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A new typology of judicial review of legislation

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Abstract: The distinction between strong and weak judicial review occupies a privileged place in comparative constitutional law. This article argues that it is necessary to generate a new typology that includes two other increasingly influential models. The two 'new' models can be identified as 'strong basic structure review' and 'weak basic structure review'. The former, present in some common law countries such as India and Belize, not only provides judges with the ability to strike down legislation that is inconsistent with a particular constitutional provision, but also constitutional amendments incompatible with the principles on which the constitution rests. The latter model, weak basic structure review, currently present in some Latin American countries, also provides judges with the power to strike down ordinary and constitution-amending legislation, but gives 'the people', acting through a constituent assembly, the final word on the validity of any form of positive law. Finally, the article considers the possibility of the development of a fifth model in which even the constituent people would be bound by certain principles to be identified and enforced by judges.

Keywords: basic structure; common law constitutionalism; parliamentary sovereignty; weak judicial review

There are, it is usually said, two main models of judicial review of legislation. The first model is normally identified as 'strong judicial review'. It gives judges the right to strike down legislation deemed inconsistent with the provisions of a rigid constitution. Under this model, the only way legislators can formally override a judicial invalidation of a law is through constitution-amending legislation which can only be adopted following an amendment rule that requires some form of qualified legislative majority (and/or, in some cases, popular ratification in a referendum). This is the model of judicial review present in most countries in North and South America, as well as in Europe. The second model, 'weak judicial review', gives ordinary legislative majorities the final word on the validity of all laws. However, judges have the duty of interpreting legislation in a

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rights-consistent way (if this is not possible, they are sometimes allowed to make non-binding declarations of inconsistency) or to initially 'strike down' the law in question. This model is currently present in several commonwealth jurisdictions, but it is also exemplified in some nineteenth- and early twentieth-century Latin American constitutions.

The distinction between strong and weak judicial review currently occupies a privileged place in comparative constitutional law. Stephen Gardbaum's recent book, for example, presents weak judicial review[1] as an alternative to both strong judicial review and parliamentary supremacy, as it gives 'the legislature the legal power of the final word, which it may or may not choose to exercise'.[2] In this article, I argue that it is time to replace the weak/strong judicial review dichotomy with a more nuanced typology that includes two other increasingly influential forms of judicial review that extend judges' strike-down powers to constitution-amending legislation and, therefore, fall outside the traditional weak-form and strong-form categories. The two 'new' models can be identified as strong basic structure review and weak basic structure review. The former, present in some common law countries such as India and Belize, not only provides judges with the ability to strike down legislation that is inconsistent with a particular constitutional provision, but also constitutional amendments incompatible with the principles on which the constitution rests. Under this model (strong basic structure review) judges are given the (true) final word on the validity of legislation: there are no *legal* means available to bring back to life a constitutional amendment that has been struck down. The latter model, weak basic structure review, currently present in some Latin American countries, also provides judges with the right of striking down ordinary and constitution-amending legislation, but gives the people, acting through a constituent assembly, the final word on the validity of any form of positive law.

The article has been organized in the following way. Parts I to IV introduce the new typology and explain the general features that characterize each of the four models. In distinguishing between these

[1] Stephen Gardbaum prefers the phrase 'new commonwealth model of constitutionalism' to refer to this form of judicial review, since he argues that 'weak-form judicial review' is only one aspect of the system, the other being 'mandatory pre-enactment political rights review'. S Gardbaum, *The New Commonwealth Model of Constitutionalism* (Cambridge University Press, Cambridge, 2013) 14–25. In this article, I will use the phrase *judicial review* in the context of all the models, since my focus is on the relationship between courts, legislatures and, as we will see shortly, the amending power. Moreover, I am looking at this relationship at the *post-enactment* moment, so apart from the occasional reference, no emphasis will be made in systems of *a priori* or *pre-enactment* review of legislation.

[2] Ibid 43–4. See also M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2009).

models, a basic point of reference will be not only the relationship between courts and legislatures, but between courts, legislatures, and the amending power. As will be seen, it is the nature of this relationship that determines which form of judicial review falls within each model. The typology is about different institutionalizations of judicial review, not about the way those institutionalizations (regardless of whether they find their origin in a constitutional text or if they are the product of a judicial decision) operate in day-to-day constitutional practice.[3] In other words, the typology is not aimed to capture the frequency or intensity with which courts choose to exercise their power to review legislation. That is, of course, an important topic but one for another day. Part V considers the possibility of the development of a 'fifth' model, one in which even the people (as opposed to the legislature) would be bound by certain higher principles to be identified and enforced by judges. Part VI concludes.

I. Weak judicial review

The main characteristic of weak judicial review is that, while courts are given the power to review the consistency of legislation with recognized rights, the legislature retains the final word on the validity of all laws. Although it is usually maintained that weak-form judicial review was invented in the late twentieth century, and that its first institutionalization is to be found in the Canadian Bill of Rights of 1960 (CBOR),[4] weak judicial review was the first form of judicial review of legislation that existed.[5] Section 2 of the CBOR established that 'every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe … any of the rights and freedoms herein recognized and declared'.

Fifteen years before the CBOR was adopted, the Political Constitution of the Republic of Ecuador (1945) had already institutionalized a variant of the weak-form model. Article 160 of that constitution created a special tribunal, the *Tribunal de Garantías Constitucionales*, charged with the

[3] For a recent analysis of that type, see R Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32(3) *Oxford Journal of Legal Studies* 487–506.

[4] Canadian Bill of Rights, S.C. 1960.

[5] Mark Tushnet recognizes this when he writes that '[T]he assertion that weak-form systems were invented in the late twentieth century may be overstated. Perhaps a more accurate statement would be that judicial review was invented in a weak form, but became transformed over two centuries to the point where weak-form systems had to be reinvented, with novel design features, in the late twentieth century.' M Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781, see (n 1).

duty of ensuring the consistency of primary and secondary legislation with the provisions of the constitution.[6] Among its powers, the tribunal could (if requested by a final appeals court), temporarily suspend a law or regulation 'until the Congress makes a decision on its validity'.[7] Prior to the adoption of this tribunal in Ecuador, several nineteenth-century Latin American constitutions also institutionalized a weak-form model of judicial review.[8] These (entrenched) constitutions usually established that legislation inconsistent with their provisions was to be considered invalid, but at the same time gave Congress the final word on any questions of constitutional interpretation.[9] The consequence of this approach, it has been stated, was that courts could declare the

[6] In civil law countries, constitutional courts used to be (and in some countries are still) given the name of 'tribunals' to distinguish them from 'courts'. Courts were as part of the judicial branch of government and, according to the doctrine of the separation of powers, could not play a role in law-making. In that respect, one might argue that the *Tribunal de Garantías Constitucionales* was not really a judicial body, and that it is thus inaccurate to speak of it as an instance of *judicial* review. However, to this day, many of the constitutional courts in Latin America and Europe attributed with the power to strike down legislation are technically separate from the ordinary judicial system, and yet are normally seen as part of a system of strong *judicial* review. For a brief discussion, see JH Merryman and RP Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, Stanford, 2007) 37–8.

