

Articles

The Formalist Resistance to Unconstitutional Constitutional Amendments

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Many courts around the world have either asserted or exercised the power to invalidate a constitutional amendment. But we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. It is imperative that constitutional actors know that there is another answer to the question whether an amendment can be unconstitutional. We have three purposes in this Article, and we seek to fulfill each of them with reference to three jurisdictions in particular—France, Georgia, and Turkey—whose constitutions and attendant constitutional practices have expressly rejected the doctrine in a way that reflects what we describe as their shared formalist resistance to unconstitutional constitutional amendments. We seek first to demonstrate that the doctrine of unconstitutional constitutional amendment has not yet matured into a global norm of constitutionalism. We seek also to explain how a jurisdiction that expressly rejects the idea of an unconstitutional constitutional amendment operates in the face of an amendment that would otherwise be invalidated as unconstitutional in a jurisdiction that has adopted the doctrine. We finally seek to evaluate what is gained and lost in a constitutional state by rejecting the doctrine. We find that there are both democracy-enhancing and democracy-weakening consequences that follow from the choice to reject the doctrine outright. Our larger purpose—to diversify our thinking about what risks becoming seen as a necessary feature of constitutionalism but that design and practice show plainly is not—is inherent in the project itself.

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INTRODUCTION—A GLOBAL TREND?

The most fascinating question in the study of modern constitutional change raises something of a paradox: can a constitutional amendment be unconstitutional? We once interpreted the formal rules of change codified in constitutions as establishing the necessary and sufficient procedures for amendments, but we know this is no longer true as a descriptive reality. Today we can be no more certain that an amendment will be valid when it satisfies the procedural strictures set out in the codified constitution than we can be certain that a law passed by a legislature is constitutional.

Courts around the world—from Bangladesh to Belize, India to Peru, Colombia to Taiwan—have either asserted or exercised the power to invalidate a constitutional amendment.¹ Courts have drawn from codified rules and extra-constitutional norms to declare that procedurally-perfect amendments are nonetheless substantively void. Scholars have in recent years taken a keen interest in this phenomenon, producing a burgeoning literature seeking both to

1. See YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 47–70 (2017).

explain and justify the judicial doctrine of unconstitutional constitutional amendment.² The dominant view in the field is overwhelmingly favorably inclined toward the idea that courts *should* have the power to invalidate a procedurally-perfect amendment they deem unconstitutional, even in cases where the codified constitution does not entrench a formally unamendable rule.³

There are relatively few exceptions to the global chorus of voices in support of the extraordinary judicial power to invalidate constitutional amendments.⁴ The dearth of contrary views reflects the normalization of the phenomenon Ran Hirschl has identified as the “judicialization of mega-politics,” a now-common phrase referring to the most important matters of political significance that constitute, define and divide polities—and that are now often adjudicated by courts.⁵ National courts today decide a host of decidedly political questions: the winner of presidential elections,⁶ the legitimacy of political parties,⁷ and the self-

2. See Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 23, 24 (Richard Albert et al. eds., 2017); Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURIS. 5, 9–10 (2009); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321, 322 (2011) (“The . . . judicial review of the constitutionality of a constitutional amendment—lies at the foundation of this paper.”); David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 WAKE FOREST L. REV. 859, 861 (2015); Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 728–33 (1981); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754–57 (1980); Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 429, 435 (2011); Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act*, 8 VIENNA J. ON INT’L CONST. L. 29, 30, 33–40 (2014); Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment—the Turkish Perspective: A Comment on the Turkish Constitutional Court’s Headscarf Decision*, 10 INT’L J. CONST. L. 175, 195–202 (2012); Md. Ariful Islam Siddiquee, *Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments’ Amending Power*, 33 J.L. POL’Y & GLOBALIZATION 64, 65 (2015).

3. See, e.g., SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 1–42 (2009); Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT’L J. CONST. L. 339, 341 (2013) (providing an alternative theory other than the replacement doctrine to justify judicial review of constitutional amendments); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606, 613–14 (2015); Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182 (2012); Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006).

4. See, e.g., JOEL I. COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER* 67 (2012) (arguing that the doctrine of unconstitutional amendment is susceptible to charges of democratic illegitimacy); cf. Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 15 (2018) [hereinafter Albert, *Constitutional Amendment and Dismemberment*] (“Today it is not uncommon for supreme or constitutional courts to annul a procedurally-perfect constitutional amendment . . . [h]owever its increasing frequency does not make it any less extraordinary nor any more reasonable.”); John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373, 383 (1985) (“[I]f the Court even did attempt to control the amendment process, that power could as easily be used for ill as for good.”).

5. Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 97 (2008).

6. *Id.* at 100.

7. *Id.*

determination of a people.⁸ Against this backdrop, invalidating a constitutional amendment is just par for the course.

But we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. It may well be that the doctrine fits in a given constitutional tradition and should be incorporated into its practices of adjudication. But this is a choice for a state and its domestic actors to make according to their own norms of governance. The politics of constitutionalism must remain localized in their particularized social and political circumstances. Otherwise, when combined with the enormous pressure on states in our day to conform to what may appear to be generally accepted standards of global constitutionalism, the trend toward adopting the doctrine of unconstitutional constitutional amendment might overwhelm the capacity of a state to evaluate whether the doctrine is right for itself in light of its own juridical history, political context, and constitutional traditions.

The doctrine of unconstitutional constitutional amendment is most certainly not a necessary feature of modern constitutionalism, nor even of the narrower idea of modern liberal democracy. It is important for all constitutional actors to know that there is another answer to the question whether an amendment can be unconstitutional. Constitutional designers, adjudicators, and amenders should know that it is an altogether reasonable choice to deny the possibility of an unconstitutional constitutional amendment.

We have three purposes in this Article. We seek to fulfill each of them with reference to three jurisdictions in particular—France, Georgia, and Turkey—whose constitutions and attendant constitutional practices have expressly rejected the doctrine of a substantively unconstitutional amendment. As we show, none of their strategies is optimal but they do reveal some available alternatives in constitutional practice. Their shared rejection of the doctrine reflects what we describe as formalist resistance to unconstitutional constitutional amendments. We seek first to demonstrate that the doctrine has not yet matured into a global norm of constitutionalism. We seek also to explain how a jurisdiction that expressly rejects the idea of an unconstitutional constitutional amendment operates in the face of an amendment that would be invalidated in a jurisdiction that has adopted the doctrine. Finally, we seek to evaluate what is gained and lost in a constitutional state that rejects the doctrine of unconstitutional constitutional amendment.

We find that there are both democracy-enhancing and democracy-weakening consequences that follow from the choice to deny the doctrine outright. Our larger purpose is inherent in the project itself: to diversify our thinking about what risks becoming seen as a necessary feature of constitutionalism but that design and practice show plainly is not. We therefore

8. *Id.* at 101, 103.

speak also to constitutional designers seeking ways to structure the rules of constitutional change so as to foreclose the doctrine of unconstitutional constitutional amendment.

I. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

The idea of an unconstitutional amendment is rooted in what its defenders regard as democratic justifications in support of limits that constitutions should properly place on political actors seeking to make modifications to the bargain struck in the name of the people.⁹ Whether defenders of the idea are persuasive is not our concern in this Article. Nor are we concerned with whether courts are correct to apply the doctrine of unconstitutional amendment to annul amendments they regard as violating their interpretation of what the constitution requires. We are concerned instead with demonstrating that there is no global norm of finding that constitutional amendments can be unconstitutional. We begin here by explaining how courts arrive at the conclusion that an amendment can indeed be unconstitutional. We then turn to identifying alternatives to that approach.

A. TEXT AND CONTEXT

Controversial though it may be, invalidating a constitutional amendment is, on one view, fully consistent with the design of the constitution where the text expressly disallows amendments adopted in violation of a certain procedure or contrary to a specified subject-matter protection. For example, the Greek Constitution imposes an outright prohibition on constitutional amendments within five years of a successfully completed amendment.¹⁰ One could therefore construct a purely textual argument in defense of a Greek court's judgment to find unconstitutional an amendment that had been proposed and ratified three years after a successful amendment. Similarly, Belgium explicitly disables the amendment procedure in a time of regency.¹¹ Accordingly, in the event of an amendment to the powers of the Belgian king during a period of recognized regency, a court could be justified to invalidate such an amendment since it would squarely violate the constitutional text.

Another example comes from South Africa, where the constitution creates an escalating framework of three different amendment procedures, each keyed specifically to certain parts and provisions of the constitution and each

9. See *infra* Subpart I.B.

10. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 2, art. 110, § 6 (Greece). This type of amendment restriction may be classified as a temporal limitation, one of several forms of limitations on the amendment power. See Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 REV. CONST. STUD. 37, 41–44 (2016).

11. 1994 CONST. art. 197 (Belg.). This type of limitation may be understood as a defensive mechanism that disables the amendment procedure in certain periods of time that put pressure on a state, namely war, siege, regency, exception, or emergency. See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 955–56 (2014).

increasing in its degree of difficulty.¹² The easiest of the three thresholds requires two-thirds support in the National Assembly,¹³ and the hardest requires three-quarters support in both the National Assembly and the National Council of Provinces, with a supporting vote of at least six provinces.¹⁴ An amendment to the constitution's hardest amendment procedure requires conformity with the hardest procedure itself.¹⁵ But if an amendment were made to that procedure using the easiest of the three thresholds, a court could be justified to invalidate that amendment because it would run afoul of a specific textual prohibition on the use of the amendment power.¹⁶

These three examples from Greece, Belgium, and South Africa introduce the problem of unconstitutional amendment in its least controversial form. To the extent there is an easy case to be made in favor of courts possessing the power to evaluate the validity of an amendment, these three cases could well be the best exhibits because each involves a court applying the plain meaning of the constitutional text to violations of the procedures of constitutional amendment. At a minimum, then, a reviewing court's operating manual would reveal the following rule: where the constitutional text is unambiguous about a prohibition or a specific procedure, courts in jurisdictions that recognize the power of judicial review stand on firm ground in policing whether political actors are acting in conformity with those clear rules.

