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From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras

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Abstract: The unconstitutional constitutional amendment doctrine has emerged as a highly successful, albeit still controversial, export in comparative constitutional law. The doctrine has often been defended as protecting a delegation from the people to the political institutions that they created. Other work has noted the doctrine's potential utility in guarding against abusive constitutionalism. In this article, we consider how these justifications fare when expanded to encompass claims against the original constitution itself, rather than a later amendment to the text. That is, beyond the unconstitutional constitutional amendment doctrine, can or should there be a doctrine of an unconstitutional constitution? Our question is spurred by a puzzling 2015 case from Honduras where the Supreme Court held an unamendable one-term limit on presidential terms, as well as protective provisions punishing attempts to alter that limit, to be unconstitutional. What is particularly striking about the case is that these provisions were not later amendments to the constitution, but rather parts of the original 1982 constitution itself. Thus, this article examines the possibility of 'an unconstitutional constitution', what we predict to be the next trend in global constitutionalism.

Keywords: abusive constitutionalism; Honduras; judicial review of constitutional norms; law; term limits; unconstitutional constitutional amendments

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I. Introduction

The unconstitutional constitutional amendment doctrine has emerged as a highly successful, albeit still controversial, export in comparative constitutional law. Recent empirical work has shown its growing acceptance in jurisdictions around the world.[1] The doctrine has often been criticised on democratic grounds, for example as creating a kind of super-counter-majoritarian difficulty.[2] However, it has also been defended as protecting a delegation from the people to the political institutions that they created. In this sense, placing limits on the amendment power is viewed as a pro-democratic act that protects the original constituent power of the people.[3] Other work has defended the doctrine on a more pragmatic ground, noting its potential utility in guarding against the use of tools of constitutional change to undermine democracy, or what has been called abusive constitutionalism.[4] Cases from contexts such as India and Colombia suggest that it might be useful to deploy when political leaders have the votes to amend the constitution in ways that will do lasting damage to the democratic order.[5]

In this article, we consider how these justifications fare when expanded to encompass claims against the original constitution itself, rather than a later amendment to the text. That is, beyond the unconstitutional constitutional *amendment* doctrine, can or should there be a doctrine of

[1] K Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press, Bursa, Turkey, 2008);Y Roznai, 'Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea' (2013) 61(3) *American Journal of Comparative Law* 657; Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017). On the objection to the doctrine see e.g. R Albert, M Nakashidze and T Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (forthcoming 2019) 70 *Hastings Law Journal*, <https://ssrn.com/abstract=3195059>.

[2] See e.g. R Albert, 'Counterconstitutionalism' (2008) 31 *Dalhousie Law Journal* 1, 47–8; R Albert, 'Constitutional Handcuffs' (2010) 42 *Arizona State Law Review* 663, 698. For an evaluation and response see Y Roznai, 'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability' in R Albert and BE Oder (eds), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Springer, forthcoming 2018).

[3] Y Roznai, 'Towards a Theory of Constitutional Unamendability: On the Nature and Scope of the Constitutional Amendment Powers' (2017) 18 *Jus Politicum – Revue de Droit Politique* 5.

[4] D Landau, 'Abusive Constitutionalism' (2013) 47(1) *UC Davis Law Review* 189, 231–9.

[5] See R Dixon and D Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13(3) *International Journal of Constitutional Law* 606.

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an unconstitutional *constitution,* or *original constitutional provision*?[6] Our question is spurred by a puzzling 2015 case from Honduras where the Supreme Court held an unamendable one-term limit on presidential terms, as well as protective provisions punishing attempts to alter that limit, to be unconstitutional. What is particularly striking about the case is that these provisions were not later amendments to the constitution, but rather parts of the original 1982 constitution itself.

Examining the possibility of an unconstitutional constitution allows us to draw out arguments supporting the unconstitutional constitutional amendment doctrine. The key cluster of arguments resting on delegation, or the differences between constituent and constituted power, simply fall apart when applied to at least *substantive*, although not necessarily *procedural*, review of the original constitution itself. But this does not inevitably doom the case for judicial review of an original constitution. Other arguments, we suggest, could be constructed to support such review. One is a set of pragmatic arguments about the ways in which constitutional replacement, just like constitutional amendment, can be used to undermine a liberal democratic order. Another is an argument about hierarchy between international and domestic law, which would argue that all domestic legal provisions, including the constitution, must comply with at least some aspects of international human rights law and other relevant aspects of international law, and that it was the domestic judiciary's role to monitor that compliance. In that respect, the investigation as for the possibility of an unconstitutional constitution is highly important for the project of global constitutionalism regarding the extent to which domestic constitutional law, including the original constitutional text, is or ought to be converging with common global standards.

[6] R Albert, R Hoque and Y Roznai, 'Judicial Invalidations of Original Constitutions' (work-in-progress). See also R Albert, 'Four Unconstitutional Constitutions and their Democratic Foundations' (2017) 50 *Cornell International Law Journal* 169 (providing different senses of how a constitution may be unconstitutional based on case studies from the United States, South Africa, Canada and Mexico). The possibility of declaring original provisions of constitutions unconstitutional was famously raised in the 1951 Southwest case, when the German Federal Constitutional Court cited with approval a statement of the Bavarian Constitutional Court according to which 'there are fundamental constitutional principles, which are of so elementary a nature and so much the expression of a law that precedes the constitution, that the maker of the constitution himself is bound by them. Other constitutional norms … can be void because they conflict with them.' By this obiter statement, the court recognised the possibility of an 'unconstitutional constitution'. See G Dietze, 'Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany' (1956) 42 *Virginia Law Review* 1; O Bachof, *Verfassungswidrige Verfassungsnormen?* (JCB Mohr, Germany, 1951) 15. The German Constitutional Court, however, has never declared a constitutional provision to be unconstitutional.

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The Honduran case fares poorly along all these dimensions. It not only makes little sense from a delegation perspective, but also seems calculated to undermine, rather than promote, liberal democratic constitutionalism from a pragmatic perspective. The Court emphasises subordination to international human rights law but does not give a compelling explanation as to why a term limit violates international human rights law. Indeed, as we demonstrate, any such argument would seem deeply problematic.

The case is nonetheless instructive in setting out conditions that might make review of a constitution more potentially defensible. We suggest, for example, that judicial review of the original constitution may often be on firmer ground if *procedural* rather than *substantive*, and if carried out close in time to the constitution-making process rather than many years after the fact as in Honduras. Finally, we suggest that a stronger set of international norms focused on constitution making and constitutions would give domestic judiciaries a more persuasive (and yet restricted) set of arguments to draw off when conducting judicial review of this kind.

Of course, by focusing on the Honduran case we do not consider all the possible permutations of an unconstitutional constitution doctrine – or the different kinds of provisions and contexts in which such a doctrine could apply. The doctrine could potentially apply to the whole, or only part of a constitution as in Honduras; and to different kinds of provisions. It could also be a judicially-enforced doctrine as in Honduras, or a political doctrine that underpins a willingness on the part of political actors to amend or repeal otherwise formally 'unamendable' provisions.[7] We leave the question of how these variations might affect the operation and legitimacy of the doctrine to another day.

The rest of this article is organised as follows. Part II briefly reviews the arguments surrounding the unconstitutional constitutional amendment doctrine, focusing on the ways in which the doctrine has gained acceptance through a combination of theoretical plausibility through the delegation rationale and pragmatic utility in cases of flexible constitutions that are liable to abuse at the hands of powerful political actors. Part III outlines the Honduran case and explains how the Court, with little direct discussion, extended the unconstitutional constitutional amendment doctrine to encompass claims against the original 1982 Constitution itself. Part IV considers the theoretical arguments that might support or undermine such an extension and analyses those arguments in light of the facts and

[7] See e.g. D Landau and R Dixon, 'Constraining Constitutional Change' (2015) 50(4) *Wake Forest Law Review* 856.

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arguments found in the Honduran case. Finally, Part V concludes by offering tentative arguments on the question of when, if ever, judicial review of a constitution itself might be appropriate.

II. Justifying the unconstitutional constitutional amendment doctrine

The unconstitutional constitutional amendment doctrine was not so long ago seen as an extreme oddity – the kind of thing that in most situations was fun to contemplate but extremely unlikely to actually be used.[8] Recent work has demonstrated however that the doctrine has actually spread very widely, becoming a core part of both constitutional design and judicial doctrine across a very large number of different countries.[9] In a large number of constitutions, some provisions are made expressly unamendable.[10] In others, the constitutional text invites judges to police boundaries on constitutional change that protect certain fundamental principles by making them impossible or more difficult to alter.[11] Finally, in some cases courts have developed a variant of the doctrine without an express invitation in the text.[12] The bite of the arguments developed below – for example in the tension between the doctrine and democratic values – may vary in important ways depending on whether courts are enforcing a clear textual command or instead are developing a doctrine as a structural inference. For purposes of this article, however, we do not emphasise those distinctions.