[7] Political Constitution of Ecuador (1945), art 160(4). This constitution lasted only one year, and in 1946, some of the functions of the tribunal were transferred to the State Council (*Consejo de Estado*), and the ability to suspend the effects of laws inconsistent with the constitution was abolished (placing the power to declare laws unconstitutional in the exclusive hands of Congress). See arts 146(2) and 189, Constitution of Ecuador (1946). The *Tribunal de Garantías Constitucionales* was re-established at different times during the twentieth century. In 1984, the tribunal was given the power to suspend laws inconsistent with the constitution at the request of one of the parties of a specific case (Congress having the final word on their validity). See art 141, Constitution of Ecuador (1979, as amended). Ecuador maintained a system of weak judicial review for a good part of the twentieth century. The Constitution of 1967, for example, attributed the Supreme Court with the power of suspending (at the request of a party or *motu proprio*) the effects of any law, regulation, or decree, either for formal defects or substantive inconsistencies with the constitution, and Congress was given the final power to determine whether that suspension should be permanent. Art 205(4), Constitution of Ecuador (1967). It was not until 1993 when the Constitutional Chamber of the Supreme Court was given the power of striking down legislation identified as unconstitutional (and their validity therefore temporarily suspended) by the *Tribunal de Garantías Constitucionales*, a power that was final and had general effects. Art 146(1), Constitution of 1978 (as codified in 1993).

[8] In the context of a confederate state, the Colombian Constitution of 1858, stated in Article 50: 'The Supreme Court is responsible for suspending the execution of the legislative acts of the states, when they are contrary to the Constitution or to the laws of the Confederation; notifying the Senate of this suspension, so that this latter entity can make a final decision on the validity or nullity of those acts.'

[9] See, for example, arts 186, 187 and 224 of the Constitution of Venezuela (1830).

unconstitutionality of a law, but these declarations would only have any legal effect upon the action of Congress.[10]

Weak judicial review represents a movement away from 'pure' parliamentary sovereignty, but without giving judges the final word on the legality of rights-inconsistent legislation: courts can make, at most, declarations of *inconsistency*, but not declarations of *invalidity* (at least not of the type that cannot be overridden by ordinary legislative majorities). The main current examples of systems of weak judicial review are provided by Canada, New Zealand and the United Kingdom. In 1982, Canada replaced the approach of the CBOR with a system in which judges are given the power to strike down legislation, but where simple majorities at the federal and provincial legislatures are able to override those decisions[11] by following a requirement as to the form of legislation. That is, by making a declaration that they wish a particular act to apply 'notwithstanding' a relevant provision of the Canadian Charter of Rights and Freedoms (CORAF).

New Zealand followed suit with the adoption of the Bill of Rights Act in 1990 (BORA). Unlike its Canadian counterpart, which forms part of an entrenched constitution subject to a special amendment procedure, the BORA is a statutory bill of rights. Not surprisingly, it does not provide judges with a strike-down power (in fact, it explicitly denies them this power).[12] Instead, it creates a judicial duty to give legislation a rights-consistent interpretation.[13] If that is not possible, then judges have no choice but to apply the rights-inconsistent legislation (although courts seem to have asserted jurisdiction to make non-binding declarations of inconsistency).[14] In 1998, the Westminster Parliament adopted the Human Rights Act (HRA), which created in the United Kingdom a system of weak judicial review similar to that of New Zealand, but expressly attributing courts with the power of making non-binding 'declarations of incompatibility'

[10] For a discussion, see AG Jiménez, *Constitucionalismo en Ecuador* (Centro de Estudios Constitucionales, Quito, 2012) 175. These arrangements are generally understood by Latin American constitutionalists as examples of parliamentary sovereignty.

[11] There are some exceptions, which will be considered in Part V.

[12] See BORA, section 4: 'No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights): (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.'

[13] See BORA, section 6.

[14] See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). For a discussion, see C Geiringer, 'On A Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act' (2009) 40 *Victoria University of Wellington Law Review* 613.

between legislation and protected rights.[15] Once such a declaration is made, the relevant minister is allowed (but not required) to amend the legislation through a remedial order.[16]

II. Strong judicial review

As noted earlier, the main characteristic of a system of weak judicial review is that it does not give judges the power to strike down legislation or that, if it does, it allows an ordinary legislative majority to override the relevant judicial determination (without the need of formally amending the constitution). Naturally, the main characteristic of strong judicial review is the opposite: it does give judges the power to strike down legislation, and these judicial determinations may only be overridden by the legislature through the formal amending process (which would normally require that body to meet a qualified majority requirement and/or, in some cases, to seek the approval of the electorate in a referendum).[17] Strong judicial review is much more common than its weak counterpart: it forms an important part of the constitutional systems of the United States and most Latin American and European countries. Naturally, these countries are characterized by having rigid constitutions, that is, constitutions that are relatively difficult to amend when compared to ordinary legislation.

[15] It could be argued that the very first formulation of the weak judicial review is to be found in the interpretative exercises suggested by some judges in Great Britain in the seventeenth century, and later accepted even by theorists of orthodox parliamentary sovereignty such as AV Dicey. Under this approach, judges would recognize the ultimate law-making power of a sovereign parliament, but would try, whenever possible, to give legislation a meaning consistent with natural law or with some principles of morality. This is, for example, one of the interpretations that can be given to Sir Edward Coke's statement in the Court of Common Pleas in 1610, to the effects that 'when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void'. *Dr Bonham's Case* (1610) 8 Co. Rep. 114a at 118a. See also *Day Savadge* (1614) Hob 85; 80 ER 235 at 237 (Chief Justice Hobart); *R v Love* (1653) 5 State Tr 825 at 828 (Keble, J); *London v Wood* (1701) 12 Mod Rep 669 at 687–688 (Chief Justice Holt); JW Gough, *Fundamental Law in English Constitutional History* (Clarendon Press, Oxford, 1955) 35; AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty Classics, Indianapolis, 1982) 19–20.

[16] See HRA, section 10(2).

[17] It is possible to have a system that combines weak and strong judicial review. This could be the case of a constitution exhibiting a tiered amendment process, and only requiring a legislative majority for some constitutional changes. With respect to provisions that are amendable through a simple majority, such a system could be said to fall under the weak judicial review model (as a simple legislative majority could override a judicial decision invalidating a law inconsistent with one of those provisions), and with respect to provisions that can only be changed through qualified majorities, it would fall under the strong judicial review model.

There are, however, important differences in the specific institutionalizations that strong judicial review has taken. The almost obligatory point of departure in this type of analysis is the United States, where, in the famous case of *Marbury v Madison*,[18] the US Supreme Court asserted its jurisdiction to strike down federal legislation inconsistent with the constitution (even though the constitutional text did not explicitly give it the power to do so).[19] Writing the opinion of the court and echoing an argument presented by Alexander Hamilton in the Federalist No 78, Justice Marshall maintained that 'the Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it'.[20] Marshall agreed with the first proposition and concluded that 'an act of the Legislature repugnant to the Constitution is void' and it should be declared as such by the courts.[21] According to this view, the only way the legislature could surpass the limits established by a constitution (as interpreted by the courts) would be through constitution-amending legislation which, in the United States, involves a number of super-majority requirements at the federal and state level.

This is the basic premise shared by all systems of strong judicial review of legislation (with one exception, discussed below). It is, for example, the basic premise in those constitutional orders that, unlike the United States, have explicitly institutionalized systems of strong-form judicial review in their national constitutions. The Constitution of Spain of 1978, for instance, created a centralized[22] system of strong judicial review in which a special court (*Tribunal Constitucional*) was given the exclusive power to

[18] *Marbury v Madison,* 5 U.S. 137 (1803). This does not mean that the practice of judicial review of legislation was unknown in the United States before *Marbury*. For a discussion, see WM Treanor, 'Judicial Review before Marbury' (2005) 58 *Stanford Law Review* 455.

[19] Cf Tushnet (n 5) 2782, who argues that *Marbury* could be understood as a 'departmentalist decision' (that is, a decision consistent with the view that each branch of government has the right to determine the constitutionality of the actions of other branches if those actions affect its own operation) since the court 'determined that Congress had improperly rearranged the Constitution's allocation of power within the judiciary'.

[20] *Marbury* (n 18) 177–178.

[21] Ibid.