The case in favor of judicial review of constitutional amendments is weaker where the constitutional text does not codify similarly precise rules about how political actors may validly amend the constitution. Here, there are two scenarios worth distinguishing:

- (1) Where the constitution codifies a content-based prohibition against amendment but states the prohibition at a high level of generality; and
- (2) Where the constitution formally codifies no rule against constitutional amendment.

Begin with the first scenario. The Constitution of the Czech Republic codifies a rule against amending the democratic character of the state: "Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible."¹⁷ The Czech Constitutional Court relied on this prohibition to invalidate an amendment intending to reduce the length of the term of the Chamber of Deputies.¹⁸ For the court, the amendment violated this unamendable rule protecting the essential requirements of democracy. The court reasoned that if longer terms are invalid then so too must be shorter terms

12. S. AFR. CONST., 1996, § 74.

13. *Id.* § 74(3)(a).

14. *Id.* § 74(1).

15. *Id.*

16. *Id.* § 167(4).

17. Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 9, § 2.

18. Nález Ústavního soudu ze dne 10.9.2009 (ÚS) [Decision of the Constitutional Court of Sept. 10, 2009], sp.zn. Pl. ÚS 27/09 (Czech).

because both violate “the principle of regular terms of office” that is central to the spirit of the unamendable rule.¹⁹

Whether the Czech judgment was correct is less important than recognizing that the outcome turned on a contingent view of what democracy requires. The textual prohibition on amendment gives little guidance about how to determine what is essential for a democratic state. Instead it is the Czech Constitutional Court’s contextual judgment that prevails in light of what it believes the rule of law requires of democracy. This may be precisely what we expect of judges—and what we openly defer to them to decide—but it is important to recognize that this codified rule preserving democracy differs from the procedural ones highlighted above. It is a content-based prohibition that requires courts to make a judgment, in all likelihood a contestable one, about whether the amendment is in its substance compatible with the textual prohibition on democracy.

The case for the judicial review of constitutional amendments is at its weakest in the second scenario where the constitution formally codifies no rule against constitutional amendment. The Indian Constitution is the prime example. Its text confers plenary power on the national and state legislatures to amend the constitution, without any formally unamendable rule standing in the way.²⁰ Despite this relatively easy formal amendment rule, the Indian Supreme Court’s first interpretation of the rule confirmed what the text says in its plain language: that the formal amendment power is subject to no limitations.²¹ But the court reversed course sixteen years later when it held that the amendment power could not be employed to violate fundamental constitutional rights.²² Yet the court moderated its astounding reversal, holding that it would exercise its new role of policing the amendment power only prospectively. Six years later, the court unveiled what is now known as the “basic structure doctrine,” which authorizes courts to invalidate amendments that violate the Indian Constitution’s basic structure.²³ Precisely what constitutes the constitution’s “basic structure” is nowhere expressly identified in its text but instead arises from the court’s interpretation of the Indian Constitution’s internal coherence, stated values, and norms of liberal constitutionalism, including the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers, and federalism.²⁴ The court later exercised its power to strike down amendments when faced with properly-passed amendments that sought to limit the court’s authority to review constitutional amendments.²⁵

19. *Id.* § VIa.

20. INDIA CONST. art. 368, § 2.

21. *Sri Sankari Prasad Singh Deo v. Union of India*, (1952) 1 SCR 89 (India).

22. *Golaknath v. State of Punjab*, (1967) 2 SCR 762 (India).

23. *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, (1973) 4 SCC 225 (India).

24. *Id.* ¶ 316.

25. *Minerva Mills Ltd. v. Union of India*, (1981) 1 SCR 206 (India).

It is difficult to justify the invalidation of constitutional amendments in India in comparison to the other cases we have encountered. In contrast to the cases from Greece and Belgium, the Indian Constitution does not establish strict procedural limitations on constitutional amendment that could justify a court striking down an amendment that fails to conform to specific rules on the process by which the text is amended. Nor was an escalating structure of amendment the basis of the Indian Supreme Court's construction of the basic structure doctrine or its actual use when it invalidated a procedurally-perfect amendment.²⁶ The Indian Constitution differs also from the Constitution of the Czech Republic and others like it, which codify a formally unamendable rule at a high level of subject-matter generality. In these jurisdictions, there is a textual referent for the court's action. In India, however, the lack of textually codified limitations on the amendment power denies the basic structure doctrine the full force it might otherwise enjoy—and it invites the claim that the court is overstepping the explicit boundaries set by the constitution about how the court should exercise its powers.

B. THE DEMOCRATIC JUSTIFICATION

Yet there may be a democratic justification for a court to invalidate amendments in the absence of a formally unamendable rule. Even in what we have described as the weakest scenario within which a court could invalidate a procedurally-perfect amendment—where, as in India, the constitution formally codifies no rule against amendment—one can build an argument in defense of a court relying on the unwritten constitution to invalidate an amendment to its text.

The best argument offered thus far to make sense of a court invalidating a constitutional amendment is anchored in the theory of constituent power, first articulated by Emmanuel Joseph Sieyès, a French political theorist whose principal interest was to build a theory to protect the essential right of the people to choose the meaning of their constitution and how it should change.²⁷ According to this theory of constituent power, only the people may create and, by its creation, legitimate a new constitution.²⁸ The people's representatives have the considerably lesser power only to make changes to the constitution provided those changes are consistent with the structure and spirit of the people's constitution.²⁹ Any change more far-reaching than that—one that alters the core commitments of the constitution—must be authorized by the people themselves, and as a result legitimated by them. For Sieyès, the people embody the constituent power, meaning the supreme body that constitutes all others. These other bodies are inferior to the people and their constituent power; these are

26. *Id.* at 215.

27. See EMMANUEL JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS-ETAT? [WHAT IS THE THIRD ESTATE ?] (Éditions du Boucher 2002) (1789) (Fr.).

28. *Id.* at 53.

29. *Id.*

described in the scholarly literature as the constituted powers. These constituted powers include the legislature, the executive and courts as well. The legal fiction of the theory of constituent power holds that these representative bodies of constituted powers are created, authorized or regulated by the constitution, which in turn has been created by the people. The bottom line, then, is this: constituted powers are bound by the rules established in the constitution by the constituent power.

The democratic foundations of the doctrine of unconstitutional constitutional amendment begin now to come into focus. These foundations are anchored in the delegation theory of constitutional change. Given that the people have created the constitution and delegated to their representatives only the limited power to modify the constitution in ways that keep the constitution aligned with its original form and values, the constituted powers cannot make changes to the constitution authorized by the constituent power without doing violence to the expressed will of the people.³⁰ Only the people themselves exercising their constituent power may make such changes to the constitution. Seen in this light, where a court invalidates a constitutional amendment passed by the actors authorized by the constitution to make amendments, we can certainly describe this action as stifling a proximate form of democratic expression—the considered judgment of the amending actors. But this argument would miss the larger picture. The choice a court makes to invalidate an amendment that it believes violates the constitution is a vindication of the supreme democratic choice originally made by the people to create the constitution. On this view, what first seems to be an undemocratic arrogation of power by courts is instead a justifiable judicial intervention to protect the terms of the original bargain approved by the people.

Yet this justification does not resonate in all constitutional states nor is it likely to take root in the self-understanding of all political actors, including judges on the highest courts of those countries that have rejected the doctrine of unconstitutional constitutional amendment. As we will show in the next three Parts, there is a strong front of resistance to the doctrine of unconstitutional amendment around the world, both in countries we may regard as champions of liberal democracy and in those where the values of liberal democracy are in formation or under attack. We might expect this resistance in the latter group but not in the former, and yet countries in both groups share this antagonism to the doctrine of unconstitutional amendment. What unites all three countries in their resistance to the doctrine of unconstitutional amendment is shared through a distinguishable set of formalist values in making, changing, and legitimating higher law.

30. The most theoretically rich account of this idea of delegation appears in ROZNAI, *supra* note 1, at 105–34.

II. ULTRA-FORMALISM IN THE REPUBLIC OF GEORGIA

One possible approach to the idea of an unconstitutional constitutional amendment is to reject it outright on purely formalist grounds. Formalism is rooted in a commitment to rules that derive their legitimacy from their clarity, consistent application, public accessibility and their widely shared acceptance as authoritative.³¹ As with most theories of constitutional interpretation and enforcement, formalism can sometimes devolve into a caricature of even its best self. This is the case in the Republic of Georgia, whose Constitutional Court has taken what may be described, as an ultra-formalist approach to adjudicating constitutional amendments.

Faced with a constitutional text that makes no explicit mention of either substantive unamendability or judicial authority to review constitutional amendments, the Georgian Constitutional Court has refused to validate all challenges to constitutional amendments.³² The court reasoned that once Parliament adopts a constitutional amendment, it becomes part of the constitution and is therefore unreviewable because the constitution cannot be unconstitutional.³³ The court has held that it lacks the constitutional authority to review amendments.³⁴ In this Part, we first explain the rules of constitutional amendment in Georgia and then turn to the court's case law in which it set out the limits to its own authority to review amendments.

