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The conundrum of unconstitutional constitutional amendments

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Abstract: National courts, largely in South Asia and Latin America, have deemed unconstitutional certain constitutional amendments that have been enacted into law in their respective jurisdictions. In the article, this author explores the normative arguments for and against the judicial enforcement of implicit substantive constraints on formal constitutional changes. In essence, the author argues that, in determining whether judges should render the substance of constitutional amendments unconstitutional, one must examine how the impugned constitutional amendment was passed. In jurisdictions where a constitutional amendment can be passed by a dominant party/coalition without bipartisan support or the general support of the people, the courts may intervene, but only where the constitutional amendment(s) in question is/are so manifestly unreasonable that such a revision is akin to a substantial destruction of the pre-existing constitution. But no constitutional amendment should ever be judicially invalidated for violating any implied 'basic features' of the constitution when the amendment process is particularly cumbersome and requires significant bipartisan support and the general public's express or implicit endorsement for the amendment to pass.

Keywords: constitutional amendments; constitutional law; democracy; human rights; judicial review

Introduction

In recent years, a new puzzle has arisen in our comparative constitutional discourse. Simply put, can constitutional amendments enacted into law be subsequently deemed unconstitutional by the judiciary? The short answer is yes, simply because courts, largely in South Asia and Latin America, have imposed implied (unwritten) substantive constraints on formal constitutional change and have invalidated any offending constitutional amendments. Nevertheless, scholars have generally focused their attention on a descriptive or historical survey of how the notion of unconstitutional

constitutional amendments has arisen and developed around the world.[1] However, in the author's opinion, the more interesting question has been left unanswered, i.e. *should* constitutional amendments be judicially invalidated? In other words, we know several judges have shielded their constitutions from some constitutional changes. But, on a normative level, *should* they have done so? In this article, the author will seek to fill this gap in the academic literature by exploring the normative arguments for and against the judicial enforcement of implicit substantive constraints on constitutional amendments.

At the outset, I shall state the scope of my discussion. In the article, I shall *not* be examining written constitutions that have explicit 'eternity' clauses, i.e. constitutions that expressly enumerate provisions that may never be amended. For example, Article 79(3) of the German Basic Law states explicitly that any constitutional amendment 'affecting the division of the Federation into Länder', human dignity, or the democratic federal structure of government is prohibited. In the same vein, Article 60(4) of the Brazilian Constitution expressly proscribes any constitutional amendments that seek to abolish federalism, universal suffrage, the separation of powers, or individual rights. Instead, the focus of my inquiry will be on constitutions that do *not* have such 'immutable' clauses and are silent on whether there are implied 'basic features' that can never be amended. Furthermore, I shall be seeking herein to explore whether courts should impose implied constraints on the *substantive content* of constitutional amendments. This is a different question from whether courts should examine the *process* by which the impugned constitutional amendment was enacted, an issue which I believe is uncontroversial or at least very much less so. If a constitution requires a constitutional amendment to be passed by a super-majoritarian vote in the legislature, a judiciary, vested with the powers of constitutional review, surely must have the right to invalidate any amendment that does not satisfy this *procedural* requirement.

Part I of the paper begins by exploring the normative arguments for recognizing any implied substantive constraints on constitutional change. Part II continues by examining the normative arguments against this position. Finally, in Part III, I respond to the solutions proposed by various

[1] See Y Roznai, 'Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea' (2013) 61 *AJCL* 657; G Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *IJCL* 460; D Gwynn Morgan, 'The Indian "Essential Features" Case' (1981) 30 *ICLQ* 307; R Hoque, 'Constitutionalism and the Judiciary in Bangladesh' in S Khilnani *et al.* (eds), *Comparative Constitutionalism in South Asia* (Oxford University Press, New Delhi, 2013); A Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in E Carolan (ed), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, Dublin, 2012).

comparative scholars to this constitutional conundrum and argue that one must examine how a particular impugned constitutional amendment was passed in determining whether judges should render the substance of the amendment unconstitutional. For jurisdictions with malleable constitutions, where a constitutional amendment has been passed by a dominant party/coalition without bipartisan support or the general support of the people, the courts may intervene, but only where the constitutional amendment in question is so manifestly unreasonable that such a revision is akin to a substantial destruction of the pre-existing constitution. But no constitutional amendment should ever be judicially invalidated for violating any implied 'basic features' of the constitution when the amendment process is particularly cumbersome and requires significant bipartisan support and the general public's express or implicit endorsement for the amendment to pass.

I: Justifications for implied substantive limits on constitutional change

Difference between original constituent powers and derivative constituent powers

A common justification for advocating that a constitutional amendment may be inconsistent with certain implicit 'basic features' of a constitution is premised on a normative distinction drawn between the creation of a constitution by a Constituent Assembly and the amending power vested in a constituted body that is derived from the constitution. Constitutional theorists, like Carl Schmitt and Emmanuel Sieyès, have argued that the former power of creation is plenary and it is subjected to no legal constraints, while the latter power of amendment is merely a *derivative* power or *constituted* power and may not be exercised to alter any fundamental features of the constitution.[2] The decision to make fundamental changes to the constitution is a matter solely reserved for the Constituent Assembly; ergo, judges may invalidate any exercises of the derivative amendment power that purport to violate the constitution's basic features.

This distinction drawn between original constituent power and derivative constituent power has also been endorsed by judges when they render constitutional amendments unconstitutional.

In *I.R. Coelho v State of Tamil Nadu*,[3] the Supreme Court of India was faced with a challenge against the constitutionality of various agrarian laws that have been immunized from judicial invalidation. Specifically,

[2] R Stacey, 'Constituent Power and Carl Schmitt's Theory of Constitution in Kenya's Constitution-making Process' (2011) 9 *IJCL* 601–2.

[3] (2007) AIR (SC) at 861.