[22] Countries like the United States, in which courts of general jurisdiction have the power to review the constitutionality of legislation, are normally said to operate under a *decentralized* or *diffused* system of judicial review. Although I make some brief references to the distinction between decentralized and centralized systems of judicial review (as well as to the distinction between abstract and concrete review), this distinction is not relevant for the typology presented in this article. It is not that these distinctions are unimportant (or that they may not indirectly affect the 'strength' of a system of strong judicial review), but that they would belong to a typology of a different nature than the one I am developing here.

strike down legislation inconsistent with the constitution.[23] At the same time, the constitution creates a special amendment process that involves the legislature and the electorate, and which could be used to override the effects of a decision of the *Tribunal Constitucional*.[24] As with the US Supreme Court, decisions of this tribunal about the unconstitutionality of a law are binding on all branches of government.

In Europe and Latin America, as a result of the historical distrust of the judiciary in the civil law world (which had traditionally appeared as a conservative institution, attempting to block the effects of progressive legislation through interpretation), many countries attribute the power to strike down legislation to a special court (such as Spain's *Tribunal Constitucional*), usually seen as separate from the judicial branch.[25] There are, in fact, many differences about the specific institutionalizations of strong judicial review: differences about the type of procedures that can trigger its exercise, differences about whether the court has jurisdiction to review the validity of laws in the abstract or only when their constitutionality is raised in the context of the facts of a specific case, or (as mentioned above) about whether the power to make declarations of invalidity is given to all judges or only to those sitting in special courts (there is also the possibility of a mixed system, best exemplified by the so-called *Colombo-Venezuelan* model).[26]

Despite these differences, one may say that what makes a model of judicial review 'strong' is that it gives judges the final word on the constitutionality and validity of ordinary legislation, and that those

[23] Constitution of Spain (1978) art 161. This is the type of system that is often referred to as the Kelsenian or Austrian system of constitutional review (exemplified in Chapter VI of the Austrian Constitution (1920)), which was also present (though only with respect to provincial statutes inconsistent with a federal constitution), in the Constitution of Venezuela (1858) which attributed to the Supreme Court of Justice the exclusive function of 'Declaring the nullity of the legislative acts adopted by the provincial legislatures, at the request of any citizen, when they are contrary to the constitution'. Art 113(9).

[24] Ibid arts 167–168.

[25] For a discussion, see Merryman and Perdomo (n 6) 40–7. There are some exceptions, of course. For example, in Colombia, the Constitutional Court is part of the judicial branch. See Title VIII, Constitution of Colombia (1991).

[26] Under this model, only a Constitutional Court (or the Constitutional Chamber of the Supreme Court) can declare the invalidity of legislation with *erga omnes* effects (at the request of any citizen and outside the context of a specific case). However, in the context of a specific case, any judge can disapply an ordinary law which she deems inconsistent with the constitution (only with effects on the parties). In this respect, this arrangement can be characterized as a mixed model, combining centralized and decentralized judicial review. See Constitution of Colombia (1991), art 241(4), art 4; Constitution of Venezuela (1999) art 336(1), art 334. For an extended discussion, see AR Brewer-Carías, *El Sistema Mixto o Integral de Control de Constitucionalidad en Colombia y Venezuela* (Universidad Externado de Colombia, Bogotá, 1995).

differences do not change this. That statement is accurate except that, as noted earlier, courts operating under a system of strong judicial review are not really given the final word about the validity of legislation, as the legislature normally has the ability to amend the constitution in order to render valid an otherwise unconstitutional act.[27] But there are exceptions. Some constitutions not only explicitly provide judges with the ability to strike down ordinary laws, but implicitly attribute them with the ability to strike down constitution-amending legislation inconsistent with certain constitutional provisions. The most famous example is that of Article 79(3) of the Basic Law of Germany (1949). This provision establishes an 'eternity' clause according to which amendments 'affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible'.[28] Clauses like this, which prohibit amendments contrary to particular clauses (or contrary to the principles expressed in certain provisions), have been present in different constitutions since early in the nineteenth century.[29]

However, in the nineteenth century, eternity clauses were usually found in constitutions that affirmed the principle of parliamentary sovereignty, established systems of weak judicial review, or in which any explicit limits to constitutional change were to be enforced politically. The best-known example is the Norwegian Constitution of 1814, which

[27] In a certain way, the French theory of the 'switchman' nicely exemplifies this basic feature of strong judicial review. According to that approach, decisions of the *Conseil Constitutionnel* that a legislative enactment is unconstitutional are not properly understood as final: the court is only letting the legislature know that it must use the constitutional amendment procedure in order to adopt the 'unconstitutional' norm. For a discussion, see D Baranger, 'The Language of Eternity: Judicial Review of the Amending Power in France (Or the Absence Thereof)' (2011) 44(3) *Israel Law Review* 389.

[28] Art 1 of the Basic Law protects the principle of human dignity. It also states, in its numeral (3), that 'The following basic rights are binding on the legislature, executive, and judiciary as directly valid law.' That list of basic rights is contained in arts 2–17 of the Basic Law. Art 20 protects the principle of democracy, the rule of law and the right of resistance.

[29] For example, the Constitution of the *Gran Colombia* (1821), established in its art 190 that the principles of national independence, the republican form of government and representative democracy, protected in Title I and Title II, could never be altered. In a similar way, art 110 of the Constitution of Ecuador (1843), stated that art 3 (which established the form of government), could never be reformed. The Constitution of Ohio (1803), in its art VII, stated in its amendment rule that '[N]o alteration of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this State.' For a historical and comparative overview, see Y Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657. See also R Albert, 'Constitutional Handcuffs' (2010) 42(3) *Arizona State Law Journal* 663; K Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press, Bursa, 2008).

establishes explicit limits on the amending power, limits which have never been enforced by the judiciary.[30] What made the adoption of eternity clauses in the twentieth century different is that, by that time, most countries with written constitutions had adopted some version of strong judicial review. As a result, many courts quickly came to understand that their power to strike down ordinary laws also extended to constitution-amending legislation inconsistent with the eternity clause (even in the absence of a specific constitutional provision recognizing their power to review the constitutionality of constitutional amendments).[31] This amounted to the creation of what might appear as the strongest form of judicial review possible, giving judges the *actual* final word on the validity of any law. Nevertheless, judges in countries whose constitutions did not contain eternity clauses soon found themselves wanting of a mechanism that allowed them to protect the constitutional system as a whole. The doctrine of the basic structure allowed them to justify the judicial creation of such a mechanism. In the next part of the article, it will be argued that the adoption of the doctrine of the basic structure amounts to the development of a third model of judicial review.

III. Strong *basic structure* review

When a written constitution gives judges the power to strike down legislation and, at the same time, contains eternity clauses, strong judicial review becomes even stronger: constitution-amending legislation would not be enough to override all judicial declarations of invalidity. But just as a sovereign parliament could use a two step-process to avoid the limitations posed by a provision entrenching a statute, a legislature could adopt a constitutional amendment removing or altering the eternity clause, and then proceed to adopt the constitution-amending legislation that was, or is at risk,

[30] Art 112 of the constitution states, among other things, that constitutional 'amendments must never … contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'. For a discussion, see E Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 *Israel Law Review* 369.

