

An unconstitutional constitution? A comparative perspective

Gary Jeffrey Jacobsohn*

My purpose in this article is to draw upon a rich vein of jurisprudential thinking from judiciaries outside of the United States to address the puzzle of the unconstitutional constitutional amendment. I focus on two nations—India and Ireland—where the question has given rise to some fascinating and instructive jurisprudence. Unlike the United States Supreme Court, courts in these countries have confronted the issue of implied substantive limits to constitutional change through the formal amendment process. The Indian judiciary has invoked the idea of constitutional identity to legitimate overturning amendments, whereas the Court in Ireland has found such activity antithetical to popular sovereignty. In considering what is at stake for constitutional theory and practice, I rely on Edmund Burke to support the option of amendment invalidation, while concluding that if ever confronted with the felt need to exercise this option, sober heads might well wonder whether it would be worth doing.

To enable us to correct the constitution, the whole constitution must be viewed together; and it must be compared with the actual state of the people, and the circumstances of the time.¹

Edmund Burke

Can a constitution be unconstitutional? In most countries this is not a question that is generally given serious consideration. We might also think the query slightly bizarre, rather like asking whether the Bible can be unbiblical. But it is, in fact, a profoundly important question—for students of constitutionalism *and* for both the citizens and prospective citizens of a constitutional regime. The latter category included the great mathematician Kurt Gödel, who, as a well-known anecdote has it, entertained last minute doubts about acquiring American citizenship after discovering that under article 5 it would be possible to change the Constitution into something with which he, a refugee from Nazi tyranny, would not wish to be associated.

* Patterson-Banister Professor of Political Science and H. Malcolm MacDonald Professor of Comparative and Constitutional Law, University of Texas at Austin. Email: gjj69@mail.la.utexas.edu

¹ Edmund Burke, *To the Chairman of the Buckinghamshire Meeting—12 April 1780*, in *SELECTED LETTERS OF EDMUND BURKE* 243 (Harvey C. Mansfield, Jr. ed., Univ. Chicago Press 1984).

He ultimately set aside his reservations with the help of another refugee Albert Einstein.²

Constitutionalism is about limits and aspirations; whether there are implicit substantive constraints on formal constitutional change is a question that implicates our most basic intuitions—as well as our most troubling uncertainties—about constitutions. Perhaps the critical moment in the design of constitutional arrangements occurs when drafters confront the vexed issue of how much freedom to extend to subsequent amenders of their handiwork. Should the later agents of change enjoy a status equivalent to that of the architects of the original design, such that the creations of both would be similarly immune to assaults upon their legitimacy? Surely there are actions that should not be undertaken through the invocation of constitutional language. Yet if these possibilities are so horrible to contemplate, much less to integrate with our sense of what it means to live constitutionally, then a known solution exists: prohibit them from happening by explicitly making them illegal by means of amendment. In the United States, for example, one might, like Gödel, think there are deeds worse than altering representation in the Senate, but inasmuch as these things were not textually designated untouchable by the founders, it is easy to sympathize with those—and they include most commentators on the subject—who find the idea of an implicitly unconstitutional constitutional amendment deeply problematic, to say nothing of hopelessly circular.³ In what follows I argue that we should view that idea sympathetically. But the importance of the issue to the theory of constitutional democracy—and sometimes its practice—requires that we retain a healthy skepticism toward arguments that might be advanced on its behalf.

Globally, there has been considerable variation in the extent of judicial consideration of the issue. The U.S. Supreme Court has largely ignored it. Cases involving the Eighteenth and Nineteenth Amendments provided the justices with opportunities to consider whether substantive limits on constitutional amendments warranted the imprimatur of the Court, but that tribunal avoided any serious engagement with the issue even while evincing a lack of sympathy for it.⁴ In the nineteenth century, the original proposal for a thirteenth amendment, better known as the Corwin amendment, would have proved a less avoidable occasion had it not been for the untimely intervention of the Civil War. So we will never know if an amendment removing congressional abolition of slavery from the

²The most recent telling of this story may be found in Margaret Talbot, *The Scalia Court*, THE NEW YORKER, February 28, 2005, at 84.

³See, e.g., Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535, 540 (1995).

⁴The cases are *National Prohibition Cases*, 253 U.S. 350 (1920), and *Leser et al. v. Garnett et al.*, 258 U.S. 130 (1922).

parameters of article 5 would itself have been held to be an abuse of the amendment provision.⁵ We can only speculate about whether the implications of such an entrenchment were sufficiently revolutionary to give pause to even the most committed defender of amendatory prerogative.

That question aside, my principal purpose in this article is to draw upon a rich vein of jurisprudential thinking from judiciaries outside of the United States to address the puzzle of the unconstitutional constitutional amendment. If U.S. jurisprudence has been spare in its consideration of the question, other national courts have given it detailed attention and reflection. Indeed, more judicial commentary on the subject may be found coming from Africa and Latin America than from the bench of the U.S. Supreme Court.⁶ The most recent examination is in an extensive treatment of the issue by the Supreme Court in Peru, which, while upholding the constitutional amendment in question, embraced the concept that it had the authority to do otherwise.⁷ According to the Court, all institutions must be faithful to the Constitution, including the Congress. The idea that the reform of the Constitution is a political act that cannot be revised by the judiciary was rejected; thus, it is the Peruvian Court that must guarantee the Constitution's principles (*principios jurídicos*) and basic democratic values (*valores democráticos básicos*).⁸ It is, however, in India where the debate has been pursued at greatest length and where one finds the most daring and innovative decisions on the reach of constitutional power. Of course, opinions in India go to great lengths about all manner of things; still, the patient reader will be amply rewarded by a discussion of constitutional maintenance and change whose comprehensiveness is unrivalled in world jurisprudence.

Nevertheless, this will not be a discourse on the activism of the Indian Supreme Court; in fact, before arriving on the subcontinent I want to make

⁵ The text of the Corwin amendment: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." Cong. Globe, 36th Cong., 2d Sess. 1263 (1861). For further discussion of the amendment, see MARK BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (Princeton Univ. Press 1998); and A. Christopher Bryant, *Stopping Time: The Pro-Slavery and 'Irrevocable' Thirteenth Amendment*, 26 HARVARD J. L. & PUB. POLY 501 (2003).

⁶ See the Uganda case, *Ssemogerere et al. v. Attorney General*, Constitutional Appeal No. 1 of 2002 (2004). Another decision from Africa, the famous South African Certification case, while not technically an amendment case, is critical in revealing the reasoning that can lead judges to declare constitutional amendments unconstitutional. *Certification of the Constitution of the Republic of South Africa, 1996*, CCT 23/96.

⁷ The occasion was a group of cases known as the "Reform of the Pensionary System of Law" cases (No. 0050-2004-AI/TC, No. 004-2005-PI/TC, No. 007-2005-PI/TC, No. 009-2005-PI/TC), decided in 2005.

⁸ *Id.*, Section VI, A.

a stop in Ireland, where the categorical rejection of implied limits on constitutional amendments is, perhaps, as surprising as is the openness to the idea in India. Ultimately, though, my concern is less with the experiences of these countries than it is with the ways in which we theorize about constitutions.

For those polities that are constitutional democracies in more than name only, the classic tension between popular governance and restraints on power has been addressed through sovereignty-based arguments that suppose that, in the limitations imposed on the expression of the popular will, there exists a more profound manifestation of democratic legitimacy, the constituent power. This is the power that represents the people in a regime's foundational enactment, which is activated, according to some, on those occasions when the trigger of formal constitutional transformation is pulled, and which, according to others, can only be approximated in these subsequent amendments. The conflation of parliamentary and popular sovereignty that allowed the British to function without a written constitution was a fiction that Americans, in establishing a new nation, were required to reject.⁹ Their new fiction allowed them to establish a basis for the belief that other institutions—principally the Court—could, through the invocation of a written constitution, embody the original popular will and, in this way, legitimately check democratic transgressions. On balance it has proved to be a useful fiction.