Article 31B[4] of the Indian Constitution expressly provides that no laws specified in the Ninth Schedule of the Constitution shall be invalidated on the ground that it is inconsistent with any constitutionally protected rights, and the impugned laws had been inserted into the Ninth Schedule. Nevertheless, Chief Justice YK Sabharwal, on behalf of the unanimous Court, observed as follows:

> [E]ven though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure [of the Constitution] if the fundamental right … taken away or abrogated pertains … to the basic structure.[5]

According to his Lordship, the judicial recognition of an implied basic structure of the Indian Constitution is justified on the following basis:

> The distinction is drawn … between making of a Constitution by a Constituent Assembly which was not subject to restraints by any external Authority as a plenary law making power and a power to amend the Constitution, a derivative power, derived from the Constitution and subject to the limitations imposed by the Constitution … The power for amendment cannot be equated with such power of framing the Constitution.[6]

In the same vein, the Appellate Division of the Supreme Court of Bangladesh in *Anwar Hossain Chowdhury v Bangladesh*,[7] by a majority of 3 to 1, invalidated a constitutional amendment that had created six additional Permanent Benches in different regions of the country that would possess the same powers and functions as the High Court Division of the Supreme Court. According to the majority, the judiciary was a 'basic structural pillar'[8] of Bangladesh's constitutional government and the creation of the new courts, parallel to the High Court Division, infringed upon the judicial powers vested in the High Court Division. As 'the basic structural pillar, that is judiciary, has

[4] Art 31B of the Indian Constitution reads: 'Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.'

[5] *I.R. Coelho* (2007) AIR (SC) at [150].

[6] Ibid at [55].

[7] (1989) 1 BLD (Appellate Division) (Special).

[8] Ibid at [295].

been destroyed and plenary judicial power of the Republic vested in the High Court Division has been taken away',[9] the constitutional amendment that authorized such a fundamental change was invalidated.

In particular, Shahabuddin Ahmed J justified the invalidation of the constitutional amendment in the following terms:

> As to the 'constituent power', that is power to make a Constitution, it belongs to the people alone. It is the original power … Even if the 'constituent power' is vested in the Parliament, the power is a derivative one and the mere fact that an amendment has been made in exercise of the derivative constituent power will not automatically make the amendment immune from challenge.[10]

The normative distinction drawn between the Constituent Assembly's plenary constituent power and the amending body's limited derivative power of revision is, however, not unproblematic as it is not plainly obvious why the amending body's power to revise the original constitution does not also comprise of the right to change its fundamental features. First, where the original Constituent Assembly has explicitly established the procedures by which the constitution may be amended, and where it has not expressly imposed any substantive constraints on constitutional change, it is not self-evident why the original Constituent Assembly has not therein divested all of its amending powers to the future amending bodies. Scholars and jurists who defend an implied 'basic features' doctrine have merely asserted that the amending body's power of constitutional revision is *derivative*. But, in making this assertion, they have in no way explained why the amending body has not inherited all powers of revision divested by the Constituent Assembly upon the completion of constitutional law-making process. Furthermore, as Carlos Bernal has asked rhetorically, 'if the foundation of a constitution is only a contingent social fact, namely, the result of a political decision, why should it be impossible to change the essential elements of the constitution by means of another contingent social fact, that is, a political decision made by means of a constitutional amendment?'[11]

Amendment is not abrogation

Another argument often raised in favour of recognizing implied substantive limits on constitutional change is derived from a textual reading of the term 'amendment'. As Professor Walter Murphy has observed:

[9] Ibid at [295] (Chowdhury J).

[10] Ibid at [381].

[11] C Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *IJCL* 349.

> The word amend … means to correct or improve; amend does not mean 'to deconstitute and reconstitute' … Thus changes that would make a polity into another kind of political system would not be amendments at all, but … transformations.[12]

In other words, the term constitutional 'amendment' suggests that the constitutional power of revision is limited to the making of more modest changes and corrections. Insofar as the amendment is seeking to destroy or to wholly transform the pre-existing constitution, the revision in question is in essence an abrogation of the constitution and not an amendment.

In *Kesavananda Bharati v Kerala*,[13] the Supreme Court of India, by a 7 to 6 majority, invalidated a part of the 25th Amendment to the Indian Constitution, which provided that any law passed with a declaration that it was intended to give effect to the Directive Principles on the state's socio-economic policy could not be 'called in question in any court on the ground that it does not give effect to such policy'. The majority judges argued that such an amendment attempted to oust judicial review and thus violated an implied 'essential feature' of the Indian Constitution, and was therefore unconstitutional. More importantly, various justices in the *Kesavananda* majority justified their conclusion on a textual understanding of the term 'amendment'. In particular Reddy J had so observed:

> In its ordinary meaning the word 'amend' as given in Shorter Oxford dictionary is to make alterations. In some of the dictionaries it is given as meaning 'to alter, modify, rephrase, or add to or subtract from'… It is also stated that 'amendment' of a statute implies its survival and not destruction. The word 'amend' in legal phraseology does not generally mean the same thing as 'repeal'… .[14]

Echoing Reddy J, Khanna J in *Kesavananda* had advanced a similar textual argument against an expansive reading of the legislature's right to amend the Indian Constitution pursuant to Article 168:[15]

[12] W Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton, NJ, 1995) 177.

[13] (1973) AIR (SC) at 1461.

[14] Ibid at [1195].

[15] Art 368 of the Indian Constitution, in its original form before it was amended, so read: 'An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.'

> [D]estruction cannot be described to be an amendment of the Constitution as contemplated by Article 368 [of the Indian Constitution]. The words 'amendment of this Constitution' and 'the Constitution shall stand amended' in Article 368 show that what is amended is the existing Constitution and what emerges as a result of amendment is not a new and different Constitution but the existing Constitution though in an amended form.[16]

In the same vein, when the Supreme Court of India, in *Minerva Mills v Union of India*,[17] unanimously invalidated Article 368(4) of the Indian Constitution,[18] which was inserted by the 42th Amendment, the Court observed as follows:

> The power to destroy is not a power to amend. Since the Constitution had conferred a limited amending power on the Parliament, the Parliament cannot under the exercise of that limited power enlarge that very power into an absolute power.[19]

In essence, the jurists were arguing that the constitutional framers' deliberate choice to use the term 'amend' or 'amendment' in a constitution suggests that any constitutional change must be more modest and cannot be so drastic as to constitute its destruction, repeal or abrogation. This textual argument may be compelling in instances where the constitution in question does not expressly define the meaning of the word 'amend'; and recourse to an ordinary/dictionary understanding of the term 'amend' may therefore shed light on the framers' intended meaning. However, one may note that in Bangladesh and India, where their judges have imposed implied substantive limits on constitutional change, their constitutions expressly define the scope of the term 'amendment' very broadly. Article 142 of the Bangladesh Constitution reads: 'Notwithstanding anything contained in this Constitution … *any* provision thereof may be amended by way of addition, alteration, substitution or *repeal*' (emphasis added). Article 368(1) of the Indian Constitution, as amended by the 24th Constitutional Amendment,[20] is similarly worded: 'Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or *repeal any provision* of

[16] *Kesavananda* at [1480–1481] (see n 13).