[31] In Germany, see e.g. *The Klass Case*, 30 BVerGE 1 (1970) and *The Electronic Eavesdropping Case*, 109 BverfGE 279 (2003), where the court decided not to strike down the constitutional amendments in question but asserted its jurisdiction to do so. At the time of writing, in Brazil, whose Constitution of 1988 also contains an eternity clause (art 60(4)), there is a constitutional amendment being considered by Congress (Amendment No. 33), which, among other things, would provide a super-majority in Congress with the power to override judicial decisions on the validity of constitutional amendments.

of being declared invalid.[32] To put it in the language of English constitutional theory, eternity clauses are usually not self-entrenched. Of course, it is not clear whether a court would enforce a constitutional amendment directed at removing an eternity clause from a constitution (and it is always possible that unwritten conventions would make such a removal unthinkable in practice).[33]

Nevertheless, the very possibility that an amendment removing an eternity clause could be accepted by the courts makes the 'eternity clause approach' a very strong version of strong-form judicial review rather than a new model of its own: qualified legislative majorities still retain the last word on the validity of ordinary (or constitution-amending) legislation, even if they must meet twice the stringent requirements of an amendment rule.[34] Some courts operating under constitutions that do not contain eternity clauses, however, have been able to assert a *final* jurisdiction to declare the invalidity of constitution-amending legislation. In so doing, they have given birth to a new model of judicial review which may be called strong basic structure review.[35] The adoption of such a model is connected in important ways to the nature of the amendment rule: in a

[32] Georges Vedel has advanced this argument with respect to the eternity clause contained in art 89 of the French Constitution of 1958. G Vedel, 'Souveraineté et Supraconstitutionnalité' (1993) 67 *Pouvoirs* 79, 90. Cf O Beaud, 'La souveraineté de l'Etat, le pouvoir constituant, et le Traité de Maastricht' (1993) *Revue Française de Droit Administratif* 1056.

[33] Carl Schmitt, one of the first constitutional theorists to develop the doctrine of unconstitutional constitutional amendments, thought that the amending power could not be used in this way. The removal of an eternity clause, he argued, would amount to the creation of a new constitution, something that could only be done by the people in the exercise of the constituent power. See C Schmitt, *Constitutional Theory* (Duke University Press, Durham, 2008) 150. The relationship between the concept of constituent power and constitutional amendments will be discussed below.

[34] The question, as put by Aharon Barak, is whether the substantive principles that are protected from constitutional change emerge from the 'entire constitution' and not only from the eternity clause. If the former, then the abolishment of the limits to constitutional change through a two-step process would not be possible: judges would strike down amendments inconsistent with the principles protected by the eternity clause even in the absence of the clause. A Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) *Israel Law Review* 321, 335.

[35] It could be argued that the adoption of the doctrine of the basic structure by a court (as will be seen shortly, the basic structure doctrine usually emerges from a judicial construction and is not explicitly recognized in the constitutional text), is actually a sign of weakness. That is to say, judges may (as was the case in India) adopt the doctrine of the basic structure as a reaction against a legislature that insists in asserting its power over the judiciary (for example, by overturning judicial interpretations of the constitution through formal constitutional amendments). But from a legal point of view, a court that successfully asserts its jurisdiction to invalidate constitutional amendments even in the absence of an eternity clause, has extended the scope of its strike-down power in a way that goes beyond the traditional strong judicial review model.

relatively flexible constitution, courts are arguably more likely to develop the basic structure doctrine in order to protect the constitution from frequent fundamental constitutional changes adopted by the legislature (and will certainly have more opportunities to do so than in a system in which amendments are very rare as a result of a very difficult amendment process).[36]

The first court to adopt this approach was the Supreme Court of India. In *Kesavananda Bharati v Kerala* (1973),[37] a case which dealt with a series of land reforms that affected property rights, the court determined that while parliament had the power to amend any constitutional provision, it could not alter the *basic structure* of the constitution. For some of the judges, the constitution's preamble and some constitutional clauses implicitly attributed a special importance to certain principles (among the principles mentioned in the different concurring opinions were those of constitutional supremacy, the republican form of government, federalism, the welfare state, individual liberty and secularism).[38] Other judges attempted to partially derive the doctrine of the basic structure from the text of the amendment rule itself. According to them Article 368 only gave parliament the power to *amend* the constitution, not to alter the very principles in which it is based, which would involve an act of constitution-making rather than a mere amendment.[39] In this sense, just as the adoption of strong judicial review in the USA, and the judicial assertion of jurisdiction to enforce eternity clauses in Germany, the adoption of the doctrine of the basic structure in India was based on a particular understanding of the constitutional system and not on a formal authorization found in the constitutional text.

The basic structure doctrine abolishes the last remnant of parliamentary sovereignty in systems that previously operated under a model of strong judicial review: it prevents a special parliamentary majority from amending the constitution in order to render ineffective a judicial declaration of invalidity (the legislature can always render ineffective a judicial invalidation of an ordinary law through a constitutional amendment,

[36] This may partially explain the reasons why the idea of unconstitutional constitutional amendments was rejected by the US Supreme Court early in the twentieth century. See e.g. *Leser v Garnett*, 258 U.S. 130 (1922).

[37] *Kesavananda Bharati Sripadagalvaru v State of Kerala*, 1973 (SUP) SCR 0001.

[38] For a discussion, see R O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 *Journal of Civil Liberties* 69.

[39] For a discussion, see Barak (n 34) 326. The idea that the phrase 'to amend' implicitly limits the scope of the constitution-amending power has also been defended by many authors. See eg WL Marbury, 'The Limitations upon the Amending Power' (1920) 33 *Harvard Law Review* 223, 225: 'It may be safely premised that the power to 'amend' the Constitution was not intended to include the power to *destroy* it.'

but the constitutional amendment itself may be invalidated). The doctrine was developed further in *Minerva Mills v Union of India* (1980), where the court expressed that the amending power could not be used to 'destroy the identity' of the existing constitution. In that case, the court struck down a constitutional amendment that explicitly attributed to parliament an unlimited amending power so as to prevent the future applicability of the doctrine.[40] In other words, the court made clear that it possessed the very final word on the validity of ordinary and constitution-amending legislation: under the basic structure doctrine, there is no existing legal process that can be used to give parliament the right to prevail over a judicial invalidation of a constitutional amendment.[41]

The Supreme Court of Belize, in a series of recent decisions, has adopted and applied the doctrine of the basic structure, openly relying on Indian jurisprudence. The first of these decisions is *Bowen v Attorney General* (2008).[42] In that case, the court declared the invalidity of the Sixth Constitutional Amendment Bill, which sought to exclude certain natural resources (including petroleum) from the protections of the right to property. The court expressed that the amendment, by impeding access to the courts in the context of alleged infringements of property rights, offended 'the basic structure of the Constitution of Belize regarding the principle of the separation of powers and … the rule of law and the

[40] For a recent book-length examination of the doctrine of the basic structure, see S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, New Delhi, India, 2009).

[41] In *Premier of Kwazulu Natal v President of SA*, CCT 36/95 at para 49, the South African Constitutional Court arguably asserted jurisdiction to declare a constitutional amendment to the Interim Constitution invalid if inconsistent with the constitution's basic structure. 'Even if there is this kind of implied limitation to what can properly be the subject matter of an amendment to our Constitution', expressed the court, '[neither of these amendments] can conceivably fall within this category of amendments so basic to the Constitution as effectively to abrogate or destroy it.' Whether these expressions are still valid under the 1996 constitution is an open question, given that Section 74 of that constitution establishes a special process for the amendment of Section 1 (which protects principles as fundamental as human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law). The explicit authorization to alter principles of such importance makes the development of the doctrine of the basic structure difficult at best (it could nevertheless be argued that a constitutional amendment contrary to the Constitutional Principles contained in the Interim Constitution—which were used by the court to review the draft constitution approved by a Constitutional Assembly—could still be used to control the amending power under the 1996 constitution).

