

THE FORMALIST RESISTANCE TO UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS

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

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INTRODUCTION—A GLOBAL TREND?

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

Courts around the world—from Bangladesh to Belize, India to Peru, Colombia to Taiwan—have either asserted or exercised the power to invalidate a constitutional amendment.¹ Courts have drawn from textually-entrenched rules and extra-constitutional norms to declare that procedurally-perfect amendments are nonetheless substantively void. Scholars have in recent years taken a keen interest in this phenomenon, producing a burgeoning literature in public law seeking both to explain and justify the judicial doctrine of unconstitutional constitutional amendment.² The dominant view in the field is overwhelmingly favorably inclined toward the idea that courts *should* have the power to invalidate a procedurally-perfect amendment they deem unconstitutional, even in cases where the codified constitution does not entrench a formally unamendable rule.³

There are relatively few exceptions to the global chorus of voices in support of the extraordinary judicial power to invalidate constitutional amendments.⁴ The dearth of contrary views reflects the normalization of the phenomenon Ran Hirschl has identified as the “judicialization of mega-politics,” a now-common phrase referring to the most important matters of political significance that constitute, define and divide polities—and that are now often

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

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

³ See, e.g., SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* (2009); Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INT’L J. CONST. L. 339 (2013); Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606 (2015); Gábor Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution*, 19 Constellations 182 (2012); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 46 (2006).

⁴ See, e.g., JOEL COLÓN-RÍOS, *WEAK CONSTITUTIONALISM: DEMOCRATIC LEGITIMACY AND THE QUESTION OF CONSTITUENT POWER*; Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1 (2018); Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663 (2010); John R. Vile, *Limitations on the Constitutional Amending Process*, 2 CONST. COMMENT. 373 (1985).

adjudicated by courts.⁵ National courts today decide a host of decidedly political questions: the winner of presidential elections,⁶ the legitimacy of political parties,⁷ and the self-determination of a people.⁸ Against this backdrop, invalidating a constitutional amendment is just par for the course.

But we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its appropriateness for all constitutional states. It may well be that the doctrine fits in a given constitutional tradition and should be incorporated into its practices of adjudication. But this is a choice for a state and its domestic actors to make according to their own norms of governance. The politics of constitutionalism must remain localized in their particularized social and political circumstances. Otherwise when combined with the enormous pressure on states in our day to conform to what may appear to be generally accepted standards of global constitutionalism, the trend toward adopting the doctrine of unconstitutional constitutional amendment can overwhelm the capacity of a state to evaluate whether the doctrine is right for itself—in light of its own juridical history, political context and constitutional traditions—without feeling compelled to adopt this practice as though it were a necessary feature of constitutionalism.

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

We have three purposes in this Article. We seek to fulfill each of them with reference to three jurisdictions in particular—France, Georgia and Turkey—whose constitutions and attendant constitutional practices have in their own way expressly rejected the doctrine of a substantively unconstitutional amendment. As we show, none of their strategies is optimal but they do reveal some available alternatives. Their shared rejection of the doctrine reflects what we call formalist resistance to the doctrine of unconstitutional constitutional amendment. We seek first to demonstrate that the doctrine has not yet matured into a global norm of constitutionalism. We seek also to explain how a jurisdiction that expressly rejects the idea of an unconstitutional constitutional amendment operates in the face of an amendment that would otherwise be invalidated as unconstitutional in a jurisdiction that has adopted the doctrine. We finally seek to evaluate what is gained and lost in a constitutional state that rejects the doctrine of unconstitutional constitutional amendment. We find that there are both democracy-enhancing and democracy-weakening features that follow from the choice to deny the doctrine outright. Our larger purpose is inherent in the project itself: to diversify our thinking about what risks becoming seen as a necessary feature of constitutionalism but that design and practice show plainly is not. We therefore speak also to constitutional designers seeking ways to structure the rules of constitutional change so as to foreclose the doctrine of unconstitutional constitutional amendment.

⁵ Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 94 (2008).

⁶ *Id.* at 100.

⁷ *Id.*

⁸ *Id.* at 101, 103.

I. THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS

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

A. Text and Context

Controversial though it may be, invalidating a constitutional amendment is on one view fully consistent with the design of the constitution where the text expressly disallows amendments adopted in violation of a certain procedure or contrary to a specified subject-matter protection. For example, the Greek Constitution imposes an outright prohibition on constitutional amendments within five years of a successfully completed amendment.⁹ One could therefore construct a purely textual argument in defense of a Greek court's judgment to find unconstitutional an amendment that had been proposed and ratified three years after a successful amendment. Similarly, Belgium explicitly disables the amendment procedure in a time of regency.¹⁰ In the event, then, of an amendment to the powers of the Belgian king during a period of recognized regency, a court could be justified to invalidate such an amendment since it would squarely violate the constitutional text.

Another example comes from South Africa, where the Constitution creates an escalating framework of three different amendment procedures, each keyed specifically to certain parts and provisions of the Constitution and each escalating in its degree of difficulty. The easiest of the three thresholds requires two-thirds support in the National Assembly and the hardest requires three-quarters support in both the National Assembly and the National Council of Provinces.¹¹ An amendment to the Constitution's hardest amendment procedure requires conformity with the hardest amendment procedure itself.¹² But if an amendment were made to that procedure using the easiest of the three thresholds, a court could be justified to invalidate that amendment because it would run afoul of a specific textual prohibition on the use of the amendment power.

These three examples from Belgium, Greece, and South Africa introduce the problem of unconstitutional amendment in its least controversial form. To the extent there is an easy case to

⁹ GREECE CONST., pt. IV, s. II, art. 110(6) (1975). This type of amendment restriction may be classified as a temporal limitation, one of several forms of limitations on the amendment power. See Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 REV. CONST. STUD. 41-44 (2016).

¹⁰ BELGIUM CONST., tit. VIII, art. 197 (1994). This type of limitation may be understood as a defensive mechanism that disables the amendment procedure in certain periods of time that put pressure of a state, namely war, siege, regency, exception, or emergency. See Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 955-56 (2014).

¹¹ SOUTH AFRICA CONST., sec. 74 (1996).

¹² *Id.* at sec. 74(1).

be made in favor of courts possessing the power to evaluate the validity of an amendment, these three cases could well be the best exhibits because each involves a court applying the plain meaning of the constitutional text to violations of the procedures of constitutional amendment. At a minimum, then, a reviewing court's operating manual would reveal the following rule: where the constitutional text is unambiguous about a prohibition or a specific procedure or in any case clear in its meaning, courts in jurisdictions that recognize the power of judicial review stand on firm ground in policing whether political actors are acting consistent with those rules.

The case in favor of judicial review of constitutional amendments is weaker where the constitutional text does not entrench similarly precise rules about how political actors may validly amend the constitution. Here, there are two scenarios worth distinguishing: (1) where the constitution entrenches a content-based prohibition against amendment but states the prohibition at a high level of generality; and (2) where the constitution formally entrenches no rule against constitutional amendment. Begin with the first scenario. The Constitution of the Czech Republic entrenches a rule against amending the democratic character of the state: "Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible."¹³ The Czech Constitutional Court relied on this prohibition to invalidate an amendment intending to reduce the length of the term of the Chamber of Deputies.¹⁴ For the Court, the amendment violated this unamendable rule protecting the essential requirements of democracy. The Court reasoned that if longer terms are invalid then so too must be shorter terms because both violate "the principle of regular terms of office" that is central to the spirit of the unamendable rule.¹⁵

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

The case for the judicial review of constitutional amendments is at its weakest in the third scenario: where the constitution formally entrenches no rule against constitutional amendment. The Indian Constitution is the prime example. Its text confers plenary power on the national and state legislatures to amend the Constitution, without any formally unamendable rule standing in the way.¹⁶ Despite this relatively easy formal amendment rule, the Supreme Court's first interpretation of the rule confirmed what the text says in its plain language: that the formal amendment power is subject to no limitations.¹⁷ But the Court reversed course 16 years later when

¹³ Czech Republic Const, ch I, art 9(2) (1993).