I want to suggest that we reduce our dependency on theorizing predominantly in these terms because it has sometimes obstructed clear thinking about constitutionalism and, specifically, about constitutional change. Those who have argued for implicit limits on the power of amendment have often invoked the theory of popular sovereignty, and those who have opposed them have, just as often, found the theory sufficiently supple to provide justification for their counterarguments. So, on one side, we have arguments that use popular sovereignty to establish the immutability of certain constitutional rights; as, for example, in Jeffrey Rosen's claim that "By refusing to enforce the Flag Burning Amendment, a Court would defer to, rather than thwart, the sovereign will of the people."¹⁰ And, on the other side, one finds claims like that, by Walter Dellinger, that "An unamendable constitution, adopted by a generation long since dead, could hardly be viewed as a manifestation of the consent of the governed."¹¹

⁹The best account of the transition from British to American notions of sovereignty will be found in EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (W. W. Norton 1988).

¹⁰Jeffrey Rosen, *Was the Flag Burning Amendment Unconstitutional?* 100 *YALE L J.* 1073, 1092 (1991).

¹¹Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *HARVARD L. REV.* 386, 387 (1983).

Here we hear the echoes of James Madison, who insisted “The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.”¹² Madison, of course, also famously cautioned against “frequent reference of constitutional questions to the decision of the whole society,” concerned as he was not to “deprive the government of that veneration which time bestows on every thing.”¹³ And there is, in addition, a further difficulty to disturb one’s philosophical equanimity: What if the people exercise their presumed constituent authority to destroy the Constitution in the name of change and progress?¹⁴

Edmund Burke, no great friend of popular sovereignty, to be sure, nonetheless can help to solve the amendment puzzle. It is not, however, this thinker’s coolness toward the consent of the governed that I embrace. Burke spent a career being mainly correct about India, Ireland, and the United States. His opposition to the tyrannies of George III in America and Warren Hastings in India were directed at both of these rulers’ abstract appeals to sovereign rights. Ultimately, though, his attractiveness, here, transcends his notable political track record and lies in the clarifying lens he offers into critical issues of constitutional change. I refer, specifically, to his depiction of the nation as an “idea of continuity,” his commitment to a politics of identity uncompromised by the destructive lure of “geographical morality” (that is, a morality only relevant and relative to its locale), and his elevation of reform as a strategy to conserve the fundamentals of constitutional structure. But first I want to explore the dilemma of the unconstitutional amendment in two nations where it has given rise to some fascinating and instructive jurisprudence.

¹² JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 564 (W. W. Norton 1987). Akhil Reed Amar is, perhaps, the most prominent exponent of the theory of popular sovereignty as a continuing source for the legal authority to “alter or abolish,” in his account even independently of the article 5 process. Among others, principally James Wilson, Amar enlists Madison in support of his (and controversially the American framers’) position that popular sovereignty provides a license to change the Constitution in accordance with majoritarian sentiment. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 470–471 (1994).

¹³ THE FEDERALIST NO. 49, at 314–315 (James Madison) (Clinton Rossiter, ed., 1961). See Sanford Levinson, *Veneration and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443 (1990).

¹⁴ Lest anyone worry about the scope of my ambitions, I hasten to add that challenging “government of the people, by the people, and for the people” is not my purpose here, although it may be of more than passing interest that the author of that immortal prose once saw fit to refer to popular sovereignty as “a pernicious abstraction.” The abstract character of the discourse on sovereignty is, of course, present throughout its history. As Gordon Wood has noted, the doctrine of sovereignty “was the single most important abstraction of politics in the entire Revolutionary era.” GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 345 (Univ. N.C. Press 1969).

1.

In 1934, at Arbour Hill Military Detention Barracks in Ireland a special tribunal was meting out summary justice under the terms of an amendment adopted three years earlier to the Irish Free Constitution of 1922. Perhaps the only thing uncontroversial about that amendment was that it was inconsistent with the provisions of the constitution as originally enacted. By authorizing the exercise of judicial power by persons who were not judges appointed in the manner provided for by the constitution, it permitted actions in clear violation of at least two articles clearly set out in the document. Passed as a Public Safety Act, the amendment could not be mistaken for an emergency measure, as it conferred upon the executive permanent authority to exercise its special powers whenever, in its uncontrolled discretion, it deemed it expedient to do so. Thus the terms of the amendment could be put into effect during conditions of absolute peace, and under these terms the tribunals could do just about anything, including sentencing people to death without a semblance of due process. As the one dissenting judge in *State (Lemmon) v. Ryan* pointed out, “The more one dwells [on its provisions] the more one is staggered by the contemplation of the range of its operations and the scope of the matters authorized by [them].”¹⁵ The provisions were, according to this judge, “the antithesis of the rule of law,” bringing Ireland alarmingly close to “the rule of anarchy.”¹⁶

The objection to this constitutional monstrosity was that it was too radical fairly to be considered anything other than a *de facto* repeal of the constitution. As an assault on the basic scheme and principles of that document, it could only be upheld under the principle of *lex posterior*, according to which the recentness of a law establishes its priority over an earlier law of the same type. This also describes the essential process of parliamentary supremacy, which is, of course, a very British way of doing things. And so one might have imagined that rejection of the amendment could have been a source of satisfaction for Irish judges seeking to affirm their nationalist bona fides. But only a single justice, Hugh Kennedy, who was, in fact, a nationalist lawyer and one of the drafters of the constitution, was so inclined, “a lone voice,” as he was later to be called, “crying in a positivistic wilderness.”¹⁷

The majority justices were unmoved by Justice Kennedy’s argument that any purported amendment repugnant to natural law would necessarily be unconstitutional and hence null and void. While not denying that the provision in question would be impossible to justify as an act sanctioned

¹⁵ *State (Ryan) v. Lemmon*, [1935] 170 I.R. 197.

¹⁶ *Id.* at 198.

¹⁷ Quoted in Rory O’Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4:48 J. CIVIL LIBERTIES 60. (1999).

by God, they firmly asserted a judicial incapacity to determine what constitutional features were fundamental and what were not, which left the legislature, within the constraints of correct procedure, with total freedom to amend in any manner it saw fit. In response to the claim that a constitutional authority to amend provisions had to be distinguished from an unauthorized power to repeal them, Justice Gerald Fitzgibbon cited the Twenty-first Amendment to the United States Constitution as evidence for the fact that amendments need not only add or clarify. Of course, the repeal of prohibition left the essential character of the U.S. Constitution unchanged, thus making it a curious example to help legitimate the repeal of due process in the Irish constitution. But the reference underscores the central point in the majority's ruling: distinguishing essential constitutional features from nonessential ones is ultimately an exercise in imponderables. "As a provision is not incorporated into a Constitution unless it is regarded as of fundamental importance, the distinction between Articles of primary and secondary importance is difficult to maintain."¹⁸ Moreover, there was no purpose in invoking a "spirit embodied in [the] original Constitution" to prevent the enactment of provisions antagonistic to it. And so, given this view of the constitution, the Court easily reached the one conclusion that was logically required by its reasoning: "In cases where the Legislature professes to amend the Constitution itself, the only function of the Court is to see that the proposed Amendment is within the scope of the power granted by the Constitution, and that the requisite forms insisted upon by the Constitution shall have been duly observed."¹⁹

Among the constitutional theorists writing at this time, the one who would have been least surprised by this result was not an Irishman but a German—Carl Schmitt. While doubtless preoccupied with his own country's rendezvous with constitutional disintegration, he might well have viewed what was happening in Ireland as confirmation of his controversial ideas about the inadequacies of the liberal state. That the amendment process in Ireland culminated in a result he would have applauded—the transfer of all power to the executive—should not obscure the fact that, in doing so, it provided a compelling demonstration of what Schmitt saw as the fundamental flaw at the heart of constitutional liberalism. An amendment process functioning in total indifference to itself and its own system of legality was a testament to the blind subordination of substance to form that was the basis of modern constitutionalism, of which, of course, Weimar was exhibit A. In such a system, Schmitt wrote, "a purely formal concept of law, independent of all content, is conceivable and tolerable."²⁰

¹⁸ *Supra* note 15, at 180.