[17] [1981] 1 SCR 206.

[18] Art 368(4) of the Indian Constitution, prior to its judicial invalidation, read: 'No Amendment of this Constitution (including the provisions of Part III) made or purporting to have been under this article (whether before or after the commencement of section 55 of the Constitution (Forth-second Amendment) Act, 1976) shall be called in question in any court on any ground.'

[19] *Minerva Mills* at 240 (n 17).

[20] The 24th Amendment to Indian Constitution was upheld unanimously by the Supreme Court of India in *Kesavananda v Kerala*.

this Constitution in accordance with the procedure laid down in this article' (emphasis added). Therefore, in such instances where the constitution explicitly authorizes the repeal of any of its provisions via the amendment process, the textual argument in favour of giving a narrow reading to the word 'amend' loses its force.[21]

Prevent amendments that seek to abolish democracy and fundamental rights

Finally, one may argue that there must be implied substantive limits placed on constitutional changes or the constitution's amending body would otherwise be legally authorized to abridge all fundamental freedoms or remove all vestiges of democracy within the state. In other words, the implied 'essential features' doctrine is needed as a safeguard against abuse by the amending body and to prevent a country from establishing totalitarianism such that all cherished democratic principles may be rendered non-existent.

As observed by Professor Walter Murphy:

> Like democracy, constitutionalism rests on the notion of human worth … Consent does not, however, function as a magic wand that can cast a benevolent spell over all political arrangements. A system that denies human worth cannot claim consent as the foundation of legitimacy, for what is worthless can confer nothing.[22]

In the same vein, David Landau has discussed how the doctrine of unconstitutional constitutional amendments has been conceived as a response to the practice of 'abusive constitutionalism',[23] i.e. the politicians' use of mechanisms of *formal* constitutional change to make a state significantly less democratic than it was before.[24]

The Constitutional Court of Colombia has been also explicit about this implicit limit to the amending power:

> [t]he power of constitutional reform cannot be used in order to substitute the Social and Democratic State and the Republican form of government (article 1) with a totalitarian state, a dictatorship or a monarchy.[25]

[21] In contrast, the Supreme Court of Sri Lanka in *Re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill* SLR-1987 Vol.2-P312 has applied textual arguments to reject expressly the application of the implied 'basic structure' doctrine. Given that art 82 of the 1987 Sri Lanka Constitution expressly provides that an amendment can be for 'the repeal and replacement of the Constitution', the Supreme Court held that it did not 'agree with the contention that some provisions of the Constitution are unamendable'.

[22] Murphy (n 12) 180.

[23] D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 196.

[24] Ibid.

[25] Sentencia 551/03 Colombian Constitutional Court (9 July 2003) [33].

To this extent, it would be understandable if one is sympathetic to the Colombian Constitutional Court for invalidating a constitutional amendment that would have allowed the incumbent President Alvaro Uribe Velez to run for a third consecutive term in office, which would have given him the power to virtually appoint all officials that were supposed to be checking him,[26] or the Supreme Court of Bangladesh (Appellate Division) for invalidating the 5th Amendment[27] and the 7th Amendment[28] to the Bangladesh Constitution, which had imposed martial law on the country over separate extended periods of time.

Jurists that argue in favour of recognizing implied substantive limits on constitutional change may suggest that the rule of law encapsulates a substantive ideal, which serves as the anvil on which the propriety of constitutional amendments is tested. Nevertheless, the trouble with this elusive rule of law ideal is not that people will disagree with its normative force in the abstract but that this higher-order law, if enforceable, must be given substance, be interpreted, and be applied.[29] The appeal to a divine ideal may be irresistible but the devil is in the details. Judges do not uphold the rule of law in the abstract but have to apply sacrosanct constitutional rights to specific and particularized facts that come before them.[30] Does the fundamental right to free speech exclude any attempts to use a constitutional amendment to ban hate speech inciting violence against racial or sexual minorities? Does the fundamental right to equality exclude all forms and varieties of race-based affirmative action programmes that the constitutional amending body may want insulated from a constitutional challenge? The rule of law is a vague, contestable ideal and is consistent with a variety of understandings and institutional arrangements.[31] As Professor RG Wright has argued, once a fundamental rights norm is sufficiently particularized to specific facts to be constitutionally useful, 'it is no longer clear why an

[26] Landau (n 23) 201.

[27] The 5th Amendment provided that all amendments or repeals made to the Bangladesh Constitution from 15 August 1975 to 9 April 1979 (inclusive) by any proclamation or Proclamation Order of the Martial Law Authorities were deemed to have been validly made, and could not be called into question before any court or tribunal or other authority. See *Khondker Delwar Hossain v Bangladesh Italian Marble Works* (2010) 62 DLR (AD) 298.

[28] The 7th Amendment to Bangladesh Constitution provided that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made from 24 March 1982 to 11 November 1986 (inclusive) had been validly made, and could not be called into question before any court or tribunal or other authority. See *Siddique Ahmed v Government of Bangladesh* (2011) 63 DLR 565.

[29] JAG Griffith, 'The Brave New World of Sir John Laws' (2000) 63 *MLR* 165.

[30] PJ Yap, 'Defending Dialogue' (2012) *PL* 538.