¹⁴ See 2009/09/10 - Pl. ÚS 27/09: *Constitutional Act on Shortening the Term of Office of the Chamber of Deputies*, available at: <http://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1> (last visited June 9, 2018) ["Czech Republic Case 2009"].

¹⁵ *Ibid* at Section V.

¹⁶ India Const, pt XX, art 368(2) (1950).

¹⁷ See *Sri Sankari Prasad Singh Deo v. Union of India*, 1951 AIR 458, 1952 SCR 89, available at: <http://www.indiankanoon.org/doc/1706770> (last visited June 9, 2018).

it held that the amendment power could not be employed to violate fundamental constitutional rights.¹⁸ Yet the Court moderated its astounding reversal, holding that it would exercise its new role of policing the amendment power only prospectively. Six years later the Court unveiled what is now known as the “basic structure doctrine,” which authorizes courts to invalidate amendments that violate the Constitution’s basic structure.¹⁹ Precisely what constitutes the Constitution’s “basic structure” is nowhere expressly identified in its text but instead arises from the Court’s interpretation of the Constitution’s internal coherence, stated values, and norms of liberal constitutionalism, including the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers and federalism.²⁰ The Court later exercised its power to strike down amendments when faced with properly-passed amendments that sought to limit the Court’s authority to review constitutional amendments.²¹

We can perceive the difficulty—though not the impossibility—of justifying the invalidation of constitutional amendments in India by comparison with the other cases we have encountered. In contrast to the cases from Greece and Belgium, the Indian Constitution does not establish strict procedural limitations on constitutional amendment that could justify a court striking down an amendment that fails to conform to specific rules on the process by which the text is amended. The Indian Constitution does entrench an escalating structure of amendment like the South African Constitution, but this was not the basis either for the Indian Supreme Court’s construction of the basic structure doctrine or its actual use when it invalidated a procedurally-perfect amendment. The Indian Constitution differs also from the Constitution of the Czech Republic and others like it which entrench a formally unamendable provision at a high level of subject-matter generality. In these jurisdictions, there is a textual referent for the Court’s action. In India, however, the lack of textually entrenched limitations on the amendment power denies the basic structure doctrine the full force it might otherwise enjoy—and it invites the claim that the Court is overstepping the explicit boundaries set by the constitution about how the Court should exercise its powers.

B. The Democratic Justification

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

The best argument offered thus far to make sense of a court invalidating a constitutional amendment is anchored in the theory of constituent power, first articulated by Emmanuel Joseph Sieyès, a French political theorist whose principal interest was to build a theory to protect the

¹⁸ *Golaknath v State of Punjab*, 1967 AIR 1643, 1967 SCR (2) 762, available at: <http://www.indiankanoon.org/doc/120358> (last visited June 9, 2018).

¹⁹ *Kesavananda Bharati Sripadagalvaru v. Kerala*, 1973 SCC (4) 225, available at: <http://www.indiankanoon.org/doc/25786> (last visited June 9, 2018).

²⁰ *Ibid* at para 316.

²¹ *Minerva Mills Ltd. v. Union of India*, 1980 AIR 1789, 1981 SCR (1) 206, SCC (2) 591, available at: <http://www.indiankanoon.org/doc/1939993> (last visited June 9, 2018).

essential right of the people to choose the meaning of their constitution and how it should change.²² According to this theory of constituent power, only the people may create and, by its creation, legitimate a new constitution while the people's representatives have the considerably lesser power: the people's representatives have only limited authority to make changes to the constitution provided those changes are consistent with the structure and spirit of the people's constitution. Any change more far-reaching than that—one that alters the core commitments of the constitution—must be authorized by the people themselves, and as a result legitimated by them. For Sieyès, the people embody the constituent power, meaning the supreme body that constitutes all others. These other bodies are inferior to the people and their constituent power; these are described in the scholarly literature as the constituted powers. These constituted powers include the legislature, the executive and courts as well. The legal fiction of the theory of constituent power holds that these representative bodies of constituted powers are created, authorized or regulated by the constitution, which in turn has been created by the people. The bottom line, then, is this: constituted powers are bound by the rules established in the constitution by the constituent power.

The democratic foundations of the doctrine of unconstitutional constitutional amendment begin now to come into focus. These foundations are anchored in the delegation theory of constitutional change. Given that the people have created the constitution and delegated to their representatives only the limited power to modify the constitution in ways that keep the constitution aligned with its original form and values, the constituted powers cannot make changes to the constitution authorized by the constituent power without doing violence to the expressed will of the people.²³ Only the people themselves exercising their constituent power may make such changes to the constitution. Seen in this light, where a court invalidates a constitutional amendment passed by the actors authorized by the constitution to make amendments, we can certainly describe this action as stifling a proximate form of democratic expression—the considered judgment of the amending actors. But this argument would miss the larger picture, which is that the choice a court makes to invalidate an amendment that it believes violates the constitution is a vindication of the supreme democratic choice originally made by the people to create the constitution. On this view, what first seems to be an undemocratic arrogation of power by courts is instead a justifiable judicial intervention to protect the terms of the original bargain approved by the people.

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

²² EMMANUEL JOSEPH SIEYÈS, *QU'EST-CE QUE LE TIERS ETAT?* (Éditions du Boucher, 2002) (originally published in 1789).

²³ The most theoretically rich account of this theory of delegation appears in ROZNAI, *supra* note 1, at 105-34.

II. ULTRA-FORMALISM IN THE REPUBLIC OF GEORGIA

One possible approach to the idea of an unconstitutional constitutional amendment is to reject it outright on purely formalist grounds. Formalism is rooted in a commitment to rules that derive their legitimacy from their clarity, consistent application, public accessibility and their widely shared acceptance as authoritative. As with most theories of constitutional interpretation and enforcement, formalism can sometimes devolve into a caricature of even its best self. This is the case in the Republic of Georgia, whose Constitutional Court has taken what may be described with no shortage of criticism as an ultra-formalist approach to adjudicating constitutional amendments.

Faced with a constitutional text that makes explicit mention of neither substantive unamendability nor judicial authority to review constitutional amendments, the Georgian Constitutional Court has refused to validate all challenges to constitutional amendments. The Court's reason why: once Parliament adopts a constitutional amendment, it becomes part of the Constitution and is therefore unreviewable because the Constitution cannot be unconstitutional. The Court has held that it lacks the constitutional authority to review amendments. It has therefore never reviewed the constitutionality of an amendment either on procedural or substantive grounds. In this Part, we first explain the rules of constitutional amendment in Georgia and we then turn to the Court's case law in which it set out the limits to its own authority in reviewing amendments.

A. Constitutional Amendment in the Republic of Georgia

Amending the Georgian Constitution requires Parliament to consider a draft law for either a general or partial amendment, submitted either by more than half of the total number of Members of Parliament or at least 200,000 eligible voters.²⁴ An amendment proposal becomes valid if Parliament keeps debate on the draft amendment open for at least one month, and then votes in two successive sessions of Parliament (separated by an interval of at least three months) in its favor with three-quarters support of all Members of Parliament.²⁵ The final steps involve the President of the Republic signing and promulgating the amendment.²⁶ The Constitution is clear that no amendment may lawfully be made during a state of emergency or martial law.²⁷

While the constitutional provisions on constitutional amendment stand as the primary source in determining their normative status, Georgian statutory law regulates the definition and relationship of legal norms in the country. Although not formally part of the Constitution, the Law of Georgia on Normative Acts governs the formal rules of legal normativity.²⁸ Article 1/1 of the Law stipulates “[t]his law defines the types and hierarchy of normative acts, the place of international agreements and treaties of Georgia in the system of normative acts of Georgia, and general rules of preparing, adopting (issuing), promulgating, applying, registering and systematizing normative acts”. Article 7/2-a of the Law counts the Constitution and *the Constitutional Law*, which refers to constitutional amendments, among the types of legislative acts

²⁴ GEORGIA CONST., art. 102, § 1.