[42] *Barry M Bowen v Attorney General of Belize* (Claim No 445 of 2008). For a discussion, see A Bulkan, 'The Limits of Constitution (Re)-Making in the Commonwealth Caribbean: Towards the "Perfect Nation"' (2013) 2(1) *Canadian Journal of Human Rights* 81. Other countries in which the Indian doctrine of the basic structure has been influential include Bangladesh and Sri Lanka. For a discussion, see Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19(2) *Constellations* 182.

protections of fundamental rights especially those relating to the ownership and protection of property from arbitrary deprivation'.[43] More recently, in 2012, the same court struck down part of the Eight Amendment, which (as the amendment invalidated by the Supreme Court of India in *Minerva Mills*) declared that the amending power of the National Assembly was not subject to any other limitations ('substantive or procedural') than those contained in the constitution's amendment rule.[44]

Attributing a special role to the constitution's preamble ('the root of the tree from which the provisions of the Constitution spring'),[45] the court expressed that 'the basic structure doctrine holds that the fundamental principles of the Preamble of the Constitution have to be preserved for all times to come and that they cannot be amended out of existence'.[46] 'The framers of the Preamble could not have intended', the court continued, 'that the National Assembly with the required majorities … could make literally any amendment to the Constitution to, for instance, abolish the judiciary, or expropriate private property without compensation, or imprison its enemies without trial.'[47] The doctrine of the basic structure assumes that the limits on constitutional change are absolute limits, that is, limits that no legally relevant entity can surpass. No constitution-amending legislation would be enough to reassert the legislature's power to override a judicial declaration that a constitutional amendment is invalid, as any attempt to do so would be struck down by the courts.

Strong basic structure review, unlike strong judicial review, allows judges to identify themselves (even if they do it by reference to the constitution's preamble, through an interpretation of the phrase 'to amend', or based on principles reflected by the constitution as a whole) the values that will act as a legally insurmountable limit to the legislature's law-making power. Interestingly, if ever accepted in actual constitutional practice, common law constitutionalism (as currently proposed by some academics and judges in the United Kingdom), could be characterized as a version of strong basic structure review operating in the context of an unwritten constitution.[48] According to

[43] See also *The Prime Minister of Belize v Alberto Vellos* [2010] UKPC 7.

[44] *The British Caribbean Bank Limited v Attorney General of Belize* (Claim No 597 of 2011). These cases have not been overturned by the Belize Court of Appeal.

[45] Ibid para 50.

[46] Ibid para 45.

[47] Ibid.

[48] For an examination of the theoretical basis of common law constitutionalism, see T Poole, 'Back to the Future? Unearthing the Theory of Common Law Constitutionalism' (2003) 23(3) *Oxford Journal of Legal Studies* 435, 439. For defences of common law constitutionalism, see J Laws, 'Law and Democracy' (1995) *Public Law* 72; T Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001); Lord Cooke of Thorndon, 'The Myth of Sovereignty' (2005) 3 *New Zealand Journal of Public and International Law* 39; (see also Lord Cooke's judgment in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 (CA)).

common law constitutionalism's proponents, there is a 'common law constitution' that rests on certain principles (such as democracy, the rule of law, or the protection of basic human rights), and judges have the right to identify and enforce these principles against the decisions of parliament.[49] In short, common law constitutionalism, as the doctrine of the basic structure, would create a true system of constitutional (or judicial) supremacy, in which the permanency of the constitution is protected from the elected legislature.

IV. Weak *basic structure* review

It is true, of course, that most courts that have adopted the doctrine of the basic structure (such as that of India and Belize), implicitly or explicitly accept that the people (as opposed to the legislature acting through the formal amendment procedure), possess an unlimited constitution-making faculty that could be used to change elements of the constitution's basic structure.[50] As Aaron Barak has stated, the doctrine 'does not block off the people's ability to change the basic structure of the constitution', although in such a case a 'completely different route must be chosen: the route of establishing a new constitution'.[51] Nevertheless, what makes those systems forms of 'strong basic structure review' (and not 'weak basic structure review', the model that will be discussed below) is that regardless of any implicit or explicit attribution of an unlimited constituent power to the

[49] The strongest judicial (*obiter*) comments in favour of this approach are the ones made by some of the Lords in *Jackson v Attorney General* [2005] UKHL 56. For example, Baroness Hale maintained that courts will 'treat with suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny'. Ibid para 159. For a discussion, see T Mullen 'Reflections on *Jackson v Attorney General*: Questioning Sovereignty' 27(1) Legal Studies 1, 13.

[50] For example, in *Kesavananda*, the court defended the basic structure doctrine by partly relying on the idea that unlike parliament, the constituent assembly that drafted the constitution was highly representative of the Indian people as a whole. 'Under these circumstances', the court stated, 'the claim that the electorate had given a mandate to the party to amend the Constitution in any particular manner is unjustified' (*Kesavananda* (n 37) para 702). Only an entity that truly represents the people, it is implicitly suggested by the court, could ever alter the constitution's basic structure. In Belize the situation is similar. In the recent case of *The British Caribbean Bank v Attorney General of Belize* (n 44, para 44), the Supreme Court of Belize emphasized that the purpose of the basic structure doctrine is to limit the amending power *of the National Assembly*, implicitly suggesting that the people, acting outside the National Assembly, could insert any content into the constitution. Moreover, discussing *Bowen v Attorney General of Belize* (n 42, para 28), the court maintained that the fundamental principles of the constitution 'emanate from the Preamble which propounds the will of the people of Belize'.

[51] Barak (n 34) 338.

people, they are based on a constitution that does not provide a formal mechanism for that unlimited power to manifest. In Barak's words, they do not provide a 'route' for the establishment of a new constitution. In that sense, and absent a radical transformation of the constitutional order, courts that operate under the strong basic structure review model have the *legal* final word on the validity of a constitutional amendment. Moreover, even if the legislature attempts to create a mechanism (through ordinary or constitution-amending legislation) to channel the expression of the unlimited constitution-making power of the people in those situations in which an alteration of the basic structure is sought, there is always the possibility that the court would refuse to accept that the institutions called to express that power truly represent the people.[52]

But as suggested above, there is another form of basic structure review that, while also protecting the constitutional system from the legislature, does not give judges the final word on the validity of constitution-amending legislation. Weak basic structure review, present in several Latin American countries, seeks to protect the constitution from the legislature by the formal establishment of limits to constitutional change. However, at the same time, it recognizes that those limits do not apply to the people's ultimate constitution-making power and provides the means for that power to be exercised. The countries that currently exhibit such a system moved in the nineteenth- and twentieth century from systems of weak judicial review to strong judicial review, but in the late twentieth- and twenty-first century, replaced the latter system with the weak basic structure review model. In Colombia, this move was the result of a judicial decision that, while asserting the Constitutional Court's jurisdiction to invalidate constitutional amendments inconsistent with the fundamental principles in which the constitution rested, left open the possibility for those decisions to be overridden by a constituent assembly authorized to exercise the constituent power of the people (a mechanism provided by the constitution itself).[53]

[52] Some courts, for example, have determined that a constitutional referendum does not count as an exercise of the people's constituent power. Under that approach, in the context of a constitutional referendum, the people only exercises the ordinary power of constitutional reform. That is to say, the referendum is merely a means to make ordinary constitutional amendments more difficult, while the exercise of constituent power involves the convocation of an extraordinary constitution-making body. See Sentencia C-141/10 (Part 1.2) of the Constitutional Court of Colombia. For an example of a different approach (in the context of a referendum called outside the ordinary amendment rule), see Decision No 62-20-DC, Nov. 6, 1962, Rec. 27 (French Constitutional Council).

[53] For a recent analysis of the Colombian approach, see C Bernal-Pulido, '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* 339–57.