The empirical prevalence of the doctrine has not of course resolved the normative debate regarding its desirability. Arguments against the doctrine tend to focus most heavily on a supposed tension with democracy. This is a variant of the counter-majoritarian difficulty, but in an especially strong form.[13] Ordinary judicial review gives judges the power to overrule political decisions;

[8] See e.g. GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460, 487 ('[I]f ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing.')

[9] See Roznai, *Unconstitutional Constitutional Amendments* (n 1).

[10] Ibid 15–38. On the rise of constitutional entrenchment see also M Hein, 'Impeding Constitutional Amendments: Why Are Entrenchment Clauses Codified in Contemporary Constitutions?' *Acta Politica* (First Online: 25 February 2018).

[11] See R Dixon and D Landau, 'Tiered Constitutional Design' (2018) 86 *George Washington Law Review* 438.

[12] See Roznai, *Unconstitutional Constitutional Amendments* (n 1) 39–70; Dixon and Landau (n 5).

[13] See GJ Jacobsohn, 'The Permeability of Constitutional Borders' (2004) 82 *Texas Law Review* 1763, 1799 (the doctrine raises the counter-majoritarian difficulty in its 'most extreme' form).

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scholars have developed a number of theories squaring this review with liberal democratic constitutionalism. But the unconstitutional constitutional amendment doctrine gives judges the power to review amendments to the constitution. One common function of constitutional amendment is to act as a safety valve, allowing heightened political majorities to express disagreement with judicial decisions.[14] Review of constitutional amendments threatens to cut off this safety valve. And if political majorities disagree with a court's decision striking down a constitutional amendment on substantive grounds, they have no clear way to overturn that ruling. They may thus move to more destabilising or destructive measures, such as undermining or packing a court, or replacing the existing constitution entirely.[15]

A related set of critiques focuses on stability. Review of constitutional amendments may be particularly destabilising because it attacks the basic norms of the system at the constitutional level, not simply laws or regulations issued under those norms. It thus threatens to change the ground rules upon which political actors may be coordinating around and on which they may rely. The stability critique, of course, poses particularly substantial difficulties if deployed well after the amendment was adopted. When there is a long lag between adoption and invalidation, a number of lower-level norms may have been adopted, based on the invalidated constitutional provision, and actors may have changed their interactions based on it.[16] Moreover, in the absence of convincing counter-arguments the timing of the decision could cause an undue concentration of power of the judiciary compared to the constitution-amending power.[17]

[14] R Dixon, 'Constitutional Amendment Rules: A Comparative Perspective' in T Ginsburg and R Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, Cheltenham and Northampton, MA, 2011) 96, 98.

[15] See Dixon and Landau (n 11).

[16] Consider decision of the Constitutional Court of Ukraine n. 20-rp/2010 from 30 September 2010 concerning the constitutionality of the Law of Ukraine 'On Introducing Amendments to the Constitution of Ukraine', No. 2222-IV (Dec. 8, 2004). In this case, the judiciary invalidated an amendment, six years after it had already gone into effect. For a critical comment and the potentially destabilising effects of such a decision, see Opinion 599 of 2010 (Opinion on the Constitutional Situation in Ukraine), Venice Commission (20 December 2010) paras 33–35. On judicial review of constitutional amendment in Ukraine see Y Roznai and S Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 16(3) *German Law Journal* 543, 558–61.

[17] See Z Pozsár-Szentmiklósy and Y Roznai, 'Judicial Review of Constitutional Amendments and the Time Perspective' (unpublished paper, copy with authors) (critically analysing Moldovan Constitutional Court Judgment n. 7 from 4 March 2016 on modality of electing the President, in which the Court decided the unconstitutionality of a constitutional amendment 16 years after its enactment, without assessing in its reasoning the temporal question).

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Scholars have developed a number of defences of the doctrine despite these difficulties.[18] The most common theoretical defence focuses on the distinction between types of constituent power – only constitution-makers (the 'original or primary constituent power') can change any aspect of the constitution, while constitutional amenders (the 'derived or secondary constituent power') are limited to making changes that do not alter the basic choices made by the constitution-makers.[19] In this sense, the amendment power is a delegation from the 'people' to their political institutions, which was carried out in the course of making the constitution. The amendment power allows political institutions to make changes to the political order, but those changes must not exceed the scope of the delegation. Thus, the unconstitutional constitutional amendment doctrine allows courts to preserve the exclusive power of the 'people' to make certain fundamental choices during constitution-making.[20] So put, the doctrine need not necessarily be seen as an anti-democratic act, but instead as one that views certain key decisions as belonging to the people themselves, rather than to their representatives wielding the amendment power.

The influence of the delegation rationale, and its strong relationship to constituent power theories of constitution-making, surely helps to explain the growing popularity of the unconstitutional constitutional amendment doctrine. Constitutional texts themselves, for example, increasingly include explicit limits on the power of amendment, either by making some provisions impossible to amend or by requiring escalating levels of procedural difficulty for increasingly key changes to the constitutional text.[21] And courts themselves, even without explicit prompting in the constitutional text, have tended to draw on theories emphasising delegation when reviewing constitutional amendments.[22]

Beyond these theoretical defences lies also a pragmatic point: review of constitutional amendments may often be useful in protecting liberal democratic constitutionalism, especially where the tools of constitutional

[18] For an exploration of the normative arguments for and against the judicial enforcement of implicit substantive constraints on formal constitutional change, see PJ Yap, 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) 4(1) *Global Constitutionalism* 114.

[19] See Roznai (n 3); J Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, New York, NY, 2012) 127 (discussing cases from Latin America).

[20] Ibid.

[21] See Hein (n 10); Albert, 'Constitutional Handcuffs' (n 2); Dixon and Landau (n 11); Y Roznai, 'Unamendability and the Genetic Code of the Constitution' (2015) 27(2) *European Review of Public Law* 775.

[22] See e.g. Y Roznai, 'The Migration of the Indian Basic Structure Doctrine' in M Lokendra (ed), *Judicial Activism in India – A Festschrift in Honour of Justice V. R. Krishna Iyer* (Universal Law Publishing Co., New Delhi, 2012) 240.

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change are highly flexible.[23] A flexible amendment rule may be beneficial in key respects, because it increases the ability to update a constitutional text and allows for more democratic input into its evolution.[24] But flexibility also increases the ability of powerful politicians to carry out forms of change that may undermine the liberal democratic order, for example by perpetuating their own power or weakening the power or independence of horizontal checks such as constitutional courts and ombudspersons.[25] In cases where a constitutional amendment would itself do significant harm to the democratic constitutional order, judges may have a strong case for striking down those amendments. Judicial decisions of this type may at least act as a kind of speed-bump against authoritarian projects, helping to slow them until different political actors gain power.[26] And the tension between the doctrine of unconstitutional constitutional amendment and democracy may be reduced, if not eliminated, in cases where the amendment being targeted itself threatens to work a substantial erosion of liberal democracy.[27]

A now very well-studied example of such a use of the doctrine is the 2010 Colombian Constitutional Court decision striking down a referendum that would have allowed President Alvaro Uribe to seek a third consecutive term in office, after the Court had earlier allowed Uribe to amend the constitution to seek a second consecutive term.[28] In light of both the domestic constitutional design and comparative experience, the Court held that a third consecutive presidential term would concentrate executive power, do grave damage to institutional checks on the president, and force the political opposition to compete on a greatly tilted playing field.[29] After the

[23] See Dixon and Landau (n 5).

[24] See Dixon and Landau (n 11). On flexible and rigid amendment procedures see also Y Roznai, 'Constitutions, Rigid(Entrenched)/Flexible' in *Max Planck Encyclopaedia of Comparative Constitutional Law* (Oxford University Press, Oxford, forthcoming 2018).

[25] See Landau (n 4); Y Roznai, 'Constituent Powers, Amendment Powers and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in R Albert, X Contiades and A Fotiado (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing, Oxford, 2017) 23, 41–8.

[26] Dixon and Landau (n 5).

[27] Ibid.

[28] See Decision C-141 of 2010, in MJC Espinosa and D Landau (eds), *Colombian Constitutional Law: Leading Cases* (Oxford University Press, New York, NY, 2017) 352.

[29] Ibid. On judicial review of constitutional amendments in Colombia see C Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11(2) *International Journal of Constitutional Law* 339; GA Ramirez-Cleves, 'The Unconstitutionality of Constitutional Amendments in Colombia: The Tension Between Majoritarian Democracy and Constitutional Democracy' in T Bustamante and B Gonçalves Fernandes (eds), *Democratizing Constitutional Law* (Springer, New York, NY, 2016) 213; MA Cajas-Sarria, 'Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016' (2017) 5(3) *The Theory and Practice of Legislation* 245.