¹⁹ *Id.* at 242.

²⁰ CARL SCHMITT, *LEGALITY AND LEGITIMACY* 20 (Duke Univ. Press 2004).

Schmitt might have recognized in the opinions of the prevailing justices in *Ryan* echoes of his positivist adversaries in the twenties. He would have seen the same conflation of parliamentary and popular sovereignty that could sustain the imagination in visualizing the constituent power whenever constitutional change emerged from the legislature.²¹ His own conception of the sovereign will of the people identified it with certain principles of substantive law that could, on the one hand, justify the infamous Enabling Act (*Ermächtigungsgesetz*) of 1933, by which the Nazis commenced their descent into pseudolegal hell, and, on the other, resist the dominant interpretation of article 76, by which the constitution could be amended in an infinite variety of ways.²² It was a conception whose reach extended to India, when, in the tumultuous decade of the seventies, Schmitt again provided theoretical support for both sides in a struggle between dictatorial power and the judicial forces arrayed against it.

But before departing Ireland, it is important to see how a different court under a different constitution arrived at a very similar result with regard to the amendment issue. This Constitution for the Republic of Ireland was inaugurated with Eamon de Valera's proclamation that "If there is one thing more than any other that is clear and shining through this whole Constitution, it is the fact that the people are the masters."²³ It included an amendment provision that required a popular referendum as the final step in any alteration of the document. The requirement was satisfied when, in 1995, the Fourteenth Amendment was adopted, providing for a right to receive and impart information relating to abortion services lawfully available outside the state. A bill passed under its authority was submitted

²¹ This article addresses only the kind of formal constitutional change that occurs through the amendment process. There is a vast literature that is concerned with constitutional transformation occurring outside of the officially designated procedures set out in constitutional provisions. In this regard, the work of Bruce Ackerman has been critically important. His ongoing *We the People* project is devoted to the understanding that the people are the source of all legitimate constitutional change, both formal and informal. Sanford Levinson has drawn attention to the affinities between Ackerman's popular sovereignty-based theory of constitutional change and the views of Carl Schmitt. For Levinson, the "sovereignty-oriented positivism" of both of these theorists would lead them (contra Jeffrey Rosen and others) to accept as legitimate the repeal of the First Amendment as long as this decision emanated from the authentic voice of the demos. Sanford Levinson, *Transitions*, 108 *YALE L.J.* 2215, 2224 (1999).

²² As the German scholar Dietrich Conrad has pointed out, the Enabling Act was considered at the time to be a legitimate use of the amending power, and thus its revolutionary implications in creating unsupervised dictatorial power should not be seen as an example of emergency power. Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, in *INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS* 387 (1970). It thus bears a resemblance to what happened in Ireland.

²³ Quoted in John A. Murphy, *The 1937 Constitution—Some Historical Reflections*, in *IRELAND'S EVOLVING CONSTITUTION, 1937–97: COLLECTED ESSAYS* 13 (Tim Murphy & Patrick Twomey eds., Hart 1998).

to the Court for constitutional review, and, as part of the challenge to its legality, the claim was made that the amendment itself was unconstitutional. It was said to be in direct conflict with the Eighth Amendment, which acknowledges the right to life of the unborn. Imagine for a moment the passage in the United States of the flag-burning amendment, and the sure objection that it violated the guarantee of free speech under the First Amendment, and you have the case that confronted the Irish Court.

Imagine, too, a further claim that, in addition to the allegation concerning a conflict between two provisions, the newer amendment should not be allowed to stand because it repudiates principles of natural justice embodied in the Constitution. This, recall, was the core of Jeffrey Rosen's effort to put into play the idea that if the flag amendment were to be adopted it deserved to be nullified by the Court. A similar effort was undertaken in Ireland, with greater ease actually, since the natural law commitments of its Constitution were, in contrast with the United States, much more explicitly set out in the language of the document. The counsel for the unborn, as they were called, maintained that the Court could not enforce any provision of a law or amendment that was contrary to natural law. And so the question was sharply posed: "[Is it] permissible for the People to exercise the power of amendment of the Constitution by way of variation, addition or repeal as permitted by Article 46 . . . unless such amendment is compatible with the natural law and existing provisions of the Constitution, and if they purport to do so, [does] such amendment [have] no effect [?]"²⁴

The lead opinion by Justice Liam Hamilton was emphatic in its response: "The Court does not accept this argument."²⁵ Without denying either that there was a conflict between two amendments or that the Abortion Information Amendment ran afoul of constitutionally significant natural law precepts, the Court confidently upheld the Fourteenth Amendment as the legitimate expression of the will of the people. In affirming the supremacy of popular sovereignty, it effectively left unimpeded the people's right to amend the Constitution. As in the earlier *Ryan* case, it was the sovereign prerogative that was decisive; the change from one constitution to another, however significant as a historical transformation to real independence, was of no consequence with respect to intraconstitutional transformation through the amendment process. It mattered not at all that the first transformation was marked by the replacement of parliamentary by popular sovereignty; ultimately the same reasoning dictated the same positivist result.

To make clear that this result was not an anomaly somehow driven by the special status of the abortion issue in Irish politics, a trilogy of cases decided in the late nineties, in which the Court waxed worshipfully at the altar

²⁴ *Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 9 IESC 38.

²⁵ *Id.* at 38.

of people power, suggests a deeper cause. If one had to differentiate the voices in the various judicial opinions delivered in these cases, the only distinguishing mark would be the decibel level at which the several justices proclaimed their complete devotion to the demos. Said one: “There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional.”²⁶ More emphatically still: “No organ of the State, including this Court, is competent to review or nullify a decision of the people.”²⁷ And finally, there is this justice’s quasi-religious intonation: “The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with. The decision is theirs and theirs alone.”²⁸

Clear and unambiguous as this is, one should be mindful that the Irish Constitution begins “In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred. . . .” While there are limits to how seriously to take that language, or, indeed, the language of any Constitution’s preamble, how are we to reconcile the democratic positivism of the Court’s decisions with some of the text in the body of the Constitution, language that was clearly inspired by the same divine authority? For example, article 41 recognizes the family as “a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”²⁹ In Ireland being a good constitutional positivist means showing a proper respect for natural law.

This is not to say that the outcome in the abortion case was wrong, only that the reasoning in it was instructively deficient. The referendum requirement in the 1937 Constitution’s amendment provisions enabled the Court to invoke the constituent authority of the people as cover for its inability or unwillingness to engage the threshold question of what precisely an amendment *is*, or, for that matter, the antecedent question of what a constitution *is*. The idea that any duly enacted amendment to the Constitution carried with it the legitimating aura of sovereign authority embodied the brilliant obfuscation of a noble fiction. The flaws in this reasoning would have been recognized by Edmund Burke, who, in his

²⁶ *Riordan v. An Taoiseach*, [1999] IESC 1, 4, available at www.bailii.org/ie/cases/IESC/1999/.