In that judgment, rendered in 2003, the court followed a similar line of reasoning to the one adopted by the Supreme Court of India in *Kesavananda* (combined with a strong reliance on the distinction between constituent and constituted powers), deciding that although the Colombian Constitution of 1991 did not contain eternity clauses, the amending power could not be used to adopt constitutional changes so fundamental that amounted to the creation of a new constitution.[54] In that case, the court was asked to review the substance of a set of proposed amendments, even though the text of Article 241 of the constitution only gave it the authority to review constitution-amending legislation for formal or procedural defects.[55] The court's reasoning took the following form. First, it was argued that when Article 241 of the Constitution of 1991 restricts the review power of the court with respect to constitutional amendments to that of identifying procedural or formal defects, it is necessarily conferring that body the power to examine if the institution promoting the constitutional changes is acting *ultra vires*[56] – that is, if the legislature is attempting to use the amending procedure to adopt constitution-amending legislation that it is not authorized to adopt.

Second, the court maintained that there are some constitutional amendments that fall outside the scope of the legislature's amending power, even in the absence of eternity clauses. It noted that legal scholars and courts around the world have recognized that under any democratic constitution the power of constitutional reform is subject to certain limits.[57] These limits emerge from the nature of the power of constitutional reform as a constituted, rather than a constituent, power.[58] That is, there are certain changes that are so fundamental that, while only altering part of the constitutional text, amount to the creation of a new constitution and can thus only be adopted by the constituent people. The absence of eternity clauses only meant that any provision of the Constitution of 1991

[54] It is worth noting here that the Colombian Constitution is relatively easy to amend: it can be amended by two separate votes in the legislative assembly, the first vote requiring a simple legislative majority, the second one requiring an absolute majority in each house of Congress (art 375).

[55] Sentencia 551/03.

[56] Ibid para 23.

[57] The court here mostly relied in the Indian jurisprudence briefly discussed in the previous section and also referred to the writings of several European and Latin American authors, including K Lowenstein, *Teoría de la Constitución* (Ariel, Barcelona, 1986); C Schmitt, *Teoría de la Constitución* (Editorial Revista de Derecho Privado, Madrid, 1934); G Burdeau, *Traité de Science Politique* (Paris, LGDJ, 1969); P de Vega, *La Reforma Constitucional y la Problemática del Poder Constituyente* (Tecnos, Madrid, 1999); and G Bidart Campos, *Historia e Ideología de la Constitución Argentina* (Ediar, Buenos Aires, 1969).

[58] Sentencia 551/03, at para 28.

could be reformed and modified, not that one could use the amendment rule to, instead of reforming the constitution, replace it with a different one.[59] Nowhere in the amendment rule,[60] the court stated, is there an authorization 'to eliminate or substitute the existing Constitution with a different one, something that can only be done by the constituent power'.[61] If the legislature were to use the ordinary amendment process to alter the constitutional text in a way that transgressed these limits, in a way that for all practical effects brought into existence a new constitution, it would be invading the terrain of the constituent people.

Even if one accepts the line of reasoning succinctly outlined above, there is at least one possible objection to this approach: what if a great majority of the people, the constituent power, favours a constitutional amendment that amounts to the creation of a new constitution? In other words, how to avoid the potentially dangerous situation that could take place under the traditional formulation of the strong basic structure review, where regardless of the intensity of popular support for fundamental constitutional change, there is no legal mechanism readily available to alter the basic principles of the constitution? In the opinion of the court, the framers of the Constitution of 1991 attempted to 'solve' this problem, to ease the tension between popular sovereignty and constitutional supremacy, by creating an opening for constituent power to manifest from time to time through an extraordinary constitution-making body. According to Article 376 of the Colombian Constitution, a legislative majority may ask electors whether they wish to convene a constituent assembly, and for the court this assembly could be authorized to adopt constitutional changes that amount to the creation of a new constitution, even if those changes have the effect of overriding a previous judicial invalidation of a constitutional amendment.

For the court, such an assembly would allow the political community to exercise its constituent power 'in order to revise or modify its fundamental

[59] Ibid at para 33.

[60] Like the Supreme Court of India, the Colombian Constitutional Court also placed some emphasis in the text of the amendment rule, and on the meaning of the phrase 'to amend' (*reformar*). See Sentencia 551/03 at para 34.

[61] Sentencia 551/03 at para 33. The court limited itself to give one example of a 'constitutional substitution': '[f]or instance, the power of constitutional reform cannot be used in order to substitute the Social and Democratic State and the Republican form of government (Article 1) with a totalitarian state, a dictatorship or a monarchy, because that would mean that the Constitution of 1991 has been replaced with a new one'. Ibid at para 33. Although in 2003 the court upheld most of the amendments at issue, it has since then exercised its power to review the constitutionality of constitutional amendments in several cases. See, for example, Sentencia C-141/10.

political decisions and to give its juridical institutions new forms and content'.[62] Such a mechanism is absent from the constitutions of India and Belize, and this is why those constitutions are examples of strong, rather than weak, basic structure review.[63] The new constitutions of Bolivia and Ecuador have taken a further step in institutionalizing the weak basic structure review model. These new constitutions establish that constitutional amendments that touch on the constitution's 'fundamental principles, its recognized rights, duties, and guarantees, or the supremacy of the constitution and the process of constitutional reform'[64] or that 'set constraints on rights and guarantees … [or] change the procedure for amending the Constitution'[65] must take place through a constituent assembly convened by referendum.

The referendum can be triggered by popular initiative, that is, through the collection of a number of signatures from registered electors (20 per cent in Bolivia, 12 per cent in Ecuador).[66] Once convened, the assembly would draft a new constitution (or a radically transformed one) which would only become valid after being directly approved by the electorate in an additional referendum. Since these provisions explicitly negate the legislature's right to alter the amendment procedure, they rule out the possibility of the legislature regaining an unlimited power of constitutional change through an ordinary constitutional amendment that alters the amendment rule. Under weak basic structure review, the legislature retains the power of adopting ordinary constitution-amending legislation in order to render ineffective judicial invalidations of ordinary laws, and courts retain the power to declare ordinary and constitution-amendment legislation invalid, but neither the legislature nor the courts are given the final word on the validity of fundamental constitutional changes.

Under this model, judicial declarations of invalidity are always susceptible of being overridden by the people, who retain an unlimited power of

[62] Ibid.

[63] See art 69 of the Constitution of Belize (1981) and art 368 of the Constitution of India (1949). In 2008, the Turkish Constitutional Court declared invalid a set of amendments (which sought to abolish the headscarf ban in universities), under a reasoning similar to that of the Colombian Constitutional Court in Sentencia 551/03. However, the Constitution of Turkey does not contain an opening for the exercise of constituent power (see art 175 of the Constitution of the Republic of Turkey (1982)). For a discussion of the Turkish decision, see Y Roznai and S Yolcu, 'An Unconstitutional Constitutional Amendment – The Turkish Perspective: A Comment on the Turkish Constitutional Court's Headscarf Decision' (2012) 10(1) *International Journal of Constitutional Law* 175.

[64] Art 411, Constitution of Bolivia.

[65] Arts 441–444, Constitution of Ecuador.

[66] Arts 411 and 444 of the constitutions of Bolivia and Ecuador. The Constitution of Venezuela (1999) was the first to establish a version of the weak basic structure review model in which the popular initiative to convene a constituent assembly was present.

constitutional change that must be exercised outside the legislature. This does not mean that judicial declarations of invalidity are seen as something negative: on the contrary, judges are attributed with the responsibility of protecting the constitution, as well as the fundamentals of the constitutional order, *from the legislature*. That is to say, they are called to determine which type of constitutional changes are so fundamental that can only be adopted through the exercise of constituent power (a role that is expressly attributed to the constitutional court by the constitutions of Bolivia and Ecuador – Articles 202(10) and 443 respectively). In the countries that exhibit this approach (with the exception of Colombia),[67] judges have not yet used their power to strike down constitution-amending legislation and thus a constituent assembly has never been convened with the purpose of overriding a judicial invalidation of a constitutional amendment. However, since instances of fundamental constitutional change would be expected to be an exceptional occurrence, this does not mean that the weak basic structure model is not working.