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Court ruled, Uribe peacefully left power, and scholars have credited the Court as playing a potentially key role in protecting against an erosion of democracy in Colombia.[30]

III. The Honduran Supreme Court, term limits and the unconstitutional constitution

The Colombian decisions reviewing term limits extensions were two of a large number of prior decisions in the region reviewing constitutional amendments on this issue in recent years.[31] In Venezuela, Bolivia, and Ecuador, for example, courts faced the question of whether proposed constitutional changes could be carried out using relatively undemanding methods of constitutional change, or instead special and more exigent procedures because they infringed on the 'basic structure' of the constitution or reduced fundamental rights.[32] In all three cases, high courts allowed the default method of change to be used, clearing an easier path for powerful presidents who sought to remain in office. In Costa Rica and Nicaragua, meanwhile, high courts found that amendments to the constitution that added or strengthened presidential term limits, and which had been put in place quite a while before the decisions were issued, were themselves unconstitutional constitutional amendments.[33] Both courts held basically that the presidential term limits infringed fundamental rights of voters and elected officials to vote and to stand for office on equal footing with other citizens.

[30] See e.g. Av Bogdandy, 'Ius Constitutionale Commune en América Latina – Observations on Transformative Constitutionalism' in Av Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune* (Oxford University Press, Oxford, 2017) Ch 2; R Dixon and D Landau, 'Democracy and the Constitutional Minimum Core' in T Ginsburg and A Hug (eds), *Assessing Constitutional Performance* (Cambridge University Press, New York, NY, 2016) 268–76. To take another example: Based upon the unamenable provision prohibiting any amendment concerning presidential term limits, on 25 May 2009, the Constitutional Court of Niger declared as unconstitutional a call for a referendum, which would have suspended the constitution and allow the President to continue in office as an interim president for a period of three years. See Cour Constitutionnelle AVIS n. 02/CC of 26.05.2009, <http://cour-constitutionnelle-niger.org/documents/avis/2009/avis_n_002_cc_2009.pdf>.

[31] See D Landau, Y Roznai and R Dixon, 'Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America' in A Baturo and R Elgie (eds), *Politics of Presidential Term Limits* (Oxford University Press, Oxford, forthcoming 2018).

[32] See D Landau, 'Term Limits Manipulation across Latin America – and What Constitutional Design Could Do about It' *Constitutionnet* (21 July 2015) <http://www.constitutionnet.org/news/term-limits-manipulation-across-latin-america-and-what-constitutional-design-could-do-about-it>.

[33] See S Ragone, *El control judicial de la reforma constitucional: aspectos teoricos y comparativos* (Editorial Porrúa, Porrúa, México, 2012) 77–85, 102.

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The core reasoning of these decisions runs strikingly contrary to the reasoning of the Colombian Constitutional Court noted above and might make one question the conditions under which the unconstitutional constitutional amendment doctrine will be pragmatically useful to protect liberal democratic constitutionalism. Many of these cases were issued in a context where liberal democracy was already under threat and where courts lacked independence from the executive.

Nonetheless, all these decisions that predated the Honduran one are quite orthodox in another sense: they all reviewed proposed or actualised amendments to an existing constitutional text, and they rested upon distinctions between 'original' and 'derived' constituent power. The Costa Rican Court for example rested its decision on a textual distinction between 'partial' reform, which could be carried out through amendment procedures and 'total' reform which required a Constituent Assembly.[34] The Nicaraguan Supreme Court also relied heavily on the standard distinction between the 'original' and 'derived' constituent power to justify its analysis, and emphasised that the provision at issue was a later addition to the 1987 constitution.[35]

In this sense, the decision of the Honduran Supreme Court in 2015 is novel and runs well beyond the reasoning of other courts in the region. Since the inception of the Honduran constitution of 1982, Article 239 has contained a one-term lifetime limit on presidential terms and Article 374 has contained an absolute prohibition on amendment of that limit.[36] Article 239 reinforces this prohibition with unusual language: '[N]o citizen who has already served as head of the Executive Branch can be President or Vice-President. Whoever violates this law or proposes its reform, as well as those that support such violation directly or indirectly, will immediately cease in their functions and will be unable to hold any public office for a period of 10 years.'[37] This clause of Article 239 purports to remove those even attempting to change the prohibition from office and bans them from serving for ten years.[38] Two other provisions added even more force to this

[34] Ibid 102.

[35] Ibid 78–83 ('In our case, the Supreme Court of Justice has been categorical in recognising that sovereignty is the will of the people and that it is regulated only by the original constituent power; the derived constituent power in general is subordinated to the principle of sovereignty and cannot contradict it.').

[36] Art 239 was amended in technical respects by subsequent decrees, but the core aspects of the existing provision are identical to those in the original 1982 constitution.

[37] Constitución de la República de Honduras [Constitution] art 239 (Hond).

[38] T Ginsburg, Z Elkins and J Melton, 'On the Evasion of Executive Term Limits' (2011) 52 *William and Mary Law Review* 1807, 1810. The authors remark there that the origins of such a 'poison pill' provision are uncertain, though the general institution may be traced to fifth century BCE Athens (referring to G Doron and M Harris, *Term Limits* (Lexington Books, Lanham, MD, 2001) 5.

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one: Article 42(5) stated that anyone 'inciting, promoting, or supporting' the continuance in office or re-election of the president could have their 'rights of citizenship lost', while Article 4 stated that 'alternation' in the presidency was obligatory and that anyone infringing that norm was guilty of treason.[39] Thus, the 1982 constitution contained a no re-election provision, an unamendability clause protecting the no re-election provision, and a set of provisions limiting and punishing attempts to change the re-election provision.

These provisions were not merely hypothetical: they played a major role in the removal of former President Zelaya in 2009. After taking power in 2006, President Zelaya proposed that he would attempt to replace the 1982 constitution by calling a Constituent Assembly. In March 2009, Zelaya announced a 'non-binding' poll to determine public support for a proposed referendum on whether to convene a national constituent assembly to replace the constitution.[40] Opponents claimed that a Constituent Assembly could not be called under the existing Honduran constitution and argued that Zelaya's efforts were motivated by the aim of disposing of the one-term limit, although Zelaya never explicitly stated any intent to alter the term limit. Eventually, the Supreme Court declared the poll unconstitutional and ordered its suspension. Despite the court's declaration, Zelaya moved forward, and after tensions continued to increase, he was removed from power by the military in June 2009 and placed on a plane to Costa Rica.

The arguments of those supporting this removal relied heavily on Article 239. According to the argument, Zelaya's decrees calling for a referendum had violated Article 239 by seeking to alter the term limit provision and to pave the way for his own re-election, a breach which justified the Congress' removal of Zelaya and appointment of a successor.[41] Virtually the entire international community and most scholars rejected these arguments and

[39] Provisions of the criminal code backed up this prohibition as well. Art 330 of the 1983 Penal code makes it punishable with 5–10 years in prison to promote presidential re-election.

[40] For descriptions of the chain of events see M Cáceres di Iorio, *The Good Coup: The Overthrow of Manuel Zelaya in Honduras* (CCB Publishing, British Columbia, Canada, 2010) xiv–xx; M Llanos and L Marsteintredet, 'Epilogue: The Breakdown of Zelaya's Presidency: Honduras in Comparative Perspective' in M Llanos and L Marsteintredet (eds), *Presidential Breakdowns in Latin America. Causes and Outcomes of Executive Instability in Developing Democracies* (Palgrave Macmillan, New York, NY, 2010) 229–38; JM Ruhl, 'Honduras Unravels' (2010) 21(2) *Journal of Democracy* 93.

[41] See e.g. N Feldman, *et al.*, 'Report to the Commission on Truth and Reconciliation of Honduras: Constitutional Issues' (23 August 2011) 59–60. *FSU College of Law, Public Law Research Paper No.* 536, <http://ssrn.com/abstract=1915214> (finding that the removal of Zelaya was illegal, although also finding that Zelaya had engaged in illegal conduct).

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declared the removal to be an unlawful military coup.[42] Honduras was, for example, suspended from membership in the Organization of American States for two years, after the OAS found that the removal constituted an 'unconstitutional alteration of the democratic order'.[43] Nonetheless, the centrality of these provisions to the episode shows their contemporary importance to Honduran constitutionalism.

Zelaya was never restored to office despite the international outcry, and in the aftermath of his removal, the political groups opposed to him – and particularly associated with the National Party – have consolidated considerable power. After the removal, domestic and international institutions called for a series of reforms to improve institutional performance and strengthen democracy in the country. Nonetheless, no systematic constitutional reform occurred. Following an initiative of the ruling National Party in 2012, the Congress purged and replaced four of the five justices on the Constitutional Chamber of the Supreme Court, after they had struck down legislation delegating power to the national chief of police that was seen as important to the government.[44] The removal of these justices was illegal because the Congress lacked any explicit impeachment authority. After the removal had occurred, however, Congress amended the Constitution to give itself the power to impeach and remove justices of the Supreme Court.[45]

Thus, there were important changes in political context between Zelaya's removal in 2009 and the Constitutional Chamber's decision in 2015 holding the term limits provisions to be unconstitutional. The now-ruling National Party, which took power after Zelaya's removal and had fiercely opposed Zelaya's constitution-making effort, now itself sought re-election

[42] Ibid. This conclusion was not however unanimous. See O Sanchez, 'A "Coup" in Honduras? Nonsense' (2 July 2009) *The Christian Science Monitor*, <https://www.csmonitor.com/Commentary/Opinion/2009/0702/p09s03-coop.html>; FM Walsh, 'The Honduran Constitution is Not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal' (2010) 38 *Georgia Journal of International and Comparative Law* 339, 357.