²⁷ *Hanafin v. Minister of the Environment*, [1996] 2 ILRM 61, 183.

²⁸ *Id.* at 183. Another excellent application of this principle may be found in Sri Lanka. The Constitution expressly provides for the amendment or repeal of any of its provisions or for the repeal of the entire Constitution. In the case of major changes the people must affirm them through a referendum. See in this regard *In Re The Thirteenth Amendment to the Constitution and the Provincial Councils Bill* [1987] 2 SRI L. R. 312, where this procedure is specifically related to the theory of popular sovereignty.

²⁹ For more discussion of the tension between article 41 and popular sovereignty, see JOHN M. KELLY, *THE IRISH CONSTITUTION* 1258 (Gerard Hogan & Gerry Whyte eds., Butterworths 2003) (1961).

“Tract on Popery,” opposed an earlier Irish policy by saying: “No arguments of policy, reason of state, or preservation of the constitution, can be pleaded in favour of [the position . . . that laws can derive any authority from their institution merely and independent of the quality of the subject-matter.]”³⁰ With the Court’s categorical rejections of implied limits, the morals-laden commitments of article 41 only serve to remind us that Irish constitutional development had not offered much to blunt the challenge posed by Carl Schmitt, to wit: How can one “put marriage, religion, and private property solemnly under the protection of the constitution and in the same constitution offer the legal means for their elimination[?]”³¹

If the Irish decisions provided a weak response to Schmitt’s critique of proceduralism, then *insisting* that the validity of a formal constitutional change was conditional on its strict adherence to natural law, as was argued in the dissent in *Ryan* or in the right-to-life brief in the abortion-information case or in the claims made by Rosen in objecting to the proposed flag amendment, also fails. None of these arguments explains why a right, even one thought to have a natural endowment, cannot be modified by “addition or variation.” Modifications, after all, are basic to our enjoyment of rights in civil society. As to the question of “repeal,” there may very well be grounds for principled resistance to excision of a constitutionally prescribed guarantee, but the claim on behalf of resistance still would have to be made based on a demonstration that the result of this more radical change is at least constitutionally incoherent. By this I mean it would have to show not just that something important has changed but that the change has, in some deep sense, disturbed the fundamentals of constitutional identity. To see how this argument unfolds, we need to go to India.

2.

It is here, in India, where the words of Lincoln’s first inaugural address take on a special significance. They are words that invite us to be very particular in what we comprehend by the power to amend, such that the kind of change that inspired Gödel’s hesitation could only properly come about through extraconstitutional deliverance. “This country . . .,” Lincoln said, “belongs to the people who inhabit it. Whenever they should grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it.”³² Lincoln did not explore this distinction between two types

³⁰ Edmund Burke, *Tracts Relating to Popery*, in I: THE REVOLUTIONARY WAR, II: IRELAND 1765 (R. B. McDowell ed., Oxford Univ. Press 1991).

³¹ CARL SCHMITT, *LEGALITY AND LEGITIMACY* 46 (Duke Univ. Press 2004).

³² Abraham Lincoln, *First Inaugural Address*, in DONALD P. KOMMERS ET AL., *AMERICAN CONSTITUTIONAL LAW: ESSAYS, CASES, AND COMPARATIVE NOTES* 1050 (Rowman & Littlefield 2004).

of constitutive restructuring—amendment and dismemberment; to elaborate its meaning is to describe the signal achievement of Indian jurisprudence.

It is an imperfect achievement made possible only by the dictatorial ambitions of a politician bearing the two most revered names in modern Indian history. Moreover, it is an achievement that, like the success of Indian democracy itself, seems somehow counterintuitive. The Indian Constitution, after all, was designed to accomplish the goal of radical social reconstruction. To this end, as one of the early justices of the Supreme Court pointed out, “The Constitution-makers visualized that Parliament would be competent to make amendments . . . so as to meet the challenge of the problems which may arise in the course of socio-economic progress and development of the country.”³³ The provision for amending the document was shaped expressly to conform with the Jeffersonian idea that each generation should be free to adapt the Constitution to the conditions of its time. Borrowing also from the Irish experience, the framers included a section in the Constitution devoted entirely to Directive Principles of State Policy, a section that came to assume a place of prominence in subsequent constitutional development that it never attained in its place of origin. Indeed, the Irish have been a frequent source of inspiration for many Indians, as is amusingly evident in an Indian judge’s slightly amended reference to Justice Fitzgibbon’s opinion in the *Ryan* case. “This . . . Eden demi-paradise, this precious stone, set in the silver sea, this blessed plot, this earth, this realm, this India. If it is not that today, let us strive to make it so by using law as a flexible instrument of social order.”³⁴

Add to this effusive embrace of change a legal culture rooted in the British legal tradition, and it is natural to suppose a hostile Indian reception to the notion of implied constitutional limits. Thus, it is not surprising for a judge to declare: “The power of amendment is in point of quality an adjunct of sovereignty. If so, it does not admit of any limitations.”³⁵ What, then, might explain the surprising receptivity to the idea?

Perhaps the answer lies, at least in part, in judicial practice developed in constitutional domains at the core of Indian self-understanding, most prominently the question of secular identity. Thus, in formulating an appropriate constitutional response to a religious presence that is pervasive and deep, Indian judges have proceeded along a path that their U.S. counterparts have studiously avoided. They have applied an “essentials of religion” test to isolate what is integral to religion from what is not, so that the constitutional goal of social reform will not be impeded by religious

³³ Justice P.B. Gajendragadkar as quoted in *Kesavananda Bharati v. State of Kerala*, 1973 SC 1461, 1492.

³⁴ *Id.* at 2027.

³⁵ *Id.* at 1495.

practices—for example, polygamy—erroneously claiming sanctified theological significance.³⁶ It may be that this defining feature of Indian church/state jurisprudence allows for greater openness to a similar test for amendments, the sort of test that was so categorically rejected by the Irish Court. At least it helps to understand why a judge might conclude that the Constitution cannot legally be used to destroy itself.³⁷ Or why a judge might argue: “[Our Constitution] is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial. The former remains but the latter is subject to change.”³⁸

But how to determine what remains and what is subject to change? In its wrestling with the amendment issue, the Indian Supreme Court has struggled mightily with this perplexity. On the one hand, its task has been less difficult than confronting the challenge of religion, where the Court’s authority to make this distinction was always more dubiously asserted; on the other hand, its effort has been complicated by the fact that the key cases testing the limits of the amendment power have directly implicated the justices’ own institutional self-interest. A very brief outline of the progression of these cases should be sufficient to pursue the logic of the Court’s rather weakly theorized, if boldly formulated, rationale for its chosen path.

Unlike the episodic character of the Irish experience, India’s history with the amendment problem presents a compelling narrative. Indeed, there are at least two stories one can tell, the first concerning a decades-long political give and take over the place of private property in India, and the second featuring a protracted struggle by the Supreme Court to establish its credibility and independence in the face of repeated attempts to diminish its standing as a significant force in Indian politics. These stories are tightly entwined and are distinguishable only by the theme one chooses to emphasize. In both accounts they are dominated by the looming presence of Indira Gandhi.