²⁵ *Id.* at art. 102, §§ 2-3.

²⁶ *Id.* at art. 102, § 4.

²⁷ *Id.* at art. 103.

²⁸ Law of Georgia on Normative Acts of Georgia, The Legislative Herald of Georgia, #33, Nov. 9, 2009, available at: <https://matsne.gov.ge/en/document/download/90052/12/en/pdf>. (last visited June 9, 2018).

in Georgia. Article 7/3 states the definitive hierarchy of norms in the Georgian legal system, placing the Constitution and the Constitutional Law at the same level—the highest—in the hierarchy. Article 10/2 moreover provides that “the Constitutional Law of Georgia is an integral part of the Constitution of Georgia. The Constitutional Law of Georgia shall be adopted to ... revise the Constitution of Georgia.” This equivalence in the Georgian legal system between the Constitution and amendments to it has a considerable impact on the Constitutional Court’s jurisprudence on its authority to review and possibly invalidate constitutional amendments.²⁹

Since its adoption in 1995, the Georgian Constitution has been amended 34 times.³⁰ While most of these have been more housekeeping than transformative, two major constitutional amendments both reforming the political system and the separation of powers become law in 2004 and 2010, and a third has been adopted in 2017, which will enter into force upon the presidential election in 2018. The 2004 constitutional amendment emerged in the aftermath of the Rose Revolution with the stated aim of converting the country from a presidential to semi-presidential system.³¹ Yet the new form of government did not create sufficient checks and balances against the concentration of power.³² Hence the 2010 constitutional amendment, which again changed the form of government, though this time from semi-presidential to one resembling a parliamentary system, in the process shifting significant executive powers from the president as an individual to the government as a body.³³ The latest reform, recommended by a Constitutional Commission convened in December 2016,³⁴ and then adopted by Parliament in September 2017,³⁵ makes dramatic changes. Most notably, the package of amendments—which one of us has described as constituting a constitutional dismemberment rather than a simple amendment³⁶—contemplates the indirect election of the President through an Electoral College and creating a pure parliamentary system. The amendment also makes substantial reforms to the legislature, including its election rules, and modifying the form and authority of the judiciary, including the Constitutional Court.³⁷

²⁹ See Dimitry Gegenava, *Unconstitutional Constitutional Amendment: Three Judgments from the Practice of the Constitutional Court of Georgia*, 2014 SOUTH CAUCASUS LAW JOURNAL 396, 397 (arguing that the main problem with regard to the legal status of constitutional amendments in Georgia is that it is regulated at the infra-constitutional level by the Law on Normative Acts).

³⁰ For a full list of the amendments, see <https://matsne.gov.ge/en/document/view/30346> (last visited June 9, 2018).

³¹ The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, The Legislative Herald of Georgia, #2, Feb. 7, 2004, available at: <https://matsne.gov.ge/ka/document/view/13294> (last visited June 9, 2018).

³² See Venice Commission, Opinion No. 281/2004 on the Draft Amendments to the Constitution of Georgia, CDL-AD(2004)008-e (Mar. 12-13, 2004).

³³ The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, The Legislative Herald of Georgia, #62, Nov. 5, 2010, available at: <https://matsne.gov.ge/ka/document/view/1080890> (last visited June 9, 2018).

³⁴ See Dimitry Gegenava, *Restrospection of the Constitutional Reforms of Georgia: In Search of the Holy Grail*, 2017 SOUTH CAUCASUS LAW JOURNAL 237, 241.

³⁵ These amendments were approved by Parliament on September 26, 2017 in the third and final reading. The President then vetoed the bill, which was later overturned by Parliament, and the amendment was officially published on October 13, 2017. On March 23, 2018 some parts of these amendments, mainly related to electoral system, have been revised.

³⁶ Albert, *Constitutional Amendment and Dismemberment*, *supra* note 4, at 54-56.

³⁷ See Venice Commission, Opinion No. 876/2017 on the Draft Revised Constitution as Adopted by the Parliament of Georgia at the Second Reading on 23 June 2017, CDL-AD(2017)023 (Oct 6-7, 2017); Venice Commission, Opinion No. 876/2017 on the Draft Revised Constitution, CDL-AD(2017)013 (Jun. 16-17, 2017).

B. Outright Rejection of the Unconstitutional Amendment Doctrine

Although there have been several amendments to the Georgian constitution, only three have provoked challenges to the Constitutional Court. All three cases featured provisions of a 2006 amendment, with the addition of the 2004 amendment discussed above also the subject of litigation in the first constitutional challenge. (The 2006 amendment stipulated that presidential and parliamentary elections would be held jointly between October 1, 2008 and December 31, 2008, the precise date of which would be determined by the President. The amendment understandably proved controversial because it changed the elected term of office.³⁸) The Court rejected all claims in each of these three cases, and along with them also the unconstitutional amendment doctrine.

The Georgian Constitution authorizes the Constitutional Court to review a broad range of official conduct. The list includes the constitutionality of laws, treaties and international and constitutional agreements, normative acts of the president and also of the government, normative acts of supreme state bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Adjara, the formation and activity of political unions of citizens, the regulations and the practice of referendums and elections, as well as the compatibility of normative acts with fundamental human rights and freedoms.³⁹ Missing from this list is the Constitutional Court's authority to review constitutional amendments. This power appears to be denied to the Court.⁴⁰

In light of the absence in the Georgian Constitution of any explicitly unamendable provision or any express authorization for (or prohibition on) judicial review of constitutional amendments, the Constitutional Court's interpretation of its own power has settled the matter. The Constitutional Court could conceivably have interpreted its own powers of judicial review of amendments broadly or narrowly. In each three times it did so between 2010 and 2013, the Court chose the narrow interpretation. The Court found each request for declaring an amendment unconstitutional inadmissible in all three cases, ruling that once an amendment is enacted it becomes part of the Constitution—and the Court cannot exercise judicial review of any part of the Constitution.

The first case was filed before the Court in 2009. A claimant challenged the constitutional amendments N3272-RS of 6 February 2004 and N4133-RS of 27 December 2006, arguing that these amendments had been adopted by an illegitimate parliament and therefore violated the constitutional amendment procedure set out in Article 102 of the Constitution. The claimant contended also that the amendment violated the right to equality in political life as protected in Article 38/1 of the Constitution, as well as Article 44/1 which stipulates “[e]veryone who lives in

³⁸ The Constitutional Law of Georgia on Amendments to the Constitution of Georgia, Dec. 27, 2006, *The Legislative Herald of Georgia*, #3, Jan. 11, 2007, available at: <https://matsne.gov.ge/ka/document/view/25852>. (last visited June 9, 2018).

³⁹ GEORGIA CONST., art. 89.

⁴⁰ We could perhaps find justification in the Constitution for the Court to exercise judicial review of constitutional amendments, specifically in Article 89/1-g, which stipulates that the Court shall “exercise other powers defined by the Constitution and Organic Law of Georgia.” This potentially leaves open the possibility of judicial review of non-listed normative acts. See Besarion Zoidze, *Problems with the Verification of Constitutional Norms and Constitutionality*, 2015 CONSTITUTIONAL LAW REVIEW 3, 8 (arguing that this clause read together with the Organic Law on the Constitutional Court of Georgia justifies procedural review of constitutional amendments). With the 2017 constitutional reform, however, this clause has been removed from the article.