V. The possible emergence of a fifth model

These four models of judicial review, as we saw, involve a particular relationship between courts, legislatures and constitutional amendments. Weak judicial review allows judges to strike down or suspend legislation inconsistent with rights, to only declare this inconsistency or, when possible, to prefer a rights-consistent interpretation. The legislature, however, is able to ignore or override judicial decisions, and in the latter case, it can do so through a law adopted by an ordinary legislative majority. Strong judicial review, on the contrary, always allows judges to strike down rights-inconsistent legislation, but gives legislative super-majorities (or the legislature and the electorate acting together) a final override power (and, at least theoretically, a final power with respect to the validity of constitutional amendments even in those cases in which the constitution contains eternity clauses).

Strong basic structure review not only provides judges with the power to strike down legislation, but also gives them the final word with respect to the validity of constitution-amending legislation. As noted earlier, under the strong basic structure review model, there is always the possibility of

[67] The Colombian Constitutional Court has struck down constitution-amending legislation on several occasions, and these decisions have been, for all practical purposes, final. Nevertheless, when in 2010 (Sentencia C-141/10) the Constitutional Court invalidated an amendment that would have allowed President Alvaro Uribe to run for a third consecutive term, some of his supporters mentioned the possibility of convening a constituent assembly to override the court's decision.

an extra-constitutional exercise of constituent power that could insert any content into the constitution. However, one of the distinguishing features of this model is that it operates under a constitution that does not provide the means for such exercises of popular power to occur. The result is that, as a matter of constitutional law, courts have the true final word as to the content of the constitution. Weak basic structure review is similar, but exists only in constitutional systems that contain mechanisms that facilitate the exercise of constituent power. These mechanisms attempt to reproduce the original episode of constitution-making, and could be used to reauthorize judicially invalidated constitutional amendments.

In a certain way, however, both strong and weak basic structure review (and arguably the traditional strong and weak judicial review models as well), are entirely consistent with what may be called a 'voluntarist' conception of constitutional authority, one in which the people, as the bearer of the constituent power, can ultimately insert any content into the constitution. A question that arises here is whether a decision attributed to the constituent power itself could ever be seen as susceptible of being set aside by courts. That is to say, whether the (voluntarist) conception mentioned above could be replaced by a 'supra-constitutionalist' approach according to which there are certain changes that are always constitutionally impermissible even if willed by the people and that, in such cases, it is the responsibility of the courts to review the acts of the constituent subject itself. In such a scenario, courts would be extending their review power beyond that envisaged under the strong and weak basic structure models. Such a conception would reflect not simply a different way of institutionalizing judicial power: it would be based on the idea that the authority of a constitution is not to be derived from 'the sovereign people', but from its adherence to certain supra-constitutional norms that require some principles to be always part of a constitution.[68]

The idea that constituent power could be subject to certain limits is not new, and can at least be traced back to seventeenth-century social contract theorists, whose reliance on natural law meant that, for them, there were things that even the sovereign people could not do. For example, Locke insisted that since an individual in the state of nature had 'no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself and the rest of mankind, this is all he doth or can give up to the

[68] For a recent study on the concept of supra-constitutionality, see Y Roznai, 'The Theory and Practice of "Supra-Constitutional" Limits on Constitutional Amendments' (2013) 62(3) *International and Comparative Law Quarterly* 557.

commonwealth'.[69] Accordingly, no institution or collective entity could ever be authorized by individuals to exercise an arbitrary power over life, property and liberty. Sieyès himself offered a similar view, when he wrote that 'prior and above' constituent power 'there is only *natural* law', and that it was 'impossible to imagine a legitimate association whose object would not be the common security, the common liberty and, finally, the common welfare'.[70] Of course, one thing is to say that 'natural law' poses limits on constituent power, and quite another that those limits are to be enforced by judges (after all, Thomas Hobbes and Jean Bodin also thought that sovereign princes were limited by natural law, even if those limits were not to be judicially enforced).[71]

But the judicial enforcement of this type of limits could have been in the minds of the German judges who, in the famous *Southwest Case*, stated that there are constitutional principles 'so fundamental and to such an extent an expression of *a law that precedes even the constitution* that they also bind the *framer* of the constitution'.[72] Since the Basic Law contains an eternity clause (Article 79.3), the idea would be that there are some natural law principles (identified by some authors as 'super-positive norms') that stand above it, and that bind both the amending and constituent powers.[73] This view seems to find indirect support in some more recent judgments, where the references to 'natural law' are weaker or entirely absent, and have been replaced by appeals to fundamental human rights or universal

[69] John Locke, *Two Treatises of Government* (Hafner Publishing Company, New York, 1956) 189, para 135.

[70] Emmanuel Sieyès, *What is the Third Estate?* (Praeger, New York, 1964) 124, 156–7 (emphasis in the original).

[71] See Thomas Hobbes, *Leviathan* (Penguin Books, 1968) 321–2; Jean Bodin, *Six Books of the Commonwealth* Book 1, Chapter VIII (1576).

[72] *The Southwest Case*, 1 BverfGE 14 (1951) in *Comparative Constitutional Law* (WF Murphy and J Tanenhaus eds) (St Martin's Press, New York, 1977) at 208 (emphasis added). The court was citing with approval a decision of the Bavarian Constitutional Court. See also the dissenting opinion of Chief Justice Kennedy in *State (Ryan) v Lemmon*, [1935] 170 I.R. 197: 'I have just stated my opinion that the Act, No. 37 of 1931, as a whole enactment, has never become law. I have further to add that I am also of opinion that, for the reasons already given, parts of the amendment (the new "Article 2A") are incapable of being validly enacted under the Constitution, some as repugnant to the Natural Law and therefore repugnant to the Source of power and authority acknowledged and declared by the Constituent Assembly, others as repugnant to some of the principles postulated by the Constituent Assembly as fundamental.' For a discussion of *Ryan*, see G Jacobsohn, 'An Unconstitutional Constitution: A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460.

[73] See R O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' (1999) 4 *Journal of Civil Liberties* 48, 54. For a brief discussion of the influence of natural law in the development of judicial review in France, see A Stone Sweet, 'Why Europe Rejected American Judicial Review – And Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744, 2751–8.

principles.[74] The *Lisbon Case*, in which the German Federal Constitutional Court ruled on several constitutional issues surrounding the adoption of the Treaty of Lisbon, offers one of the most recent examples.

In that case, the court stated that 'the constituent power of the Germans which gave itself the Basic Law wanted to set an insurmountable boundary to any future political development' through an eternity clause that 'prevents a constitution-amending legislature' from affecting the principles laid down in Article 1 and Article 20 (principles that reflect the constitution's identity). However, it then added the following *obiter* statements: '[i]t may remain open whether, due to the universal nature of dignity, freedom and equality alone, this commitment even applies to the constituent power, i.e. to the case that the German people, in free self-determination, but in a continuity of legality to the rule of the Basic Law, gives itself a new constitution'.[75] The phrase 'in a continuity of legality to the rule of the Basic Law' suggests that in order for the court to have jurisdiction to invalidate an act of the constituent power, the exercise of this power must not involve a legal revolution (that is to say, a break in the chain of legal continuity that may come accompanied with the abolition of the Constitutional Court and the emergence of a new juridical order, based on a different *Grundnorm*).[76] In other words, this qualification may be understood as recognition that the effectivity of any judicial attempt to enforce substantive limits on a constitution-making body, ultimately depends on purely political considerations.

