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# Unconstitutional Constitutional Change by Courts

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## INTRODUCTION

I am delighted to be given the opportunity to offer some brief observations following the fascinating essay by Jon Marshfield on how state courts participate in informal constitutional change.<sup>1</sup> Using an original dataset, Marshfield successfully demonstrates that informal constitutional change through courts plays a very significant role in state constitutional change. More surprisingly, in contrast with dominant theories according to which there is “an inverse relationship between formal amendment frequency and rates of informal amendment,” Marshfield shows how “[v]arious states with high formal amendment rates also have some of the highest rates of informal amendment by courts. . . . [and] a few states with relatively low formal amendment rates have low informal amendment rates.”<sup>2</sup> Moreover, notwithstanding a very high rate of formal amendments, “informal amendment regarding individual rights was more prevalent than formal amendment.”<sup>3</sup> These are very important findings.<sup>4</sup>

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<sup>1</sup> See generally Jonathan L. Marshfield, *Court and Informal Constitutional Change in the States*, 51 NEW ENG. L. REV. 453 (2017).

<sup>2</sup> *Id.* at 488–89 (“[I]nformal amendment by courts may in fact be catalyzed by higher formal amendment rates.”).

<sup>3</sup> *Id.* at 487.

<sup>4</sup> It seems to me that there is one important data missing: how many times courts have issued calls to the legislature to amend the constitution (often termed judicial advice, judicial hints, or judicial alarms) and the correlated responses by the legislative bodies. If there were such calls, and these were ignored, this might assist in understanding the trend by which courts informally change the constitution without even mentioning the possibility of formal

At the outset, I must emphasize that Marshfield's study is a long and rich piece raising many enquiries. Since it focuses on the significant role of courts in informal constitutional changes in the states, this brief Note concentrates on one aspect, which is the scope of the court's competence, i.e. legal power, to bring about a constitutional change. Unavoidably, this Note is not even attempting to provide a complete analysis of my thoughts on the subject matter. Yet, I hope that even this abbreviated Note will stimulate further important discussion on informal constitutional change by courts.

### I. Returning to Basics: Courts and Constitutional Change

Constitutions change with time and such change can take place in various ways.<sup>5</sup> Outside of constitutional law, it can occur in the social sphere, for instance, "by gradually shifting the rank and importance of constitutional factors . . . and norms."<sup>6</sup> Within constitutional law, the text of a constitution can be formally modified according to an amendment procedure stipulated within it.<sup>7</sup> While formal constitutional amendments are an essential means of constitutional change,<sup>8</sup> constitutional changes, even important ones, may also come without alterations to the constitutional text, for instance, through judicial interpretation or practice.<sup>9</sup> When the enforce-

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amendments. On such judicial calls to change the law, *see generally, e.g.*, Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on R. v. Schachter*, 36 MCGILL L.J. 1 (1991); Ronald J. Krotoszynski, *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 109 (1998).

<sup>5</sup> *See generally* HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro eds., 2011); ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA (Xenophon Contiades ed., 2013).

<sup>6</sup> Rudolf Smend, *Constitution and Constitutional Law*, in WEIMAR: A JURISPRUDENCE OF CRISIS 213, 248 (Arthur J. Jacobson & Bernhard Schlink eds., 2002). For Georg Jellinek, the issue of constitutional transformation which occurs outside of the constitutional text is far more interesting than that of constitutional amendments. *See* Georg Jellinek, *Constitutional Amendment and Constitutional Transformation*, in WEIMAR: A JURISPRUDENCE OF CRISIS 54 (Arthur J. Jacobson & Bernhard Schlink eds., 2002).

<sup>7</sup> Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 930 (2014).

<sup>8</sup> Adrian Vermeule, *Constitutional Amendments and the Constitutional Common Law*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 229 (Richard W. Bauman & Tsvi Kahana eds., 2006); Heinz Klug, *Constitutional Amendments*, 11 ANN. REV. L. & SOC. SCI. 95, 96 (2015).

<sup>9</sup> *See, e.g.*, Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934); Jerre S. Williams, *Stability and Change in Constitutional Law*, 17 VAND. L. REV. 221, 237 (1963–64); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1494 (2000–2001); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 419 (2000); Richard

able meaning of the constitution changes outside of the amendment process, this is an informal constitutional change,<sup>10</sup> or as Marshfield defined it, “an informal amendment.”<sup>11</sup>

Indeed, some scholars in the U.S. have claimed that certain judicial interpretations of the U.S. Constitution are better viewed as constitutional amendments.<sup>12</sup> It is certainly true that a judicial decision—for example in the form of an interpretive modification of the constitutional text—may often carry a greater effect on the constitutional system than a formal constitutional amendment.<sup>13</sup> An oft-cited example of an informal amendment to the U.S. Constitution brought about by a court’s decision is the famous *Marbury v. Madison*.<sup>14</sup> Another prime example is the Israeli *United Mizrahi Bank Case* of 1995,<sup>15</sup> a judicial decision of monumental significance, in which the Israeli Supreme Court ruled that the two basic laws on human rights<sup>16</sup> carry a supreme constitutional status; that the Knesset has only limited legislative powers; and, comparable to the “Marbury” model, that the Court possesses the authority to conduct judicial review of legislation and invalidate laws that contradict the substantive provisions established in the basic laws.<sup>17</sup> Additionally, in a series of judicial decisions which have followed the *United Mizrahi Bank* case, the Israeli High Court of Justice has inferred from “human dignity” other fundamental rights which were not

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Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1060–79 (2014).

<sup>10</sup> Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 287, 288–89 (2015).

<sup>11</sup> Marshfield, *supra* note 1, at 465–66.

<sup>12</sup> See generally Frederic R. Coudert, *Judicial Constitutional Amendment*, 13 YALE L.J. 331 (1904); Sanford Levinson, *How Many Times Has the United States Constitution Been Amended?* (A) <26; (B) 26; (C) 27; (D) >27: *Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 13, 33 (Sanford Levinson ed., 1995).

<sup>13</sup> Dieter Grimm, *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics*, 4 NUJS L. REV. 15, 27 (2011).

<sup>14</sup> 5 U.S. 137 (1803); see Marshfield, *supra* note 1, at 484; James A. Gardner, *Practice-Driven Changes to Constitutional Structures of Governance*, 69 ARK. L. REV. 333, 346 (2016).

<sup>15</sup> CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, P.D. 49(4) 221; see Suzie Navot, *Mizrahi Bank Case (Isr)*, OXFORD CONSTITUTIONAL LAW: MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW, <https://perma.cc/8VD8-TV8N> (last visited Oct. 7, 2018).

<sup>16</sup> See David Kretzmer, *The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law*, 26 ISR. L. REV. 238, 241 (1992).