The use of the amendment process to insulate certain issues from judicial oversight began in the early days of the republic, long before Mrs. Gandhi’s ascension to power. In a 1951 decision (and again in 1965), the Supreme Court upheld the plenary power of Parliament to amend the Constitution

³⁶ I have discussed this development in detail in GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA’S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (Princeton Univ. Press, 2003). Because religion in India is so deeply embedded in the existing social structure, indifference to the substance of religious belief is a much costlier indulgence than it is in places where the spiritual and temporal are not so tightly entwined.

³⁷ As was said in *Minerva Mills Ltd. v. Union of India*, AIR 1980 SC 1789 (hereafter *Minerva Mills*), “[t]he power to destroy is not a power to amend.” *Minerva Mills* at 1798.

³⁸ *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1624.

over the claim that the process had been used to deprive landowners of fundamental property rights guaranteed under the document.³⁹ These rulings stood up rather well until 1967 and the landmark decision of *Golak Nath v. State of Punjab*,⁴⁰ in which a divided Court announced that duly enacted amendments could not be permitted to render a constitutional right unenforceable. It was, as one commentator has described it, a case that “began the great war . . . over parliamentary versus judicial supremacy.”⁴¹ Technically, the decision did not invalidate the amendments in question, as the Court issued a prospective judgment essentially putting Parliament on notice that the days of its amendatory interference with fundamental rights were over. But the intense political reaction to the Court’s move left little doubt that something very important had occurred.

The opinions in the case were noteworthy more for having established a foundation for debating the meaning of constitutional change than for the quality of the judges’ own initial contributions, which were, for the most part, underdeveloped. The main opinion by the chief justice introduced the critical question of what the word “amend” actually means; his preference for a limited understanding must be seen in connection with his main point, which was that “fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament.”⁴² Not surprisingly, his natural rights claim—he called them “primordial rights”—provoked some Holmesian grumblings among his dissenting colleagues, one of them quoting the American justice to the effect that “[t]he Constitution is an experiment as all life is an experiment.”⁴³ No reference was made to Justice Hugo Black’s memorable denunciation of natural rights as an “incongruous excrescence upon the Constitution,”⁴⁴ although when viewed comparatively it is clear that, however suspect may be its descriptive value in the United States, this unappealing appellation has more resonance in India.

This became evident in the 1973 case *Kesavananda Bharati v. State of Kerala*, arguably India’s most important constitutional decision. *Golak Nath* had provided Indira Gandhi with a splendid issue for a populist campaign

³⁹ *Shankari Prasad Deo v. Union of India* 1951 (3) SCR 106; *Sajjan Singh v. State of Rajasthan* 1965 (1) SCR 933. The use of the amendment process to preclude judicial review of particular issues (mainly property) began under Mrs. Gandhi’s father, Prime Minister Jawaharlal Nehru, although his efforts never aroused the same concerns as did his daughter’s in subsequent years.

⁴⁰ *L. C. Golak Nath and Others v. State of Punjab* AIR 1967 SC 1643.

⁴¹ Granville Austin, *Working a Democratic Constitution: The Indian Experience* 198 (Oxford Univ. Press, 1999).

⁴² *Id.* at 1656.

⁴³ *Id.* at 1736.

⁴⁴ *Adamson v. California*, 332 U.S. 46, 75 (1947).

that ended in electoral triumph in 1971.⁴⁵ Her substantial victory quickly translated into passage of no less than four constitutional amendments, one of which—the Twenty-fourth—explicitly overturned the earlier decision on fundamental rights, extending to Parliament the authority to adopt amendments that were immune from judicial review. War with Pakistan precipitated a declaration of presidential emergency and subsequent nationalization, which, in turn, led to the litigation that ended in the landmark judgment in *Kesavananda*. Its massive content (approximately 800 pages) and numerous crosscutting opinions are not conducive to easy recapitulation. In essence the Court—seven of the thirteen participating judges—affirmed the authority of Parliament to amend constitutional provisions involving fundamental rights, while rejecting its authority to place statutes enacted to implement the Constitution's Directive Principles beyond the power of judicial review. It thus reversed *Golak Nath* but narrowly asserted its own authority to invalidate a constitutional amendment that was in defiance of the “basic structure” of the Indian Constitution. While relenting on its authority to designate specific provisions as immune from constitutional change, the majority invested the Court with a broader supervisory jurisdiction over the fundamental meaning of the document.⁴⁶ In the fashion of *Marbury v. Madison*, the Court avoided a direct confrontation with the government, yet appreciably strengthened its powers in anticipation of battles ahead.

And so the era of natural rights in India was short-lived. Should any legitimacy attach to the idea of implied limits to the amendment power, it would not be found in natural rights arguments. While there were differences on the Court over epistemological questions concerning such rights, a broad consensus emerged that “Fundamental rights . . . are given by the Constitution, and, therefore, they can be abridged or taken away by the . . . amending process of the Constitution itself.”⁴⁷ The judges were mindful of how arguments from natural rights had been employed elsewhere—notably in the United States—to impede efforts to achieve greater social and economic

⁴⁵ As noted by Granville Austin, the Court's decision “was a masterpiece of unintentional timing, for it gave Mrs. Gandhi a cause and an enemy in her quest for renewed power.” *Supra* note 41, at 198.

⁴⁶ The essence of the Court's ruling is in line with William Harris's theoretical reflections on constitutional change. “Even for important existing features it would seem that rather than ranging over the constitutional scheme to pick out elements that might arguably be more fundamental in the hierarchy of values, it would be more advisable to develop essential principles that would guide a choice as to whether a particular Constitutional change were substantively invalid. That is, a Constitutional provision would be fundamental only in terms of some articulated political theory that makes sense of the whole Constitution.” WILLIAM HARRIS, *THE INTERPRETABLE CONSTITUTION* 188 (Johns Hopkins Univ. Press 1993).

⁴⁷ *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1691.

equality, and they seemed determined to avoid the potential damage to constitutional values associated with the ambiguity surrounding these rights. A characteristically Indian objection expressed what is, for better or worse, a reality of our time: “Natural law has been a sort of religion with many political and constitutional thinkers. But it has never believed in a single Godhead. It has a perpetually growing pantheon. . . . The pantheon is not a heaven of peace. Its gods are locked in internecine conflict.”⁴⁸

Notice that this rejection of a rights-based bar to first-order constitutional change did not culminate in acceptance of the government’s extraordinary argument to the Court that Parliament could do anything it wanted through the amendment power, no matter how revolutionary or destructive. To be sure, the ghost of Oliver Wendell Holmes returned—and with a vengeance—but only to a small minority of the justices, among whom Justice Y.V. Chandrachud was most expansive: “If the people acting through the Parliament want to put the Crown of a King on a head they like, or if you please, on a head they dislike . . . let them have that liberty. . . . [As Justice Holmes said], ‘[W]hen the people . . . want to do something I can’t find anything in the Constitution expressly forbidding them to do it, I say, whether I like it or not: God-dammit it, let ’em do it.’”⁴⁹ But these sentiments ultimately lost out to the proponents of “basic structure,” a doctrine that might not have made it very far beyond the ruling in this case had it not been for the overreaching of the Indian prime minister.

On June 12, 1975, a high court judge in Mrs. Gandhi’s electoral constituency upheld charges against her for the crime of electoral fraud. Two weeks later, faced with the possibility of removal from office, she introduced India’s first domestically driven emergency regime, which quickly evolved into a harsh and unremitting dictatorship. Among its first acts were a series of constitutional amendments that were, shall we say, unusual. One of them, the Thirty-ninth Amendment, prevented any judicial inquiry into the election of the prime minister. As one noted Indian legal scholar remarked, “Nowhere in the history of mankind has the power to amend a Constitution thus been used.”⁵⁰ Another, the Thirty-eighth, shielded from judicial review any laws adopted during the emergency that might conceivably impinge upon fundamental rights. Gandhi’s claim was Schmittian in the extreme; in essence, the constituent power, as an expression of the sovereign will of the people, was all-embracing and at once judicial, executive, and legislative. It was such an extravagant claim that it accomplished what all previous

⁴⁸ *Id.* at 2006.