In Venezuela, which has a system of judicial review that falls under the weak basic structure model, the country's highest court seems to share the views of its German counterpart. In a 2006 judgment that concerned

[74] MJ Herdegen, 'Unjust Laws, Human Rights and the German Constitution: Germany's Recent Confrontation with the Past' (1995) 32 *Columbia Journal of Transnational Law* 591. Herdegen reports that in Judgment of 23 April 1991, BVerfG 1st Sen., 84 BVerfGE 90, the Federal Constitutional Court stated that the legislature, in its ordinary and amending capacity, as well as the original creator of the constitution must comply with 'basic requirements of justice which include the principle of equality before the law and the prohibition of arbitrariness'. Ibid 604.

[75] *Lisbon Case*, BVerfG,2 BvE 2/08 from 30 June 2009, paras 216–217.

[76] One may ask, however, what form would the exercise of constituent power that the court has in mind would take? It could not take place through the ordinary amendment procedure, as the point is to suggest that *not only* the ordinary amending power is limited by the principles protected through the Basic Law's eternity clause. Perhaps the type of exercise of constituent power that the court had in mind was a popular referendum in which the people are asked to ratify a new constitution, and that this referendum is not only understood as an exercise of constituent power, but is called in the absence of any violation of the established constitutional order. For a discussion of this aspect of the decision and of its relationship to art 146 of the Basic Law, see JEK Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press, Oxford, 2013).

the eligibility to office of certain state officials, the Constitutional Chamber of the Supreme Court of Justice stated in passing that the people's constituent power is subject, like any political power, to limits that arise 'from the rights inherent to all human persons and derived from their own dignity'.[77] It is not clear whether this statement necessarily implies that the limits to the constituent power are judicially enforceable, that is, that in the event of the convocation of a constituent assembly under Article 348 of the constitution, the court would be prepared to assert its jurisdiction to invalidate newly adopted provisions if they are determined to be contrary to the unspecified fundamental rights mentioned above. On the contrary, it might be that these limits are to be enforced politically, an approach that is suggested by the constitutional text itself. While Article 347 of the constitution describes the people as the bearer of the 'original constituent power' and states that in the exercise of that power it may 'create a new juridical order', Article 350 expresses that 'the people of Venezuela … will not recognise any regime, legislation, or authority contrary to democratic values and principles, or that affects human rights'.[78]

Common law constitutionalism, which was previously identified as a possible example of strong basic structure review, may nevertheless be seen as the closest approximation to a model in which the judiciary is called to impose legal limits on a constituent people.[79] It is in a way strange that countries that currently operate under the weakest form of judicial review appear as candidates to adopt the strongest version of judicial

[77] Supreme Court of Justice of Venezuela, Constitutional Chamber, Expediente N. 06-0747, 28 de julio de 2006, (Part IV). Since then, this statement has been quoted in at least two subsequent Supreme Court of Justice judgments. See Expediente N. 06-0570, 18 de diciembre de 2006; Expediente N. 08-1617, 3 de febrero de 2009.

[78] It could be argued that, in extreme cases, the limits imposed by human rights on the exercise of constituent power could be enforced by the international community (under the emerging international law doctrine of the responsibility to protect). For a discussion, see A Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) *European Journal of International Law* 513. See also J Tapia Valdés, 'Poder Constituyente Irregular: Los Límites Metajurídicos del Poder Constituyente Originario' (2008) 6(2) *Estudios Constitucionales* 121, 132–4.

[79] A partial example of this model operating in actual constitutional practice is provided by the decision of the South African Constitutional Court in *Certification of the Constitution of the Republic of South Africa*. In that case, the Constitutional Court determined that some provisions of the constitution adopted by a Constitutional Assembly had to be changed since they were inconsistent with a set of principles set out in the Interim Constitution. *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). Nevertheless, the fact that in this case the limits were pre-established in an Interim Constitution, makes the South African example different from what would be the ideal type of the fifth model (a system in which judges identify certain unwritten principles that are then used to limit the constitution-making power of the people).

review imaginable (if the *obiter* contained in cases such as *Jackson* ever becomes *ratio*). The reason for this is directly connected to the fact that in those constitutional systems (particularly in that of the United Kingdom), parliament was traditionally conceived as a sovereign law-making body, as a constituent assembly in permanent session.[80] Accordingly, there is no extra-constitutional people to whom an ultimate constitution-making faculty is to be attributed: the people exercises its constitution-making power through parliament, and if this power is to be subject to legal limits, then those limits apply to the people as well.[81] Moreover, the common law constitution that serves as the basis for judges' strike-down power under this model is not understood as having been the product of a discrete political act, but a result of historical practices. In short, there is no obvious reason why judges would conclude that the law-making power of parliament is limited by the common law constitution and at the same time suggest that the principles protected by that constitution could be superseded by a popular exercise of (extra-parliamentary) constitution-making.

This is why Rivka Weill has recently written that '[u]nder common law constitutionalism, certain rights and values are too fundamental for even the people or the original constituent assembly to alter'.[82] However, even in judgments that contain strong statements in favour of common law constitutionalism, there are some passages that evidence the influence that the voluntarist conception of constitutional authority may have even over judges apparently sympathetic to this 'fifth' model. For example, in *Jackson*, Lord Hope stated that the principle of parliamentary sovereignty, which for him was a creature of the common law, 'is built upon the assumption that Parliament represents the people whom it exists to serve' and that it 'depends upon the legislature maintaining the trust of the electorate'.[83] These statements are not in any way conclusive, but by referring to the citizenry as somehow superior to parliament, they suggest that the idea that judges would ever enforce substantive limits on

[80] AV Dicey *Introduction to the Study of the Law and the Constitution* (Macmillan, London, 1959) 36–7. See also A de Tocqueville, *Democracy in America* (New American Library, New York, 1956) 74.

[81] For a discussion, see E Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (Norton & Co, New York, 1989). This view may be currently under challenge by the increasing use of the referendum in the United Kingdom (both at a local and national level). V Bogdanor, *The New British Constitution* (Hart Publishing, Oxford, 2009).

[82] R Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making' (2014) 62 *The American Journal of Comparative Law* 127, 132.

[83] *Jackson* (n 49) para 126 (Lord Hope).

the constitution-making power of the people might never become a constitutional reality.[84]

VI. Conclusion

The weak/strong judicial review dichotomy may successfully describe the models of constitutional review present in a number of English speaking jurisdictions, but it fails to properly capture other models that are increasingly influential in different parts of the world. In examining the main features of the two new models (weak basic structure review and strong basic structure review), the article attempted to move further our understanding of the institution of judicial review of legislation. This does not mean, however, that the proposed typology describes the full range of variations that each of these models might exhibit in particular jurisdictions. In other words, just as there has never been a single or universal version of weak or strong judicial review of legislation, there is no single or universal version of strong or weak basic structure review. There are variations, for example, in the ways in which the judicial power to strike down constitution-amending legislation is justified (and these variations may have implications in the way in which this power is exercised in practice), in the role that pre-enactment review may play in these new models, or in the ways in the people's unlimited constitution-making power is supposed to be exercised.

These variations, as well as their practical implications, are yet to be fully explored by scholars interested in the global phenomenon of judicial review of legislation. Moreover, it is also possible that systems operating under any of these models might begin to show evidence of a transition to a 'supra-constitutional' conception according to which there is certain content that can never be inserted into (or removed from) a constitution, being the responsibility of judges to strike down any attempt to do so (regardless of the origin of the attempt). The possibility of the development of this model may become a topic of increasing interest in the next few years, if judicial suggestions about possible enforceable limits on the exercise of constituent power increase. This model would involve a radical reordering of political and judicial power not present in any of the four institutionalizations of judicial review identified in this article, and a rejection of popular sovereignty as providing the ultimate basis for the authority of a constitutional system.

[84] The idea has nevertheless received some academic support outside the context debates about common law constitutionalism in the United Kingdom. See, for example, D Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.

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