[43] The situation in 2009 in Honduras was more complex than the OAS action might have indicated. See VC Jackson, 'Reformas Constitucionales Inconstitucionales: Una Mirada a la Teoria Constitucional y el Constitutionalism Transnacional' in Esteban Restrepo Saldarriaga (ed), *Libertad De Expressión: Entre Tradición Y Renovación: Ensayos En Homenaje A Owen Fiss* (Ediciones Uniandes, Colombia, 2013) 135. See also R Dixon and VC Jackson, 'Constitutions Inside out: Outsider Interventions in Domestic Constitutional Contests' (2013) 48 *Wake Forest Law Review* 149, 159 (the authors note there, at 172, that 'the actions of the OAS may have been perceived as motivated more by the fear of displacement of incumbent heads than by a bona fide concern for the domestic constitutional order of Honduras').

[44] See J Antonio Gutierrez Navas *et al*., 'Destitución ilegal y arbitraria de magistrados de la Sala de lo Constitucional de la Corte Suprema de Justicia de Honduras' (2015) 5 *Revista Internacional de Derechos Humanos* 175.

[45] See Hond Const, art 234.

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as a way to perpetuate the power of their incumbent president, Juan Orlando Hernandez.[46] The 2015 decision originated with two challenges, both brought by key politicians in the National Party.[47] Furthermore, the 2015 decision was issued by a Constitutional Chamber that had effectively been packed by the National Party three years earlier. At any rate, the Chamber unanimously accepted the challenges and held the requisite articles – the term limit itself, the unamendability of that limit, and the prohibition on seeking to change the article – to be 'inapplicable'.

The Court focused on the parts of Articles 239 and 42 punishing attempts to change the term limit, holding that these articles were in tension with fundamental rights of freedom of expression found elsewhere in the Honduran Constitution and in regional and international human rights instruments, and which themselves were linked to the political rights of voters and candidates.[48] It held that when there was such a 'collision' between some parts of the Constitution and others that were 'fundamental rights inherent to the human person contained in the present constitution and international principles and human rights norms', the Court had the power to hold certain parts of the Constitution 'inapplicable'.[49] In this case the Court held that there was such a collision between Articles 239 and 42 and fundamental rights such as the freedom of expression, since the provisions at issue stopped citizens from potentially advocating for constitutional changes.

The Court set aside not only the parts of Articles 239 and 42 that punished attempts to change the term limit, but also the part of Article 239 that created the term limit itself and the part of Article 374 that made the term limit unamendable, since those provisions had a 'direct and necessary relationship' with the other constitutional articles struck down.[50] The result of the decision was thus to invalidate not only the parts of the constitution that potentially punished attempts to change the term limit, but also the unamendable nature of the term limit and the term limit itself. That is, the decision left Honduras without any presidential term limit at all, and

[46] See Landau, Roznai and Dixon (n 31). For an elaboration on the political context in which the term limits decision was made in Honduras see Juan Muñoz-Portillo and Ilka Treminio, 'The Politics of Presidential Term Limits in Central America: Costa Rica, El Salvador, Guatemala, and Honduras' in A Baturo and R Elgie (eds), *Politics of Presidential Term Limits* (Oxford University Press, Oxford, forthcoming 2018).

[47] Supreme Court of Justice, Constitutional Chamber, Decision of 22 April 2015. <http://www.poderjudicial.gob.hn/Documents/FalloSCONS23042015.pdf>.

[48] Decision of 22 April 2015, section 14.

[49] Ibid section 18.

[50] Ibid section 29.

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this has allowed the incumbent president, Juan Orlando Hernandez of the National Party, to seek re-election in the 2017 elections.[51]

The Court does not discuss in much depth the distinction between the unusual situation it faced – reviewing a part of an original constitution – and the now relatively common practice of reviewing a later amendment to the constitution. However, the Court does not rest its doctrine on any distinction between 'original' and 'derived' constituent power, presumably because such an analysis would make no sense. It also hints at some uneasiness. For example, it affirms that all relevant constitutional norms are of the same rank, which is why it holds the term-limit related provisions 'inapplicable' rather than nullifying them or striking them down.[52]

The Court's theory of the unconstitutional constitution appears to rest primarily on international law and a resultant hierarchy of norms. It relies heavily on Article 15 of the Honduran constitution, which states that Honduras 'makes its own principles and practices of international law that promote the solidarity and self-determination of peoples, nonintervention and the strengthening of universal peace and democracy'. The Court held that this and other articles created a 'constitutional block' through which certain provisions of international law became part of the constitutional order. The suggestion of the Court was that international law, and particularly human rights law, created something of a hierarchy of constitutional norms in which the fundamental rights provisions of the constitution found in international human rights law were at the top. These higher-order norms thus served as ammunition to hold the term-limit related provisions inapplicable.

IV. Evaluating the arguments for an unconstitutional constitution doctrine

One can distinguish four different classes of arguments that might bear on judicial review of both constitutional amendments and original constitutional texts: a delegation argument, a pragmatic argument, an international law argument, and a stability argument. We consider all these arguments here and conclude that together they may leave room for some variant of

[51] See 'Honduras: Hernández busca la reelección y la oposición explora una posible alianza' 13 March 2017) *CNN Espanol*, <http://cnnespanol.cnn.com/2017/03/13/honduras-hernandez-busca-la-reeleccion-y-la-oposicion-explora-una-posible-alianza/>.

[52] Ibid section 18 (noting that all the provisions involved had the 'same rank and constitutional vigilance', but that the Court could 'choose one interpretation over another or even apply one norm over another or disapply one' in order to maintain 'the articulation and coherence' of the constitutional text).

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an unconstitutional constitution doctrine, although in a radically different form than what was actually done by the Honduran Supreme Court here.

Delegation and constituent power

A delegation argument at first glance would seem to foreclose any kind of review of an original constitutional text itself. If the purpose of the unconstitutional constitutional amendment doctrine is to protect the original constituent power of the people, then it makes a considerable amount of sense to review an amendment to the constitution, but none to review the substance of the constitution itself, since the constitution is itself the act of the original constituent power.

In many cases where petitioners have attacked the substance of their constitutions, courts have adopted such reasoning rather clearly. For example, in Brazil, where the judicial review of constitutional amendments is an accepted practice, the Federal Supreme Court has emphasised that the *cláusulas pétreas* – the explicit immutable principles – limit only the secondary constituent power but not the primary constituent power.[53] Likewise, in Venezuela, in its decisions, the Supreme Court accentuated that constitutional unamendability cannot limit 'the people' in their capacity as holders of original constituent power.[54]

In two cases before the Constitutional Court of Bosnia and Herzegovina, certain constitutional provisions that granted privileges for the three constituent people (Bosnians, Serbs and Croats) were challenged before the Constitutional Court for conflicting with the principle of equality. The majority of the Constitutional Court held that it lacked the competence to decide upon the constitutionality of the Constitution. Otherwise, if it decided that part of the constitution was 'unconstitutional', it would fail its duty under Article VI(3)(a) of the Constitution to 'uphold this Constitution'.[55]

The exceptions to this rule might also be seen as illustrating it. South Africa is a very well-known example where the Court certified whether the draft final constitution of 1996 complied with 34 substantive principles found in the interim constitution of 1993. The Constitutional Court

[53] ADIN n. 815-3/DF, DJU de 10.05.96, p. 15131; cited in AZ Melo, 'A limitação material do poder constituinte derivado' (2008) 8(1) *Revista Mestrado em Direito* 31, 48.

[54] See e.g. Supreme Court of Justice of Venezuela (Constitutional Chamber), Opinion n. 53 of 3 February 2009); cited in J Colón-Ríos, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia' (2011) 18(3) *Constellations* 365, 369–72.

[55] See Case No U-5/04 Request of Mr Sulejman Tihić, Decision of 31 March 2006, <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/bih/eng/bih-2006-1-003> ; Case No U-13/05, Request of Mr Sulejman Tihić, Decision of 26 May 2006, <http://www.codices.coe.int/NXT/gateway.dll/CODICES/full/eur/bih/eng/bih-2006-2-005>.