A. CONSTITUTIONAL AMENDMENT IN THE REPUBLIC OF GEORGIA

Prior to the coming-into-force of a series of amendments to Georgia's constitution on October 28, 2018, amending the Georgian Constitution required Parliament to consider a draft law for either a general or partial amendment, submitted either by more than half of the total number of members of Parliament or at least 200,000 eligible voters.³⁵ An amendment proposal became valid provided Parliament kept debate on the draft amendment open for at least one month, and then voted by three-quarters in favor of the amendment in two successive sessions of Parliament (separated by an interval of at least three months).³⁶ The final steps involved the President of the Republic signing and

31. For general readings on formalism, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985).

32. We discuss these cases *infra* Subpart II.B in greater detail: Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] July 12, 2010, N2/2/486; Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Oct. 24, 2012, N1/3/523; Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Feb. 5, 2013, N1/1/549.

33. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] July 12, 2010, N2/2/486, § 2, ¶ 9.

34. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Feb. 5, 2013, N1/1/549, § 2, ¶ 9.

35. 2018 K'ONST'IT'UTSIA [CONSTITUTION] art. 102, § 1 (Geor.).

36. *Id.* art. 102, §§ 2–3.

promulgating the amendment.³⁷ The constitution was clear that no amendment could lawfully be made during a state of emergency or martial law.³⁸ Today, Georgia's new amendment rules are largely similar with one important difference—differential supermajorities are now required to ratify an amendment.³⁹

Georgian statutory law regulates the definition and relationship of legal norms in the country. Although not formally part of the constitution, the Law of Georgia on Normative Acts governs the formal rules of legal normativity.⁴⁰ Paragraph 1 of article 1 stipulates “[t]his law defines the types and hierarchy of normative acts, the place of international agreements and treaties of Georgia in the system of normative acts of Georgia, and general rules of preparing, adopting (issuing), promulgating, applying, registering and systematising [sic] normative acts.”⁴¹ Paragraph 2 of article 7 enumerates the constitution and “*the Constitutional Law of Georgia*,” which refers to constitutional amendments, among the types of legislative acts in Georgia.⁴² Paragraph 3 of article 7 states the definitive hierarchy of norms in the Georgian legal system, and places the constitution and the constitutional law at the same level—the highest—in the hierarchy.⁴³ Paragraph 2 of article 10 moreover states that “[t]he Constitutional Law of Georgia is an integral part of the Constitution of Georgia. The Constitutional Law of Georgia shall be adopted to . . . revise the Constitution of Georgia.”⁴⁴ This equivalence in the Georgian legal system between the constitution and amendments to it has a considerable impact on the Constitutional Court's jurisprudence on its authority to review and possibly invalidate constitutional amendments.⁴⁵

Since its adoption in 1995, the Georgian Constitution has been amended thirty-five times.⁴⁶ While most of these have been more housekeeping than transformative, two major constitutional amendments reforming the political

37. *Id.* art. 102, § 4.

38. *Id.* art. 103.

39. See Constitutional Law of Georgia No. 1324 of 13 Oct. 2017; Constitutional Law of Georgia No. 2071 of 23 Mar. 2018 (requiring that if an amendment is supported by at least two-thirds of the total number of the Members of Parliament, the amendment will be sent to the President for promulgation upon the support of at least two thirds of the total number of the Members of next Parliament; but that if an amendment is supported by at least three-fourths of the total number of the Members of Parliament, the amendment will be sent directly to the President for promulgation).

40. Law of Georgia on Normative Acts (Act No. 1876/ 2009).

41. *Id.* art. 1, § 1.

42. *Id.* art. 7, § 2(a).

43. *Id.* art. 7, § 3.

44. *Id.* art. 10, § 2.

45. See Dimitry Gegenava, *Unconstitutional Constitutional Amendment: Three Judgments from the Practice of the Constitutional Court of Georgia*, 5 S. CAUCASUS L.J. 396, 397 (2014) (arguing that the main problem with regard to the legal status of constitutional amendments in Georgia is that it is regulated at the infra-constitutional level by the Law on Normative Acts).

46. For a full list of the amendments, see *Constitution of Georgia*, LEGIS. HERALD GEOR., <https://matsne.gov.ge/en/document/view/30346> (last visited Mar. 15, 2019).

system became law in 2004 and 2010, and a third was adopted in 2017 to enter into force in 2018.⁴⁷ The 2004 constitutional amendment emerged in the aftermath of the Rose Revolution with the stated aim of converting the country from a presidential to semi-presidential system.⁴⁸ Yet the new form of government did not create sufficient checks and balances against the concentration of power.⁴⁹ Hence the 2010 constitutional amendment, which changed the form of government, though this time from semi-presidential to one resembling a parliamentary system, in the process shifting significant executive powers from the President as an individual to the government as a body.⁵⁰ The latest reform, recommended by a constitutional commission convened in December 2016,⁵¹ and then adopted by Parliament in September 2017,⁵² makes dramatic changes. Most notably, the package of amendments—which one of us has described as amounting to a constitutional dismemberment rather than a simple amendment⁵³—contemplates the indirect election of the President through an Electoral College and creates a pure parliamentary system. The amendment also makes substantial reforms to the legislature, including its election rules, and it modifies the form and authority of the judiciary, including the Constitutional Court.⁵⁴

B. OUTRIGHT REJECTION OF THE UNCONSTITUTIONAL AMENDMENT DOCTRINE

Although there have been several amendments to the Georgian Constitution, only three have provoked challenges to the Constitutional Court. As we discuss below, each of the three challenges involved a 2006 constitutional amendment stipulating that presidential and parliamentary elections would be held jointly between October 1, 2008 and December 31, 2008, the precise date

47. *The Constitutional Law of Georgia on Amendments to the Constitution of Georgia*, LEGIS. HERALD GEOR., #1324-rs, <https://matsne.gov.ge/ka/document/view/3811818?publication=1> (last visited Mar. 15, 2019).

48. 2004 K'ONST'IT'UTSIA [CONSTITUTION] art. 5 (Geor.).

49. See Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on the Draft Amendments to the Constitution of Georgia*, 58th Sess., Op. No. 281/2004 (Mar. 29, 2004).

50. 2010 K'ONST'IT'UTSIA [CONSTITUTION] art. 21 (Geor.).

51. See Dimitry Gegenava, *Retrospection of the Constitutional Reforms of Georgia: In Search of the Holy Grail*, 8 S. CAUCASUS L.J. 237, 241 (2017).

52. *Parliament of Georgia Passed the Draft Constitutional Law with the III Reading*, PARLIAMENT GEOR. (Sept. 26, 2017), http://parliament.ge/en/saparlamento-saqmianoba/plenaruli-sxdomebi/plenaruli-sxdomebi_news/saqartvelos-parlamentma-konstituciuri-kanonis-proeqti-mesame-mosmenit-mii-go.page.

These amendments were approved by Parliament on September 26, 2017 in the third and final reading. The President then vetoed the bill, which was later overturned by Parliament, and the amendment was officially published on October 13, 2017. On March 23, 2018 some parts of these amendments, mainly related to electoral system, were revised.

53. Albert, *Constitutional Amendment and Dismemberment*, *supra* note 4, at 54–56.

54. See Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017*, 112th Sess., Op. No. 876/2017 (Oct. 9, 2017); Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Georgia: Opinion on the Draft Revised Constitution*, 111th Sess., Op. No. 876/2017 (June 19, 2017).

to be determined by the President.⁵⁵ The amendment understandably proved controversial because it changed the elected term of office.⁵⁶ The first challenge also involved a 2004 amendment, which we introduce below. The important point for our purposes is that the court rejected all claims in each of these three cases, and along with them also the unconstitutional amendment doctrine.

The Georgian Constitution authorizes the Constitutional Court to review a broad range of official conduct.⁵⁷ But the constitution's lengthy enumeration does not include the Constitutional Court's authority to review constitutional amendments. This power appears to be denied to the court.⁵⁸

In light of the absence in the Georgian Constitution of any express authorization for (or prohibition on) judicial review of constitutional amendments, the Constitutional Court's interpretation of its own power has settled the matter. On each of the three occasions between 2010 and 2013, the court rejected the idea of an unconstitutional amendment, ruling that once an amendment is enacted it becomes part of the constitution—and that the court cannot exercise judicial review of any part of the constitution.

The first case arose in 2009. A claimant challenged the constitutional amendments N3272-RS of February 6, 2004 and N4133-RS of December 27, 2006, arguing that these amendments had been adopted by an illegitimate parliament and therefore violated the constitutional amendment procedure set out in article 102 of the constitution.⁵⁹ The claimant contended also that the amendment violated the right to equality in political life as protected in paragraph 1 of article 38 of the constitution, as well as paragraph 1 of article 44 which stipulates “[e]veryone who lives in Georgia shall be obliged to observe the Constitution and legislation of Georgia.”⁶⁰ For the court, the question was effectively only whether it had authority over the normative acts. Referring to paragraph 2 of article 10 of the Law of Georgia on Normative Acts, which affirms that constitutional amendments are an integral part of the constitution, the court argued that constitutional amendments have the same normative value as primary constitutional norms.⁶¹ Reviewing constitutional amendments, therefore, would be to review the “constitutionality of the norms of the

55. 2007 K'ONST'IT'UTSIA [CONSTITUTION] art. 2 (Geor.).

56. *Id.*

57. K'ONST'IT'UTSIA [CONSTITUTION] art. 60 (Geor.).

58. We could perhaps find justification in the constitution for the court to exercise judicial review of constitutional amendments, specifically in paragraph 4-j of article 60, which stipulates that the court shall “exercise other powers determined by the Constitution.” *Id.* art. 60, § 4(j). This potentially leaves open the possibility of judicial review of non-listed normative acts. See Besarion Zoidze, *Problems with the Verification of Constitutional Norms and Constitutionality*, 8 CONST. L. REV. 3, 8 (2015) (arguing that this clause read together with the Organic Law on the Constitutional Court of Georgia justifies procedural review of constitutional amendments).

59. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] July 12, 2010, N2/2/486.

60. 2014 K'ONST'IT'UTSIA [CONSTITUTION] art. 44, § 1 (repealed 2018) (Geor.); accord Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] July 12, 2010, N2/2/486.

61. Law of Georgia on Normative Acts (Act No. 1876/2009).

Constitution.”⁶² And this, according to the court, was beyond its jurisdiction. The court ruled the claim inadmissible and did not address its merits.⁶³

A second case challenging the constitutionality of an amendment reached the court in 2012.⁶⁴ In this case, a claimant challenged the constitutionality of two 2006 constitutional amendments that added the following rules to section 2 of article 50 of the constitution:

Regular parliamentary elections shall be held during the month of October in the calendar year when Parliament’s term of office expires. The President of Georgia shall fix the date of elections not later than 60 days before the elections.⁶⁵

This amendment furthermore amended section 9 of article 70 of the constitution as follows:

Regular presidential elections shall be held in the month of October of a calendar year when the President’s powers expire. The President of Georgia shall fix the date of elections not later than 60 days before the elections.⁶⁶

The claimant argued that extending the parliamentary term by five months and the presidential term by nine months violated articles 49 and 70 of the constitution, which govern parliamentary and presidential elections, respectively.⁶⁷ The claimant also contended that these term extensions violated the right of citizens to run for the presidency, the right to free expression, and the constitutional function of the people as a source of state authority defined in article 28, including his own right to participate in parliamentary and presidential elections.⁶⁸

Following its reasoning from the 2010 case, the court stressed the normative status of constitutional amendments as stipulated by the constitution and the organic laws.⁶⁹ It explained the hierarchy of norms in the Georgian legal order and concluded that a constitutional amendment, as an integral part of the constitution, sits on the top of the constitutional hierarchy.⁷⁰ The court concluded that it is authorized to review only those normative acts sitting below the constitution in the hierarchy, and held that it did not have the authority to review the constitutionality of any part of the constitution.⁷¹ The court again rejected the challenge to the amendment.⁷²

62. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] July 12, 2010, N2/2/486, § II, ¶ 3.

63. *Id.*

64. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Oct. 24, 2012, N1/3/523.

65. 2006 K’ONST’IT’UTSIA [CONSTITUTION] art. 50, § 2.1 (repealed 2018) (Geor.).

66. *Id.* art. 70, § 9 (repealed 2018).

67. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Oct. 24, 2012, N1/3/523, § I, ¶ 5.

68. *Id.*

69. *Id.* § II, ¶ 4.

70. *Id.* § II, ¶¶ 3–4.

71. *Id.* § II, ¶¶ 4–5.

72. *Id.* § III, ¶ 1.

The last case on constitutional amendments is from 2013. Section 2-c of article 1 of the 2006 amendment was again the subject of the challenge, only this time the claim was that it violated articles 17 and 28 of the constitution, namely the protection of human dignity and the right to participate in elections.⁷³ In this case, the claimant argued that although the Constitutional Court is not directly authorized to review constitutional amendments, the court has a constitutional duty to review the compliance of normative acts with the basic rights and freedoms protected in the constitution.⁷⁴ In the claimant's view, by granting retroactive effect to the constitutional norm regulating the public authority of the President, the Parliament had violated the basic principles of public law.⁷⁵ The presidential election of 2008 had been held ten months sooner than the constitutionally prescribed date, which would have had the effect of extending the President's term. This extension, for the claimant, violated section 1 of article 70 of the constitution.⁷⁶ The claimant also argued that the court's authority over constitutional amendments "derives from the authority and the general logic of the mission of the Constitutional Court."⁷⁷

In this third and most recent case, the court discussed the question whether it had the authority to review the conformity of constitutional amendments with codified rights. The court set out its two functions as it sees them: first, to ensure the functioning of state authority within the framework established by the constitution; and second, to protect human rights from unreasonable interference by public authorities.⁷⁸ The court argued, however, that it could not properly serve these functions without respecting the limits of constitutional authority operating upon it, the foremost limits being the ones codified in the constitution.⁷⁹ The court could not read the constitution as granting it the power to review amendments because, in the court's own view, constitutional norms—including amendments—create a unified constitutional-legal order and this constitutes the standard against which inferior normative acts are to be reviewed by the Constitutional Court. For the court, its authority was at an end when the challenge concerned the constitution itself.

Interestingly, the Constitutional Court of Georgia made express reference to the Venice Commission's finding that there is no consensus in public law on the authority of constitutional courts over constitutional amendments.⁸⁰ The court concluded that in the absence of formally unamendable clauses—even if there is a substantive hierarchy among constitutional norms—there exists no

73. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Feb. 5, 2013, N1/1/549.

74. *Id.* § II, ¶ 5.

75. *Id.* § II, ¶ 12.

76. *Id.* § II, ¶ 13.

77. *Id.* § I, ¶ 5.

78. *Id.* § II, ¶ 5.

79. *Id.*

80. *Id.* § II, ¶ 10; Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Report on Constitutional Amendment*, 81st Sess., Study No. 469/2008, ¶¶ 225–37 (Jan. 10, 2009).

formal hierarchy.⁸¹ According to the court, the resolution of contestations on the constitutional plane in the hierarchy of legal norms is left to the political process in Georgia.⁸² The court added a further point: in order for the court to acquire the authority to review constitutional amendments, the principle of separation of powers demands that the constitution itself provide a clear basis for the court to exercise this power within clearly defined parameters.⁸³

In sum, the Constitutional Court of Georgia has consistently refused to review the constitutionality of constitutional amendments by ruling that once an amendment has been enacted, it forms an integral part of the constitution. As constitution-level norms, amendments are not subject to constitutional review. In response to this ultra-formalist practice of the court, some have suggested that explicit unamendability should be introduced into the Georgian Constitution,⁸⁴ while others, relying on the non-exhaustive list of its authorities stipulated in the constitution, insist that the court already possesses within its toolkit the power to review constitutional amendments.⁸⁵

III. ENFORCING DEMOCRATIC PROCEDURES IN TURKEY

An alternative model of resistance is apparent in Turkey, whose constitution limits the Constitutional Court to exercising only formal procedural review of amendments. However, the court has devised ways of manipulating this limitation to exercise substantive review in disguise. In this Part we explain how amendment rules are structured in Turkey and also reveal how even a rigid rule limiting courts to only procedural review is prone to manipulation by an aggressive court.

A. CONSTITUTIONAL AMENDMENT IN TURKEY

Amending the constitution in Turkey is a quite complicated process of alternative paths.⁸⁶ Initiation requires the agreement of one-third of the total number of parliamentarians, after which the proposal must be debated twice in a plenary session of Parliament.⁸⁷ At least three-fifths of parliamentarians must

81. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia], N1/1/549, § II, ¶ 11; *see also* Besik Loladze, *Konstituciis Tsvlilebebis Konstitutsiurobis Kontrolis Perspektiva Saqartveloshi* [Perspectives of Constitutional Review of Constitutional Amendments in Georgia], EMC (Nov. 11, 2014), <https://emc.org.ge/2014/11/11/experts-third> (supporting the court's argument and contending that the authority of the formation of unamendability guarantees is upon the legislature and not the Constitutional Court).

82. Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia], N1/1/549, § II, ¶ 11.

83. *Id.*

84. Vakhushti Menabde, *Revision of Constitution of Georgia—What Ensures Legitimacy of Supreme Law*, in FROM SUPERPRESIDENTIALISM TO PARLIAMENTARISM: CONSTITUTIONAL AMENDMENTS IN GEORGIA 116, 127 (Ghia Nodia & Davit Afrasidze eds., 2013); Elene Janelidze, *Judicial Review of Constitutional Amendments in Georgia, France and Germany—the Quest for Eternity* 33–34 (Apr. 1, 2016) (unpublished L.L.M. short thesis, Central European University), http://www.etd.ceu.hu/2016/janelidze_elene.pdf; Loladze, *supra* note 81.

85. *See* Zoidze, *supra* note 58.

86. *See* TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 175 (Turk.).

87. *Id.*

then approve the proposal for it to proceed, but two alternatives present themselves depending on the strength of the approval vote.⁸⁸ If at least two-thirds vote in favor, the President has the option of either approving the proposal into law, sending it back to Parliament for reconsideration, or putting it to a referendum.⁸⁹ However, if fewer than two-thirds vote in favor, the President cannot approve the bill but has the choice of either sending it back or putting it to a referendum.⁹⁰ If the bill is sent back to Parliament after earning at least a two-thirds vote, and is approved again by at least a two-thirds vote, the President again is given the choice of either approving it outright or putting the bill or some of its articles to a referendum.⁹¹ But if the amendment proposal had earned a small majority vote, a referendum on the bill becomes compulsory.⁹²

The Turkish Constitution also codifies substantive limitations on amendment.⁹³ No amendments are permitted to “[t]he provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3.”⁹⁴ When elaborated beyond these references by incorporation, the list of unamendable items includes the republican form of the state, the nationalism of Atatürk, the fundamental tenets set forth in the preamble, the principles of democracy, secularism, social state, the rule of law, respect for human rights, as well as the provisions establishing the integrity, the official language, the flag, the national anthem and the capital of the country.⁹⁵

Earlier Turkish Constitutions—the 1924 and 1961 versions—also codified explicit forms of unamendability,⁹⁶ but only for the republican state form, patterned after the unamendability clause in the French Constitution.⁹⁷ Both of these superseded Turkish Constitutions also protected the characteristics and national symbols of the state, but these were not expressly designated as unamendable.⁹⁸

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See Ergun Özbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15 EUR. PUB. L. 533, 534 (2009).

94. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 4 (Turk.).

95. *Id.* arts. 1, 2, 3, 4.

96. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 102 (1924) (repealed 1960) (Turk.); TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 9 (1961) (repealed 1982) (Turk.).

97. 1958 CONST. art. 89 (rev. 2008) (Fr.) (“The republican form of government shall not be the object of any amendment.”).

98. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 2 (1924) (repealed 1960) (Turk.); TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] arts. 2, 3 (1961) (repealed 1982) (Turk.).

B. SUBSTANTIVE REVIEW AS PROCEDURAL REVIEW IN TURKEY

The Turkish Constitutional Court's review of constitutional amendments is a complicated story. The court has neither been consistent in its interpretation of the legal enforceability of unamendable clauses nor in its interpretation of its own authority over constitutional amendments. Historically across three separate eras, the court has found ways to exercise substantive judicial review of amendments even where it has been severely limited in its discretionary authority in relation to amendments. From 1961 to 1971, only the republican form of the state was unamendable⁹⁹ and the constitution was silent on the court's judicial review authority over amendments.¹⁰⁰ From 1971 to 1980, the same unamendable rule existed but the constitution authorized the court to review amendments only as to their form, not their content.¹⁰¹ And since 1982, unamendability has expanded in scope, but the constitution continues to authorize judicial review of amendments only as to their form, and even still to only three specifically enumerated formal criteria that do not at all relate to the content of the amendments.¹⁰² And yet in all three eras since 1961, the court has exercised substantive judicial review of amendments.

A formalist understanding has underlain the design of constitutional unamendability in Turkey. Following the constitution's initial silence on the question, constitutional reforms directed the Constitutional Court away from substantive review of constitutional amendments at two important turning points, namely by an amendment in 1971 and later by the 1982 constitution. In both attempts at restraining the court, however, the reformers insisted upon authorizing the court to review only the procedural propriety of constitutional amendments. Yet these efforts to constrain the court failed. The court exercised substantive review of amendments from 1975 to 1977 and again from 2008 to 2010. What is utterly fascinating is that in establishing the basis for legally enforceable substantive unamendability the court resorted to arguments rooted in formalism. The court argued that policing the formal procedural correctness of an amendment required it to inquire into the substantive merits of the amendment. The irony is that the court exercised substantive review of amendments in the name of formal procedural review.

Formal unamendability in Turkey dates to 1924, but its judicial enforceability emerged as an issue only after the establishment of the Constitutional Court in the 1961 constitution. Shortly after its creation, the court hinted in an *obiter* that it would review constitutional amendments against the standard set by the constitution's unamendable rule, arguing that an "amendment" can only be progressive and that any effort to regress from the

99. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 9 (1961) (repealed 1982) (Turk.).

100. *Id.* art. 147.

101. *Id.* (amended 1971).

102. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 148 (Turk.).

promise of the constitution or to modify the core “essence” of the 1961 constitution could not be properly regarded as an “amendment.”¹⁰³

Until the 1971 constitutional reform, the Constitutional Court had reviewed only two constitutional amendments. In the first case, the court struck down on procedural grounds an amendment reinstating the political rights of the Democratic Party politicians—rights that had been taken away in the aftermath of the 1960 military coup.¹⁰⁴ In justifying its authority to review constitutional amendments, the court argued that it had the constitutional authority to review *laws* and since a constitutional amendment is formally a *law*, it is subject to constitutional review like all others.¹⁰⁵ Although the court stated that constitutional amendments are subject to both procedural and substantive review, it concluded that the amendment had not been enacted procedurally properly and hence the court did not engage in substantive review.¹⁰⁶

In the second case, the court reviewed on both procedural and substantive grounds an amendment that extended by sixteen months the ordinarily six-year term limit for certain senators.¹⁰⁷ In upholding the amendment, the court declared that it had the constitutional authority to protect the constitution against the sovereignty of the majority.¹⁰⁸

The court’s bold pronouncement drew an equally bold response. Parliament passed an amendment overriding the constitution’s silence on the judicial review of amendments.¹⁰⁹ Parliament amended article 147 of the 1961 constitution to explicitly state that the Constitutional Court has the authority to review constitutional amendments only on the *formal* grounds set forth by the constitutional amendment rules.¹¹⁰ The constitution was amended, therefore, with the purpose of restricting the court from engaging in substantive review. And yet the court nevertheless continued to exercise substantive review of

103. Anayasa Mahkemesi [AYM] [Constitutional Court] Sept. 26, 1965, E. 1963/173, K. 1965/40 4 AYMKD 290, 329 (Turk.).

104. Anayasa Mahkemesi [AYM] [Constitutional Court] June 16, 1970, E. 1970/1, K. 1970/31 8 AYMKD 313, 332–33 (Turk.).

105. *Id.* at 322. A similar reasoning was put forward by the majority in the Indian Supreme Court’s *Golaknath* decision three years earlier, where the Court struck down a constitutional amendment on the grounds that it abridged fundamental rights. *Golaknath v. State of Punjab*, (1967) 2 SCR 762 (India); *see also* S. P. Sathe, *India: From Positivism to Structuralism*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 215, 244 (Jeffrey Goldsworthy ed., 2006).

106. Anayasa Mahkemesi [AYM] [Constitutional Court] June 16, 1970, E. 1970/1, K. 1970/31 8 AYMKD 313 (Turk.).

107. Anayasa Mahkemesi [AYM] [Constitutional Court] Apr. 13, 1971, E. 1970/41, K. 1971/37 9 AYMKD 416, 431 (Turk.).

108. *Id.* at 428–29.

109. This amendment was passed in the aftermath of the 1971 military memorandum. 1488 SAYILI KANUN [LAW NO. 1488] Sept. 20, 1971, Resmi Gazete [Official Gazette] No. 13964 (Turk.).

110. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 147 (1961) (repealed 1982) (Turk.) (emphasis added) (reading as amended: “The Constitutional Court shall review the conformity of laws and the parliamentary rules of procedure to the Constitution and of constitutional amendments to the formal requirements set out in the Constitution.”).

amendments on six separate occasions thereafter until the adoption of the 1982 constitution, which remains in force today.

In the first case after the 1971 amendment, the Constitutional Court was asked to review an amendment that created an exception in times of war to the rule that “the majority of members of military courts should be qualified judges.”¹¹¹ In discussing its authority over constitutional amendments for the first time since the 1971 amendment that sought to limit its power, the court admitted that it no longer had the authority to exercise substantive review and that its review would be confined only to formal review.¹¹² This admission, however, came with a twist. The court went on to argue that the unamendable rule incorporated both formal and substantive rules.¹¹³ First, it prohibited actual amendments to the form of the state. And, second, it prohibited even proposing of any such amendments.¹¹⁴ The second element, the court argued, was a formal limitation the court was required to honor, but the court added that, in order to properly complete its formal review of the amendment, it had to apply a test on whether the amendment could in fact be proposed in the first place.¹¹⁵ The court understood this to be a *proposability* test.¹¹⁶ Under this test, an amendment would fail the formal criterion of proposability if in its substance it violated the unamendable rule entrenched in the constitution.¹¹⁷

Using the same reasoning, the Constitutional Court reviewed five more amendments before the 1980 military coup, three of which it struck down as unconstitutional.¹¹⁸ In each of these cases, the court exercised substantive review as a necessary feature of its formal review.

The 1982 constitution changed the rules of amendment considerably. In addition to the republican form of state, the characteristics and symbols of the state have also been explicitly given unamendability protection.¹¹⁹ Attentive to the ways in which the court had in the past exceeded its delegated authority to review only the form of amendments, the drafters of the new constitution again made clear that the Constitutional Court can exercise only formal review and expressly limited this power to three categories: (1) the required majority for

111. Anayasa Mahkemesi [AYM] [Constitutional Court] Apr. 15, 1975, E. 1973/19, K. 1975/87 13 AYMKD 403 (Turk.).

112. *Id.* at 426–27.

113. *Id.* at 429.

114. *Id.* at 429–31.

115. *Id.* at 431.

116. *Id.* at 430–41.

117. *Id.*

118. Anayasa Mahkemesi [AYM] [Constitutional Court] Sept. 27, 1977, E. 1977/82, K. 1977/117 15 AYMKD 444 (Turk.); Anayasa Mahkemesi [AYM] [Constitutional Court] Jan. 27, 1977, E. 1976/43, K. 1977/4 15 AYMKD 106 (Turk.); Anayasa Mahkemesi [AYM] [Constitutional Court] Oct. 12, 1976, E. 1976/26, K. 1976/47 14 AYMKD 287 (Turk.); Anayasa Mahkemesi [AYM] [Constitutional Court] Oct. 12, 1976, E. 1976/38, K. 1976/46 14 AYMKD 252 (Turk.); Anayasa Mahkemesi [AYM] [Constitutional Court] Mar. 23, 1976, E. 1975/167, K. 1976/19 14 AYMKD 118 (Turk.).