<sup>17</sup> See Yoram Rabin & Arnon Gutfeld, *Marbury v. Madison and Its Impact on the Israeli Constitutional Law*, 15 U. MIAMI INT’L & COMP. L. REV. 303, 317 (2007); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 311 (1994).

explicitly included in the two basic laws on human rights, such as the right to equality and freedom of expression.<sup>18</sup> Accordingly, any new legislation from the Knesset that would violate equality would have to meet the terms set forth in the Basic Law: Human Dignity and Freedom. Suzie Navot correctly claims that “this dramatic development is surely a revolution in itself.”<sup>19</sup> This series of judicial decisions since the mid-1990s produced a fundamental constitution, transforming Israel from a “parliamentary sovereignty” system to a “constitutional democracy” without formal constitutional amendment.<sup>20</sup>

Courts thus take a key role in national constitutional change processes and, as Marshfield demonstrates, also in subnational informal constitutional change notwithstanding flexible constitutions with a high rate of formal constitutional amendments.<sup>21</sup>

## II. Limitations on Constitutional Change, or The Theory of Constitutional Unamendability

Today, the modern constitutional design of amendment formulas often includes escalating structures of difficulty or a tiered constitutional design that reflects a hierarchy of constitutional values.<sup>22</sup> Amendment formulas may also include a combination of quorum requirements, special or supermajorities, electoral preconditions, temporal limitations, emergency/regency periods prohibiting amendments, and mechanisms intended to include popular participation such as referenda or constituent assemblies.<sup>23</sup> Another notable feature in formal amendment formulas is the absolute entrenchment of certain constitutional provisions or principles as unamendable.<sup>24</sup>

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<sup>18</sup> See H CJ 6427/02 Movement for Government Quality in Israel v. The Knesset, ver 61(1), 619 (regarding equality). See generally H CJ 10203/03 The National Census Ltd. v. Attorney General (not published) (regarding political expression).

<sup>19</sup> SUZIE NAVOT, THE CONSTITUTION OF ISRAEL: A CONTEXTUAL ANALYSIS 235, 235 (2014).

<sup>20</sup> See YANIV ROZNAI & GARY JACOBSON, *A Constitutional Revolution by Court*, in JUDICIAL REVIEW: PROCESS, POWER, AND PROBLEMS: Festschrift in Honour of Upendra Baxi (Salman Khurshid et al., eds., forthcoming 2019).

<sup>21</sup> See generally Marshfield, *supra* note 1.

<sup>22</sup> Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L. J. 225, 244–57 (2013); Rosalind Dixon & David Landau, *Tiered Constitutional Design*, 86 GEO. WASH. L. REV. 438, 441 (2017).

<sup>23</sup> Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 948–56 (2014). On the inclusion of the people in formal constitutional change see PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION (Xenophon Contiades & Alkmene Fotiadou eds., 2017).

<sup>24</sup> YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 20–21 (2017).

An unamendable provision is “impervious to the constitutional amendment procedures enshrined within a constitutional text and immune to constitutional change even by the most compelling legislative and popular majorities.”<sup>25</sup> For example, according to Article 79(3) of the German Basic Law, amendments affecting human dignity and the democratic and federal features of the constitutional order are inadmissible.<sup>26</sup> The French Constitution of 1958 stipulates in Article 89 that “[t]he republican form of government shall not be the object of any amendment,”<sup>27</sup> and according to the Constitution of Norway of 1814, amendments “must never . . . contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution.”<sup>28</sup> From the protection of the essential requirement for a democratic state governed by the rule of law, as in the 1992 Czech Republic Constitution,<sup>29</sup> to states that declare the state religion unamendable in their constitutions,<sup>30</sup> the principles of secularism<sup>31</sup> and even territorial integrity recur in constitutional limitations.<sup>32</sup> Such explicit unamendability, which is intended to express and protect deeply held values,<sup>33</sup> has now become a standard constitutional design strategy.<sup>34</sup>

<sup>25</sup> Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 666 (2010).

<sup>26</sup> Art. 79 S. 3 GG. See generally Helmut Goerlich, *Concept of Special Protection for Certain Elements and Principles of the Constitution Against Amendments and Article 79(3), Basic Law of Germany*, 1 NUJS L. REV. 397 (2008); Ulrich K. Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44(3) ISR. L. REV. 429 (2011).

<sup>27</sup> Const., Art. 89. See generally Denis Baranger, *The Language of Eternity: Constitutional Review of the Amending Power in France (Or the Absence Thereof)*, 44 ISR. L. REV. 389 (2011).

<sup>28</sup> Grl Art. 112. See generally Eivind Smith, *Old and Protected? On the “Supra-Constitutional” Clause in the Constitution of Norway*, 44 ISR. L. REV. 369 (2011).

<sup>29</sup> Čl 9.2 Ústavy CR. See generally Ondřej Preuss, *The Eternity Clause as a Smart Instrument: Lessons from the Czech Case Law*, 57 HUN. J. LEG. STUD. 289 (2016); 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 (2014).

<sup>30</sup> RICHARD ALBERT & YANIV ROZNAI, *Religion, Secularism and Limitations on Constitutional Amendment*, in RESEARCH HANDBOOK ON LAW AND RELIGION 154, 154–77 (Rex Ahdar ed., 2018).

<sup>31</sup> See generally Yaniv Roznai, *Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions*, 2017 MICH. ST. L. REV. 253 (2017).

<sup>32</sup> See generally Yaniv Roznai & Silvia Suteu, *The Eternal Territory? The Crimean Crisis and Ukraine’s Territorial Integrity as an Unamendable Constitutional Principle*, 16 GER. L. J. 542 (2015).

<sup>33</sup> Albert, *supra* note 22.

<sup>34</sup> Whereas between 1789 and 1944, about seventeen percent of world constitutions enacted in this period included unamendable provisions, between 1945 and 1988, twenty-seven percent of world constitutions enacted in those years included such provisions; and out of the constitutions which were enacted between 1989 and 2013, more than half (fifty-three percent) included unamendable provisions. See ROZNAI, *supra* note 24, at 20–21.

The fact that a constitution does not include explicit unamendability does not necessarily mean that the constitutional amendment power is absolute and that all the parts of the constitution are amendable. Constitutional courts around the world have recognized a core of basic constitutional principles which should be regarded as implicitly unamendable. Perhaps the most famous example is the Indian one, where in *Kesavananda Bharati v. State of Kerala* case of 1973, the Indian Supreme Court held that, “the power to amend the constitution does not include the power to alter the basic structure, or framework of the constitution so as to change its identity,”<sup>35</sup> creating what has come to be known as the “basic structure doctrine.”<sup>36</sup> This basic structure doctrine migrated into neighboring and other states, and was accepted in courts in Bangladesh, Pakistan, South-Africa, Kenya, Taiwan, Colombia, Peru, and Belize. In all these countries, courts declared that some basic features or principles of the constitution are beyond the constitutional amendment power even without any explicit limitations.<sup>37</sup>

Explicit and implicit limitations on constitutional amendments are very often more than mere declaration. They are very often enforced by courts which conduct judicial review of constitutional amendments. Not only do courts often review constitutional amendments, but they also often declare amendments unconstitutional.<sup>38</sup>

The basic theory behind constitutional unamendability is rooted in the distinction between the people’s primary constituent power, which is the absolute power to establish a new legal order, and secondary constituent power, or amendment power, which is a delegated power that acts within the constitutional framework and is limited under the terms of its man-

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<sup>35</sup> *Kesavananda Bharati v. State of Kerala*, 1973 (4) S.C.C. 225.