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declared several parts of an initial draft of the Constitution of 1996 to be unconstitutional before fully certifying a revision.[56] The interim constitution in this case clearly gave the Court the power to exercise this kind of judicial review, and all parties agreed that the final constitution-making process should be bound by the roadmap laid out in the interim constitution. In this sense, the interim and final constitution could both be seen as part of the same constitution-making process and the same intervention of the people. Therefore, in observing the constitution-making process, the Court arguably acted within its competence, exercising an explicit delegated authority.[57]

Another interesting exception might be the recent decision of the High Court Division in Bangladesh, in which a majority declared unconstitutional the Sixteenth Amendment to the Constitution.[58] This case raises thorny questions for constitutional theory because although the court reviewed and invalidated an amendment, this amendment restored an original constitutional arrangement concerning the removal of Supreme Court judges. Formally speaking, of course, the normative provision under review was a constitutional amendment enacted by the secondary constituent power (although reinstating parts of the original constitution).[59]

A potentially much broader form of review left open by the constituent power rationale goes to the process rather than the substance of constitution-making. Substantive review of an original constitutional text appears unavoidably to be judicial review of the original constituent power. But procedural review of a constitution-making process could be seen as *defending* the original constituent power against attempts to abuse its form in the name of powerful political actors or other forces. An increasing number of scholars suggest that constituent power must take a particular form to be legitimate.[60] In particular, it must reflect a

[56] Re Certification of the Constitution of the Republic of South-Africa, 1996(4) SALR 744.

[57] See e.g. A Sachs, 'South Africa's Unconstitutional Constitution: The Transition from Power to Lawful Power' (1997) *41 St. Louis University Law Journal* 1249; Albert (n 6) 178–82. For a discussion on the nature of the constitution-making power in South Africa see H Botha, 'Instituting Public Freedom or Extinguishing Constituent Power? Reflections on South Africa's Constitution-Making Experiment' (2010) 26 *South African Journal on Human Rights* 66.

[58] Asaduzzaman Siddiqui and Others v. Bangladesh, Writ Petition n. 9989 of 2014; judgment of 5 May 2016 (Bangladesh).

[59] For a preliminary analysis see R Hoque, 'Can the Court Invalidate an Original Provision of the Constitution?' (2016) 17(2) *University of Asia Pacific Journal of Law and Policy* 13, <http://uap-bd.edu/lhr/wp-content/uploads/2017/05/2.pdf> (the author argues that the court lacks such judicial review power, and that the assertion of such a power would run counter to the original constituent power).

[60] See e.g. KL Scheppele, 'Unconstitutional Constituent Power' 32–6 (unpublished manuscript, 2012–2013) <http://perma.cc/3DG2-RTXX>; J Braver, 'We, the Mediated People: Unconventional Adaptation in Venezuela and Bolivia' (6 May 2018) <https://ssrn.com/abstract=3022221>.

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reasonable approximation of popular will. Courts might thus review whether the process of constitution-making, such as the rules for triggering a constitution-making process, electoral rules for selecting an Assembly, voting rules in the Assembly, and rules for ratification via referendum and other process adequately reflect such an authentic popular will.[61]

We do not downplay the significant theoretical and practical obstacles to exercising this form of review, but merely point out here that it could be consistent with constituent power theories of constitution-making and judicial review. And indeed, some courts seem to adopt a similar approach during constitution-making processes. During the making of the Colombian constitution of 1991, for example, the Court held that the implications of constituent power theory required that the Court eliminate politically-imposed limits on the Constituent Assembly's topics of deliberation.[62] In essence, the Court held that the exercise of original constituent power had to be unrestricted by a priori political pacts.

In Venezuela, more dramatically, the Supreme Court tried at several points to restrain the Chavez-led constitution-making process of 1999, while at the same time accepting the basic ability to rewrite the Venezuelan constitution by making use of constituent power theory.[63] These cases rest on a murky theoretical foundation. Nevertheless, they are perhaps best understood as attempts to ensure that the process reflected the true 'will of the people', even though they ultimately proved to be ineffectual. The most interesting intervention occurred relatively early on, when the Court held that Chavez's attempt to send to referendum a question asking whether the public was in accord with the calling of a Constituent Assembly based on electoral rules that Chavez himself would later draft was unconstitutional.[64] In particular, it held that this question violated a requirement that the process represent the 'true popular will', and instead required that Chavez lay out his proposed electoral rules before the referendum was held.[65]

[61] See W Partlett, 'Courts and Constitution-Making' (2015) 50(5) *Wake Forest Law Review* 921; J Braver, 'Revolutionary Reform in Venezuela – Electoral Rules and Historical Narratives in the Creation of the 1999 Constitution' in Albert, Contiades and Fotiadou. *The Foundations and Traditions of Constitutional Amendment* (n 25) 137.

[62] See MA Cajas Sarria, *La Historia de la Corte Suprema de Justicia de Colombia, 1886–1991, Tomo II: Del Frente Nacional a la Asamblea Constituyente, 1958–1991* (Universidad de los Andes y Universidad Icesi, Bogotá, 2015) 406–8.

[63] See D Landau, 'Constitution-Making Gone Wrong' (2012) 64(5) *Alabama Law Review* 923, 939–49; J Braver, 'Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez Over the Creation of the 1999 Constitution' (2016) 14(3) *International Journal of Constitutional Law* 555.

[64] See Caso: Gerardo Blyde, contra la Resolucion No. 990217–32 (Supreme Court of Justice, Political-Administrative Chamber) in *Revista Del Derecho Publico*, nos. 77–80 (1999) 73.

[65] Ibid 80.

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This requirement ultimately did little to restrain Chavez – his referendum won overwhelming support with highly majoritarian electoral rules that allowed his forces to dominate the Assembly – but it does show how courts might be able to use variants of constituent power theory to shape the exercise of original constituent power.[66]

In Honduras, of course, the Supreme Court did not adjudicate the process of making the 1982 constitution at all, but rather a set of substantive provisions. In challenging these provisions, the Court challenged a decision made by the original constituent power. And not just any of its decisions, but one that seemed – because of the many different ways in which it was instantiated and protected in the text – to be fundamental to that power, virtually the heart of the 1982 Constitution. This kind of review seems simply impossible to square with constituent power or delegation theories of judicial review.[67]

Pragmatism

Many defences of the unconstitutional constitutional amendment doctrine focus on its potential utility as a speed bump in slowing down forms of constitutional change that threaten to damage a liberal democratic order. From this perspective, constitutional replacement poses similar risks to constitutional amendment.[68] Powerful political actors can use the constitution-making process to centralise power, reduce the power of the opposition, and take control of or reduce the strength of horizontal checks such as courts. Indeed, because constitution-making allows drafters to alter a number of norms and institutions at once, it may pose a particularly salient risk. At least viewed in terms of potential damage to liberal democracy, the case for restraining constitutional change via replacement is at least as strong as the case for restraining change via amendment.[69]

[66] See R Segura and AM Bejarano, '¡Ni una asamblea más sin nosotros! Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes' (2004) 11(2) *Constellations* 217.

[67] Because that these provisions were so fundamental to the constitutional order, Richard Albert correctly claims that the decision amounts to, what he terms, a dismemberment: 'The Honduran Supreme Court should not have rendered the provision inapplicable—a decision whose effect amounted to a constitutional dismemberment—without confirming the substantial popular support for such a fundamental change to the core of the Constitution. As it was, however, the Court dismembered the Constitution on its own—a role that is not properly the Court's but rather that people's own.' R Albert, 'Constitutional Amendment and Dismemberment' (2018) 43(1) *Yale Journal of International Law* 1, 68–9.

[68] See Landau and Dixon (n 7); Landau (n 4).

[69] Interestingly, the most common methods executives seeking to overstay their term limits are constitutional amendment and thereafter constitutional replacement. See T Ginsburg, Z Elkins and J Melton, 'Do Executive Term Limits Cause Constitutional Crises?' in T Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, New York, NY, 2012) 350, 362 n 12.

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The Honduran Constitutional Court's decision is, however, difficult to justify through such a lens. The term limit itself, and even the anti-attempt provisions guarding it, did not pose a realistic threat to liberal democracy. Indeed, it would appear that in the eyes of the drafters of the 1982 constitution, it was a safeguard against its erosion through the route of a caudillo remaining in power indefinitely and then using that duration in office to tilt the electoral playing field in their favour.[70] This perspective was maintained in recent Honduran history. The main popular argument against President Zelaya was that his attempts to rewrite the constitution were aimed at allowing him to remain in power, thus threatening liberal democratic constitutionalism in Honduras.[71] Article 239 in that instance was used, ironically by some of the same actors who would in 2015 seek its removal, as a justification for the irregular removal of a sitting president.

The potential threat to liberal democracy in this episode instead may stem from the Court itself, by effectively abolishing any presidential term limit. As is suggested by recent experience elsewhere in the region, leaving the door open for indefinite presidential re-election may increase the risk of a powerful political actor establishing a competitive authoritarian regime where elections are still held but the opposition is forced to compete on a heavily tilted playing field and lacks guarantees of its fundamental rights.[72] The context in which the decision was issued – at the behest of politicians affiliated with the ruling National Party, and after that party had taken illegal measures to pack the Constitutional Chamber – heightens those risks further.[73]

The Honduran Court nonetheless made an unusually pragmatic argument for removal of the term limit, although on different grounds. It focused on two arguments. The first was that the provision at issue 'may have made

[70] As Alexander Baturo notes, 'almost all presidents that had their term limits extended proceeded to win subsequent re-elections'. See A Baturo, *Democracy, Dictatorship, and Term Limits* (University of Michigan Press, Ann Arbor, MI, 2014) 9. On what influences whether presidents attempt to overstay their tenure see A Baturo, 'The Stakes of Losing Office, Term Limits and Democracy' (2010) 40(3) *British Journal of Political Science* 635.