Georgia shall be obliged to observe the Constitution and legislation of Georgia.”⁴¹ For the Court, the question in this case was effectively only whether it had authority over the normative acts. Referring to Article 10/2 of the Law of Georgia on Normative Acts, which provides that constitutional amendments are an integral part of the Constitution, the Court argued that constitutional amendments have the same normative value as primary constitutional norms. Reviewing constitutional amendments, for the Court, therefore, would be to review the “constitutionality of the norms of the Constitution.”⁴² According to the Court, then, the matter was beyond its jurisdiction. The Court ruled the claim inadmissible and did not address its merits.⁴³

A second case challenging the constitutionality of a constitutional amendment reached the Court in 2012.⁴⁴ In this case, a claimant challenged the constitutionality of Article 1/1-a and Article 1/2-c of the 2006 constitutional amendment. This amendment had added paragraph 2¹ to Article 50 of the Constitution with the following content:

Regular parliamentary elections shall be held during the month of October in the calendar year when Parliament’s term of office expires. The President of Georgia shall fix the date of elections no later than 60 days before the elections.

Furthermore, this amendment had amended Article 70/9 of the Constitution as follows:

Regular presidential elections shall be held in the month of October of a calendar year when the President’s powers expire. The President of Georgia shall fix the date of elections no later than 60 days before the elections.

The claimant argued that extending the parliamentary term by five months and the presidential term by nine months, the amendment violated Articles 49 and Article 70 of the Constitution, which govern the parliamentary and presidential elections, respectively.⁴⁵ The claimant also contended that these term extensions violated the right of citizens to run for the presidency, the right to free expression and the constitutional function of the people as a source of state authority defined in Article 28, including his own right to participate in parliamentary and presidential elections.⁴⁶

Following its reasoning in the 2010 case, the Court stressed the normative status of constitutional amendments as stipulated by the Constitution and the organic laws. It explained the hierarchy of norms in the Georgian legal order and concluded that a constitutional amendment, as an integral part of the Constitution, sits on the constitutional plane at the top of the hierarchy.⁴⁷ The Court declared that it is authorized to review only those normative acts sitting below the Constitution in the hierarchy, and it concluded that it did not have the authority to review the constitutionality of a part of the Constitution. The Court again rejected the challenge.

⁴¹ Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Ruling N2/2/486, Jul. 12, 2010.

⁴² *Id.* § II, ¶ 3.

⁴³ *Id.*

⁴⁴ Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Ruling N1/3/523, Oct. 24, 2012.

⁴⁵ *Id.* § I, ¶ 5.

⁴⁶ *Id.*

⁴⁷ *Id.* § II, ¶ 3-4.

The last case on constitutional amendments is from 2013. Article 1/2-c of the 2006 amendment was again the subject of the challenge, only this time the claim was that it violated Articles 17 and 28 of the Constitution, namely the protection of human dignity and the right to participate in elections.⁴⁸ In this case, the claimant argued that although the Constitutional Court was not directly authorized to review constitutional amendments, the Court has a constitutional duty to review the compliance of normative acts with the basic rights and freedoms protected in the Constitution. In the claimant's view, by granting a retroactive effect to the constitutional norm regulating the public authority of the President, the Parliament had violated the basic principles of public law.⁴⁹ The presidential election of 2008 had been held ten months sooner than the constitutionally prescribed date, which would have had the effect of extending the president's term. This extension, for the claimant, violated Article 70/1 of the Constitution.⁵⁰ The claimant also argued that the Court's authority over constitutional amendments "derives from the authority and the general logic of the mission of the Constitutional Court."⁵¹

In this third and most recent case, the Court discussed the question whether it had the authority to review the conformity of constitutional amendments to constitutional rights. The Court set out its two functions as it sees them: first, to ensure the functioning of state authority within the framework established by the Constitution; and second, to protect human rights from unreasonable interference by public authorities.⁵² The Court argued, however, that it could not properly serve these functions without respecting the limits of constitutional authority operating upon it, the foremost limits codified in the Constitution.⁵³ The Court could not read the Constitution as granting it the power to review amendments because, in the Court's view, constitutional norms, including constitutional amendments, create a unified constitutional-legal order and this constitutes the standard against which inferior normative acts are to be reviewed by the Constitutional Court. For the Court, its authority was at an end when the challenged concerned the Constitution itself.

Interestingly, the Constitutional Court of Georgia made express reference to the Venice Commission's finding that there is no consensus in public law on the authority of constitutional courts over constitutional amendments.⁵⁴ The Court concluded that in the absence of formally unamendable clauses—even if there is a substantive hierarchy among constitutional norms—there is no formal hierarchy among them.⁵⁵ According to the Court, the resolution of contestations on the constitutional plane in the hierarchy of legal norms is left to the political process in Georgia.⁵⁶ The Court added a further point: in order for the Court to acquire the authority to review

⁴⁸ Saqartvelos Sakonstitucio Sasamartlo [Constitutional Court of Georgia] Ruling N1/1/549, Feb. 5, 2013.

⁴⁹ *Id.* § II, ¶ 12.

⁵⁰ *Id.* § II, ¶ 13.

⁵¹ *Id.* § I, ¶ 5.

⁵² *Id.* § II, ¶ 5.

⁵³ *Id.*

⁵⁴ *Id.* § II, ¶ 10. See Venice Commission, Study No. 469/2008 on Constitutional Amendment, CDL-AD(2010)001 (Dec. 11-12, 2009) ¶¶ 225-37.

⁵⁵ Ruling N1/1/549, § II, ¶ 11. See Besik Loladze, *Konstituciis tsvlilebebis konstitutsiurobis kontrolis perspektiva saqartveloshi* [Perspectives of constitutional review of constitutional amendments in Georgia], <https://emc.org.ge/2014/11/11/experts-third> (supporting the Court's argument and contending that the authority of the formation of unamendability guarantees is upon the legislature and not the Constitutional Court).

⁵⁶ Ruling N1/1/549, § II, ¶ 11.

constitutional amendments, the principle of separation of powers demands that the Constitution itself provide a clear basis for the Court to exercise this power within clearly defined parameters.⁵⁷

In sum, then, the Constitutional Court of Georgia has adamantly refused to review the constitutionality of constitutional amendments, ruling that once constitutional amendments have been enacted, they form an integral part of the Constitution. As constitution-level norms, they are not subject to constitutional review. In response to this ultra-formalist practice of the Court, some have suggested that explicit unamendability should be introduced into the Georgian Constitution,⁵⁸ while others, relying on the non-exhaustive list of its authorities stipulated in the Constitution, insist that the Court already possesses within its toolkit of legitimate authority the power to exercise judicial review of amendments within the current constitutional framework.⁵⁹

III. ENFORCING DEMOCRATIC PROCEDURES IN TURKEY

An alternative model of resistance is apparent in Turkey. The current Constitution limits the Constitutional Court to exercising only formal procedural review of constitutional amendments. But the Court has devised ways of manipulating this limitation to exercise substantive review in disguise, and until recently the Court did in fact exercise substantive review of amendments. In 2016, the Court announced a return to a strictly formal proceduralist review of amendments. In this Part we explain how amendment rules are structured in Turkey and also reveal how even a rigid rule limiting courts to procedural review is prone to manipulation by an aggressive court.

A. Constitutional Amendment in Turkey

Amending the Constitution in Turkey is a quite complicated process of alternative paths.⁶⁰ Initiation requires the agreement of one-third of the total number of parliamentarians, after which the proposal must be debated twice in a plenary session of Parliament. At least three-fifths of parliamentarians must then approve the proposal for it to proceed, but two alternatives present themselves depending on the strength of the approval vote. If at least two-thirds vote in favor, the president has the option of either approving the proposal into law, sending it back to Parliament for reconsideration, or putting it to a referendum. However if fewer than two-thirds vote in favor, the president cannot approve the bill but has the choice of either sending it back or putting it to a referendum. Where the bill is sent back to Parliament and earned at least a two-thirds vote, the president again is given the choice of either approving it outright or putting it to a referendum. But where the amendment proposal earns a small majority vote, the referendum becomes compulsory.

