slavery provision (before 1808).

Constraints-F and  $-F_1$  illustrate the effect of a non-justiciability doctrine on how a constraint distributes power. A justiciable standard-content-constraint, particularly if it involves a concept as nebulous as human dignity, is much more an empowerment of a contemporary judiciary than a past generation. Constraint-G, in contrast, illustrates that more power is retained by the past generation where a counter-majoritarian rule (rather than a standard) is laid down.

- H: court-content-standard-majoritarian, the Indian basic structure doctrine.<sup>61</sup>
- $H_1$ : the Indian basic structure doctrine 40 years after its judicial creation.

Constraints-H and  $-H_1$  illustrate how a basic structure doctrine distributes power to courts but also the temporal distribution when viewed from the perspective of  $T_3$ .<sup>62</sup> At the moment of its pronouncement, the basic structure doctrine in India constrained the contemporary democratic majority in favour of: (a) the Supreme Court, through its decision that there should be a basic structure doctrine, (b) the past generation that made the decisions that loosely determined the Indian constitution's basic structure, and (c) the Supreme Court again through its power to interpret that basic structure. Constraint  $H_1$  shows what the basic structure looks like at time  $T_3$ —still located in the past but, on account of it being a standard-constraint, somewhat amenable to contemporary judicial interpretation.

## C Contextual Factors

The purpose of the schema is merely to represent the differing ways in which constraints on constitutional amendment powers distribute power away from contemporary majorities. Before analysing the majoritarian, foundational and counter-majoritarian justifications, it is necessary to consider some contextual factors that bear on those justifications. Although our concern is with normative constraints rather than physical constraints (see section III above), the justification for including such constraints in the Constitution is sensitive to the effect that

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<sup>61</sup> The basic structure doctrine can be seen as majoritarian or counter-majoritarian in outlook depending on the values that it protects. I present it here in its majoritarian orientation.

<sup>62</sup> If I were presenting a counter-majoritarian orientation of the basic structure rule, it would be closer to  $T_1$  than  $T_3$ .

constitutionalisation of the constraint will actually have in the particular political community. In this regard, attention should be paid to the following points.

First, whether a constraint is justified depends on the country concerned: some countries may be at greater risk of democratic decay and therefore more in need of majoritarian-constraints, for example. Secondly, we cannot assume that the constitutional imposition of a constraint will necessarily lead to respect for that constraint. I cited the Honduran protection of term limits on several occasions above precisely because it illustrates this point. The Supreme Court of Honduras has held that the constitutional prohibition on amendments to presidential term limits is itself unconstitutional, applying a basic structure doctrine to the original constitutional text as opposed to an amendment.<sup>63</sup> Thirdly and also illustrated by the Honduran case, we cannot simply assume that judges will respect and correctly interpret constitutional constraints on amendment powers. There may be reasons why judges, as a relatively independent branch of government, are well placed to check contemporary majoritarian incursion on the three values under consideration. But it is also possible that judges could be under the sway of majoritarian forces or could act to protect the sectional interests of the relatively privileged social class from which judges are often drawn. These factors, and therefore the evaluation of constraints on constitutional amendment powers, will again vary from country to country.

Fourthly, we cannot assume that contemporary majorities have no respect for counter-majoritarian or long-run majoritarian values. Jacobsohn criticises the Irish Supreme Court decision in *State (Ryan) v Lennon* for not constraining the constitutional amendment power of the Irish Free State or—at least—for not articulating for the benefit of the constitutional legislator that the amendment in question was unconstitutional.<sup>64</sup> However, the most salient feature of this case is that it was followed within two years by a new constitution that, however imperfectly, has provided a reasonable basis for majority rule and the protection of minority rights for the following 75 years: a democratic majority checked itself more effectively than a court ever could have. Fifthly and finally, legal constraint of amendment powers does nothing to

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<sup>63</sup> For discussion, see D Landau and B Sheppard, 'The Honduran Constitutional Chamber's Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?' (*International Journal Constitutional Law Blog*, 6 May 2015) <<http://www.iconnectblog.com/2015/05/the-honduran-constitutional-chambers-decision-erasing-presidential-term-limits-abusive-constitutionalism-by-judiciary>> accessed 1 August 2016 and L Marsteintredet, 'The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions' (*International Journal Constitutional Law Blog*, 1 May 2015) <<http://www.iconnectblog.com/2015/05/Marsteintredet-on-Honduras>> accessed 1 August 2016.