119. TÜRKİYE CUMHURİYETİ ANAYASASI [CONSTITUTION] art. 4 (Turk.).

proposing an amendment; (2) the required majority for voting on it; and (3) the requirement that the amendment bill be debated twice in a plenary session.¹²⁰

The first amendment to the 1982 constitution occurred in 1987. It lifted the restrictions on the political rights of some politicians that had been imposed by the 1980 military junta. The amendment was challenged in the Constitutional Court on formal grounds. However, the claim—that it was improper for Parliament simultaneously to pass an amendment and to put that amendment to a referendum using the same act—did not fall under any of the three formal criteria the constitution contemplates for the court to exercise its power to review an amendment. Accordingly, the court rejected the request, holding that its authority over constitutional amendments was limited to determining whether the three enumerated formal criteria had been met.¹²¹ In 2007, two more constitutional amendments were taken to the Constitutional Court, and in both cases the court restricted its review to the three formal criteria, refusing to engage in substantive review or in any other form of formal review.¹²²

The court abandoned its restraint when reviewing constitutional amendments in its infamous headscarf judgment in 2008.¹²³ The context was highly charged: the governing Justice and Development Party's (AKP) closure case was pending before the Constitutional Court for its activities allegedly violating the unamendable principle of secularism.¹²⁴ The amendment before the court sought to lift the ban on religious headscarves worn by women at universities. Constrained by a much more rigid limitation on its authority over constitutional amendments as compared to previous eras, the court devised a novel justification for its authority to exercise substantive review of amendments in relation to the unamendable rules in the constitution. The court argued that satisfying the first enumerated procedural condition of the required majority for proposal required also meeting the condition of proposability.¹²⁵ This proposability test required the court to engage in substantive review and, as it had done before, the court again exercised substantive review in the name of formal review. The court concluded that the amendment violated the unamendable principle of secularism and struck it down as unconstitutional.¹²⁶

120. *Id.* art. 148, para. 2, cl. 1.

121. *Anayasa Mahkemesi [AYM] [Constitutional Court] June 18, 1987, E. 1987/9, K. 1987/15 23 AYMKD 282, 285–86 (Turk.).*

122. *Anayasa Mahkemesi [AYM] [Constitutional Court] Nov. 27, 2007, E. 2007/99, K. 2007/86 45 AYMKD 429, 443–44 (Turk.); Anayasa Mahkemesi [AYM] [Constitutional Court] July 5, 2007, E. 2007/72, K. 2007/68 44 AYMKD 1053, 1087–94 (Turk.).*

123. *Anayasa Mahkemesi [AYM] [Constitutional Court] June 5, 2008, E. 2008/16, K. 2008/116 45 AYMKD 1195 (Turk.).*

124. See Ash Bâli, *Courts and Constitutional Transition: Lessons from the Turkish Case*, 11 INT'L J. CONST. L. 666, 688–90 (2013).

125. *Anayasa Mahkemesi [AYM] [Constitutional Court] June 5, 2008, E. 2008/16, K. 2008/116 45 AYMKD 1195, 1233 (Turk.).*

126. *Id.* at 1240–41.

This interpretation reads the constitution's amendment rules against their very purpose, which is to prohibit substantive judicial review of constitutional amendments. The court has, for good reason, suffered criticism.¹²⁷ Yet the court nevertheless, struck down parts of another amendment in 2010.¹²⁸ Repeating its reasoning with regard to its authority to review the substance of the amendment in relation to the unamendable rules, the court engaged in substantive review.¹²⁹ The court declared unconstitutional the proposed voting procedures for selecting members for the High Council of Judges and Prosecutors and for the Constitutional Court, and the proposed rule allowing the president to appoint academics from political science and economics or senior executives violated the unamendable principle of the "democratic state governed by rule of law."¹³⁰

In somewhat of a surprise, the court has recently returned to its pre-2008 position that it will respect the constitution's explicit rule that the court is authorized to review amendments only as to form. In a 2016 case brought by seventy parliamentarians challenging an amendment that temporarily lifted parliamentary immunity, the court declared that its authority over constitutional amendments extends only to whether the required majorities for proposal and voting have been met and the requirement of two debates has been observed.¹³¹ The case grew from the claim that although the law had taken the form of a constitutional amendment, the subject matter of the amendment was the lifting of parliamentary immunity—and since article 85 of the constitution contemplates judicial review of parliamentary decisions lifting parliamentary immunity before the Constitutional Court—this amendment should be subject to judicial review.¹³² Returning to a formalist approach to defining the legal status of the act of Parliament, the court dismissed the challenge by ruling that the challenged act was indeed a constitutional amendment and that the challenge brought did not fall into any of the three formal criteria set out in the constitution.¹³³ In the court's unanimous judgment, we see clearly the court's adoption of a formalist approach to unconstitutional amendments.¹³⁴

127. See Albert, *Constitutional Amendment and Dismemberment*, *supra* note 4, at 26–29; Bâli, *supra* note 124, at 681–88; Levent Köker, *Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court*, 17 *CONSTELLATIONS* 328, 335 (2010); Özbudun, *supra* note 93, at 537–38; Roznai & Yolcu, *supra* note 2; Abdurrahman Saygili, *What Is Behind the Headscarf Ruling of the Turkish Constitutional Court?*, 11 *TURKISH STUD.* 127 (2010).

128. Anayasa Mahkemesi [AYM] [Constitutional Court] July 7, 2010, E. 2010/49, K. 2010/87 47 AYMKD 1069, 1173–78 (Turk.).

129. *Id.* at 1153–55.

130. *Id.* at 1161–61, 1168–70.

131. Anayasa Mahkemesi [AYM] [Constitutional Court] June 3, 2016, E. 2016/54, K. 2016/117 53 AYMKD 915, 923 (Turk.).

132. See Tarik Olcay, *The Unamendability of Amendable Clauses: The Case of the Turkish Constitution*, in *AN UNAMENDABLE CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* 313, 337 (Richard Albert & Bertil Emrah Oder eds., 2018).

133. *Id.*

134. *Id.* at 336–37.

IV. THE TRIUMPH OF POPULAR SOVEREIGNTY IN FRANCE

France illustrates the popular sovereigntist resistance to the doctrine of unconstitutional amendment. Although the French Constitution codifies an unamendability clause, the Constitutional Council has taken the view that amendments to the constitution are manifestations of popular sovereignty that cannot be reviewed on substantive grounds.¹³⁵ As the birthplace of the theory of constituent power, France is a noteworthy exception to the trend toward the judicial review of constitutional amendments around the world. Amendments are not reviewable in court—a rule that derives not from constitutional design but from judicial interpretation.¹³⁶

A. CONSTITUTIONAL AMENDMENT IN FRANCE

Amending the French Constitution is no easy feat.¹³⁷ The constitution grants the President (at the request of the Prime Minister) and members of Parliament the authority to initiate a constitutional amendment.¹³⁸ Once an amendment bill is introduced in Parliament, it must be passed in identical terms in both the National Assembly and the Senate.¹³⁹ If the bill is adopted in both houses, the President can either submit the bill to Parliament for approval or put it to referendum.¹⁴⁰ If it is submitted to Parliament, both houses convene together as a Congress and the bill becomes official it is approved by at least three-fifths of all votes cast.¹⁴¹ However, if the President chooses to put the bill to a referendum, a simple majority vote is required to make it official.¹⁴²

The constitution does not by its text authorize the Constitutional Council to exercise the power of judicial review over constitutional amendments. But it does formalize explicit limitations on amendment. The constitution prohibits amendments to the republican form of government,¹⁴³ and it also expressly disallows any amendment when there is a threat to the integrity of the French national territory¹⁴⁴ or when there is a vacancy in the office of the presidency.¹⁴⁵

135. Conseil constitutionnel [CC] [Constitutional Council] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.), translated in NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 97 (3d ed. 2016); Conseil constitutionnel [CC] [Constitutional Council] decision No. 2003-469DC, Mar. 26, 2003, Rec. 293 (Fr.).

136. Conseil constitutionnel [CC] [Constitutional Council] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.), translated in DORSEN ET AL., *supra* note 135, at 97; Conseil constitutionnel [CC] [Constitutional Council] decision No. 2003-469DC, Mar. 26, 2003, Rec. 293, (Fr.).

137. See 1958 CONST. art. 89 (rev. 2008) (Fr.) (detailing the arduous process for amendment).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* art. 7.

There have been over twenty amendments to the current French Constitution.¹⁴⁶ Neither of the first two amendments complied with the ordinary procedures of constitutional amendment. The first was adopted using special procedures in article 85 for amendments to articles 77 through 87 involving the French Community. That was the only use of article 85, which has since been repealed along with articles 78 through 87.¹⁴⁷

The second was far more significant to the course of modern French constitutional history. Four years after founding of the Fifth Republic in 1958, President Charles de Gaulle became convinced that the president should no longer be elected by an Electoral College but instead by direct popular vote.¹⁴⁸ A change of this magnitude required a constitutional amendment, but it was politically unlikely that the houses of Parliament would propose the amendment on de Gaulle's behalf. De Gaulle found an alternative: he would bypass Parliament and invoke a special procedure in article 11, which authorizes the President to submit any bill on "the organization of the public authorities" to a referendum.¹⁴⁹ Until 1962, this provision had not generally been interpreted as a vehicle for constitutional amendment.¹⁵⁰ De Gaulle's tactic was therefore quite controversial at the time and widely regarded as unconstitutional.¹⁵¹ The Council of State formally reproached the use of article 11 for constitutional amendment as unconstitutional, whereas the Constitutional Council did so informally.¹⁵² The President of the Senate and the opposition saw de Gaulle's move as an "outrageous breach of the Constitution."¹⁵³ Undeterred, de Gaulle pressed ahead with his unconventional plan to amend presidential selection using article 11, and the people went to the polls in referendum. The referendum passed with a nearly two-thirds approval (about 61.75 % voting yes).¹⁵⁴

In the aftermath of the vote, the Senate President challenged the constitutionality of the amendment before the Constitutional Council.¹⁵⁵ He argued that the law was not properly a constitutional act (*loi constitutionnelle*) or an organic law, but rather just an ordinary law.¹⁵⁶ He also argued that its adoption by referendum did not shield it from review by the Council.¹⁵⁷ He

146. *See generally id.* (listing throughout the various amendments).

147. *Id.* arts. 76, 77 (noting the repeal of articles 78 through 86).

148. David B. Goldey, *The French Referendum and Election of 1962: The National Campaigns*, 11 POL. STUD. 287, 288 (1963).

149. *Id.* at 289–90.