⁵⁷ *Id.*

⁵⁸ Elene Janelidze, *Judicial Review of Constitutional Amendments in Georgia, France and Germany – The Quest for Eternity* (2016) 33-34 (unpublished LL.M. short thesis, Central European University), *available at*: http://www.etd.ceu.hu/2016/janelidze_elene.pdf (last visited June 9, 2018; Loladze *supra* note 55; VAKHUSHTI MENABDE, *Revision of Constitution of Georgia—What Ensures Legitimacy of Supreme Law*, in *FROM SUPERPRESIDENTIALISM TO PARLIAMENTARISM: CONSTITUTIONAL AMENDMENTS IN GEORGIA* 116, 127 (Ghia Nodia & Davit Afrasidze eds., 2013).

⁵⁹ See Zoidze, *supra* note 40.

⁶⁰ TURKEY CONST., art. 175.

The Turkish Constitution also entrenches substantive limitations on amendment, and together they form by comparative standards a quite broad set of restrictions on the amending power.⁶¹ No amendments are permitted to “[t]he provision of Article 1 regarding the form of the State being a Republic, the characteristics of the Republic in Article 2, and the provisions of Article 3.”⁶² When elaborated beyond these references by incorporation, the list of unamendable items includes the republican form of the state; the nationalism of Atatürk; the fundamental tenets set forth in the Preamble; the principles of democracy, secularism, social state, the rule of law, respect for human rights; as well as the provisions establishing the integrity, the official language, the flag, the national anthem and the capital of the country. The wording of the Constitution suggests that in addition to prohibiting amendments to these provisions so too is even proposing to amend them.

Earlier Turkish Constitutions—the 1924 and 1961 versions—also entrenched explicit forms of unamendability,⁶³ but only for the republican state form, patterned after the unamendability clause in the French Constitution. Both of these superseded constitutions also protected the characteristics and national symbols of the state, but these were not expressly designated as unamendable.

B. Substantive Review as Procedural Review in Turkey

The Turkish Constitutional Court’s review of constitutional amendments is a complicated story. The Court has not been consistent in its interpretation of the legal enforceability of unamendable clauses nor in its interpretation of its own authority over constitutional amendments. Historically across three separate eras, the Court has found ways to exercise substantive judicial review of amendments even where it has been severely limited in its discretionary authority in relation to amendments. From 1961 to 1971, only the republican form of the state was unamendable and the Constitution was silent on the Court’s judicial review authority on amendments. From 1971 to 1980, the same unamendable rule existed but the Constitution authorized the Court to review amendments only as to their form, not their content. And since 1982, unamendability has grown as discussed above, but the Constitution continues to authorize judicial review of amendments only as to their form, and even still to only three specifically enumerated formal criteria that do not at all relate to the content of the amendments. And yet in all three eras since 1961, the Court has exercised substantive judicial review of amendments.

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

⁶¹ Ergun Özbudun, *Judicial Review of Constitutional Amendments in Turkey*, 15 EUR. PUB. L. 533, 534 (2009).

⁶² TURKEY CONST., art. 4.

⁶³ TURKISH CONST. (superseded), art. 102 (1924); TURKISH CONST. (superseded), art. 9 (1961).

required it to inquire into the substantive merits of the amendment. And so the irony is that the Court exercised substantive review of amendments in the name of formal procedural review.

Formal unamendability in Turkey dates to 1924 but its judicial enforceability emerged as an issue only after the establishment of the Constitutional Court in the 1961 Constitution. Shortly after its creation, the Court hinted in an *obiter* that it would review constitutional amendments against the standard set by the Constitution's unamendable rule, arguing that an "amendment" can only be progressive and that any effort to regress from the promise of the Constitution or to modify the core "essence" of the 1961 Constitution cannot be properly regarded as an "amendment."⁶⁴

Until the 1971 constitutional reform, the Constitutional Court reviewed two constitutional amendments. In the first case, the Court struck down on procedural grounds an amendment reinstating the political rights of the Democratic Party politicians—rights that had been taken away in the aftermath of the 1960 military coup.⁶⁵ In justifying its authority to review constitutional amendments, the Court argued that it had the constitutional authority to review *laws* and since a constitutional amendment is formally a *law*, it is subject to constitutional review like all others.⁶⁶ Although the Court stated that constitutional amendments are subject to both procedural and substantive review, it concluded that the amendment had not been enacted procedurally properly and did not engage in substantive review. In the second case, the Court reviewed on both procedural and substantive grounds a constitutional amendment that extended by 16 months the ordinarily six-year term limit for certain senators but upheld it.⁶⁷ The Court declared that it had the constitutional authority to protect the Constitution against the sovereignty of the majority.⁶⁸

The Court's bold pronouncement drew an equally bold response. Parliament passed an amendment overriding the Constitution's silence on the judicial review of constitutional amendments.⁶⁹ It amended Article 147 of the 1961 Constitution to explicitly state that the Constitutional Court has the authority to review constitutional amendments only on the *formal* grounds set forth by the constitutional amendment rules.⁷⁰ The Constitution was amended, therefore, with the purpose of restricting the Court from engaging in substantive review. And yet the Court nevertheless continued to exercise substantive review of amendments on six separate occasions thereafter until the adoption of the 1982 Constitution, which remains in force today.

In the first case after the 1971 amendment, the Constitutional Court was asked to review a constitutional amendment that created an exception in times of war to the rule that "the majority

⁶⁴ Anayasa Mahkemesi [AYM] [Constitutional Court] Sept. 26, 1965, E. 1963/173, K. 1965/40 4 AYMKD 290, 329.

⁶⁵ Anayasa Mahkemesi [AYM] [Constitutional Court] Jun. 16, 1970, E. 1970/1, K. 1970/31 8 AYMKD 313.

⁶⁶ *Id.* at 322. A similar reasoning was put forward by the majority in the Indian Supreme Court's *Golaknath* decision three years earlier (1967 2 S.C.R. 762), where the Court struck down a constitutional amendment on the grounds that it abridged fundamental rights. See S. P. SATHE, *India: From Positivism to Structuralism* in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY (Jeffrey Goldsworthy ed., 2007) 215, 244.

⁶⁷ Anayasa Mahkemesi [AYM] [Constitutional Court] Apr. 13, 1971, E. 1970/41, K. 1971/37 9 AYMKD 416.

⁶⁸ *Id.* at 428-29.

⁶⁹ This amendment was passed in the aftermath of the 1971 military memorandum. 1488 sayılı Kanun [Law No. 1488], Resmi Gazete [Official Gazette], Sept. 22, 1971 No. 13964, enacted Sept. 20, 1971.

⁷⁰ 1961 ANAYASASI [The 1961 Constitution] art. 147 as amended: "The Constitutional Court shall review the conformity of laws and the parliamentary rules of procedure to the Constitution and of constitutional amendments to the formal requirements set out in the Constitution" (emphasis added).

of members of military courts should be qualified judges.”⁷¹ In discussing its authority over constitutional amendments for the first time since the 1971 amendment that sought to limit its power, the Court admitted that it no longer had the authority to exercise substantive review and that its review would be limited only to formal review. This admission, however, came with a twist. The Court went on to argue that the unamendable rule incorporated both formal and substantive rules. First, it prohibited actual amendments to the form of the state. And, second, it prohibited proposals of any such amendments. The second element, the Court argued, was a formal limitation the Court was required to honor, but the Court added that in order properly to complete its formal review of the amendment it had to apply a test on whether the amendment could be proposed in the first place.⁷² The Court understood this to be a *proposability* test. Under this test, an amendment would fail the formal criterion of proposability if in its substance it violated the unamendable rule entrenched in the Constitution.

Using the same reasoning, the Constitutional Court reviewed five more amendments before the 1980 military coup, three of which it struck down as unconstitutional.⁷³ In each of these cases, the Court exercised substantive review as a necessary feature of its formal review.