<sup>64</sup> [1935] IR 170. For discussion, see A Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in E Carolan (ed), *The Irish Constitution: Perspectives and Prospects* (Bloomsbury, 2012) 331.

preclude constitutional replacement: there are limits to the extent to which political power can (and should) be controlled by constitutional constraints.<sup>65</sup>

#### D Majoritarian Constraints

Majoritarian constraints seem to be the most prevalent in practice. Their justification is relatively easy to assess since there is no conflict between values but rather a conflict between respect for majoritarianism in the short term and the desire to preserve majoritarianism over the medium term. Process-majoritarian constraints, which seek to ensure that the true majoritarian will is being expressed, require less justification than content-majoritarian constraints, which prevent contemporary majorities from making certain changes. This observation coheres with the insights of Yap and Roznai, the latter writing in this volume, that where amendment processes are rigid and/or approximate to involvement of the constitution-making power, courts should be slower to declare amendments unconstitutional. From the perspective of this paper, such amendment processes should themselves be understood as majoritarian process-constraints, relatively easy to justify. To the extent that they better allow the ascertainment of a settled popular will, however, they greater serve the value of majoritarianism. For this reason—and not because they approximate to constitution-making power—any further constraints require greater justification.

As noted above, however, an extreme process-constraint might make a constitutional provision constructively unamendable and therefore require the same justification as a content-majoritarian constraint to similar effect. In this regard, the conundrum is how to guard against the risks to majoritarian democracy in the future while respecting majoritarian democracy in the here and now. This problem is particularly acute because democracy is itself a contested concept. It would be undemocratic to dictate what form of majoritarian decision-making process a particular polity must follow. Majorities must decide their own procedures for identifying their own majority will, subject only to the constraint that they cannot take decisions that lead to the disestablishment of any form of majoritarian governance.<sup>66</sup> Nevertheless, there is a genuine dilemma here. Political elites have incentives to entrench their own power, incentives that may not cohere with the interests of the people who elect them. Content-constraints guard against this possibility but their justifiability will vary from country to country

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<sup>65</sup> Oliver and Fusaro argue that if incremental change is difficult, rupture or forced interpretation becomes more likely. Oliver and Fusaro (eds) (n 43) 424.

<sup>66</sup> I am indebted to the work of David Prendergast for this understanding of democracy. PhD thesis on file with author.

and depend as much on questions of political culture as institutional design. In this regard, Halmai has plausibly argued that constraints of this type are required in countries with a history of military dictatorship and totalitarian government.<sup>67</sup>

As noted above, court-constraints are more difficult to justify than legislator-constraints since they involve judges acting against the law that they are under a presumptive obligation to apply; otherwise, however, the structure of argument is the same. Process-constraints that require fairness—whether for referendums as in the Irish case or for parliamentary deliberations as suggested by Halmai in the Hungarian case—are justifiable on the basis that they make it more likely that an amendment actually reflects majority will. Content constraints are more difficult to justify but may—in principle—be justifiable. The Indian basic structure doctrine, although a significant expansion of judicial power at the cost of a contemporary democratic majority, appears to have been vindicated by subsequent events. The curtailment of Indira Gandhi’s state of emergency helped to preserve democratic culture within India.<sup>68</sup> Nevertheless, there seems to be a troublesome tendency for the scope of basic structure doctrines to expand.<sup>69</sup> Any such risk must be factored into the justification of basic structure doctrines.