150. *Id.*

151. *Id.*

152. *Id.* at 290.

153. JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 134 (1992) (internal quotation marks omitted).

154. MARK CLARENCE WALKER, *THE STRATEGIC USE OF REFERENDUMS: POWER, LEGITIMACY, AND DEMOCRACY* 35 (2003).

155. Conseil constitutionnel [CC] [Constitutional Council] decision No. 62-20DC, Nov. 6, 1962, Rec. 27 (Fr.), *translated in* DORSEN ET AL., *supra* note 135, at 97.

156. *Id.*

157. *Id.*

contended further that the exercise of national sovereignty, whether by the people or their representatives, should be in accordance with the clear rules set out in the constitution.¹⁵⁸ The Council rejected the Senate President's challenge by a vote of six to four.¹⁵⁹ In its judgment, the Council focused on its own constitutional competence. It stressed that its authority was bound narrowly by the text of the constitution and also by the organic law on the Constitutional Council.¹⁶⁰ In its short decision, the Council distinguished "direct expression[s] of national sovereignty" (*referendums*) from "activities of public authorities" (*lois*), the former resting on a higher plane than the latter.¹⁶¹ The court concluded that neither the constitution nor the organic law gave the Council the power to review the constitutionality of a "bill adopted by the French people by way of referendum."¹⁶²

The Council's judgment stands for the proposition that courts will not review the choice of the people to amend the constitution in a referendum. This presumably applied to constitutional referendums under both articles 11 and 89, though it remained an open question whether courts would review the constitutionality of an amendment passed by Parliament without recourse to a referendum.¹⁶³ The Council hinted at an answer thirty years later in 1992. After the signing of the Maastricht Treaty, sixty senators asked the Council to rule on the Treaty's conformity with the French Constitution.¹⁶⁴ The senators claimed that the Treaty violated article 3 of the constitution, which establishes that "national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum."¹⁶⁵ In response, the Council suggested that constituent authority is sovereign and subject only to the unamendable rules, both substantive and temporal.¹⁶⁶ The Council was speaking specifically about constituent authority and only generally about amendment, but seemed to suggest that the explicit limitations on amendment are enforceable.

The court finally answered the question a decade later in 2003. Sixty senators again challenged the constitutionality of an amendment, this time the Constitutional Law on Decentralized Organization of the Republic.¹⁶⁷ The amendment had been the first to be passed by a joint meeting of the National

158. *Id.*

159. *Id.* For the number of votes, see BELL, *supra* note 153.

160. CC, decision no. 62-20DC, ¶ 1.

161. *Id.* ¶ 2.

162. *Id.* ¶ 5.

163. Sophie Boyron, *From Abolition to Amendment: Life and Death of Constitutions in France*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS 133, 147 (Mads Andenas ed., 2000).

164. Conseil constitutionnel [CC] [Constitutional Council] decision No. 92-312DC, Sept. 2, 1992, Rec. 76 (Fr.).

165. 1958 CONST. art. 3(1) (rev. 2008) (Fr.).

166. CC, decision no. 92-312DC, ¶ 19.

167. Conseil constitutionnel [CC] [Constitutional Council] decision No. 2003-469DC, Mar. 26, 2003, Rec. 293 (Fr.).

Assembly and the Senate under the procedure specified in article 89 that was later challenged at the Council.¹⁶⁸ The Senators invoked the formal unamendability of the republican form of government, and argued that this unamendability did not prohibit a return to monarchy alone, but also protected the fundamental characteristics of the French Republic.¹⁶⁹ The Senators argued that decentralizing local government was a violation of the unitary character of the state.¹⁷⁰ In response, the Council echoed its holding of four decades prior. Its judgment focused on its own competence and ultimately held that since no provision of the constitution confers upon it the power to review constitutional amendments, it had no jurisdiction to hear the case.¹⁷¹ The rule in France, then, seems to be that courts will not review the constitutionality of any amendment at all.

B. DEFERENCE TO POPULAR SOVEREIGNTY

Despite the formal entrenchment of an unamendable rule in the French Constitution, the Constitutional Council has elected to treat them as judicially unenforceable. The reason why appears to rest on the court's peculiar, though not improper, understanding of the relationship between popular sovereignty and constitutional change. To be specific, the court equates the constitutional amendment power to constituent power, and interprets constitutional amendments as direct expressions of popular sovereignty.

The 1962 decision on the constitutionality of the electoral reform referendum reveals that the court rejected the theory of delegation. According to the court, when the French people speak through a referendum they are exercising not a delegated, constituted power but rather a full proprietary constituent power of their own.¹⁷² The consequence of the court's approach is to equate constitution-making with constitutional amendment, the result being that there can be no limitations on what the people can do if they choose to do so in a referendum. The people could even elect in a referendum to amend or abolish one of the unamendable rules in the French Constitution. Under the Constitutional Council's understanding of the authority of the people, such an unfettered amendment power amounts to an exercise of original constituent power.

The Council regards the constituent power as sovereign, when referring to the people acting as the constitution-amender. For the court, since amendments

168. For a discussion of the context and substance of this constitutional reform, see Xavier Philippe, *France: The Amendment of the French Constitution "On the Decentralized Organization of the Republic,"* 2 INT'L J. CONST. L. 691 (2004).

169. CC, decision No. 2003-469DC, pt. II.2; see also Sophie Boyron, *France, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 115, 128 (Dawn Oliver & Carlo Fusaro eds., 2011).

170. CC, decision No. 2003-469DC, pt. III.1.

171. *Id.*

172. Conseil constitutionnel [CC] [Constitutional Council] decision No. 62-20DC, Nov. 6, 1962, Rec. 27, ¶ 5 (Fr.), translated in DORSEN ET AL., *supra* note 135, at 97.

emanate from the sovereign, they are final and unreviewable.¹⁷³ This attribution of sovereign authority to the constitutional amendment power echoes the theory of constituent power in Israel as resting in the Knesset, the national legislature. The Knesset is understood to possess “ongoing” constituent power,¹⁷⁴ always ready to be deployed to make or unmake constitution-level laws without needing to mobilize a separate body clothed in a higher authority. In France, what has occurred is a similar formalization of how to exercise constituent power, only the vehicle for its exercise is not the legislature as in Israel, but rather the people themselves speaking in the referendum.¹⁷⁵ De Gaulle’s legacy, then, is at least partly to sever the connection between popular sovereignty and the national legislature,¹⁷⁶ and to validate by practice that the people are simultaneously constitutional and constituent actors.

French theorist Jean-Jacques Rousseau once wrote that “a people is always free to change its laws, even the best of them; for if it chooses to do itself harm, who has the right to stop it?”¹⁷⁷ The jurisprudence of the Constitutional Council to date seems to accord with Rousseau: the people are sovereign and no entity but the people themselves may invalidate a constitutional change. Nonetheless, one could imagine that the Council could justify reviewing an amendment for its procedural correctness, just as the Council could also review the constitutionality of an amendment that violates one of the constitution’s temporal limitations—both are nonetheless consistent with its theory equating amending actors with constituent power.

V. THE NATURE AND LIMITS OF FORMALIST RESISTANCE

Georgia, Turkey, and France have so far resisted the growing trend toward adopting the doctrine of unconstitutional constitutional amendment. The foundations of their resistance differ, as do whether and how the resistance is legally required. Additionally, they differ as to how their resistance manifests itself in the course of adjudicating a challenge to the constitutionality of an amendment. In this Part, we briefly compare these three jurisdictional encounters with the idea of an unconstitutional amendment, and we explore their limitations.

173. Wanda Mastor & Liliane Icher, *Constitutional Amendment in France*, in *ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA* 115, 118 (Xenophon Contiades ed., 2013).

174. Claude Klein, *Basic Laws, Constituent Power and Judicial Review of Statutes in Israel*: Bank Hamizrahi United v. Kfar Chitufi Migdal and Others, 2 EUR. PUB. L. 225, 230–33 (1996).

175. Lucien Jaume, *Constituent Power in France: The Revolution and Its Consequences*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 67, 68 (Martin Loughlin & Neil Walker eds., 2007).

176. *Id.* at 79.

177. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 89 (Christopher Betts trans., Oxford World’s Classics ed., Oxford University Press 2009) (1762).

A. THE BOUNDARIES OF THE CONSTITUTION

Whether an amendment can be constitutional is inextricably linked to a question of enduring fascination and complexity: *what* is the constitution? In the United States, when the First Congress convened after the adoption of their Constitution, a powerful distinction was made between the Constitution and its amendments.¹⁷⁸ The American Constitution was seen as more authoritative than the amendments made to it. The Constitution was a specially-constituted agreement among federal and state actors whereas amendments, according to one important view at the time, were rooted in an inferior authority because they were primarily acts of the states.¹⁷⁹ It may well be worth contrasting the differential authority between the Constitution and its amendments, but the American experience suggests that amendments might sometimes stand on higher authority if the standard is the ratification threshold. Article VII states the rule for ratifying the Constitution: the approval of nine states out of thirteen was sufficient for the Constitution to take effect.¹⁸⁰ Yet the Article V threshold for ratifying a mere amendment was ten out of thirteen states.¹⁸¹

Whether a constitution and its amendments are taken to stand on equal footing controls the answer to the question whether an amendment can be unconstitutional. The justification for an unconstitutional amendment—and for a court’s power to invalidate it as a result—derives from the cardinal rule of the delegation theory of constitutional change: A constitution rests on authority superior to an amendment because only the constituent power can authorize the making of a constitution while changes to it are the province of a lesser constituted power. It therefore follows that an exercise of a constituted power to make a decision that is properly made only by the constituent power—in this context, to make a fundamental change to the constitution that exceeds the scope of an amendment—cannot survive a court’s review because it amounts to a corruption of the limited authority delegated to the constituted power.