The 1982 Constitution changed the rules of amendment considerably. In addition to the republican form of state, the characteristics and symbols of the state have been also explicitly included under unamendability protection.⁷⁴ Attentive to the ways in which the Court had in the past exceeded its delegated authority to review only the form of amendments, the drafters of the new Constitution again made clear that the Constitutional Court can exercise only formal review but expressly limited this power to three categories of formal review the Court may undertake: (1) on the required majority for proposing an amendment; (2) on the required majority for voting on it; and (3) on the requirement that the amendment bill be debated twice in a plenary session.⁷⁵

The first amendment to the 1982 Constitution occurred in 1987. It lifted the restrictions on the political rights of some politicians that had been imposed by the 1980 military junta. The amendment was challenged in the Constitutional Court on formal grounds. However, the claim—that it was improper for Parliament simultaneously to pass an amendment and to put that amendment to a referendum using the same act—did not fall under any of the three criteria the Constitution contemplates for the Court to review for form of an amendment. Accordingly, the Court rejected the request stating that its authority over constitutional amendments was restricted to determining whether the three enumerated formal criteria had been met.⁷⁶ In 2007, two more constitutional amendments were taken to the Constitutional Court, and in both cases the Court

⁷¹ Anayasa Mahkemesi [AYM] [Constitutional Court] Apr. 15, 1975, E. 1973/19, K. 1975/87 13 AYMKD 403.

⁷² *Id.* at 427-31.

⁷³ Anayasa Mahkemesi [AYM] [Constitutional Court] Mar. 23, 1976, E. 1975/167, K. 1976/19 14 AYMKD 118; Anayasa Mahkemesi [AYM] [Constitutional Court] Oct. 12, 1976, E. 1976/38, K. 1976/46 14 AYMKD 252; Anayasa Mahkemesi [AYM] [Constitutional Court] Oct. 12, 1976, E. 1976/26, K. 1976/47 14 AYMKD 287; Anayasa Mahkemesi [AYM] [Constitutional Court] Jan. 27, 1977, E. 1976/43, K. 1977/4 15 AYMKD 106; Anayasa Mahkemesi [AYM] [Constitutional Court] Sep. 27, 1977, E. 1977/82, K. 1977/117 15 AYMKD 444.

⁷⁴ 1982 ANAYASASI [The 1982 Constitution] art. 4.

⁷⁵ *Id.* art. 148, ¶ 2, cl. 1.

⁷⁶ Anayasa Mahkemesi [AYM] [Constitutional Court] Jun. 18, 1987, E. 1987/9, K. 1987/15 23 AYMKD 282, 285-86.

restricted its review to the three formal criteria, refusing to engage in substantive review or in any other form of formal review.⁷⁷

The Court abandoned its restraint on judicial review of constitutional amendments in its infamous headscarf judgment in 2008.⁷⁸ The context was highly charged: the governing Justice and Development Party's (AKP) closure case was pending before the Constitutional Court for its activities allegedly violating the unamendable principle of secularism.⁷⁹ The amendment also before the Court sought to lift the ban on religious headscarves worn by women at universities. Constrained by a much more rigid limitation on its authority over constitutional amendments compared to previous eras, the Court devised a novel justification for its authority to exercise substantive review of amendments in relation to the unamendable rules in the Constitution. The Court argued that satisfying the first enumerated procedural condition of the required majority for proposal required also meeting the condition of proposability, meaning for the Court that those amendments violating the unamendable rules are not in fact proposable and the Court must guard the Constitution against them. This proposability test required the Court to engage in substantive review and, as it had done before, the Court again exercised substantive review in the name of formal review. The Court concluded that the amendment violated the unamendable principle of secularism and struck it down as unconstitutional.

This interpretation reads the Constitution's amendment rules against their very purpose, which is to prohibit substantive judicial review of constitutional amendments. The Court has for good reason suffered criticism.⁸⁰ The Court, nevertheless, struck down parts of another constitutional amendment in 2010. Repeating its reasoning with regard to its authority to review the substance of the amendment in relation to the unamendable rules, the Court engaged in substantive review. The Court declared unconstitutional the proposed voting procedures for selecting members for the High Council of Judges and Prosecutors and the Constitutional Court, and the proposed rule allowing the President to appoint academics from political science and economics or senior executives violated the unamendable principle of the "democratic state governed by rule of law."⁸¹

In somewhat of a surprise, the Court has recently returned to its pre-2008 position that it will respect the Constitution's explicit rule that the Court can review amendments only as to form. In a 2016 case brought by 70 parliamentarians challenging an amendment that temporarily lifted parliamentary immunity, the Court declared that its authority over constitutional amendments extends only to whether the required majorities for proposal and voting have been met and the requirement of two debates has been observed.⁸² The case grew from the claim that although the law had taken the form of a constitutional amendment, the subject-matter of the amendment was

⁷⁷ Anayasa Mahkemesi [AYM] [Constitutional Court] Jul. 5, 2007, E. 2007/72, K. 2007/68 44 AYMKD 1053; Anayasa Mahkemesi [AYM] [Constitutional Court] Nov. 27, 2007, E. 2007/99, K. 2007/86 45 AYMKD 429.

⁷⁸ Anayasa Mahkemesi [AYM] [Constitutional Court] Jun. 5, 2008, E. 2008/16, K. 2008/116 45 AYMKD 1195.

⁷⁹ See Ashl Bâli, *Courts and constitutional transition: Lessons from the Turkish case*, 11 INT'L J. CONST. L. 666, 688-90 (2013).

⁸⁰ Özbudun, *supra* note 61, at 537-38; Bâli, *supra* note 79, at 681-88; Albert, *supra* note 4, at 26-29 (2018); Yaniv Roznai & Serkan Yolcu, *supra* note 2; Abdurrahman Saygılı, *What is Behind the Headscarf Ruling of the Turkish Constitutional Court?*, 11 TURK. STUD. 127 (2010); Levent Köker, *Turkey's Political-Constitutional Crisis: An Assessment of the Role of the Constitutional Court*, 17 CONSTELLATIONS 328 (2010).

⁸¹ Anayasa Mahkemesi [AYM] [Constitutional Court] Jul. 7, 2010, E. 2010/49, K. 2010/87 47 AYMKD 1069.

⁸² Anayasa Mahkemesi [AYM] [Constitutional Court] Jun. 3, 2016, E. 2016/54, K. 2016/117 53 AYMKD 915, 923.

the lifting of parliamentary immunity—and since Article 85 of the Constitution contemplates judicial review of parliamentary decisions lifting parliamentary immunity before the Constitutional Court, this amendment should be subject to judicial review. Returning to a formalist approach to defining the legal status of the act of parliament, the Court dismissed the challenge by ruling that the challenged act was indeed a constitutional amendment and that challenge brought did not fall into any of the three formal criteria set out in the Constitution. In the Court’s unanimous judgment, we see clearly the Court’s re adoption of a formalist approach to unconstitutional amendments.⁸³

IV. THE TRIUMPH OF POPULAR SOVEREIGNTY IN FRANCE

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

A. Constitutional Amendment in France

Amending the French Constitution is no easy feat.⁸⁴ The Constitution grants the President, at the request of the Prime Minister, and Members of Parliament the authority to initiate a constitutional amendment. Once an amendment bill is introduced to Parliament, it must be passed in identical terms in both the National Assembly and the Senate. Where the bill is adopted in both houses, the President can either submit the bill to Parliament for approval or put it to referendum. If it is submitted to Parliament, both houses convene together as a Congress and the bill becomes official if approved by at least three-fifths of all votes cast. However, if the President chooses to put the bill to a referendum, a simple majority vote is required to make it official.

The Constitution does not by its text authorize the *Conseil Constitutionnel* to exercise the power of judicial review over constitutional amendments. But it does formalize explicit limitations on amendment. The Constitution prohibits amendments to the republican form of government,⁸⁵ and it also expressly disallows any amendment when there is a threat to the integrity of the French national territory⁸⁶ or when there is a vacancy in the office of the presidency.⁸⁷

There have been over twenty amendments to the current French Constitution. Neither of the first two amendments complied with the ordinary procedures of constitutional amendment. The first was adopted using special procedures in Article 85 for amendments to Articles 77 to 87

⁸³ See TARIK OLCAJ, *Unamendability of Amendable Clauses: The Case of the Turkish Constitution*, in AN UNCONSTITUTIONAL CONSTITUTION? UNAMENDABILITY IN CONSTITUTIONAL DEMOCRACIES (Richard Albert & Bertil Oder eds., forthcoming 2018).