[71] See above Pt III.

[72] See S Choudhry, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment: A reply to Rosalind Dixon and David Landau' (2017) 15(3) *International Journal of Constitutional Law* 826, 828 ('Proposals to relax or remove presidential term limits are the most visible and common example of constitutional amendments in the service of democratic backsliding, having generated constitutional conflict in recent years across Sub-Saharan Africa (Burkina Faso, Burundi, Cameroon, Chad, Congo Brazaville, Democratic Republic of Congo, Gabon, Guinea, Malawi, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo, Uganda, and Zambia) and Latin America (Colombia, Ecuador, Honduras, Nicaragua, and Venezuela).')

[73] See above Pt III.

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sense in its time, but not today after the country has gone through ten electoral processes'.[74] The Court thus suggested that it had the power to update the Constitution by excising a now outdated provision. Second, the Court blamed the eternity clause preventing amendment of the term limit for causing some of the problems during the Zelaya episode. It suggested that its decision would allow for a peaceful exit caused by the 'dilemma' of a term limit that could not otherwise be changed through any democratic process.[75]

It is well accepted that courts have a power of interpretation that will often act as a form of informal change or updating of a constitutional text. But this is quite different from the act of formally invalidating a part of the constitutional text as the Court did here.[76] In practice, highly rule-like provisions often cannot easily be updated or informally changed by courts. The United States constitution offers an interesting example – rule-like clauses requiring that a citizen be 35 years of age to run for president, or that a right to jury trial be given for all common-law claims with amount in controversy over $10, have never been updated despite potential arguments that they are outdated and a Supreme Court that has aggressively reinterpreted other parts of the constitution such as the scope of federal power.[77]

The Court's argument also reflects a somewhat cramped view of the legal arguments surrounding eternity clauses. These can be viewed as a form of tiered constitutional design, thus making a given kind of constitutional change unachievable through amendment but allowing it through replacement. So understood, the argument preserves the distinction between 'original' and 'derived' constituent power that lies behind the delegation rationale, by allowing the people to make any legal change they wish. It also preserves space for even fundamental constitutional change by democratic process, rather than judicial action alone.

In the Honduran context, of course, the eternity clause protecting term limits appears to have been understood differently during the Zelaya episode: those supporting his removal often argued that he could not change

[74] See Decision of 22 April 2015, section 10.

[75] Ibid section 15.

[76] See Y Roznai, 'Unconstitutional Constitutional Change by Courts' *New England Law Review* (forthcoming 2018) (copy with authors).

[77] See e.g. R Dixon, 'Updating Constitutional Rules' (2009) *The Supreme Court Review* 319. But see JL Marshfield, 'Court and Informal Constitutional Change in the States' *New England Law Review* (forthcoming 2018) (copy with authors) (Marshfield provides qualitative illustrations regarding cases in which courts, in US state level, have engaged with informal constitutional change, regarding double-jeopardy protections, civil rights, the judicial branch, taxation and finance, voting and executive power. Marshfield also demonstrates how courts provided a restrictive constitutional interpretation to the right to a trial by jury).

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the no-re-election rule even through the drafting of a new constitution, and that his alleged attempts to do so were grounds for removal.[78] And the peculiar features of the Honduran constitutional design, which not only make the term limit unamendable but punish any attempt to change it, doubtlessly contributed to this perception.[79] Even if it were necessary to provide an 'exit' by somehow excising the anti-attempt provisions, this could have been done without touching the term limit itself or even the eternity clause protecting it.

International law and hierarchy

The Honduran Court's explicit rationale focuses largely on a vision of Honduran constitutionalism that subordinates norms in the domestic constitution to certain precepts of international law, such as international human rights law. The Court suggests that it has the power to declare parts of the constitutional order to be incompatible with international principles and therefore to hold them 'inapplicable'.[80] The Court thus suggests a hierarchy in which the domestic constitution is itself subordinate to some aspects of the international legal order.

Such a vision of judicial power collapses any distinction between judicial review of constitutional amendments and replacements; in either case constitutions themselves may be controlled by higher legal principles found in international law.[81] As Colón-Ríos has observed, it is thus in tension with the delegation or constituent power theory and seems to drive towards an alternative theory.[82] Rather than viewing constitution-making as an autonomous act carried out by the people, it seems to view it as a legally controlled and subordinated act. Of course, from the perspective of international law, this is clearly the case, as international law is regarded as superior to domestic law – constitutional law included – be it constitutional amendments or original constitutional provisions. Accordingly, supra-national law may pose limitations both to constitutional amendments and original constitution-making.[83]

[78] See above Pt III.

[79] See text accompanying (nn 107–08) for further discussion.

[80] See Decision of 22 April 2015, section 18.

[81] D Maus, 'The Influence of Contemporary International Law on the Exercise of Constituent Power' in A Jyränki (ed), *National Constitutions in the Era of Integration* (Kluwer Law International, The Hague, 1999) 50.

[82] See e.g. J Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143 (noting this possibility as a departure from the constituent power tradition).

[83] In contrast, in most jurisdiction constitutional law prevails, from the perspective of domestic constitutional law. See Y Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments' (2013) 62(3) *International and Comparative Law Quarterly* 557, 577–80.

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This notion is also reflected in Article 27 of the Vienna Convention on the Law of Treaties according to which domestic legal norms, including constitutional norms, cannot be a ground for excusing a state's responsibility. Accordingly, when constitutional norms conflict with an international obligation, the former may be declared by an international body as unenforceable and the state can be found responsible. However, such unenforceability applies merely in the international sphere, and the constitutional norm would retain its validity under domestic national law.[84]

At the same time, such a view may be useful from a pragmatic perspective because it allows for the possibility that constitutional replacement, in addition to amendment, can be used to erode liberal democracy, and allows for a set of procedural or substantive tools that could be used to restrain both.[85]

At minimum, of course, a court seeking to make this kind of argument would need to establish three points: (1) that a subordination of domestic constitutional law to international law, from the perspective of the domestic constitutional order, was theoretically possible, (2) that such a subordination had in fact occurred in the text, and (3) the content of the international law being used to control the domestic constitution.[86] One might argue that a constitution itself could delegate to a court the power to judge whether its own provisions were consistent or inconsistent with international legal standards, and to annul parts of the constitution that were inconsistent with those standards. A constitutional order might thus seek to restrain itself in particularly strong form by not simply committing its constitutional stability to rigid domestic norms, but also to international legal standards.[87] It is also unclear whether this kind of argument works in the context of review of an original constitution rather than a

[84] See also K Gözler, 'La Question de la Superiorité des Normes de Droit international sur la Constitution' (1996) 46(1–4) *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 195, 200.

[85] See Landau and Dixon (n 68). For a critical review of international law as limiting constitution-making see D Landau, 'Democratic Erosion and Constitution-Making Moments: The Role of International Law' 2 (2017) *U.C. Irvine Journal of International, Transnational and Comparative Law* 87, 105–8.

[86] See e.g. Y Roznai and LRC Kreuz, 'Conventionality Control and Amendment 95/2016 – A Brazilian Case of Unconstitutional Constitutional Amendment' (forthcoming 2018) 5(2) *Revista de Investigações Constitucionais* (arguing that Constitutional Amendment 95 of December 2016 to the Brazilian Constitution can be the object of conventionality control on the basis of international human rights conventions to which Brazil is a signatory).

[87] XF Torrijo, 'International and Domestic Law: Definitely an Odd Couple' (2008) 77(2) *Revista Juridica UPR* 483, 491. See e.g. the Constitution of Switzerland of 1999, according to which when there is a partial or even total revision of the constitution, 'The mandatory provisions of international law must not be violated' (arts 193(4), 194(2)). Similarly, art 2(2) of the Constitution of Bosnia and Herzegovina of 1995 specifically provides that those standards set in the European Convention for the Protection of Human Rights and Fundamental Freedoms shall have priority over all other law, including constitutional amendments.

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later amendment, since transnational practice itself does not stand in a hierarchical relationship to a domestic constitutional text.[88]

The Honduran Supreme Court, at any rate, made little effort to establish its constitution had created such a hierarchy. The Court points mostly to a constitutional provision stating that Honduras makes certain principles of 'international law' its own.[89] This is a fairly thin reed on which to hang such a strong claim. Even if it incorporates international law into the Honduran legal order in some form, it does not clearly establish the supremacy of international law over the domestic Honduran constitution.