[31] J Goldsworthy, 'Homogenizing Constitutions' (2003) 23 *OJLS* 505.

amendment must be unconstitutional if, for example, it limits the protection or advancement of one conception of human dignity for the sake of some other equally plausible conception of human dignity'.[32]

Furthermore, there is evidence that this implied basic structure doctrine has tended to expand through time as courts find more parts of the constitution to be basic, and it would seem that this doctrine is also used (or abused) by the judiciary for turf-protection purposes.[33] For example, the Colombian Constitutional Court has recently suggested that a legislative attempt to recriminalize drug possession, following a judicial decision that decriminalized it, would likely be an unauthorized act of constitutional substitution as this would violate core values pertaining to human dignity and autonomy.[34]

Ergo, if scholars are right that judges should recognize that certain implied 'basic features' of the constitution are inviolable, such that fundamental rights may never be abrogated, they must subsequently go on to demonstrate why the judges' perception of human dignity in *every* concrete context would always be superior to the amending body's conception each time. But, unfortunately, sympathizers of the implied 'basic features' doctrine have never proceeded to make their case in support of the latter proposition.

II: Justifications against the judicial imposition of implied substantive limits on constitutional change

Identifying implied 'basic features' is to mull over imponderables

On the other hand, scholars who are sceptical about the judicial identification of a constitution's implied 'essential features' would point to the sheer impossibility of determining these fundamental norms in an objective, value-neutral way. Given that the texts of such constitutions are silent on which features are so basic or fundamental that they are beyond abrogation, any list of such norms are open to debate and 'cannot be objectively deduced or passively discerned in a viewpoint-free way'.[35]

Even in the Indian case of *Kesavananda* where the majority on the Supreme Court first recognized an implied 'essential features' of the Indian Constitution, the judges were not unanimous on which elements would

[32] RG Wright, 'Could a Constitutional Amendment Be Unconstitutional?' (1990) 22 *Loyola University Law Journal* 753.

[33] Landau (n 23) 237.

[34] See Sentencia C-574-/11 Colombian Constitutional Court (22 July 2011).

[35] L Tribe, 'A Constitution We Are Amending: In Defence of a Restrained Judicial Role' (1983) 97 *Harvard Law Review* 433.

constitute its basic structure. In particular, Khanna J, unlike his other six colleagues in the *Kesavananda* majority, did not regard the right to property as forming part of the inviolable implied basic elements of the Indian Constitution.[36]

The difficulty of identifying what exactly are the implied 'essential features' of a constitution was most astutely pointed out by Ray J in his dissenting opinion in *Kesavananda*:

> To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made … On what touchstone are the essential features to be measured? Is there any yardstick by which it can be gauged?[37]

Ray J's objection is fair and is premised on the argument that the court's exercise of judicial review must appeal to and draw support from the constitutional text it is interpreting. But one must concede that most, if not all, constitutional instruments enshrine abstract, open-textured rights that are often open to a multitude of interpretations in specific contexts, and that textualism alone cannot resolve this interpretive conundrum. In other words, even when courts invalidate *ordinary legislation* for violating open-textured constitutional rights, there may not be a specific textual mandate for a particular result. Therefore, the indeterminacy associated with 'judicial line-drawing'[38] is inherent in all forms of constitutional adjudication and is not unique only to the judicial review of constitutional amendments.

Judicial invalidation of constitutional amendments undermines the people's will

Furthermore, sceptics would argue that the judicial invalidation of constitutional amendments would gravely 'threaten the notion of a government founded on the consent of the governed'.[39] This view has been most robustly advanced by the Supreme Court of Ireland, which has consistently rejected any implied substantive limits on constitutional change.

[36] *Kesavananda* at [1539] (see n 13).

[37] *Kesavananda* at [949] (see n 13).

[38] A Harding, 'The Death of a Doctrine? Phang Chin Hock v Public Prosecutor' (1979) 21 *Malayan Law Review* 373.

[39] J Vile, 'The Case against Implicit Limits on the Constitutional Amending Process' in S Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton University Press, Princeton, NJ, 1995) 198.

In *Riordan v An Taoiseach (No 2)*,[40] the Supreme Court of Ireland had to address whether Section 7(3)[41] of the 19th Amendment to the Irish Constitution, which provided that the said Amendment would come into force when the Belfast Agreement of 1998 took effect, was repugnant to the Constitution. Barrington J, on behalf of the unanimous Court, was emphatic that the judicial invalidation of constitutional amendments in such circumstances would be impermissible:

> The Court has repeatedly stated that under our constitutional system the people are sovereign. Provided the appropriate procedures are complied with there are no circumstances in which this Court could purport to sit in judgement on an authentic expression of the people's will or an amendment of the Constitution made in accordance with the provisions … .[42]

Where the people's will has been expressed in the form of a constitutional amendment, the constraint on courts to give effect to this revision should be a very strong one. If the judiciary is allowed to independently pass judgment on the merits of constitutional amendments in such circumstances, it would ultimately be subordinating the amendment process to the constitutional status quo the people had intended to override expressly. So far as a handful of unelected judges is empowered, under the guise of a nebulous 'essential features' doctrine, to thwart constitutional changes authorized by the people, the integrity of a constitutional structure committed to democracy would be gravely threatened.[43]

However, one must note that whether a constitutional amendment is reflective of the people's will is dependent on the procedure by which the amendment is passed in that jurisdiction. Irish judges can rightly appeal to the people's will as a constitutional amendment can only be passed in Ireland if it is endorsed by a majority vote in a referendum.[44] Similarly, in the United States, where a constitutional amendment may only be effected if it is proposed by two-thirds of both Houses of Congress (or two-thirds of states) and ratified by three-quarters of the states, that amendment

[40] [1999] 4 IR 343.

[41] Section 7(3) of the 19th Amendment provides: 'If the Government declare that the State has become obliged, pursuant to the [Belfast] Agreement, to give effect to the amendment of this Constitution referred to therein … this Constitution shall be amended as follows.'

[42] *Riordan* at 359–60 (n 40).

[43] Tribe (n 35) 442.

[44] Art 46 of the Constitution of Ireland 1937 reads: 'Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.'

would need to have the overwhelming support of the American electorate before it can be successfully passed.[45]

The same argument, however, cannot be made for constitutions where amendments can be unilaterally achieved by the ruling government of the day. Inevitably, to appreciate this, one must take into account the constitutional politics and the institutional context of the state in question.