⁸⁴ FRANCE CONST., art. 89 (1958).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at art. 7.

involving the French Community. That was the only use of Article 85, which has since been repealed along with Articles 78 to 87 after the abolition of the Community.⁸⁸

The second was far more significant to the course of modern French constitutional history. Four years after founding of the Fifth Republic in 1958, President Charles de Gaulle became convinced that the presidential election should change from an Electoral College to a direct popular vote. Such a change required a constitutional amendment, but it was politically unlikely that the houses of Parliament would propose the amendment on de Gaulle's behalf. De Gaulle found an alternative: he would bypass Parliament and invoke a special procedure in Article 11, which authorizes the president to submit any bill on "the organization of the public authorities" to a referendum. Until 1962, this provision had not generally been interpreted as a vehicle for constitutional amendment.⁸⁹ De Gaulle's tactic was therefore quite controversial at the time and widely regarded as unconstitutional. The Conseil d'Etat formally reproached the use of Article 11 for constitutional amendment as unconstitutional, whereas the Conseil Constitutionnel did so informally.⁹⁰ The President of the Senate and the opposition saw de Gaulle's move as an "outrageous breach of the Constitution."⁹¹ Undeterred, de Gaulle pressed ahead with his unconventional plan to amend presidential selection using Article 11, and the people went to the polls in referendum. The referendum passed with a nearly two-thirds approval of 61.75 percent.⁹²

In the aftermath of the vote, the Senate President challenged the constitutionality of the amendment before the Conseil Constitutionnel. He argued that the law was not properly a constitutional act (*loi constitutionnelle*) or an organic law, but rather just an ordinary law. He also argued that its adoption by referendum did not shield it from review by the Conseil. He contended further that the exercise of national sovereignty, whether by the people or their representatives, should be in accordance with the clear rules set out in the Constitution.⁹³ The Conseil rejected the Senate President's challenge by a vote of 6 to 4.⁹⁴ In its judgment, the Conseil focused on its own constitutional competence. It stressed that its authority was bound narrowly by the text of the Constitution and also by the Organic Law on the Conseil Constitutionnel. In its short decision, the Conseil distinguished "direct expressions of national sovereignty" (*referendums*) from "activities of public authorities" (*lois*), the former resting on a higher plane than the latter. The Court concluded that neither the Constitution nor the Organic Law gave the Conseil the power to review the constitutionality of a "bill adopted by the French people by way of referendum."⁹⁵

⁸⁸ *Id.* at tit. XIII.

⁸⁹ David B. Goldey, *The French Referendum and Election of 1962: The National Campaigns*, 11 POLITICAL STUD. 287, 289-90 (1963).

⁹⁰ *Id.* at 290.

⁹¹ JOHN BELL, FRENCH CONSTITUTIONAL LAW 134 (1995).

⁹² MARK CLARENCE WALKER, THE STRATEGIC USE OF REFERENDUMS: POWER, LEGITIMACY, AND DEMOCRACY 35 (2003).

⁹³ Saisine par Président du Sénat, CC décision no. 62-20DC, Nov. 6, 1962, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1962/62-20-dc/saisine-par-president-du-senat.102453.html> (last visited June 9, 2018).

⁹⁴ CC décision no. 62-20DC, Nov. 6, 1962, Rec. 27. An English translation of parts of this decision is available in NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 97 (3rd ed. 2016). See Bell, *supra* note 91, for the number of votes.

⁹⁵ CC décision no. 62-20DC, Nov. 6, 1962, Rec. 27 ¶ 5.

The Conseil's judgment stands for the proposition that courts will not review the choice of the people to amend the constitution in a referendum. This presumably applies to constitutional referendums under both Articles 11 and 89, though it remains an open question whether courts would review the constitutionality of an amendment passed by Parliament without recourse to a referendum.⁹⁶ The Conseil hinted at an answer thirty years later in 1992. After the signing of the Maastricht Treaty, 60 senators asked the Conseil to rule on the Treaty's conformity with the French Constitution. The senators claimed that the Treaty violated Article 3 of the Constitution, which establishes that "national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum."⁹⁷ In response, the Conseil suggested that constituent authority is sovereign and subject only to the unamendable rules, both substantive and temporal.⁹⁸ The Conseil was speaking specifically about constituent authority and only generally about amendment, but seemed to suggest that the explicit limitations on amendment are enforceable.

The Court finally answered the question a decade later in 2003. Sixty senators again challenged the constitutionality of an amendment, this time the Constitutional Law on Decentralized Organization of the Republic. The amendment had been the first to be passed by a joint meeting of the National Assembly and the Senate under the procedure provided in Article 89 to later be challenged at the Conseil.⁹⁹ The senators pointed to the formal unamendability of the republican form of government, and argued that this unamendability did not prohibit a return to monarchy alone, but also intended to protect the characteristics of the French Republic.¹⁰⁰ The senators argued that decentralizing local government was a violation of the unitary character of the state.¹⁰¹ In response, the Conseil echoed its holding of four decades prior. Its judgment focused on its own competence and ultimately held that since no provision of the Constitution confers upon it the power to review constitutional amendments, it had no jurisdiction to hear the case.¹⁰² The rule in France, then, seems to be that courts will not review the constitutionality of any amendment at all.

B. Deference to Popular Sovereignty

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

⁹⁶ Sophie Boyron, *Life and Death of Constitutions in France*, in *THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS* 133, 147 (Mads Andenas ed., 2000).

⁹⁷ FRANCE CONST., art. 3(1).

⁹⁸ CC décision no. 92-312DC, Sept. 2, 1992, Rec. 76, ¶ 19. An English translation of this decision is available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-92-312-dc-of-2-september-1992.137203.html> (last visited June 9, 2018).

⁹⁹ For the context and substance of this constitutional reform, see Xavier Philippe, *France: The Amendment of the French Constitution "on the Decentralized Organization of the Republic"*, 2 INT'L J. CONST. L. 691 (2004).

¹⁰⁰ Saisine par 60 sénateurs – 2003-469DC, II.2, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2003/2003-469-dc/saisine-par-60-senateurs.101124.html> (last visited June 9, 2018). See also Sophie Boyron, *France*, in *HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY* 115, 128 (Dawn Oliver & Carlo Fusaro eds., 2011).

¹⁰¹ Saisine par 60 sénateurs – 2003-469DC, at III.1.

¹⁰² CC décision no. 2003-469DC, Mar. 26, 2003, Rec. 293.

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

The Conseil regards the constituent power as sovereign, when referring to the people acting as the constitution-amender. For the court, since amendments emanate from the sovereign, they are final and unreviewable.¹⁰³ This attribution of sovereign authority to the constitutional amendment power echoes the theory of constituent power in Israel as resting in the Knesset, the national legislature. The Knesset is understood to possess "ongoing" constituent power,¹⁰⁴ always ready to be deployed to make or unmake constitution-level laws without needing to mobilize a separate body clothed in a higher authority. In France, what has occurred is a similar formalization of how to exercise constituent power, only the vehicle for its exercise is not legislature as in Israel but rather the people themselves speaking in the referendum.¹⁰⁵ De Gaulle's legacy, then, is at least partly to sever the connection between popular sovereignty and the national legislature,¹⁰⁶ and to validate by practice that the people are simultaneously constitutional and constituent actors.

French theorist Jean-Jacques Rousseau once wrote that "a people is always free to change its laws, even the best of them; for if it chooses to do itself harm, who has the right to stop it?"¹⁰⁷ The jurisprudence of the Conseil Constitutionnel to date seems to accord with Rousseau in that ultimately the people as the sovereign will be the judge of constitutional change, and that in the absence of express constitutional authorization, even formally entrenching an unamendable rule does not grant it the power to engage in substantive review of constitutional amendments, what we might define as the actual content of the amendment. Nonetheless, one could imagine the Conseil could justify reviewing an amendment for its procedural correctness, just as the Conseil could also review the constitutionality of an amendment that violates one of the Constitution's temporal limitations, still consistent with its theory equating amending actors with constituent power.