⁴⁹ *Id.* at 2044. A similar sentiment appears in the opinion of Justice S.M. Sikri: “[S]hort of repeal of the Constitution, any form of Government with no freedom for the citizens can be set up by Parliament by exercising its powers under Article 368.” *Id.* at 1490.

⁵⁰ UPENDRA BAXI, *COURAGE CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES* 70 (N. M. Tripathi Priv. Ltd. 1985).

debate over property-related amendments had failed to do—establish the legitimacy of the unconstitutional constitutional amendment.

This was too much even for the aforementioned Holmesian justice, who perhaps experienced an epiphany, in the face of these events, concluding that the Constitution could indeed be subverted by revolutionary methods, and that constitutional provisions should not, after all, be the vehicle for such change. While Mrs. Gandhi's election was prudently upheld, the Court decisively repudiated the Thirty-eighth and Thirty-ninth Amendments. "The common man's sense of justice sustains democracies,"⁵¹ wrote another of the prime minister's expected judicial supporters, and the outrage provoked by these travesties must, he felt, be given due regard in determining the attributes of basic structure. In particular, these provisions were a blatant negation of the right of equality and were in sharp contravention of the most basic postulate of the Constitution. Hence, following *Kesavananda*, they could not stand.

Of course, one could question just how meaningful these developments were in light of the unusual circumstances that brought them about. That is why the last of the cases in this brief summary—involving a government takeover of a failing business—is so important. In 1980, the Court decided *Minerva Mills, Ltd. v. Union of India*,⁵² better known as the "sick textiles" case, in which parts of yet another amendment, the Forty-second, were invalidated in a ringing affirmation of the basic structure doctrine. The amendment represented Mrs. Gandhi's last strike at the Court, including the provocative declaration that "No amendment . . . shall be called into question in any court on any ground."⁵³ Again it was left to Justice Chandrachud to articulate what he called "the theme song of *Kesavananda*," for which he was now fully prepared to become a part of the chorus. "Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity."⁵⁴

3.

The legal scholar Frederick Schauer has asked: "What makes a constitution constitutional?" "Nothing," he answered, "nor does or can anything make a constitution unconstitutional."⁵⁵ The Indian cases provide

⁵¹ *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299, 2469.

⁵² *Minerva Mills*, *supra* note 37, at 1789.

⁵³ Text of the Forty-second Amendment.

⁵⁴ *Minerva Mills*, *supra* note 37, at 1798.

⁵⁵ Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145 (Sanford Levinson ed., Princeton Univ. Press 1995).

another answer, even if much of the jurisprudence that emerged was forged in the extreme circumstances of emergency power, and much of what was innovative about the line of cases flowed from the Court's own institutional needs. One lesson to draw from them might be to follow the Brazilian example and preclude the enactment of constitutional amendments during periods of emergency.⁵⁶ But surely more can be learned from an account of this legal history; moreover, the rather extreme conditions that provided the context for what judicially transpired are, in fact, useful in clarifying the stakes in the debate over implied limits.

Hence we should not be surprised to learn that it was the German experience that offered the Indian judges guidance in their extended parrying of Indira Gandhi.⁵⁷ She, of course, had a lot to learn from that experience as well, if, alas, from an earlier decade. But both the judges and the prime minister could find in the person of Carl Schmitt a source of ideas for their conflicting agendas, for that enigmatic theorist is at once the guru of emergency power and the proponent of the notion that there are fundamental principles limiting the amendment power. Indeed, his argument that the amendment power was not an expression or reincarnation of the original constituent power, and thus limited under its original mandate, was incorporated into the jurisprudence of the Basic Law of the Federal Republic. While never actually invalidating a constitutional amendment, the postwar German Court has declared such an act conceptually possible and has expressly invoked the nation's recent past to affirm that never again would formal legal means be used to legalize a totalitarian regime.⁵⁸

⁵⁶ The Constitution of Brazil may not be amended during a state or federal intervention, defense, or siege. C.F. Art. 60, section 1. It is popularly viewed as a mechanism of self-preservation in a country with a history of authoritarian interventions in the constitutional text.

⁵⁷ Instrumental in the education of Indian judges regarding the German experience was the work of Dietrich Conrad, a German scholar of Indian politics and law. See, e.g., Dietrich Conrad, *Limitation of Amendment Procedures and the Constituent Power*, 15–16 THE INDIAN YEAR BOOK OF INTERNATIONAL AFFAIRS (1970). Conrad's work was cited by Indian justices in several of the decisions discussed in this article.

⁵⁸ The Southwest Case, BverfGE 1, 14 (1951): "That a constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the constitution. There are constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the constitution that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void, because they contravene those principles. . . ." Privacy of Communications Case (Klass Case), BverfGE 30, 1 (1970): "The purpose of Article 79, paragraph 3, as a check on the legislator's amending the Constitution is to prevent the abolition of the substance or basis of the existing constitutional order, by formal legal means of amendment . . . and abuse of the Constitution to legalize a totalitarian regime." Fundamental constitutional alteration is not prohibited as long as it meets the criterion of coherence. "Restrictions on the legislator's amending the Constitution . . . must not, however, prevent the legislator from modifying by constitutional amendment even basic constitutional principles in a system-immanent manner."

If proximity to the abyss has a way of concentrating the mind on the essentials of constitutionalism, judicial enforcement of implied limits to the amendment power should not rest solely on reasons fashioned for the dire circumstances of the worst case. For Schmitt, it was the doctrine of popular sovereignty traceable to the French Revolution that animated his views on the subject, just as it did his defense of executive dictatorship.⁵⁹ Perhaps it was the tragically induced awareness of the multiple ends the doctrine could serve that led the German Court to emphasize, as a basis for the conceptual possibility it had countenanced, the further idea of preserving the “inner unity” of the Constitution. Thus a constitutional amendment could be subject to nullification to the extent that it was responsible for transforming the document to which it was added into something fundamentally incoherent.

Of the raft of reasons adduced by the Indian Court in analyzing the unconstitutional amendment, the one that stands out is a version of the coherence requirement—the need to preserve the Constitution’s identity. If anything, however, it is a more demanding criterion than the German test. Thus the incongruities and inconsistencies that could lead to a finding of constitutional incoherence might only mean that the document’s identity has been obscured in a manner that seemingly casts doubt on its fundamental character and commitments. Also, the exigencies of constitution making often lead to an original constitution’s incoherence, in the sense that necessary compromises produce contradictions affecting its “inner unity” even before any subsequent amending hand is laid upon it. That is certainly the U.S. story, and in its finest moment article 5 served the nation well by enabling its fundamental law to begin the process of working itself pure.

Reforming a constitution is, as Walter F. Murphy has pointed out, different from re-forming a constitution.⁶⁰ The latter, one might say, extends beyond incoherence and implicates identity. Aristotle, in speaking of the polis, asked, “On what principles ought we to say that a state has retained its identity, or, conversely, that it has lost its identity and become a different State?”⁶¹ His answer was that a polis’s identity changes when the constitution (referring to more than just a document) changes as the result of a disruption in its essential commitments, much as a chorus is a different chorus when it appears in a tragedy rather than a

⁵⁹ Schmitt’s thoughts on popular sovereignty and constitutional change are well treated in Peter C. CALDWELL, *POPULAR SOVEREIGNTY AND THE CRISIS OF GERMAN CONSTITUTIONAL LAW: THE THEORY AND PRACTICE OF WEIMAR CONSTITUTIONALISM* (Duke Univ. Press 1997).