For example, in India, amendments to most provisions in its Constitution, including enshrined fundamental rights, can be passed so long as they receive the support in 'each House [of Parliament] by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting'.[46] In other words, so long as the ruling government in India has majority control over both Houses of Parliament, it can pass a constitutional amendment to abridge fundamental rights, even if the people does not support this measure. The 'basic structure' doctrine was first conceived and developed as a judicial response to the legislative excesses of the Indira Gandhi government, which had relied on a supine Parliament to effect constitutional changes that the 'hyper-executive' government unilaterally wanted. Following a landslide victory at the 1971 polls, the Congress Party headed by Indira Gandhi was able to pass constitutional amendments with remarkable ease. The 25th Amendment was passed to insulate Gandhi's socialist policies from judicial review. In response to rising political unrests after 1973, a State of Emergency was imposed in 1975, which led to the suspension of fundamental rights and the detention of opposition politicians.[47] The Constitution was also amended several more times in quick succession.[48] Specifically, in response to a lower court's finding that the Prime Minister had violated electoral laws and was disqualified from holding public office for six years, the 39th Amendment was passed to insulate the Prime Minister's election from any judicial inquiry and render pending proceedings in respect of such elections null and void.[49] Furthermore, the 42th Amendment made nearly 60 significant changes to the Indian Constitution, which included

[45] Art V of the USA Constitution.

[46] Art 368(2) of the Indian Constitution.

[47] R Guha, *India after Gandhi* (Macmillan, New York, 2007) 491–9.

[48] M Pal Singh, 'India' in D Oliver and C Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2013) 177–81.

[49] In *Indira Nehru Gandhi v Raj Narain* (1975) AIR (SC) at 2299, a majority on the Indian Supreme Court invalidated the impugned part of the 39th Amendment, which had sought to insulate the Prime Minister's election from judicial review, on the basis that it violated the implied 'basic features' doctrine, but the Court also unanimously upheld the validity of her election on the facts. See G Austin, *Working a Democratic Constitution: A History of the Indian Constitution* (Oxford University Press, New Delhi, 1999) 318–24 for an insightful discussion on the history of the case.

an express ouster of judicial review over constitutional amendments.[50] The Indian judges were convinced that if they did not intervene, all vestiges of democracy in India would eventually be removed.[51]

For Colombia, the impugned constitutional amendment that authorized President Uribe to run for a third Presidential term, on its surface, may seem innocuous. But, within the institutional context of Colombia, this amendment would allow Uribe, upon election, to appoint all the officials that were supposed to check him and would have given him near-complete control over all aspects of the state, and it would be almost impossible to dislodge him after that.[52]

Similarly, in the Republic of China (Taiwan), prior to 2005, constitutional amendments could only be initiated and passed by the National Assembly, an unelected (and unpopular) legislative branch of government.[53] Therefore, when the Judicial Yuan (the Constitutional Court of Taiwan) invalidated a constitutional amendment enacted by the Assembly, which had sought to extend its own term of office by allowing political parties with seats in the Legislative Yuan (Taiwan's primary legislative chamber) to 'elect' delegates to the said Assembly,[54] one cannot reasonably argue that such a judicial manoeuvre had undermined popular sovereignty. Of course, one may still query whether the Court was right to deem democracy and human rights protection as part of the implied 'unchangeable provisions'[55] in the Republic of China Constitution, which would justify the invalidation of *any* constitutional amendment that violated these (judicially discerned) basic principles.[56]

[50] In *Minerva Mills v Union of India*, (1981) 1 SCR 206 the Supreme Court unanimously invalidated art 368(4) of Indian Constitution, which ousted any judicial review over constitutional amendments.

[51] See O Chinnappa Reddy, *The Court and the Constitution of India: Summits and Shallows* (Oxford University Press, New Delhi, 2008) 53–72.

[52] Landau (n 23) 236–7 (n 23).

[53] According to art 174 of the Republic of China (Taiwan) Constitution: 'The Constitution may be amended upon the proposal of one fifth of the total number of Delegates to the National Assembly and by a resolution of three fourths of the Delegates present at a meeting with a quorum of two thirds of all Delegates to the National Assembly.'

[54] JY Interpretation No 499, 24 March 2000.

[55] Ibid.

[56] In 2005, art 12 of the Amendment of the (Republic of China) Constitution was passed and it so reads: 'Amendment of the Constitution shall be initiated upon the proposal of one-fourth of the total members of the Legislative Yuan, passed by at least three-fourths of the members present at a meeting attended by at least three-fourths of the total members of the Legislative Yuan, and sanctioned by electors in the free area of the Republic of China at a referendum held upon expiration of a six-month period of public announcement of the proposal, wherein the number of valid votes in favor exceeds one-half of the total number of electors. The provisions of Article 174 of the Constitution shall not apply.'

III: Addressing the constitutional conundrum

In drawing a normative distinction between the Constitutional Assembly's *original* constituent power of constitutional-making and the amending body's *derivative* power of revision, proponents that argue in favour of judges imposing implied substantive limits on constitutional change have never explained why the constitutional amending body could not have inherited all powers of revision divested by the Constituent Assembly upon the completion of constitutional law-making process. Furthermore, while few would disagree that human dignity and democracy are fundamental features of a constitutional state, proponents of the implied inviolable 'essential features' have never demonstrated why the judges' perception of human dignity in *every* concrete context would always be superior to the constitution's amending body's conception each time.

Ultimately, the best normative argument in favour of recognizing implied substantive limits on constitutional change rests on the fact that this judicial innovation is necessary to prevent a temporary dominant authoritarian political party/coalition from harnessing the amending process to 'extend its own life [in Parliament] indefinitely'[57] or 'to debar any other (political) party from functioning, establishing totalitarianism, enslave the people'.[58] In other words, if courts are empowered to rein in any abuse of the amendment process, they can rescue the nation from legislative abuses and perhaps 'save us from the abyss'.[59] Ergo, this judicial doctrine is needed as a safeguard against political worse-case scenarios.

On the other hand, one must also accept that the judicial development of an implied 'essential features' doctrine is riddled with difficulties. For any judicial rule or standard to be workable in practice, it must, however, be 'judicially manageable'. Professor Richard Fallon has argued that for a doctrinal test devised by the courts to be judicially manageable, the legal doctrine must (i) be intelligible (rationally comprehensible); (ii) have 'analytical bite', i.e. the capacity to structure an analysis that could in principle lead to correct results; (iii) have the ability to generate predictable and consistent results; and (iv) be administrable without overreaching the court's empirical capabilities.[60] In view of the four criteria Fallon raised, one may indeed have concerns about how judges can objectively discern and defend what constitutes essential elements of a constitution.