Neither Georgia nor France sees any such boundary between constitution and amendment, though their operating theories are at some variance. For Georgia, there is no formal difference between its constitution and an amendment to it, whereas in France there is indeed a formal difference between them but no functional difference.

To understand why, we must return first to Georgia. The Constitutional Court has denied all bids to review the constitutionality of an amendment because, on its theory of constitutional change, once an amendment is properly enacted according to the procedural strictures in the codified constitution, that amendment becomes not a mere appendage to the constitution but rather it

178. See 1 ANNALS OF CONG. 734 (1789) (Joseph Gales ed., 1834).

179. *Id.* at 735.

180. U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

181. *Id.* art. V (requiring the agreement of three-quarters of the states to ratify an amendment proposal).

becomes *the* constitution, equal in form, status and authority to it. As a consequence, the Georgian Constitutional Court does not entertain the possibility of invalidating an amendment since that would be akin to invalidating the constitution itself, something which, for the court, is a logical incongruity and therefore theoretically and in reality out of bounds.¹⁸²

The French resistance to invalidating an amendment rests on a different theory but reaches the same result. For the Constitutional Council, an amendment properly made through a referendum is different in form from the constitution itself: the amendment is recognized as a modification to the constitution and it is understood to be a separate and distinguishable part of the constitution when and if it ultimately becomes valid. Yet when it is approved by the people in a referendum, the amendment attains an impregnable status that makes it impervious to invalidation by a court. The reason why returns us to the delegation theory of constitutional change. The amendment-by-referendum is treated as functionally indistinguishable from the constitution itself, both arising out of the same or similar source of popular authority and neither properly susceptible to reversal by any institution other than the people themselves in a subsequent referendum or in a future choice to write an altogether new constitution.

Even when an amendment in France is approved by the people's representatives in Parliament, it is insulated from substantive judicial review. The result in France of amendment-by-Parliament brings the country into formation with Georgia since in both countries amendments made by political actors—as opposed to those made directly by the people in a referendum—are unreviewable in court. In Georgia, it is because an amendment possesses the same status as the constitution, and in France it is because the Council has ruled that it has no jurisdiction to review the content of the parliamentary amendment.

The risks are clear in both the Georgian and French cases. It is possible in either instance to contemplate the possibility of an amendment denying or diminishing minoritarian civil and political rights, imposing archaic restrictions in the name of national security, marginalizing the forces of official opposition or consolidating power in the hands of the governing party or executive. Were either high court to remain consistent with their precedents, they would be constrained to accept as valid any of these amendments as long as their ratification complied with the procedures required by the constitution. No amendment is reversible, whether it is adopted by the people speaking directly through a referendum or the constituted organs of government.

In Turkey, the Constitutional Court has in turn both respected and breached the boundaries of the constitution. Recall that the constitution entrenches several items against formal amendment but importantly limits the court to reviewing

182. For a discussion of the different manifestations of unconstitutional constitutions, see Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 *CORNELL INT'L L.J.* 169 (2017).

amendments only as to their form. Rarely since 1961 has the court adhered to this limitation in its many iterations. The court has exceeded its authority to review amendments even where the defect in the amendment relates to substance and not to form. The court has tried to classify what it regards as substantive defects into formal ones but these have been transparent efforts to do circuitously what the constitution plainly does not allow directly. For the Turkish Constitutional Court then, the boundaries the constitution has set around its authority have not been effective to prevent the court from achieving its constitutional objectives on questions the court believes are of the highest importance, including most prominently the secular character of the state.

B. CODIFIED AND UNCODIFIED RULES OF EXCEPTION

Each of these three jurisdictions therefore reveals a different approach recognizing the valid exercise of constituent power. In Georgia, the amendment power is understood to function as the constitution-making power, fusing the constituted and constituent powers into the same body of amending actors. We can describe the self-understanding of Georgian constitutionalism as constitutionalizing the constituent power in its amendment rules. Where political actors deploy the amendment rules to make a change of any kind to the constitution, that change is taken to have been driven by a reactivation of the constituent power, whose choice of change, whatever it is, cannot be overruled by courts once it becomes final.

To the extent there is an exception to this rule in Georgia, it may implicitly be what is made explicit in Turkey. A constitutional amendment, in order to be valid, must comply strictly with the procedures outlined in the codified text. If the Georgian Constitutional Court is satisfied that the procedure for a constitutional amendment has fallen short of the expectation set by the constitution or is otherwise defective, the court may find it appropriate to take action to ensure that political actors conform with the constitution's own rules. The contrary choice—to allow departures from the constitution's formal amendment rules—would undermine the organizing logic of the Georgian Constitutional Court's ultra-formalist approach to constitutional change. But it is not difficult to imagine the court declaring that its hands are tied in the face of a procedurally defective amendment if the challenge to the amendment is registered only after the amendment is ratified, because it would have achieved constitution-level status and immunity from challenge. This is the great paradox, and problem, of the Georgian theory of amendment-as-constitution.

In France, the Constitutional Council has acquiesced to a significant measure of procedural irregularity and validated the outcome. It is important to stress that the court has not accepted all manner of procedural irregularity. The ones that have mattered for our purposes in this inquiry into formalist regimes are the changes that have been supported by popular consent in a referendum. Even where the amendment procedure has defied the codified rules of change,

the court has not challenged the procedure or its outcome if the vehicle has been popular choice in a referendum. Procedural correctness in relation to the codified text, then, is not a primary concern of the court. This is an important contrast between the French Constitutional Council and the Turkish Constitutional Court.

There is a further point worth making about France. Unlike what appears to be true of the Georgian Constitutional Court's interpretation of the Georgian Constitution, constituent power in France is not constitutionalized in codified text, but it has nonetheless been constitutionalized in practice. Political actors know in advance that a popular referendum can be deployed to make and remake the French Constitution in a fundamental way. There is no need to convene a special assembly for that purpose, nor must political actors innovate an altogether new procedure to create a new constitutional regime, though they may do so if they and the people wish. Instead, the roadmap to both minor and wholesale constitutional change is much more simple: the people may speak through a referendum to reflect the highest authority in the French constitutional order. In both Georgia and France, then, we know what is accepted in the self-understanding of each political community as a valid exercise of constituent power before a major change is attempted. In contrast, it is not unusual in other states to wait until after a major change is attempted or made to be in a position to evaluate whether, if it is successful, the change is an exercise of constituent power. Indeed, a judicial determination that a given constitutional change has not been validated by the constituent power is often the principal reason why courts invalidate constitutional amendments.

Turkey offers a twist: although the constitution is understood to be an expression of the constituent power's wish to restrain the court in its evaluation of amendments, the court has taken the view that its substantive review of amendments is a proper defense of the values identified as foundational by the constituent power. We therefore see in Turkey conflicting understandings of the role of the court. Where the Turkish Constitutional Court has exceeded its constitutional authorization to review amendments as to their form alone, one could reasonably claim that the court is violating the commands of the constituent power that authorized the constitution and that specifically restricted the role of the court in matters of constitutional change. On another view, however, one could make a contrary claim when faced with the same facts: that the court's departure from its narrow authorization in the constitution is an effort to defend the values, principles, and rules from attack by those who would undermine the constitution approved by the constituent power. Where one stands turns on how important one believes the codified constitutional text should be because it is unmistakably clear that the current Turkish Constitution intends to constrain the range of authority of the court in relation to constitutional amendments. Both the French and Georgian courts reject the historical Turkish approach—to exceed the constitution's mandate and to exercise substantive

review of amendments—but that approach is no longer dominant since the Turkish Constitutional Court has returned to reviewing the constitutionality of amendments as to their form alone. Codification has ascended again to importance in Turkey.

CONCLUSION—A NEEDED COUNTERWEIGHT IN CONSTITUTIONAL PRACTICE

We began this inquiry with a challenge: faced with what appears by its momentum and popularity to be an emerging trend to adopt the doctrine of unconstitutional constitutional amendment, we sought to bring to light alternatives that show other ways courts might respond to the question whether an amendment can be unconstitutional. We have highlighted three different alternatives—one each from Georgia, Turkey, and France—that together represent variations on the same theme. They are all examples of formalist resistance to unconstitutional constitutional amendments.

Each model has its own limitations. The Georgian model of ultra-formalist review of constitutional amendments strikes us as rigid and mechanistic, though some might regard it as thoughtless. We believe it is fairly described as reflecting a theory of amendment-as-constitution, the idea that the product of constitution-changing has the same constitution-level status as the product of constitution-making. The Turkish model of proceduralism seems promising as a way to cabin the power of courts to invalidate amendments but it is subject to manipulation, as history has shown time and again. The Turkish Constitutional Court's recurring strategy of integrating substantive review of amendments into its procedural review is, by all historical accounts, a distortion of what was intended by the design of the constitution's formal amendment rules. Yet if constitutional designers wish to restrict courts to only procedural review, the Turkish Constitution offers evidence of how the design can both function and malfunction. In France, there is a purity to the country's model of popular sovereignty insofar as the Constitutional Council will acquiesce to the people's expressions of self-determination through a referendum, even if the popular choice is inconsistent with the constitution's most fundamental commitments. This purity, of course, comes with serious consequences where the people's choice concerns minority rights.

The takeaway of our inquiry can be stated in one phrase: we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. The doctrine of unconstitutional constitutional amendment is not a necessary feature of modern constitutionalism, nor of modern liberal democratic constitutionalism, and it remains open to constitutional states to explore alternatives that cohere their own constitutional traditions. It is crucial in this age of the harmonizing tendencies of globalization to diversify the options available to constitutional actors so they may choose not the path of least resistance, but the path they believe is best suited to their state and its peoples.