<sup>36</sup> Much has been written about this doctrine. See, e.g., SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2010).

<sup>37</sup> ROZNAI, *supra* note 24, at ch. 2. See Yaniv Roznai, *The Migration of the Indian Basic Structure Doctrine*, in *JUDICIAL ACTIVISM IN INDIA: A Festschrift in Honour of Justice V. R. Krishna Iyer* 240 (Malik Lokendra ed., 2012).

<sup>38</sup> See generally Rory O’Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4 J. C. L. 48 (1999); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011); Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, 19 CONSTELLATIONS 182 (2012); Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013); Gábor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective*, 50 WAKE FOREST L. REV. 951 (2015).

date.<sup>39</sup> Accordingly, the amendment power must obey those explicit unamendable provisions stipulated in the constitution. In other words, unamendable provisions create a normative hierarchy between constitutional norms. Moreover, the constitutional amendment power cannot be used in order to destroy the constitution from which its authority derives. The amendment process is the internal method that the constitution provides for its self-preservation, by destroying the Constitution, the amending power undermines its own *raison d'être*. Similarly, as every constitution consists of a set of basic principles that structure the “spirit of the constitution” and its identity, the alteration of the constitution’s core results in the collapse of the entire constitution and its replacement by another. Consequently, the amendment power cannot be used in order to destroy the basic principles of the constitution.<sup>40</sup>

Constitutional amendment is not constitutional replacement. Replacing the constitution with a new one is the role of the people who retain the primary constituent power; and through its exercise they may shape and reshape the political order and its fundamental principles. The theory of unamendability thus restricts the amending authorities from amending certain constitutional fundamentals. Unamendability does not block all the democratic avenues for constitutional change, but rather merely proclaims that one such avenue, namely the amendment process, is unavailable. It makes sure that certain constitutional changes take place through particular channel of higher-level democratic deliberations, popular-democratic, or consensual rooting. Understood in this way, the theory of unamendability can be seen as a safeguard of the people’s primary constituent power.<sup>41</sup>

To summarize this section, in modern constitutions formal constitutional change is not absolute. Limitations are imposed upon constitutional amendment powers to prevent replacement. Through the amendment procedure, certain basic constitutional principles are considered so sacred to the constitutional order that amending them is tantamount to destroying

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<sup>39</sup> Yaniv Roznai, *Towards A Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers*, 18 *JUS POLITICUM: REVUE DE DROIT POLITIQUE* 5, 5–37 (2017).

<sup>40</sup> Roznai, *supra* note 39; ROZNAI, *supra* note 24, at ch. 4–5; see also CARL SCHMITT, *CONSTITUTIONAL THEORY* 150 (Jeffrey Seitzer trans. ed., 2008) (noting formal constitutional amendment can change the text “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved”).

<sup>41</sup> See Yaniv Roznai, *Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability*, in *AN UNCONSTITUTIONAL CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES* 29–61 (Richard Albert & Bertil Emrah Oder eds., 2018); see also Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, in *DEMOKRATIE-PERSPEKTIVEN: FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 47. 58–62, 70* (Geburtstag Astrid Wallrabenstein et al., eds., 2013).

the constitution and replacing it with a new one. Before turning to the main issue, which is whether such limitations also apply to informal amendments by courts, I first examine the applicability of constitutional unamendability in state constitutions.

### III. Constitutional Unamendability in State Constitutions

Richard Albert recently claimed that while many democratic states absolutely entrench certain constitutional provisions against amendments, the U.S. federal Constitution does not include formal unamendability, which makes it exceptional compared to other states.<sup>42</sup> Notwithstanding this lack of explicit unamendability, Albert raised the question whether the U.S. Constitution has an implicit “unamendable core,” suggesting that in order for the U.S. Constitution to remain internally coherent, the First Amendment’s protections of democratic expression are to be regarded as implicitly unamendable.<sup>43</sup> Indeed, large debates have historically taken place on whether the U.S. Constitution has certain unamendable features.<sup>44</sup> Aside from this important debate on the federal level, is the notion of constitutional unamendability applicable to state constitutions in the U.S.?

On the one hand, Marshfield correctly claimed, state constitutions are important because they “create, guide, and limit the institutions and officials” of the states’ governments.<sup>45</sup> On the other hand, there are important theoretical distinctions between federal and state constitutions. Most observably, a state constitution is, by definition, legally subordinate to the federal constitution,<sup>46</sup> which, for the question of constitutional unamendability, means that there is another kind of supra-constitutional form of limitation above the state’s constitution.<sup>47</sup>

There are other notable distinctions between the federal and state constitutions in the American context. For one, in contrast with the U.S. Constitution, state constitutions contain relatively detailed and lengthy provi-

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<sup>42</sup> Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 *ARK. L. REV.* 217, 231 (2016).

<sup>43</sup> Richard Albert, *The Unamendable Core of the United States Constitution*, in *COMPARATIVE PERSPECTIVES ON FREEDOM OF EXPRESSION* 13, 24–31 (András Koltay ed., 2015).

<sup>44</sup> See ROZNAI, *supra* note 24, at 39.

<sup>45</sup> Marshfield, *supra* note 1, at 455.

<sup>46</sup> See generally Cheryl Saunders, *The Constitutional Credentials of State Constitution*, 42 *RUTGERS L. J.* 853 (2010–11); Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 *STAN. L. REV.* 1583 (2010). On the complicated conception of national and subnational entities in the constitutions of the revolutionary era, see generally Mark A. Graber, *State Constitutions as National Constitutions*, 69 *ARK. L. REV.* 371 (2016).

<sup>47</sup> By ‘Supra-Constitutional’, I refer to something that is external to and above the constitution. See, e.g., Yaniv Roznai, *The Theory and Practice of ‘Supra-Constitutional’ Limits on Constitutional Amendments*, 62 *INT’L & COMP. L.Q.* 557, 558 (2013).



sions.<sup>48</sup> The greater detail and length of state constitutions is connected to another distinctive flexible character of state constitutions. In contrast to the onerous federal amendment procedure in Article V, state constitutions are traditionally considerably easier to amend or revise and are frequently amended.<sup>49</sup> They are also characterized by direct democracy and majoritarian voting rules.<sup>50</sup> As flexible constitutions place “fundamental principles and institutions at risk of being swept away by majorities momentarily fascinated with a new idea, and—together with short-term political interests and the danger of qualified majorities—give rise to fears of misuse of the amendment power,”<sup>51</sup> this distinction carries a great importance to the question of unamendability.<sup>52</sup> As Lawrence Friedman, who recently explored the question of an unamendable constitutional core in the state constitutions correctly observes:

If nothing else, the U.S. Constitution’s rigidity suggests that the procedural hurdles that attend its amendment play some role in preventing the ratification of amendments that would abridge many of the values contained in the document that could rival democratic expressive interests for a place of prominence. . . . An extended deliberative opportunity will likely slow progress and temper passions, reducing, if not eliminating, the possibility that an amendment proposing to alter or diminish some important constitutional interest—say, due process—would at day’s end be approved. But amendment procedures vary greatly as between the federal and state constitutions, and amendment can be ac-

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<sup>48</sup> See, e.g., Michael G. Colantuono, *Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1510 (1987).