There is also a separate problem: the relative scarcity of international law rules governing either the procedure of constitution-making or its substance. True, emerging international and supranational legal rules address matters such as constitutional reform.[90] But the most commonly cited emerging or existing international legal rule for the process of constitution-making requires that it be 'participatory'.[91] Recent work has shown that this is a highly ambiguous, perhaps nearly indeterminate concept, and that in practice constitution-makers have used a large number of different models which they have labelled 'participatory'.[92]

It may of course be possible to use international human rights law and other areas of law (such as *jus cogens* or international humanitarian law) as criteria for invalidating substantive constitutional provisions,[93] as a source of evidence as to the scope of transnational constitutional practices – what

[88] Roznai (n 83) 594–5 (arguing that 'in the internal *espace juridique* (contrary to the external one) any arguments that supranational law prevails over domestic constitutional law are commonly based on the constitution itself, which may grant to certain international or regional law a normative status higher than domestic law. However, that constitution may be amended or replaced by a new constitution, so as to loosen or even exclude such superiority.').

[89] See Hond. Const., art 15.

[90] See SJ Schnably, 'Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal' (2008) 62 *University of Miami Law Review* 417, 422.

[91] See e.g. TM Franck and AK Thiruvengadam, 'Norms of International Law Relating to the Constitution-Making Process' in LE Miller (ed), *Framing the State in Times of Transition: Case Studies in Constitution Making* (USIP, Washington DC, 2010) 3; V Hart, 'Constitution-Making and the Right to Take Part in a Public Affair' in Miller, *Framing the State in Times of Transition* ibid 20.

[92] See A Saati, 'Participatory Constitution-Making as a Transnational Legal Norm: Why Does It "Stick" in Some Contexts and Not in Others?' (2017) 2 *U.C. Irvine Journal of International, Transnational and Comparative Law* 113, 122.

[93] See L Garlicki and ZA Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44(3) *Israel Law Review* 343 (arguing that in the current state of globalisation, international law – and particularly international human rights law which is relatively clear, precise, and has effective judicial review mechanisms – can play a significant role in the judicial assessment of the legal legitimacy of constitutional provisions); JT Valdés, 'Poder constituyente irregular: los límites metajurídicos del poder constituyente originario' (2008) 6(2) *Estudios Constitucionales* 121 (suggesting that the globalisation of fundamental rights and jus cogens norms set new limits on constitutional law-making powers).

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Dixon and Landau have called the 'democratic minimum core',[94] or as 'minimum constitutional guarantees' which limit constitution-making.[95]

There might be both principled and pragmatic reasons for doing so. In South Africa, for instance, in 1993 in the transition from apartheid the key parties to constitutional negotiations (i.e. The ANC and the National Party) agreed to adopt a set of constitutional principles as the basis for future democratic decision-making, which drew directly on the idea of protecting 'universally accepted fundamental rights, freedoms and civil liberties' in both the interim and final Constitution.[96] This had a pragmatic justification: it provided the National Party with a degree of 'insurance' against overly majoritarian forms of decision-making by a later democratic ANC majority, and thereby facilitated an agreement to allow for a truly democratic process for the draping of the final 1996 Constitution.[97]

The 1996 Constitution itself also incorporated international norms, but in a different way. Section 36 of the South African Constitution provides that limitations on rights can be justified providing they are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The incorporation of transnational legal norms, in this context, could also serve a variety of more principled functions: it could serve as a source of at least quasi-objective guidance to constitutional judges as to the scope and content of open-ended ideas such as democracy and freedom; it could help check certain behavioural biases on the part of judges about the degree to which particular features of their own system are in fact fundamental or necessary to democracy; and in other cases, provide important discursive or rhetorical support for attempts by judgments to enforce the democratic minimum core in the face of 'abusive' forms of constitutionalism.[98]

[94] Dixon and Landau (n 5). See also BO Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue' (2006) 80 *Tulane Law Review* 203, 219.

[95] T Altwicker, 'Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights' in AV Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area – Theory, Law and Politics in Hungary and Romania* (Hart Publishing, Oxford and Portland, OR, 2015) 344.

[96] 1993 South African Constitution, CP II.

[97] On insurance theories of judicial review and constitutions, see T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003) 25; R Dixon and T Ginsburg, 'The Forms and Limits of Constitutions as Political Insurance' (2017) 15(4) *International Journal of Constitutional Law* 988.

[98] Dixon and Landau (n 5). On transnational legal norms as checks on behavioural biases see also VC Jackson, *Constitutional Engagement in a Transnational Era* (Oxford University Press, Oxford, 2010) (arguing that 'comparison can be a useful way to achieve some reflective distance, improving impartiality and objectivity about interpretive questions').

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In the context of guiding the unconstitutional constitutional amendment doctrine, Dixon and Landau have argued for the use of transnational legal practice rather than international law.[99] That is, instead of seeking to identify and apply binding international legal norms that are suited to restrain the procedure or substance of constitutional change, they have called on courts to use design and other constitutional systems as an anchor. Consideration of such practice may be helpful as a guideline: the existence of a design element in other liberal democracies may alleviate concerns about its effects on liberal democratic constitutionalism, while its absence may raise additional suspicions and give a judge more legitimacy to strike down a particular constitutional change.

This kind of approach to international law, however, does not give international law true supremacy qua international law, but rather treats it as having epistemic value as part of a process of 'transnational constitutional anchoring'. It also takes seriously the existence of reasonable disagreement, among democracies, about the different possible ways of institutionalising shared commitments to freedom and self-government: What is essential, or inessential, to democracy will of course depend on the specific national context, and the history of political power and constitutionalism in the country and region. Term limits, for example, may be relatively unimportant in parliamentary systems but quite important in presidential systems as a means of restraining the concentration of political power in a single actor, especially in regions such as Latin America with a history of hyper-presidentialism.[100] But presidential systems also clearly vary in the degree to which they permit re-election for one or two terms of different lengths, as we elaborate below.

A commitment to transnational anchoring is thus as much an approach aimed at restraining, as empowering, courts to focus on the minimum requirements for competitive democracy in the application of open-ended doctrines such as an unconstitutional constitutional amendment doctrine – or the exercise of powers of 'super-strong' judicial review. This is also even truer for the application of an unconstitutional constitutional doctrine, which purports to constrain all legal processes of constitutional change.

The Honduran Court, in relying on comparative practice, failed to give credit to this notion of reasonable disagreement. The Honduran Court carried out some version of transnational analysis: it noted that the provisions

[99] Ibid.

[100] Ibid. See also SA McConnell, 'The Return of Continuismo?' (2010) 109(724) *Current History* 74–80. On the distinction between Presidential and Parliamentary systems with regard to term limits see e.g. JJ Linz, 'The Perils of Presidentialism' (1990) 1(1) *Journal of Democracy* 51; JJ Linz, 'Democracy's Time Constraints' (1998) 19(1) *International Political Science Review* 19.

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at issue were 'strange in comparative law', and used this argument to bolster its conclusion that the various provisions should be held inapplicable.[101] But this analysis arguably ignored the variation on constitutional regulation of re-election in comparative law. Pure presidential systems in Latin America demonstrate a range of approaches to presidential terms, ranging from no term limit at all to a similar level of strictness as found in Honduras. Mexico, Colombia, Paraguay and El Salvador, for example, all currently limit presidents to only one lifetime term in office.[102] The same is true of other pure presidential and semi-presidential systems around the world.[103] The Venice Commission, acting on a referral from the Organization of American States, recently conducted a review of the question of whether presidential term limits would generally violate international human rights and found the answer to be a clear no.[104] It based this conclusion both on the commonality and variation of term limits in national practice and on well-accepted limits on rights like the right to political participation.[105]

Similarly, eternity clauses completely prohibiting amendment to certain articles, although treated as a bizarre animal by the Honduran Court, are also common in comparative terms.[106] And these clauses protect a range of articles, including with some frequency presidential term limits. Constitutions in Africa and elsewhere in Central America guard their presidential term limits with an eternity clause.[107]

This leaves the anti-attempt provisions, which do seem to be highly unusual in comparative constitutional law. The rarity of these provisions might place extra suspicion on them, although this by itself is not enough to have them excised. A more reflective analysis would be needed, one which would consider the impact of these provisions on the liberal democratic order or perhaps core constitutional 'identity'. The Court relied on comparative law as a guide to scope of commitments to freedom of

[101] See Decision of 22 April 2015, section 10.

[102] See e.g. Jj Corrales and M Penfold, 'Manipulating Term Limits in Latin America' (2014) 25(4) *Journal of Democracy* 157.

[103] See European Commission for Democracy through Law (Venice Commission), Report on Term-Limits Part I – Presidents, Study No. 908/2017.

[104] Ibid.

[105] Ibid.

[106] Roznai, *Unconstitutional Constitutional Amendments* (n 1) 15–38.

[107] Ibid, 30–1. See generally H Kantor, 'Efforts Made by Various Latin American Countries to Limit The Power of the President' in A Lijphart (ed), *Parliamentary versus Presidential Government* (Oxford University Press, Oxford, 1992) 101; C Fombad and NA Inegbedion, 'Presidential Term Limits and Their Impact on Constitutionalism in Africa' in C Fombad and C Murray (eds), *Fostering Constitutionalism in Africa* (Pretoria University Law Press, Pretoria, 2010) 1.

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expression, but without fully acknowledging the global variation in the concrete content or implantation of such norms.