[57] *Kesavananda* at [704] (Shelat and Grover JJ) (see n 13).

[58] *Kesavananda* at [309] (Sikri CJ) (see n 13).

[59] L Fuller, *The Morality of Law* (Yale University Press, New Haven, CT, 1964) 44.

[60] R Fallon, 'Judicial Manageable Standards and Constitutional Meaning' (2006) 119 *Harvard Law Review* 1285–92.

My critics may reply that courts are institutionally well placed to be the final adjudicator of the implied unwritten limits of a constitution because unelected judges stand above the rancour of politics and are duty-bound to reach reasoned judgments, such that they are more likely to enforce a society's long-term principles.[61] This might be true but, as discussed by Professor Adrian Vermeule, there is a trade-off in institutional design between freedom from bias and information.[62] Judges are insulated from the political winds and are arguably more impartial; but comparatively, it is this insulation that limits their access to the requisite empirical evidence to make a fully-informed constitutional judgment and, due to their professional homogeneity, judges lack the necessary training to assess accurately the social or economic consequences of their constitutional decisions.[63] (The reverse holds true for the political branches of government.) Therefore, judicial apologetics tend to view the courts through rose-tinted glasses; they only see the institutional advantages that the judges enjoy in constitutional adjudication and fail to account for the institutional disadvantages inherent in the office.

Furthermore, even in the Indian *Kesavananda* case, where we witnessed the world's first example of a constitutional amendment being invalidated on the basis that it violated implied substantive constraints against constitutional change, the seven judges in the majority were not unanimous about what constituted the basic structure of the constitution. For example, only four judges considered that secularism[64] formed part of the unamendable basic structure, while a different plurality of judges viewed the unity and sovereignty of the nation[65] as a core element. More interestingly, one Indian judge considered that parliamentary democracy[66] is part of the Constitution's implied fundamental features and this system of government may not be abrogated via a constitutional amendment. In other words, the scope of the amending power is ultimately circumscribed by what a handful of judges might think constitutes its proper limits. If so, every constitutional amendment approved by the People or their elected representatives may technically come under the pruning knife of the judges.

[61] See TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001); R Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA, 1977); R Dworkin, *Law's Empire* (Harvard University Press, Cambridge, MA, 1986).

[62] A Vermeule, *Law and the Limits of Reason* (Oxford University Press, Oxford, 2008) 86.

[63] PJ Yap, 'Defending Dialogue' (2012) *PL* 534.

[64] *Kesavananda* at [316] (Sikri CJ); [620] (Shelat and Grover JJ); [1480] Khanna (see n 13).

[65] *Kesavananda* at [704] (Hegde and Mukherjea JJ); [620] (Shelat and Grover JJ) (see n 13).

[66] *Kesavananda* at [1206] (Reddy J) (see n 13).

While the 'essential features' doctrine was conceived as safeguard against *executive/legislative* abuse, one must also admit that its introduction into any constitutional landscape would also open up the possibility of *judicial* abuse. Where the judiciary takes upon itself the power to void the substance of constitutional amendments that have been deliberated, debated and popularly ratified, unelected judges may also be undermining the very essence of human dignity and the sanctity of democratic choice that they purport to protect.[67]

In response to this constitutional conundrum, eminent scholars have offered various proposals and it is to their solutions I will now turn. Vicki Jackson, for example, has argued that the implied 'basic structure' doctrine can be modified such that it does not cut off all avenues for a democratic override.[68] In other words, while certain formal constitutional changes may not be achieved by a mere constitutional amendment, they may be pursued with the use of a more demanding and deliberative political procedure. In the same vein, Joel Colon-Rios has advised on how Colombia Constitutional Court has 'resolved' this constitutional conundrum by allowing for a Constituent Assembly, which exercises the constituent power of the people, to make these fundamental changes.[69]

In principle, these proposals may be sound. But the devil is in the details. Where the constitution itself is silent on the use of a Constituent Assembly, or any comparable institution, one would still have to address whether any Constituent Assembly subsequently convened is sufficiently representative and deliberative to be considered democratically legitimate.[70] Where the constitution does not provide for such a Constituent Assembly, how judges would be able to make this determination remains a constitutional mystery. This is unlike Colombia where Article 376 of its Constitution expressly stipulates how a Constituent Assembly should operate to authorize any fundamental constitutional changes. One may also note that in Venezuela, the President Hugo Chavez had used its Constituent Assembly to close down Congress and the Supreme Court.[71] As David Landau has observed, constitutional replacement is also part of the toolkit of abusive constitutional

[67] Vile (n 39) 199.

[68] See V Jackson, 'Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism' in M Bäuerle *et al.* (eds), *Demokratie-Perspektiven: Festshcrift fur Brun-Otto Bryde zum 70. Geburstst*ag (Mohr Siebeck, Tübingen, 2013) 47, 60–2.

[69] See J Colon-Rios, 'Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America' (2013) 44 *Victoria University of Wellington Law Review* 521.

[70] J Colon-Rios, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48 *Osgoode Hall Law Journal* 199.

[71] Landau (n 23) 204–7.

regimes; in particular, Venezuela and Ecuador are recent examples of how Constituent Assemblies have been openly abused by politicians, purporting to act in the name of the people, to entrench their own power.[72]

Therefore, the advocacy of a two-tiered system for constitutional change would not fully address the issue of *whether* and *how* judges should enforce implied substantive limits on these changes. This is especially so for any country where a Constituent Assembly is not expressly provided for in its constitution. In resolving this constitutional conundrum, we should instead *weigh* the risks of any legislative abuse of the amendment process against the dangers of any judicial abuse that may follow from unelected judges enforcing a nebulous 'essential features' doctrine that can frustrate legitimate constitutional revisions designed to meet changing times. To determine how this constitutional balance should be struck, one must inevitably examine how the constitutional change in question was achieved.