⁶⁰ Walter F. Murphy, *Slaughter-House, Civil Right, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1, 17 (1987). For Murphy, the addition of the Thirteenth and Fourteenth Amendments provided the Constitution with the intellectual coherence it had previously lacked, and in doing so enhanced, rather than undermined, the integrity of its core principles.

⁶¹ ARISTOTLE, *THE POLITICS OF ARISTOTLE* 98 (Ernest Barker trans., Oxford Univ. Press 1962).

comedy.⁶² According to the Oxford English Dictionary, to speak of identity is to refer to that condition or fact that makes something unique, especially as a continuous unchanging property throughout its existence. This follows the account of the eighteenth-century Scottish philosopher Thomas Reid and his observation that “Continued uninterrupted existence is...necessarily implied in identity.”⁶³ As it has evolved in Indian jurisprudence, the meaning of a constitutional amendment has essentially conformed to these definitions of identity. Thus in *Kesavananda*, Justice H.R. Khanna, the author of the decision’s most important opinion, wrote: “The word ‘amendment’ postulates that the old constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.”⁶⁴ In *Minerva Mills*, Justice P.N. Bhagwati, one of the last holdouts against the idea of implied limits, argued: “If by constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.”⁶⁵

The question of constitutional identity is, of course, much more easily asserted than enforced. Given the exceedingly high probability that any such assertion will be vigorously contested, judges are understandably reluctant to enforce it. This is because “[i]solating the mechanism that makes invocations of identity...persuasive would take us into deep philosophical waters.”⁶⁶ While such an exercise could prove quite beneficial, the safer judicial route would be to avoid these waters entirely. Thus in the U.S. case *Coleman v. Miller* Justice Hugo Black said of the article 5 process that it “is ‘political’ in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point.”⁶⁷ The judicial practice of invoking this “political question” doctrine, to avoid difficult constitutional questions, began in *Luther v. Borden*,⁶⁸ which was in essence a case of political identity in which the Supreme Court refused to say what it was that the republican guaranty clause (article 4, section 4) guaranteed. The same jurisprudential choice to

⁶² *Id.* at 99.

⁶³ Quoted in Udo Thiel, *Individuation*, in 1 *CAMBRIDGE HISTORY OF SEVENTEENTH CENTURY PHILOSOPHY* 253 (Daniel Garber & Michael Ayers eds., Cambridge Univ. Press 1998).

⁶⁴ *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1860.

⁶⁵ *Supra* note 37, at 1824.

⁶⁶ Christopher Eisgruber, *Is the Supreme Court An Educative Institution?* 67 *N.Y.U.L. REV.* 962, 971 (1992).

⁶⁷ *Coleman v. Miller*, 307 U.S. 433, 459 (1939).

⁶⁸ *Luther v. Borden*, 48 U.S. 1 (1849).

avoid the question of identity underlies the unwillingness to find implied limits to formal constitutional change.⁶⁹ When, several years later, the abolitionist senator from Massachusetts Charles Sumner suggested that republican identity was incompatible with slavery, and hence the federal government should do what the Constitution commanded and remove those governments that supported it, his arguments were easily defeated by John C. Calhoun and the logic of *Luther v. Borden*.

Very different was the result in India when, in 1994, the Supreme Court upheld the authority of the central government to dismiss the elected governments in three states for their complicity in undermining the polity's commitment to secularism.⁷⁰ The provision under which this was done had been modeled after the U.S. guaranty clause. As a prominent delegate at the constituent assembly said, "In putting in that Article [for dismissing state governments], we are merely following the example of the classical or model federation of America."⁷¹ The Court's main concern was Indian constitutional identity, and so, following *Kesavananda*, secularism was declared essential to the unchangeable basic structure of the Constitution. But here, as in the earlier case, the Court's boldness in defending against the assault on constitutional foundations was not matched by an effort to articulate a theory by which the properties of a protected domain of identity might be known. Moreover, the determination to preserve this domain begs the question of why, as an axiom of constitutional policy, this "precious heritage" must be shielded from destruction.⁷² "[T]o say your Constitution is

⁶⁹ At the state level there has occasionally been less reluctance to engage such issues. In *Downs v. City of Birmingham*, 198 Southern Reporter 231 (1940), the Supreme Court of Alabama held that an amendment to the State Constitution must be consistent with a republican form of government as required by the federal Constitution. Some states (California, Delaware) distinguish in their constitutions between "amendment" and "revision," the latter intended to apply to pervasive changes in constitutional arrangements. The Spanish Constitution of 1978 has a similar two-tier amending system. For a comparative analysis of the various approaches to constitutional amendment, see Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J. L. & SOC. PROBLEMS 251 (1996). Katz argues that while everything in a constitution should be amendable, certain clauses should be harder to amend than others.

⁷⁰ *S. R. Bommai v. Union of India*, 3 SC 1 (1994). The case is discussed at length in GARY J. JACOBSON, *THE WHEEL OF LAW* 125–160 (Princeton Univ. Press 2003).

⁷¹ *Constituent Assembly Debates*, 7 Official Reports 150 (Delhi: Lok Sabha Secretariat). The delegate, Alladi Krishnaswami, was a future Supreme Court justice.

⁷² Thus the judge in *Kesavananda* who raised the following question did not get a satisfactory answer. "And what is the sacredness about the basic structure of the Constitution? Take the republican form of government, the supposed cornerstone of the whole structure. Has mankind, after wandering through history, made a final and unalterable verdict that it is in the best form of government? Does not history show that mankind has changed its opinion from generation to generation?" *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1948.

what it has been, is no sufficient defense for those, who say it is a bad Constitution.”⁷³

These last words belong to Edmund Burke, whose reflections on the dramatic changes in one country have unfortunately obscured his decades of engagement in the transformation of others. In South Asia, where some said he stubbornly—others prefer tenaciously—championed the rights of Indians against the numerous depredations of the British Empire, he is given more regard as a visionary thinker, albeit one whose gaze was never fully diverted from the past.⁷⁴ There are approving references in the *Kesavananda* ruling to Burke’s famous injunction about the need to accommodate change in order to conserve what is truly important.⁷⁵ But in the development of their ideas on constitutional identity and basic structure, the Indian justices could have gotten more mileage from one whose unique Irish perspective led him to condemn the injustices done to their ancestors.⁷⁶

Indeed, Burke’s immersion in the struggles of Ireland and India had a lot to do with what I would characterize as his dual track understanding of constitutional identity. As to the first, I mean that there are, at the most basic level, certain attributes of the rule of law that are the necessary condition for generic constitutional governance. What the renowned American legal philosopher, Lon Fuller, called the “inner morality of law”⁷⁷ is a fair representation of Burke’s unequivocal denial of constitutional identity to a rulership that fails to meet its minimum requirements. These are the requirements of due process in the Magna Carta sense, not the more contemporary version of substantive guarantees. In fact, in arguing for Fox’s East India Bill, Burke said it was “intended to inform the Magna Carta of Hindostan.”⁷⁸ To this end his impeachment prosecution of Warren Hastings

⁷³ Edmund Burke, *Speech On a Motion made in the House of Commons, the 7th of May 1782, for a Committee to inquire into the state of the Representation of the Commons in Parliament*, in *ON EMPIRE, LIBERTY, AND REFORM: SPEECHES AND LETTERS OF EDMUND BURKE* 275 (David Bromwich ed., Yale Univ. Press 2000).