<sup>49</sup> Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 277 (1994); see also Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1668 (2014) (“A polity that includes elaborate and detailed policies in its constitution will continue to tinker with the document in a process of trial and error and in response to changing economic and social conditions. According to our own data, the length of constitutions is positively correlated with their rate of revision, both at the state and national levels.”).

<sup>50</sup> Jurgen Goossens, *Direct Democracy and Constitutional Change in the US: Institutional Learning from State Laboratories*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 343, 362–65 (Richard Albert et al., eds., 2017). For an argument how direct democracy in the states can influence national constitutional change on important issues see Vikram David Amar, *Constitutional Change and Direct Democracy: Modern Challenges and Exciting Opportunities*, 69 ARK. L. REV. 253, 261–262 (2016).

<sup>51</sup> ROZNAL, *supra* note 24, at 5.

<sup>52</sup> See generally Yaniv Roznai, *Constituent Powers, Amendment Powers and Popular Sovereignty: Linking Unamendability and Amendment Procedures*, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 23 (Richard Albert et al., eds., 2017).

completed more readily in the state constitutional context.<sup>53</sup>

Friedman concludes that implicit unamendability may work differently in the federal or state level, yet ultimately even in the states an implicit unamendable core may express “what is most valued in the constitutional cultures of the individual states.”<sup>54</sup>

Constitutional unamendability is not a new feature of constitutional design in U.S. constitutions. Historically, state constitutions included also explicit protection of certain principles, rules and institutions from amendments. Perhaps the most famous example is “the Fundamental Constitutions” of the colony of Carolina, written in 1669 by John Locke, who provided that “every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina forever.”<sup>55</sup> Later state constitutions allowed for amendments, yet made certain provisions unamendable. For example, the Delaware Constitution of 1776 prohibited amendments to the declaration of rights, the bicameral legislature, the legislature’s power over its own officers and members, the ban on slave importation, and the establishment of any one religious sect.<sup>56</sup> The Georgia Constitution stated that, “[i]t shall be an unalterable rule that the house of assembly shall expire and be at an end, yearly and every year, on the day preceding the day of election mentioned in the foregoing rule.”<sup>57</sup> Current state constitutions also include formal explicit unamendability.<sup>58</sup> The Alabama Constitution, for example, states that “representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments,”<sup>59</sup> and also that “everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.”<sup>60</sup> Interestingly, in an advisory

<sup>53</sup> Lawrence Friedman, *The Potentially Unamendable State Constitutional Core*, 69 ARK. L. REV. 317, 326–27 (2016).

<sup>54</sup> *Id.* at 334.

<sup>55</sup> JOHN LOCKE, THE WORKS OF JOHN LOCKE 198 (1823).

<sup>56</sup> See DEL. CONST. art. XXX.

<sup>57</sup> GA. CONST. art III; see also Albert, *supra* note 42, at 241 n. 132.

<sup>58</sup> Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 268 (2016); see also Albert, *supra* note 42, at 240–41 nn. 125, 129 (citing the following examples: ARK. CONST. art. II, § 3 (“[T]he equality of all persons before the law is recognized, and shall ever remain inviolate . . . .”); FLA. CONST. art. I, § 22 (“The right to trial by jury shall be secure to all and remain inviolate.”); KAN. CONST. BILL OF RIGHTS, § 11 (“The liberty of the press shall be inviolate . . . .”); N.C. CONST. art. 1, § 6 (“The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); and N.M. CONST. art. II, § 5 (“The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate.”)).

<sup>59</sup> ALA. CONST. art. XVIII, § 284; see also Albert, *supra* note 42, at 241.

<sup>60</sup> ALA. CONST. art. I, § 36; see also Albert, *supra* note 42, at 241.

opinion, the Alabama Supreme Court held that these articles were nonetheless amendable on the grounds of popular sovereignty. The people, the Court held in its opinion, “can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they ‘shall forever remain inviolate.’”<sup>61</sup> It therefore seems that both implicit and explicit unamendability are applicable to state constitutional law. This is what Albert terms “first-order formal unamendability.”<sup>62</sup>

U.S. state constitutions also include a “second-order formal unamendability,” which refers to the distinction between the procedures for constitutional amendment and for revision. Revision usually requires a more onerous process of a constituent assembly or a constitutional convention with far-reaching popular participation than amendment.<sup>63</sup> Nearly half of American state constitutions formally entrench this distinction.<sup>64</sup> In the American state tradition, amendment and revision are understood as substitute devices of constitutional change,<sup>65</sup> the former authorizing fractional change, for instance, to one provision or a set of related provisions, and the latter allowing comprehensive modifications to more than one provision or subjects, or even the adoption of a whole new constitution.<sup>66</sup>

By entrenching different procedures for amendment and revision, these constitutions, Albert notes, make explicit a conceptual distinction between amendment and revision.<sup>67</sup> While it is not always conceptually clear how to distinguish between the two,<sup>68</sup> in general an “amendment” is a constitutional change “within the lines of the original instrument,” while “a revision” is “a far reaching change in the nature and operation of our gov-

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<sup>61</sup> Opinion of the Justices, 81 So. 2d 881, 883, 885 (Ala. 1955); see Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 58, 602–06 (1997).

<sup>62</sup> Albert, *supra* note 42, at 231.

<sup>63</sup> Albert, *supra* note 42, at 231. See generally Russell Patrick Plato, *Selective Entrenchment against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, 82 N.Y.U. L. REV. 1470 (2007).

<sup>64</sup> Albert, *supra* note 42, at 231; see also Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 178 (G. Alan Tarr & Robert F. Williams eds., 2006).

<sup>65</sup> G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 38 (2000).

<sup>66</sup> WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 118 (1910).

<sup>67</sup> Richard Albert, *Amendment and Revision in the Unmaking of Constitutions*, in EDWARD ELGAR HANDBOOK ON COMPARATIVE CONSTITUTION-MAKING 2 (David Landau & Hanna Lerner eds., forthcoming 2017).