The existence of a 'hyper-executive' in government, where executive and legislative power is consolidated by one party/coalition, may allow for constitutional changes to be passed without the general public's approval or ratification. In such circumstances, the invalidation of the impugned constitutional amendments may seem less like a unilateral and indefensible arrogation of power by an unaccountable branch of government. Nevertheless, while such constitutional amendments may not necessarily have any popular mandate, the judicial power to invalidate constitutional amendments passed in these circumstances should still be exercised most sparingly. To allow judges to render the substance of constitutional amendment unconstitutional merely on the basis that it is arguably inconsistent with, but falling short of a substantial destruction of, some 'essential features' of the constitution would be to enthrone a handful of judges at the apex of the political system. For example, if parliamentary democracy or federalism is a (judicially discerned) implied basic feature of the Indian Constitution, any attempts for India to switch over to a Presidential form of government or a unitary state will be doomed from conception.[73] Furthermore, if India were to accede to treaties in the future that require the submission of certain human rights or economic issues to the jurisdiction of supranational bodies, it is not inconceivable that a reactionary panel of its Supreme Court may consider any constitutional amendment that effects such changes a violation of the state's national sovereignty, another basic feature of the Indian Constitution.

[72] Ibid.

[73] R Ramachandran, 'The Supreme Court and the Basic Structure Doctrine' in BN Kirpal *et al*. (eds), *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2000) 128–9.

In view of the live dangers associated with an aggressive judicial enforcement of a nebulous and arguably limitless implied 'essential features' doctrine, it is my view that for such *malleable* constitutions, judges may interfere with the substance of the amendment only when its passage would substantially destroy the pre-existing constitution, i.e. the constitutional change in question must be *manifestly unreasonable*. With regard to *malleable* constitutions, I am referring herein to constitutions that are easily amended, taking into account any of the states' political realities where the dominant executive/legislature may have control over the amending process.[74]

My critics may respond by asking whether this 'manifestly unreasonable' standard of review is too imprecise to be judicially manageable by the courts.[75] With respect, I disagree. This standard of review has already been widely applied by common law courts around the world in determining the constitutionality of certain ordinary legislation,[76] and it is also a semantic variation of the *Wednesbury* review that these common law courts, for decades, have traditionally applied in administrative law.[77] I am merely seeking to extend and apply this standard of review herein to constitutional amendments. Like *Wednesbury*, all this 'manifestly unreasonable' review means is that courts would not interfere lightly with the substance of the decisions reached.[78]

On the other hand, critics might also ask whether it would be adequate for the courts to apply a conceptual variant of *Wednesbury* review when courts in the world are moving toward proportionality review. I have two responses to this. First, one must note that no court in the world

[74] See D Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51 *Harvard International Law Journal* 319.

[75] Interestingly, Carlos Bernal has argued, for Colombia at least, that a constitutional amendment would be invalid if 'it derogates the charter of constitutional rights, the rule of law, or the principle of the separation of power; or if, according to the normative argument, it changes the constitution in such a way that it can no longer be considered an institutionalization of deliberate democracy'. With respect, this proposal is unhelpful as the author in no way fleshes out the substantive content and meaning of the conceptual terms 'rule of law', 'separation of power' and 'deliberative democracy'. The devil, as usual, is in the details. See Bernal (n 11) 356.

[76] *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312 at [33]; *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at [76].

[77] See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 234 where the English Court of Appeal held that the judiciary would only interfere with an executive decision if it has 'come to a conclusion so unreasonable that no reasonable authority could ever have come to it'. See EC Ip, 'Taking a "Hard Look" at "Irrationality": Substantive Review of Administrative Discretion in the US and UK Supreme Courts' (2014) *Oxford Journal of Legal Studies* 1 online.

[78] See also Ip (n 77) 10 and H Woolf, *De Smith's Judicial Review* (6th edn, Sweet & Maxwell, London, 2007) 551.

has ever applied proportionality review vis-à-vis the constitutionality of an impugned constitutional amendment. Second, and more importantly, proportionality review would require courts to balance the various interests and substitute its judgment of what is *necessary* for that of the amending body's. This '*substitutionary* engagement with the merits'[79] (original emphasis) of a constitutional amendment, as proportionality review essentially requires, would be in substance no different from the conferral upon judges the right to prune the Constitution as they deem fit.

So far as the judiciary does not interfere with the amending body's constitutional solution unless it is manifestly unreasonable, the courts would be under-enforcing the constitution against public officials. But we should not equate 'the scope of a constitutional norm as coterminous with the scope of its judicial enforcement'.[80] The most prominent rationale for the judicial under-enforcement of the constitution is premised on the belief that the political branches of government are better than judges in weighing costs and benefits in such circumstances.[81] Due to institutional constraints and the informational costs associated with the adjudication over the substantive content of constitutional amendments, judges may not want to exhaust the full content of these constitutional norms so that the political branches of the government can, on their own, flesh out the conceptual boundaries of these implicated rights. Judicial deference is generally justified in instances where the political branches of government usually have superior expertise and knowledge, vis-à-vis the judiciary, to assess the polycentric issues (often raised in constitutional amendments) that affect a large number of disparate interests, such that they are more likely than the courts to determine these constitutional questions correctly.[82] This is not to say that courts should always acquiesce to what the political branches deem to be legitimate constitutional change; for indeed where the amendment is perceived to be manifestly unreasonable, judicial intervention is warranted even if such an intrusion interferes with legislative or executive policy choices on these polycentric issues.[83] To this end, and on this basis, the courts were justified to have rendered the substance of constitutional amendments unconstitutional in those cases from Bangladesh, Colombia, India (during the Indira Gandhi administration), and Taiwan that we discussed above. In all those instances, we witnessed authoritarian regimes harnessing the

[79] J Goodwin, 'The Last Defence of Wednesbury' (2012) *PL* 454.

[80] LG Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (Yale University Press, New Haven, CT, 2004) 86.

[81] K Roosevelt III, 'Aspiration and Underenforcement' (2006) 119 *Harvard Law Review* 193.

[82] See also A Young, 'In Defence of Due Deference' (2009) 72(4) *MLR* 554.

[83] See J Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65(1) *CLJ* 174.

amending process with ease to achieve its manifestly unreasonable and undemocratic goals.