## E Foundational Constraints

For Schmitt, the substance of the constitution (as distinct from mere constitutional laws) is ‘the concrete political decisions providing the ... people’s form of political existence.’<sup>70</sup> Foundational constraints are therefore the paradigm case of restrictions on the constitution-making power. This view is reflected in provisions, such as Article 152.1 of the Romanian constitution, prohibiting amendments that affect territorial integrity. Roznai and Suteu argue that the people should be allowed to address issues such as territoriality through constitutional processes.<sup>71</sup> This is correct but applies more broadly to all foundational questions.<sup>72</sup> There is no sound reason to preclude the alteration of a polity through its existing constitutional processes. As noted above, in 2005 additional articles were added to the Taiwanese Constitution that, by altering the identity of the constitutional legislator, effectively shifted the people of the Republic of China to

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<sup>67</sup> Halmai (n 54) 192.

<sup>68</sup> Jain (n 47) 2362.

<sup>69</sup> Landau (n 4) 237–8; Dixon and Landau (n 58) 620–23.

<sup>70</sup> Schmitt (n 25) 78.

<sup>71</sup> Y Roznai and S Suteu, ‘The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle’ (2015) 16 *German L J* 542, 573.

<sup>72</sup> This does not preclude such issues being addressed alternatively outside the constitutional order.

those living in the 'Free Area' only, implicitly excluding those in mainland China.<sup>73</sup> In 1998, the Irish Constitution was amended to withdraw a territorial claim over Northern Ireland and adopt a more inclusive notion of the Irish people. For Schmitt, these amendments would have represented paradigm cases of a constituted power illegitimately purporting to exercise a constitution-making power. If the distinction between constituted and constituent power holds salience in this context, which I argue above it does not, it follows that the actions of the Taiwanese and Irish constitutional legislators were illegitimate. Conversely, if one considers those actions legitimate, one must abandon the claim that the concept of constitution-making power implies necessary limitations on the powers of constitutional amendment.

#### F Counter-Majoritarian Constraints

Counter-majoritarian constraints pose a straightforward conflict between incommensurable values. This is the fundamental debate of constitutional theory and cannot be resolved here. It suffices to note two important ways in which the issue of constraints on constitutional amendment powers differs from general debates in constitutional theory. First, a common way of resolving the competition between majoritarian and counter-majoritarian values is to characterise a constitution as the embodiment of values that the majority has chosen to obey. The possibility of constitutional amendment is necessary for this characterisation to work. Accordingly, this resolution cannot justify the imposition of constraints on the amendment power. Secondly, as noted above, constraints on the constitutional amendment power may be avoided by constitutional replacement. Indeed, the more difficult it is to change a constitution, the more likely that rupture will occur. Counter-majoritarian constraints may have precisely the opposite effect to what was intended. As against this, it can be argued that the expressive function of unamendability might dissuade political actors from even considering certain measures.<sup>74</sup>

## **VII Conclusion**

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<sup>73</sup> Yeh argues that these amendments have formed a new collective identity of Taiwanese people. See J Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing, 2016) 48–49.

<sup>74</sup> During the Parliamentary Council deliberations on the German Constitution, Thomas Dehler argued that constraints on constitutional amendment could prevent revolutionaries from relying on a constitution to legitimise their movement. See Polzin (n 31) 423–24.

Constraining the power of constitutional amendment raises fundamental normative questions. On the one hand, there is value in allowing contemporary democratic majorities determine their own laws. On the other hand, contemporary majorities may seek to undermine democratic processes in the medium run or act contrary to other fundamental values. The appropriate resolution of these competing values is heavily context-dependent. Moreover, given the incommensurability of some of the values in questions, any resolution may remain contestable. Nevertheless, it is important that the competition between values be directly addressed. Much of the literature impedes clarity of analysis because it focuses on a judicial doctrine of unconstitutional constitutional amendments. This deflects attention onto the largely irrelevant question of the quantum of change introduced by the constitutional amendment. Such an approach may be superficially attractive because it appears to align the judicial task (interpreting 'constitutionalism' or the limits of 'constitutional amendment') with the archetypal judicial role of interpreting the constitution itself. However, this apparent alignment depends on incoherent arguments and conceals the judicial role in resolving a fundamental competition of moral values. In order to have any chance of reaching defensible answers, constitution-drafters, courts and scholars alike must focus directly on the values served and disserved by constraints on the power of constitutional amendment.