<sup>68</sup> Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 356 (1994).

ernmental structure.”<sup>69</sup> In other words, an amendment is consistent with the constitution while a revision is inconsistent with the fundamental pre-suppositions of the constitution. It substantively alters the basic constitutional framework.<sup>70</sup> Thus, second-order of formal unamendability results in jurisprudence that ranks constitutional priorities by determining which provisions or principles affect the constitution’s core (thereby require revision for their change), and which are marginal (thereby modifiable through ordinary amendments).<sup>71</sup>

This formal procedural distinction between amendment and revision provides a ground for judicial intervention when an ordinary constitutional amendment affects certain fundamental provisions or a principle, which require a special revision procedure for their modification.<sup>72</sup> Of course, when distinct procedures exist for amendment and revision, it is for the courts to theorize what actually comprises an amendment or revision. At the review stage, courts then must examine the content of the constitutional amendment in question to determine whether it alters certain fundamental principles that require a revision process for their change.<sup>73</sup> Manoj Mate claimed that the abovementioned Indian “basic structure doctrine” of implicit limitation on constitutional amendment powers may provide a strong and comprehensive framework for evaluating whether certain constitutional change constitutes an amendment or revision in the framework of U.S. state constitutions.<sup>74</sup> Moreover, according to Mate, U.S. state supreme

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<sup>69</sup> Albert, *supra* note 67, at 13 (citing the Supreme Court of California in *Livermore v. Waite*, 102 Cal. 113, 118–19 (Cal. 1894) and *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P. 2d 1281, 1286 (Cal. 1978)).

<sup>70</sup> Albert, *supra* note 42, at 238.

<sup>71</sup> Marshfield, *supra* note 58; see also Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1521–24 (2009).

<sup>72</sup> ROZNAI, *supra* note 24, at 212; see e.g. *Raven v. Deukmejian*, 801 P. 2d 1077 (Cal. 1990) (where the Supreme Court of California prohibited an amendment from appearing on the ballot for a referendum on the grounds that it was much more fundamentally transformative than an amendment, such that it amounted to a revision, which requires a different procedure); see also Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL’Y SYMP. 27, 30 (1996); Tarr, *supra* note 65, at 27–28.

<sup>73</sup> This, I argued elsewhere, is a substantive judicial review of constitutional amendments dressed as a formal or procedural review. ROZNAI, *supra* note 24, at 213. *But see* David Landau, *Selective Entrenchment in State Constitutional Law: Lessons from Comparative Experience*, 69 ARK. L. REV. 425, 442 (2016) (“In form, this kind of review appears to be something of a hybrid between the policing of tiers of change and the unconstitutional constitutional amendment doctrine . . . . Moreover, the amendment/revision distinction is generally not clearly defined in the constitution, and thus requires the courts to develop a standard to enforce the distinction.”).

<sup>74</sup> See generally Manoj Mate, *State Constitutions and The Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441 (2014).

courts should play a key role in preserving the “constitutional identity” of state constitutions by determining which constitutional provisions cannot be altered through the initiative process.<sup>75</sup>

To conclude, constitutional unamendability is applicable and indeed applies in U.S. state constitutions. This means that certain constitutional subjects, principles, rules, and institutions are beyond the ordinary amendment power. They are either completely unamendable, thus requiring the re-emergence of the primary constituent power for their change, or entrenched in a manner that requires a more special procedure of revision for their amendment. This premise is crucial for advancing the following argument which is that state courts are also limited in their scope of bringing informal constitutional amendments through judicial interpretation.

#### IV. Courts and Unconstitutional Informal Constitutional Change

Constitutional unamendability has, *prima facie*, a strong link to the interaction between formal and informal methods of constitutional change. Marshfield correctly observes that the dominant theories regarding the interaction between formal and informal constitutional change suggest that informal change is a byproduct or a consequence of high barriers to formal amendments.<sup>76</sup> Accordingly, one would suggest that when one route of constitutional change—mainly formal constitutional amendment process—is inapplicable due to unamendability, another route—mainly judicial interpretation—would be the avenue for the sought constitutional change. In other words, if constitutional unamendability blocked certain formal changes to the constitution, judicial constitutional change would function as the “safely valve” for making constitutional adaptations without the need to recourse to extra-constitutional or even revolutionary means. As I wrote elsewhere with regard to courts’ capability to interpret unamendable principles:

The elasticity and the semantic openness of these terms allow their content to evolve as changes occur in a social context and can create a dialogue regarding their meaning. This ability may relax the risk of constitutional stagnation posed by unamendability. For example, what republicanism meant in France in 1848 is infinitely different than what it means nowadays and the Norwegian Constitution’s spirit and principles are not necessarily those of 1814, but of the present time. The ability of courts to interpret

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<sup>75</sup> *Id.* at 497 (“[S]tate supreme courts[] should consider and apply insights from the Indian basic structure doctrine in the review of constitutional amendments. More broadly, state Supreme Courts should protect the identity and uniqueness of state constitutions vis-à-vis the federal constitution to preserve a republican system of government and protect against the tyranny of the majority at the state level.”).

<sup>76</sup> Marshfield, *supra* note 1, at 469–70.

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and reinterpret unamendable provisions manages simultaneously to preserve the core elements of the protected principles while allowing a certain degree of change and, in so doing, eases rigidity with the changing needs of society.<sup>77</sup>

This, I argued, is mostly conceivable with vague unamendability of general principles that allow flexibility.<sup>78</sup> This argument corresponds with Maichel Besso's claim that informal constitutional change is most politically plausible when the relevant constitutional rules derived from vague and general provisions.<sup>79</sup>

Of course, one of Marshfield's important insights is that the interaction between formal and informal change in state constitutions is much more complex, as even when state constitutions are frequently amended, courts informally change the constitution through interpretation.<sup>80</sup>

I want to look at the other side of coin—not that of the “frequently amended” but that of constitutional unamendability. And the point of my coda is the following: the constitutional designation of certain rules or principles as unamendable (first order formal unamendability) or even as subject to a more robust procedure of “revision” rather than “amendment” (second-order formal unamendability) raises the question whether courts are allowed to informally amend these basic principles or provisions in a radical manner so as to substantially replace the constitution with a new one.

Bruce Ackerman claimed that informal constitutional change is “marked by a decisive set of transformative judicial opinions that self-consciously repudiate preexisting doctrinal premises and announce new principles that redefine the American people's constitutional identity.”<sup>81</sup> And this is the crucial point. A nation's constitutional identity is defined by the intermingling of universal values with the nation's particularistic history, customs, values, and aspirations.<sup>82</sup> For the sake of the argument, let us assume that this applies *mutatis mutandis* to state constitutional identity. Importantly, constitutional identity is never a static thing but emerges from the interplay of inevitably disharmonic elements.<sup>83</sup> It can always be rein-

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<sup>77</sup> ROZNAL, *supra* note 24, at 216.

<sup>78</sup> ROZNAL, *supra* note 24, at 216.

<sup>79</sup> Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 82 (2005) (“The lack of further explicit elaboration of this constitutional language in effect permitted the political (re)construction of its meaning.”).

<sup>80</sup> See generally Marshfield, *supra* note 1.

<sup>81</sup> Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1173 (1988).

<sup>82</sup> See Gary Jeffrey Jacobsohn, *Constitutional Identity*, 68 REV. POL. 361, 363 (2006).