V. THE NATURE AND LIMITS OF FORMALIST RESISTANCE

France, Georgia and Turkey have so far in meaningfully different ways resisted the growing trend toward adopting the doctrine of unconstitutional constitutional amendment. The foundations

¹⁰³ Wanda Mastor & Liliane Icher, *Constitutional Amendment in France*, in ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 115, 118 (Xenophon Contiades ed., 2013).

¹⁰⁴ Claude Klein, *Basic Laws, Constituent Power and Judicial Review of Statutes in Israel: Bank Hamizrahi United v. Kfar Chituvi Migdal and Others*, 2 EUR. PUB. L. 225, 230-33 (1996).

¹⁰⁵ Lucien Jaume, *Constituent Power in France: The Revolution and its Consequences*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 67, 68 (Martin Loughlin & Neil Walker eds., 2007).

¹⁰⁶ *Id.* at 79.

¹⁰⁷ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 89 (Christopher Betts trans., Oxford World's Classics 2008) (1762).

of their resistance differ, as do whether and how the resistance is legally required in addition to how their resistance manifests itself in the course of an adjudication of a challenge to the constitutionality of an amendment. In this Part, we compare briefly these three jurisdictional encounters with the idea of an unconstitutional amendment, and we explore their limitations.

A. The Boundaries of the Constitution

Whether an amendment can be constitutional is inextricably linked to a question of enduring fascination and complexity: *what* is the constitution? When the First Congress convened after the adoption of the United States Constitution, a powerful distinction was made between the constitution and its amendments.¹⁰⁸ The Constitution was seen as more authoritative than the amendments made to it. The Constitution was a specially-constituted agreement among federal and state actors whereas amendments, according to one important view at the time, were rooted in an inferior authority because they were primarily acts of the states.¹⁰⁹ It was of course incorrect to claim that amendments were rooted in inferior authority as compared to the Constitution, and the evidence was visible for all to see in Articles V and VII of the Constitution. Article VII states the rule for ratifying the Constitution: the approval of nine states out of thirteen was sufficient for the Constitution to take effect.¹¹⁰ Yet the Article V threshold for ratifying a mere amendment was ten out of thirteen states,¹¹¹ a higher degree of state agreement than was needed to bring the Constitution to life to begin with. It may well be worth contrasting the differential authority between the Constitution and its amendments but the American experience suggests that amendments might sometimes stand on higher authority if the standard is the ratification threshold.

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

Neither Georgia nor France sees any such boundary between constitution and amendment, though their operating theories are at some variance. For Georgia, there is no formal difference between its Constitution and an amendment to it, whereas in France there is indeed a formal difference between them but no functional difference. Return to Georgia. The Constitutional Court has denied all bids to review the constitutionality of an amendment because, on its theory of constitutional change, once an amendment is properly enacted according to the procedural strictures entrenched in the codified constitution, that amendment becomes not a mere *part of* the

¹⁰⁸ 1 ANNALS OF CONGRESS 734 [August 13, 1789].

¹⁰⁹ *Ibid.* at 735.

¹¹⁰ U.S. CONST., art. VII (“The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”)

¹¹¹ *Id.* at art. V (requiring the agreement of three-quarters of the states to ratify an amendment proposal).

Constitution but rather it becomes *the* Constitution, equal in form, status and authority to it. As a consequence, the Georgian Constitutional Court does not entertain the possibility of invalidating an amendment since that would be akin to invalidating the Constitution itself, something which, for the Court, is a logical incongruity and therefore theoretically and in reality out of bounds.¹¹²

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

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

In Turkey, the Constitutional Court has in turn both respected and breached the boundaries of the Constitution. Recall that the Constitution entrenches several items against formal amendment but importantly limits the Court to reviewing amendments only as to their form. Rarely since 1961 has the Court adhered to this limitation in its many iterations, exceeding its authority to review amendments even where the defect in the amendment relates to substance and not to form. The Court has tried to classify what it regards as substantive defects into formal ones but these have been transparent efforts to do circuitously what the Constitution plainly does not allow. For the Court, then, the boundaries the Constitution has set around its authority have not been effective to prevent the Court from achieving its constitutional objectives on questions the Court believes are of the highest importance, including most prominently the secular character of the state.

B. Codified and Uncodified Rules of Exception

Each of these three jurisdictions therefore reveals a different answer to the question how we may recognize the valid exercise of constituent power. In Georgia, the amendment power is understood to function as the constitution-making power, fusing the constituted and constituent

¹¹² For a discussion of the different manifestations of unconstitutional constitutions, see Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169 (2017). For a discussion of the possibility of invalidating an original rule in a constitution, see Richard Albert, Ridwanul Hoque & Yaniv Roznai, *Judicial Invalidations of Original Constitutions* (work-in-progress).

powers into the same body of amending actors. We can describe the self-understanding of Georgian constitutionalism as constitutionalizing the constituent power in its amendment rules. Where political actors deploy the amendment rules to make a change of any kind to the Constitution, that change is taken to have been driven by a reactivation of the constituent power, whose choice of change, whatever it is, cannot be gainsaid once it becomes final.

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

In France, the Conseil Constitutionnel has acquiesced to a significant measure of procedural irregularity and validated the outcome. It is important to stress that the court has not accepted all manner of procedural irregularity. The ones that have mattered for our purposes in this inquiry into formalist regimes are the changes that have been supported by popular consent in a referendum. Even where the amendment procedure has defied the codified rules of change, the Court has not challenged the procedure or its outcome if the vehicle has been popular choice in a referendum. Procedural correctness in relation to the codified text, then, is not a primary concern of the Court. As we will soon see, this is an important contrast between the French Conseil Constitutionnel and the Turkish Constitutional Court's current posture toward constitutional amendment.

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

Turkey offers a twist: although the Constitution is understood to be an expression of the constituent power's wish to restrain the Court in its evaluation of amendments, the Court has taken the view that its substantive review of amendments is a proper defense of the values identified as foundational by the constituent power. We therefore see in Turkey conflicting understandings of the role of the Court. Where the Turkish Constitutional Court has exceeded its constitutional authorization to review amendments as to their form alone, one could reasonably claim that the Court is violating the commands of the constituent power that authorized the Constitution—and that specifically restricted the role of the Court in matters of constitutional change. On another view, however, one could make a contrary claim when faced with the same facts: that the Court's departure from its narrow charge from the Constitution is an effort to defend the values, principles and rules from attack by those who would undermine the Constitution approved by the constituent power. Where one stands turns on how important one believes the codified constitutional text should be, because it is unmistakably clear that the current Turkish Constitution intends to constrain the range of authority of the Court in relation to constitutional amendments. Both the French and Georgian courts reject the historical Turkish approach—to exceed the Constitution's mandate and to exercise substantive review of amendments—but that approach is no longer dominant since the Turkish Constitutional Court has returned to reviewing the constitutionality of amendments as to their form alone. Codification has ascended again to importance in Turkey.

CONCLUSION—A NEEDED COUNTERWEIGHT IN CONSTITUTIONAL PRACTICE

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

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

The takeaway of our inquiry can be stated in one phrase: we should not take the increasing prevalence of the doctrine of unconstitutional constitutional amendment as evidence of its

appropriateness for all constitutional states. The doctrine of unconstitutional constitutional amendment is not a necessary feature of modern constitutionalism, nor of modern liberal democratic constitutionalism, and it remains open to constitutional states to explore alternatives that cohere their own constitutional traditions. It is crucial in this age of the harmonizing tendencies of globalization to diversify the options available to constitutional actors so they may choose not the path of least resistance but the path they believe is best suited to their state and its peoples.