The main claim in the Honduran Court's decision in this context seems to be that the anti-attempt provisions protecting the unamendable one-term limit clashed with fundamental rights of freedom of expression found in international and regional human rights law. At least on a broad read of Articles 239 and 42, it would be possible to draw a conclusion that they disproportionately limit acts of expression aimed at expressing disagreement with the term limit itself. But the highly unusual context seems relevant to this inquiry – the provisions impinge on expression on the single question of presidential re-election and seem to target political officials undertaking projects to remain in office, rather than the citizenry as a whole. Furthermore, any collision between these anti-attempt provisions and the freedom of expression depends crucially on how broadly phrases like 'attempt', and 'promote' are interpreted. Under plausible readings, these provisions would not target expression critiquing the clauses at all, but only actions aimed at a president remaining in office or removing the limit.

Moreover, a more sophisticated constitutional analysis might compare the Honduran provisions to other 'democratic defences': approaches sometimes thought to be in tension with fundamental human rights but thought to be allowed as efforts to protect liberal democratic constitutionalism. One obvious comparison, for example, is the militant democracy practice of allowing Constitutional Courts to ban anti-democratic or anti-constitutional political parties, which originated in Germany and is now found in a number of countries.[108] These practices have been upheld by human rights tribunals under certain circumstances as appropriate limitations on expressive, associational, and political rights in order to prevent liberal democracy from being hijacked from within.[109] The Honduran anti-attempt provisions could be seen as similar, and indeed milder, prohibitions along the same lines. Thus, the international and transnational case against even the anti-attempt provisions is far murkier than it at first appears.

[108] See e.g. T Ginsburg and Z Elkins, 'Ancillary Powers of Constitutional Courts' (2008) 87 *Texas Law Review* 1431, 1446–9 (showing that the power to ban anti-constitutional political parties is a common power for constitutional courts around the world).

[109] See e.g. Refah Partisi (the Welfare Party) and Others v. Turkey [GC] – 41340/98, 41342/98, 41343/98, European Court of Human Rights, Judgment 13.2.2003 [GC]; see also S Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, New York, NY, 2015); S Tyulkina, *Militant Democracy: Undemocratic Political Parties and Beyond* (Routledge, Abingdon, 2015); GH Fox and G Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1.

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Stability

Finally, and as noted above, a particular problem with judicial review of constitutional amendments is that it can be particularly destabilising, by striking down not just ordinary legislation, but constitutional ground rules around which parties coordinate. These arguments would seem to apply with even more force to review of the original constitution itself.

Part of the difference lies in the fallback or default where a constitutional provision is struck down. When an amendment to the constitution is held unconstitutional, actors can at least return to the pre-amendment constitution. The normative consequences of striking down provisions or an original constitution, or even the entire constitution, are murkier. There is no fallback provision in that case, and the resulting constitutional text may become incoherent.

The distinction between the Costa Rican and Honduran decisions involving term limits is relevant on this point. The Costa Rican Supreme Court held an amendment to the constitution establishing a lifetime limit of one presidential term to be unconstitutional; the result of the decision, the Court held, was to default to the older constitutional provision, where the term limit barred consecutive but not lifetime terms.[110] The Court thus loosened the rules governing term limits, but left a meaningful limit in place. In Honduras, in contrast, when the Court held the term limit inapplicable because of its 'direct and necessary relationship' to the anti-attempt provisions in Articles 239 and 42, it left the country with no term limit at all: presidents can now run for consecutive re-election indefinitely. It makes little sense to see this as a decision of the 'original constituent power', which expressly put a very tough term limit in place. Nor does it really make sense as a fallback provision – it seems unlikely that the constituent power's preferred alternative to the strictest term limit would be no term limit at all. It is instead a natural consequence of the normative vacuum that resulted when the Court struck the term limit down.

The timing of review seems like a partial response to the challenge posed by instability. It is worth noting that the episodes involving judicial review of constitution-making process or substance noted above occurred during the constitution-making process, rather than afterwards. In Venezuela, for example, the Court reviewed the process of selecting the Assembly, not the 1999 constitution itself after it had been promulgated. In South Africa, the Constitutional Court reviewed a draft, un-promulgated version of the new constitution, based on an explicit agreement in the interim constitution that it would be given this power.

[110] See Ragone (n 33).

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In contrast, where courts have been asked to review already promulgated and in-force constitutions, they have generally rejected the claims and drawn heavily on ideas about the destabilising effects of their interventions to do so. Chile offers an interesting example. Several petitioners challenged the 1980 Chilean constitution by challenging the process through which the constitution was approved.[111] They rightly pointed to numerous problems in the Chilean constitution-making process. The constitution was adopted during a repressive military dictatorship with only highly limited mechanisms of popular participation, after the military regime had taken power in a coup and suspended compliance with the existing constitution. The text was drafted by an appointed commission and then military actors, rather than being debated or adopted by an elected body. The final text was approved in an up-or-down referendum, but one held under continued military rule and highly restrictive and unfair campaign conditions in which the opposition could not make much of a public case. Despite these devastating flaws in the origin of the 1980 constitution, the Constitutional Court rejected the argument and seemed primarily convinced by the argument that since it itself was a creature of the 1980 Constitution and drew its legitimacy from it, it could not review the constitution-making process or final constitution. The argument sounded in stability – if the 1980 constitution were reviewed and struck down, then not only would the Court's own authority be endangered, but the country would be in danger of existing in a normative vacuum.

All of this suggests that timing is crucial. This is true when it comes to judicial review of constitutional amendments, and it is all the more so when it comes to reviewing the original constitution. The problem of judicial review of amendments is often corrected with textual or judge-made rules that review is only allowed ex ante, before an amendment has become part of the constitutional text, or within a strictly defined period after they have gone into effect (say, one year). Even the most egregious problems with constitution-making cannot easily be corrected if a constitution has become an instrument of reliance, and perhaps not after a constitution has gone into effect at all. In other words, review of a constitution itself might always need to be ex ante. The Honduran Court's analysis stands out as puzzling from this perspective, once again, because it reviewed a provision that had been in effect for over 30 years, and which had been a focus of constitutional debate.

[111] Ibid.

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V. Conclusion: A case for an unconstitutional constitution doctrine?

With relatively little attention to the point, the Honduran Supreme Court recently moved the debate about judicial review of constitutional norms beyond amendments and towards the original text of constitutions themselves. In this article, we have used its decision as a vehicle to examine the question of whether judicial review of constitutional texts is ever appropriate and if so, under what circumstances. We outline a set of perspectives to which courts and scholars might be attentive – delegation and constituent power, international law and hierarchy, pragmatism, and stability. Under any of these perspectives, the Honduran Supreme Court's removal of an unamendable one-term limit found in the 1982 constitution is very difficult to justify.

At the same time, each of these perspectives offers a potential defence of some types of judicial review of constitutions themselves. From a delegation perspective, for example, substantive review or constitutional texts makes little sense, but review of the procedure through which constitution-making occurs may be a powerful tool for ensuring that an assertion of 'constituent power' actually reflects popular will. From a pragmatic perspective, restraint on constitutional replacement, like amendment, may sometimes be useful for protecting a liberal democratic order. For those who emphasise international or transnational norms as a constraint on domestic constitutionalism, those norms might sometimes be deployed as a limit on even the constitution-making power, particularly as they continue to thicken. And even from the perspective of constitutional stability, judicial review of original constitutional texts might be acceptable if it occurs close in time to enactment of a constitution, rather than long after the fact as was the case of Honduras.

The conclusion is thus a surprising one: some judicial review of original constitutional texts can be justified by using the same arguments currently used to justify the unconstitutional constitutional amendment doctrine. This may mean that the Honduran decision is not an isolated occurrence, but instead the harbinger of a broader trend, which we predict global constitutionalism will see more of. Since the judicial review of original constitutional texts – even more than the review of constitutional amendments – is such a potentially powerful tool that raises a set of significant risks, scholars should seek to provide better guidance as to the theoretical underpinnings of this kind of review and the conditions under which it can be utilised. Indeed, recent events suggest that the risks of an unmoored unconstitutional constitution doctrine are real. In 2017, the Bolivian Constitutional Court issued a decision holding the terms limits in its 2009 constitution to be unconstitutional, in a similar political context

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and with fairly similar reasoning as the Honduran Supreme Court.[112] In particular, the Court relied very heavily on the argument that presidential term limits violate international human rights law, an argument that as we note above has no real foundation.[113] In this sense, the Honduran case is useful mainly as a negative example, suggesting a set of considerations that it largely ignored, but to which future courts should be more attentive.

[112] Tribunal Constitucional Plurinacional, Sentencia Constitucional N. 84 of 2017, (28 November 2017).

[113] See S Verdugo, 'How the Bolivian Constitutional Court Helped the Morales Regime to Break the Political Insurance of the Bolivian Constitution' *Blog of the International Journal of Constitutional Law* (10 December 2017) <http://www.iconnectblog.com/2017/12/how-the-bolivian-constitutional-court-helped-the-morales-regime-to-break-the-political-insurance-of-the-bolivian-constitution/>.

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