<sup>83</sup> See Gary Jeffrey Jacobsohn, *The Disharmonic Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 47 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

terpreted and reconstructed.<sup>84</sup> A constitutional identity is changeable, but is “resistant to its own destruction.”<sup>85</sup> Aiming at preventing certain changes, unamendability can be regarded as a design strategy to maintain a constitutional identity.<sup>86</sup> It reflects a nation’s will to remain faithful to a ‘basic structure’ that coheres with and gives formal shape to its constitutional identity.<sup>87</sup> Unamendability defines the identity of “we the people.”<sup>88</sup>

Now, according to the theory of unamendability, certain constitutional amendments might be unconstitutional because they attempt to do more than merely amend the constitution; they attempt to change the constitutional identity so as to replace the constitution with a new one. Since such an act is reserved to the people in their primary constituent power capacity of the more superior revision authority, not to the more limited amendment authority, such an act is *ultra vires*.

However, constitutions change not only through formal amendments, but also, and in the majority of cases, through informal amendments brought about by judicial interpretation. Courts are constituted authorities. They are created by the constitution and are inferior to the primary constituent power. As constituted organs they are limited in their scope of action. Like other governmental bodies, courts must act within constitutional limits imposed upon them. According to the theory of unamendability, the amendment power, which is a *sui generis* power, must remain within the constitutional limits provided by the primary constituent power. If the amendment power, which has the ability to change other constituted organs such as the judiciary, legislature, and government, is limited in its scope so as to not destroy the constitutional core and replace the constitution with a new one, all the more so the court, which is an ordinary constituted organ, is bound by similar limitations.<sup>89</sup>

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<sup>84</sup> See generally Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049 (1994–1995).

<sup>85</sup> Jacobsohn, *supra* note 82, at 363. See generally GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY (2010).

<sup>86</sup> See generally Yaniv Roznai, *Unamendability and The Genetic Code of The Constitution*, 27 EUR. REV. PUB. L. 775, 775–825 (2015).

<sup>87</sup> CARLO FUSARO AND DAWN OLIVER, *Towards a Theory of Constitutional Change*, in HOW CONSTITUTIONS CHANGE—A COMPARATIVE STUDY 428 (Dawn Oliver & Carlo Fusaro eds., 2011) (“Every constitutional arrangement is based upon a set of core principles which cannot be changed and which can be regarded as intrinsic to its specific identity. . . . These superconstitutional provisions could be referred to as the genetic code of the constitutional arrangements.”).

<sup>88</sup> Preuss, *supra* note 26, at 445.

<sup>89</sup> Cf., 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, 198 (2012).

Contemplating on the limits judicial activism, Radim Dragomaca rightly asked the following question:

If the Constitution establishes some part of itself as being unchangeable, and this provision can be said to be addressed to both the legislature and the courts . . . does it also limit the power of the courts to change the meaning of that provision through interpretation? Does it require the judge to use a different and more restrictive method of interpretation than s/he would otherwise use?<sup>90</sup>

Ostensibly, it seems to me, that if certain principles or provisions are unamendable, this logically means that courts cannot interpret those unamendable constitutional principles in a manner that modifies their core so as to change the constitutional identity. This does not mean that courts cannot interpret these provisions or principles. Of course, courts retain the legal power to interpret and reinterpret constitutional provisions, even unamendable ones. What courts cannot do is change the essence of the core of the constitution and its basic principles, because such an action requires resorting to the primary constituent power. Therefore, certain informal constitutional changes by courts, which—from a substantive perspective—replace the constitution with a new one, can be considered unconstitutional; an unconstitutional constitutional interpretation.

Likewise, if the constitution creates a distinction between amendment process and a more popular inclusive process of revision, just as the constitutional legislature is prohibited from bringing about certain constitutional changes through the ordinary amendment process, the court cannot informally amend those fundamental principles or provisions because such an act requires a different special revision procedure. And just like formally amending those provisions via the ordinary amendment process would be an unconstitutional formal constitutional amendment, amending them by an informal amendment would be unconstitutional.

A relatively easy example for such an unconstitutional informal constitutional change comes from Honduras. One of the basic principles in the 1982 Honduran Constitution is the presidential term limit. Article 239 of the Constitution contains a prohibition on presidential re-election and also stipulates that anyone who “violates” the no-re-election rule or who “proposes its reform” shall “cease immediately” in their public posts and will be prohibited from serving in office for ten years. In addition, Article 374 declares that the no-re-election provision can under no circumstances be amended. Moreover, according to Article 42(5), citizenship may be lost by

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<sup>90</sup> Radim Dragomaca, *Constitutional Amendments and the Limits of Judicial Activism: The Case of the Czech Republic*, in *THE JURISPRUDENCE OF AHARON BARAK: VIEWS FROM EUROPE* 198 (Willem Witteveen & Maartje DeVisser eds., 2011).



“inciting, promoting, or supporting the continuation or re-election” of the president.<sup>91</sup>

In 2014 a group of fifteen representatives in the Honduran Congress belonging to the National Party challenged these constitutional rules regarding presidential re-election, and in early 2015 ex-president of the National Party Rafael Callejas, challenged Article 239 itself claiming it should be inapplicable. According to the challenges, the prohibition on re-election infringes upon fundamental rights such as the right to be elected, the right to vote, and freedom of expression. In a unanimous judgment of April 22, 2015, the Constitutional Chamber of the Honduran Supreme Court held that Article 239 (banning re-election), Article 374 (making the re-election clause unamendable) and Article 42 (on loss of citizenship for promoting re-election) unconstitutional and inapplicable.<sup>92</sup> Therefore, the decision completely eradicated the presidential term limit/no-re-election rule that had been at the core of the 1982 constitution, potentially allowing presidents to stay in office *ad infinitum*. This “constitutional” decision by the Supreme Court is in fact unconstitutional. If term limits are unamendable, and are shielded from constitutional amendments, they cannot be informally amended by the court.

Is this notion of unconstitutional informal constitutional change by courts applicable to state constitutional change? This question demands further research.

Marshfield successfully demonstrates that notwithstanding the flexibility of the formal amendment formula, courts remain active in constitutional change and in fact play a significant role in informal constitutional change, especially in the area of individual rights. Marshfield provides qualitative illustrations regarding the cases in which courts have engaged with constitutional change<sup>93</sup> regarding double-jeopardy protections,<sup>94</sup> civil rights,<sup>95</sup> the judicial branch,<sup>96</sup> taxation and finance, voting, and executive power.<sup>97</sup> Were any of these decisions unconstitutional? In order to deter-

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<sup>91</sup> REPÚBLICA DE HONDURAS CONST. arts. 239, 374.

<sup>92</sup> *Corte Suprema de Justicia—Sala de lo Constitucional, F-165*, PODER JUDICIAL DE HONDURAS, <https://perma.cc/MT5D-B2J9> (last visited Oct. 5, 2018). For an analysis, see David Landau & Brian Sheppard, *The Honduran Constitutional Chamber’s Decision Erasing Presidential Term Limits: Abusive Constitutionalism by Judiciary?*, ICONNECT BLOG (May 6, 2015), <https://perma.cc/M5WY-FBLA>; Leiv Marsteintredet, *The Honduran Supreme Court Renders Inapplicable Unamendable Constitutional Provisions*, ICONNECT BLOG (May 1, 2015), <https://perma.cc/G6NB-BDBU>.