With regard to India, even after the end of the controversial Indira Gandhi administration, the Supreme Court has invoked the 'basic structure' doctrine twice to *invalidate* constitutional amendments passed by its Parliament. Interestingly, they both concerned the operation of Administrative Tribunals, which were established in 1985 to ameliorate the backlog in the Indian judiciary. In *L. Chandra Kumar v Union of India*,[84] the Supreme Court invalidated two constitutional amendments that empowered the federal and state legislatures to 'exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court'[85] on matters that are exercisable by the Administrative Tribunals, while in *Sambamurthy v State of Andhra*,[86] the Supreme Court invalidated Article 371D(5) of the Indian Constitution, which allowed for any state government in the Union, by special order made in writing, to modify or annul any order of the Administrative Tribunal. The latter decision is eminently sensible because it would be manifestly unreasonable for the government, a party in every of such litigation, to be given the unilateral power to override any decision of the Tribunal as it deems fit, as this would 'make a mockery of the entire adjudicative process';[87] but, in the former case, it is not self-evident why Parliament, in the interests of clearing the infamous backlog that was clogging up India's judicial process, could not, via a constitutional amendment, exclude the jurisdiction of the lower courts over decisions handed down by the Administrative Tribunals, especially since the Supreme Court retains jurisdiction to intervene in all such cases.

The fact is, in framing doctrinal constitutional rules, courts often seek to 'minimize the sum of error costs and administrative costs',[88] i.e. they would seek to minimize both the costs of erroneous decisions, including their own, and the administrative costs of implementing a particular doctrinal rule. In jurisdictions with *malleable* constitutions, the judicial exercise of deferential review over any impugned constitutional amendments is an example of a doctrinal rule whereby courts take into account their institutional capabilities during constitutional adjudication, adopt a posture of deference toward the propriety of formal constitutional

[84] (1997) AIR (SC) 1125.

[85] See art 323A(2)(d) and art 323B(3)(d) of the Indian Constitution.

[86] (1987) SCR (1) 879.

[87] Ibid at 888.

[88] D Strauss, 'The Ubiquity of Prophylactic Rules' (1988) 5 *University of Chicago Law Review* 193.

changes, and only invalidate constitutional amendments that are manifestly indefensible.

On the other hand, a constitutional amendment that has to 'travel a great distance from proposal to law'[89] should be treated differently. This is especially so for constitutional amendments where the people have made 'significant temporal commitment' to.[90] This precondition is satisfied when the amendment process is particularly cumbersome and requires significant bipartisan support and the general public's express or implicit endorsement[91] for the amendment to pass. (Examples would include the United States and Irish Constitution.) For these *rigid* constitutions, any constitutional amendments passed should *never* be judicially invalidated for violating some implied substantive constraints against change.

My critics might respond by arguing that it is *possible* for manifestly unreasonable constitutional amendments to be passed in jurisdictions with *rigid* constitutions, such that there is no reason why judges should be barred from invalidating such constitutional amendments in those jurisdictions too. But one must note that precisely because such jurisdictions (e.g. the United States and Ireland) have *rigid* constitutions, the enactment of constitutional amendments of any kind would be rarer in practice. As I have discussed earlier, in deciding *ex ante* whether to recognize or reject any implied substantive limits on constitutional change, one should *weigh* the risks of any legislative abuse of the amendment process against the dangers of any judicial abuse that may follow from unelected judges enforcing a nebulous 'essential features' doctrine that can frustrate legitimate constitutional changes that are intended to meet the exigencies of a changing world. The risks of the legislature successfully abusing the amendment process are much lower in jurisdictions with *rigid* constitutions. To allow the courts to have the exclusive and final say on the substantive propriety of constitutional amendments in these jurisdictions, one would ultimately be making a choice to place unelected judges at the apex of the constitutional system and to live with judicial errors over legislative ones.

[89] R Albert, 'Nonconstitutional Amendments' (2009) 22(5) *Canadian Journal of Law and Jurisprudence* 45.

[90] J Rubenfeld, *Freedom and Time: A Theory of Self Government* (Yale University Press, New Haven, CT, 2001) 175.

[91] One may note that while a public referendum mechanism is not provided for under the United States Constitution, three-quarters of the states must ratify any constitutional amendment before it can take effect. For this highly onerous threshold to be satisfied in such a heterogeneous country like America, the general public can be presumed to have implicitly approved of any such formalized change.

Conclusion

The implied basic structure doctrine was judicially conceived to protect the 'core features of contested democratic governance'.[92] But precisely where the constitution does not *ex ante* determine what this core is, the parameters of the core can only be judicially determined *ex post*.[93] In view of counter-majoritarian danger of any such judicial exposition, this doctrine should only thus be enforced in states, with *malleable* constitutions, where the dominant party/coalition in power has unilaterally harnessed the amendment process to achieve manifestly unreasonable political outcomes.

On the other hand, the super-majoritarian support for an amendment (in a jurisdiction with a *rigid* constitution) lends legitimacy to the constitutional change not merely because of the sheer numbers in its favour, but because the process of revision requires the exhaustion of considerable political energy and time that ensures careful deliberation by the separate political branches of the government and the public's intention to make a temporal commitment to abide by them.[94] The people may not be always right, for popular sovereignty is not an absolute guarantee of substantive justice.[95] But neither are judges infallible in their moral deliberations. In these circumstances, the judiciary must cede to the expression of popular sovereignty, not merely because the amendment is an unmistakeable expression of public will, but because this convergence of interests is undisputable evidence of 'the triumph of the political process over the intervening institutional and electoral barriers erected by the separation of governmental powers'.[96]

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[92] S Issacharoff, 'Constitutional Courts and Democratic Hedging' (2000) 99(4) *Georgetown Law Journal* 1002.

[93] It is noteworthy that the Federal Court of Malaysia, the nation's highest court, has recently recognized this implied basic structure doctrine. See *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 33 at [8]. On the other hand, the Singapore Court of Appeal in *Teo Soh Lung v Minister of Home Affairs* (1990) 2 MLJ 129 at [44] and the Constitutional Court of South Africa in *United Democratic Movement v President of the Republic of South Africa*, 2002 (11) BCLR 1179 at [16]–[17], have held that it was unnecessary to decide whether this doctrine applied in their countries.

[94] Issacharoff (n 92) 1002.

[95] Vile (n 39) 211.

[96] Albert (n 89) 44.