<sup>93</sup> Marshfield, *supra* note 1, at 494–95.

<sup>94</sup> Marshfield, *supra* note 1, at 495–500.

<sup>95</sup> Marshfield, *supra* note 1, at 500–04.

<sup>96</sup> Marshfield, *supra* note 1, at 504–06.

<sup>97</sup> Marshfield, *supra* note 1, at 506–07.

mine whether or not courts in those instances have exceeded their limit one also has to examine whether any of these principles or provisions is regarded in the state constitution as unamendable or whether modifying the relevant provisions or principles requires a more deliberative and inclusive process of revision rather than mere constitutional amendment. If formally amending any of these constitutional principles is prohibited through ordinary amendment but requires revision, then informally amending these principles through judicial interpretation might be an unconstitutional constitutional change by courts.

At first sight, it appears that in these cases courts have been indeed involved in informal constitutional changes. However, not every constitutional change is a constitutional revolution. A constitutional revolution is a constitutional change of a specific magnitude. It is a change that fundamentally makes a paradigm shift in the basic principles or features of the constitutional order. After such a change, the constitutional order is no longer the same; it has been drastically altered and replaced with a new one.<sup>98</sup> Even direct and meaningful constitutional changes brought about by the courts, as illustrated by these cases, do not seem to fall under the categorization of constitutional revolution.

A more challenging illustration is the one concerning constitutional changes made to jury trial rights.<sup>99</sup> Trial by jury is often considered in U.S. States a basic constitutional principle.<sup>100</sup> The state constitutions usually contain a provision that generally provides that “the right to trial by jury shall remain inviolate.”<sup>101</sup> It is of course questionable whether the term “remain inviolate” is to be equated with “unamendable.” Richard Albert correctly observed that “the language of inviolability reflects what we see in constitutions today that make rights unamendable by prohibiting their ‘diminishment.’”<sup>102</sup> The immediate comparison that comes to mind is with the German Basic Law, according to which “Human dignity shall be invio-

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<sup>98</sup> See generally GARY J. JACOBSON & YANIV ROZNAI, CONSTITUTIONAL REVOLUTIONS (forthcoming, 2019); Yaniv Roznai, *Constitutional Transformations: The Case of Hungary*, in CONSTITUTIONALISM IN CONTEXT (David Law ed., forthcoming 2019).

<sup>99</sup> Marshfield, *supra* note 1, at 498–500.

<sup>100</sup> See, e.g., Gale E. Juhl, *Criminal Jury Trials in Iowa: A Time for Revision*, 31 DRAKE L. REV. 187, 187 (1981–1982) (“Probably no other legal institution has been so integral to the American criminal experience, and none more jealously guarded than trial by jury. The mere mention of the word ‘jury’ tends to evoke visions of a most noble and infallible institution. To criticize such a hallowed instrument of justice is viewed by some legal scholars as being tantamount to jurisprudential heresy.”).

<sup>101</sup> Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 670 (1918).

<sup>102</sup> Albert, *supra* note 42, at 240 n. 125.

lable.”<sup>103</sup> Not only is human dignity defined as “inviolable,” but according to article 79(3), amendments to the Basic Law affecting human dignity are inadmissible.<sup>104</sup> This is supported by two textual arguments. First, if the constitution-maker stipulates that certain principles are “inviolable,” what difference does it make if the violation comes from secondary legislation, such as regulation, an ordinary legislation of the legislature, or even a constitutional legislation? All types of law can violate the said rights or principles, which are protected in the constitution from violations. Second, the phrasing says “shall remain inviolable.” These constitutional provisions do not state that “trial by jury is inviolable” but rather that it “shall remain inviolable.” This emphasis on the endurance and continuation of the constitutional protection implies unamendability.

In any case, it is not unimaginable for a constitution to provide the institution of trial by jury with an absolute constitutional entrenchment, protecting it from future amendments. In one of the earliest examples of limitations on constitutional amendments, already in 1776, the Constitution of New Jersey states that members of the Legislative Council or House of Assembly had to take an oath not to ‘annul or repeal’ the constitutional provisions for a trial by jury, among other basic provisions (Article 23).<sup>105</sup> In Virginia, the Constitution of 1776 stipulated that, “[t]he trial by jury is preferable to any other and ought to be held sacred,”<sup>106</sup> Therefore, the traditional attitude toward trial by jury regarded it as a *sacred* personal right of the accused, and that states cannot compel a non-consenting individual to stand trial without jury.<sup>107</sup> The Georgia Constitution, for example, designated as formally unamendable the right to a jury trial stating that “trial by jury to remain inviolate forever,”<sup>108</sup> and a similar designation appears in the current New York State Constitution, which provides that, “[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever.”<sup>109</sup> While this notion of sacredness or perpetuity may be regarded as an implicit unamendability, the Massachusetts Constitution explicitly prohibits constitutional amendments

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<sup>103</sup> Art. 1 S. 1 GG. See generally, Ernst Benda, *The Protection of Human Dignity (Article 1 of the Basic Law)*, 53 SMU L. REV. 443 (2000); Christoph Enders, *The Right to have Rights: The Concept of Human Dignity in German Basic Law*, 2 REVISTA DE ESTUDOS CONSTITUCIONAIS, HERMENÊUTICA E TEORIA DO DIREITO 1 (2010).

<sup>104</sup> See generally Goerlich, *supra* note 26.

<sup>105</sup> Roznai, *supra* note 38, at 662.

<sup>106</sup> V.A.CONST. of 1776, art. 11; see Lucilius A. Emery, *Government by Jury*, 24 YALE L. J. 265 (1915).

<sup>107</sup> S. Chesterfield Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 702 (1927).

<sup>108</sup> G.A. CONST. art. LXI; see also Albert, *supra* note 42, at 241, n. 132.

<sup>109</sup> N.Y. CONST. art. I, § 2; see *Right to Trial by Jury*, 14 Touro L. REV. 1135, 1137 (1998).

via the initiative process that are inconsistent with the rights to a trial by jury.<sup>110</sup>

Notwithstanding these various stipulations in state constitutions that the right to trial by jury “shall remain inviolate,” Marshfield demonstrates how courts provided a creative constitutional interpretation to that right in a way that allowed its restrictions.<sup>111</sup> The problem is that the term “inviolable” applies both to the legislature and courts. And if inviolable is to be construed as unamendable, this limitation on constitutional change applies not only to formal amendments by the constitution-amenders but also to informal amendments by the courts. Take for example Article I, § 9 of the Constitution of Iowa according to which the right to a jury trial was “inviolable” and applied in “all criminal prosecutions, and in cases involving the life, or liberty of an individual.”<sup>112</sup> When the Supreme Court of Iowa explicitly disregards this literal language of the Constitution and does not allow a jury trial before a specialized juvenile court,<sup>113</sup> this raises the question whether the court itself violates the inviolable right. It is fair, for the court, to claim that the constitutional provision is unsuitable to the new and changing conditions in which a separate juvenile court system exists. It is doubtful, however, whether the court, as a constituted organ bound by the constitution may disregard explicit limits imposed by the primary constituent power. A similar challenge arises concerning the Kentucky Supreme Court’s decision regarding jury trials. The Constitution of Kentucky stipulates that “the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this constitution.”<sup>114</sup> Thus, according to the text of the Constitution trial by jury is regarded “sacred” and “inviolable” yet not formally unamendable as it may be modified by a formal amendment. When the Kentucky Supreme Court decides that jury trial is waivable,<sup>115</sup> does it not infringe the sacredness of this protected principle?

I am not interested in the normative question of whether these judicial decisions are desired or not. Both may be perfectly correct and desirable, from a normative theory. Additionally, from a democratic point of view, it might be desirable that any such constitutional change would be conducted by the constitutional bodies entrusted with the constitutional amend-

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<sup>110</sup> M.A. CONST. art. XLVIII, pt. II, § 2.

<sup>111</sup> Marshfield, *supra* note 1, at 498–500.

<sup>112</sup> Marshfield, *supra* note 1, at 498–99; IOWA CONST. art. I, § 9.

<sup>113</sup> Marshfield, *supra* note 1, at 499; *In re Johnson*, 257 N.W.2d 47, 50 (Iowa 1977).

<sup>114</sup> Marshfield, *supra* note 1, at 499–500; KY. CONST. § 7.

<sup>115</sup> Marshfield, *supra* note 1, at 499–500; *Short v. Commonwealth*, 519 S.W.2d 828, 832–33 (Ky. 1975).

ment power rather than by the court.<sup>116</sup> I am merely questioning whether or not by these decisions the courts have overstepped their scope of competence. Courts may indeed bring about constitutional changes through interpretation. This is one crucial method to advance constitutional law with the needs of changing times, an essential part of the “living constitution.”<sup>117</sup> Fair enough. However, if certain parts of the constitution are deemed unamendable, thereby implicitly or explicitly placing limitations on constitutional amendments, courts are also limited in their competence to change these unamendable constitutional provisions, rules, or principles.

Clearly, such interpretations of the Iowa and Kentucky Supreme Courts discount to some extent explicit constitutional text. They informally amend the constitution. This interpretation, however, need not necessarily be considered unconstitutional, even if one regards trial by jury as an unamendable principle. Unamendability is not aimed at preventing minor changes that contradict unamendable principles or deviate from them. Unamendability is intended to preserve the core nucleus principles of the constitution. It concerns those extraordinary and exceptional circumstances in which the constitutional change strikes at the heart of the constitutional principle and deprives it of its minimal conditions of existence. After such an amendment, the constitutional principle will have been essentially modified.<sup>118</sup> The decisions of the Iowa Supreme Court and the Kentucky Supreme Court surely deviate from or limit the basic protected (“sacred” or “inviolable”) principle of “right to a trial by jury,” yet they do not modify the principle’s essence. *Prima facie*, then, even activist state courts have not exceeded their scope of authority to such an extent so as to consider their decisions as ‘unconstitutional’.

The core argument, however, remains: if certain constitutional amendments are prohibited, either due to explicit or implicit unamendability, or because the constitution requires that certain constitutional changes be made through a different revision process rather than ordinary constitutional amendment process, then these limitations apply also to informal amendment by courts. From a constitutional theory, perspective amending unamendable provisions—even informally amending them by courts—is

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<sup>116</sup> J. Clifford Wallace, *Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation*, 16 *IMPRIMIS* 1, 4 (1987) (“From an instrumental perspective, democracy might at times produce results that are not as desirable as platonic guardians might produce. But the democratic process—our participation in a system of self-government—has transcendental value.”).

<sup>117</sup> See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 695 (1975–1976); Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1742 (2006–2007).

<sup>118</sup> Roznai & Yolcu, *supra* note 89, at 205–06; Roznai, *supra* note 29, at 39–40.

tantamount to a constitutional revolution.<sup>119</sup> Consequently, certain constitutional interpretations that overstep these limitations may be considered unconstitutional.

## CONCLUSION

Judges have a lawmaking role; they fill legal gaps, clarify legal rules, and—sometimes—modify the law where necessary, even constitutional law.<sup>120</sup> There is no doubt that courts often play a key role in constitutional change. As Marshfield demonstrates, state courts take a very significant role in informal amendments. And it appears that state courts' activist involvement in constitutional change is not debilitated even when the constitution is flexible and frequently amended.<sup>121</sup> However, are there any limitations on the power of courts to informally amend the constitution?

My claim here is simple: if one acknowledges the existence of limits to formal constitutional amendments, then, inevitably, there must also be limits to informal constitutional changes brought about by courts. If one considers certain judicial decisions as amendments, this designation must also count when considering limitations on amendments. Judicial activism or interpretive liberalism<sup>122</sup> is acceptable and often even desirable. Nonetheless, courts are constituted organs created by and owing their authority to the constitution. They are “guardians of the constitution.”<sup>123</sup> They do not have the competence to destroy the constitution or its basic principles thereby replacing it with a new one. This is the role of the primary constituent power. *Pouvoir judiciaire* is not *pouvoir constituant*.

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<sup>119</sup> Cf. Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13 INT'L J. CONST. L. 639, 642–43 (2015).

<sup>120</sup> See Henry Wade Rogers, *The Law-Making Power* 3 N.W. L. REV. 39, 44 (1895) (“Not only is it true that the courts make law, but they make more law than do the legislative bodies.”). See generally Mauro Cappelletti, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, 8 MONASH U. L. REV. 15 (1981–1982). Judicial role is often even more formidable, when a judge is called upon to pass judgment on the validity or authority of the constitution itself or to rule on the transition from one constitutional order to another. See generally N.W. Barber and Adrian Vermeule, *The Exceptional Role of Courts in The Constitutional Order*, 92 NOTRE DAME L. REV. 817 (2016).

<sup>121</sup> See generally Marshfield, *supra* note 1.

<sup>122</sup> See Egidijus Kūris, *Judges as Guardians of the Constitution: “Strict” or “Liberal” Interpretation*, in OLD AND NEW CONSTITUTIONS: THE CONSTITUTION AS INSTRUMENT OF CHANGE 209 (EIVIND SMITH ED., 2003).

<sup>123</sup> See generally Gerhard Casper, *Guardians of the Constitution*, 53 S. CAL. L. REV. 773, 786 (1979–1980). For a critical view of the use of the ‘guardian’ rhetoric, see Brian Christopher Jones, *Constitutional Paternalism: The Rise and (Problematic) Use of Constitutional ‘Guardian’ Rhetoric*, 51 N.Y.U. J. INT'L L. & POL. (forthcoming), available at <https://perma.cc/L7QL-NCU3>.

Further study is necessary in order to understand what precisely the limits of informal constitutional change are, and these, like the genetic code, may vary from one state to the other. However, thanks to Marshfield's work, we can better begin understanding the prominence of informal constitutional change in the states and the interaction between formal and informal constitutional change. This is a blessed first step in understanding judicial constitutional change and perhaps in theorizing "unconstitutional constitutional change by courts."