⁷⁴ In fact, not only in South Asia has he been so viewed. Thus Harold Laski pointed out that “[on] Ireland, America, and India, he [Burke] was at every point upon the side of the future. . . .” Quoted in UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH POLITICAL THOUGHT* 155 (Univ. Chicago Press 1999).

⁷⁵ For example, Justice Khanna quoting Burke: “A state without the means of some change is without the means of its own conservation. Without such means it might even risk the laws of that part of the Constitution which it wished the most religiously to preserve.” *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1847.

⁷⁶ The best study of how Burke’s Irish roots shaped his political ideas is CONOR CRUISE O’BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY OF EDMUND BURKE* (Univ. Chicago Press 1992).

⁷⁷ LON FULLER, *THE MORALITY OF LAW* 42 (Yale Univ. Press 1964).

⁷⁸ Edmund Burke, *Speech on Fox’s East India Bill*, in *ON EMPIRE, LIBERTY, AND REFORM*, *supra* note 73, at 292 (David Bromwich ed., Yale Univ. Press 2000).

for the latter's maladministration of India was premised on the idea that "The laws of morality are the same everywhere."⁷⁹ Whatever the identity of a governance that does not provide Magna Carta-like liberties, it is not constitutional. This did not mandate a particular form of government, as it did for the theoreticians of natural rights whom Burke often scolded, but it did mean that to be properly identified for what it was, a constitution would have to be able, in Fuller's words, to "save us from the abyss."⁸⁰ It is unlikely that Indira Gandhi's amendments or, for that matter, the Seventeenth Amendment to the Irish Free Constitution, would have satisfied Burke's requirement.

One of the justices in the Indira Gandhi case, in speaking of the principles of the rule of law, pointed out that they "must vary from country to country depending on the provisions of [the] constitution."⁸¹ Burke's second track concerns this variability, which is about the identity of a particular constitution. In his speech on the reform of representation, delivered just one year before his better known speech on the East India Bill, Burke explained why he favored the idea of the prescriptive constitution: "Because," he said, "a nation is not an idea of local extent, but is an idea of continuity, which extends in time as well as in numbers, and in space. And this is a choice not of one day, or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and generations; it is a Constitution . . . made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time. It is a vestment, which accommodates itself to the body."⁸²

It is tempting, though mistaken, to think of Burke as a precursor of modern moral relativism, even if excerpts like this illuminate why some have held that view. His emphasis on particularities and prescription—that is, the constitutional principle of inheritance—and on the constitution as something that evolves to fit the circumstances and habits of a people, is surely suggestive of a moral sensibility strongly deferential to entrenched cultural norms. But the deference was not unqualified, as illustrated in Burke's rejection of Hastings's main argument for his morally questionable actions in India. Hastings had framed a defense of "geographical morality," which held that whatever happened in India was compatible with local customs and, therefore, could not be judged by external standards. Burke was categorical in rejecting this moral perspective, arguing in response that the governance

⁷⁹ Quoted in FREDERICK G. WHELAN, *EDMUND BURKE IN INDIA: POLITICAL MORALITY AND EMPIRE* 281 (Univ. Pittsburgh Press 1996).

⁸⁰ FULLER, *supra* note 77, at 44.

⁸¹ *Supra* note 51, at 2470.

⁸² *Supra* note 73, at 274.

of Indians had to respect the same universal laws of right conduct that applied to Englishmen. Necessary, for Burke, was a prudential balancing of the universal and the particular. “The foundations of government [are . . . in the constitution] laid . . . in political convenience and in human nature; either as that nature is universal, or as it is modified by local habits.”⁸³

While there were preconditions for a constitution to exist, the nation as an “idea of continuity” meant that *constitutions* had to be viewed as embodiments of unique histories and circumstances. “I never was wild enough to conceive that one method would serve for the whole; that the natives of Hindostan and those of Virginia could be ordered in the same manner. . . .”⁸⁴ One would never mistake the constitutional identities of these wildly divergent peoples, just as one would not confuse the aesthetic identities of an ornate eighteenth-century French writing table and its minimalist twentieth-century Finnish counterpart.⁸⁵ The accommodation of the vestment to the body implied a tolerance for diverse practices; abstract theory could not dictate constitutional form or identity. One can debate whether Burke was too permissive in the span of constitutional variability he imagined as compatible with legitimate rule. The point is that the Burkean understanding of constitutions as artifacts of time and experience supplies the necessary background assumption for Justice Khanna’s critically important criterion for the legitimacy of an amendment: that the old constitution survive without loss of its identity.

Survival depends on successfully pursuing the inquiry into constitutional essentials. In the philosophical literature the relationship between survival

⁸³ Quoted in Francis Canavan, *Prescription of Government*, in DANIEL RITCHIE, EDMUND BURKE: APPRAISALS & APPLICATIONS 259 (Transaction Publishers 1990). One of the most thoughtful accounts of Burke’s views on India is contained in Uday Mehta’s *LIBERALISM AND EMPIRE*, in which Burke is distinguished from such theorists as John Stuart Mill on the basis of his—Burke’s—preference for the local over the universal, such that it led him to see, in a way that was not evident to these other thinkers, the abuses of empire. Mehta’s argument is very persuasive, although he overstates Burke’s renunciation of universal principles. Thus it is incomplete to say, “For Burke . . . obligations and the norms of justice spring from the local and the conventional.” *Supra* note 74, at 176. A similar account, highlighting Burke’s aesthetic theory, may be found in LUKE GIBBONS, *EDMUND BURKE AND IRELAND: AESTHETICS, POLITICS, AND THE COLONIAL SUBLIME* 166–180 (Cambridge Univ. Press 2003). “Geographical morality” is present in some of the sentiments expressed in *Kesavananda*. For example: “Law varies according to the requirements of time and place. Justice thus becomes a relative concept varying from society to society according to the social milieu and economic conditions prevailing therein.” *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1735.

⁸⁴ Edmund Burke, *Letter to the Sheriffs of Bristol*, in 2 *THE WORKS OF EDMUND BURKE* 119 (Little, Brown 1839).

⁸⁵ Yet just as the presence of a horizontal surface assures the viewer that the latter contrast pertains to the category of tables, the constitutional observer will have to be satisfied that analogous generic criteria establish a common basis for comparing the two bodies politic.

and identity is a much-contested subject;⁸⁶ according to one account, “[W]hat matters in survival is mental continuity and connectedness... What matters in survival is identity.”⁸⁷ Accordingly, “Change should be gradual rather than sudden, and (at least in some respects) there should not be too much change overall.”⁸⁸ Although written in reference to personal identity, a similar idea may be said to give meaning to identity at the constitutional level. In Indian jurisprudence this can lead, as in Justice Khanna’s opinion, to a basic structure and in Burke to the constitutional principle of inheritance, more familiarly known as *prescription*. Burke, as Francis P. Canavan has noted, “supposes that [the constitution] is a contingent part of the moral order and for that very reason imposes an obligation that overrides the alleged right of each successive generation to scrap the existing constitution and frame a new one for itself.”⁸⁹ But as the Indian, Irish, and American controversies that so defined Burke’s political career make absolutely clear, prescription is not a synonym for the status quo; rather “it points toward a reconciliation of permanence and change.”⁹⁰ Indeed, the commitment to established institutions (including the rule of law) may require—as was true in these three cases—a quite energetic program of reform that belies Burke’s reputation for stodgy conservatism. Burke often distinguished between reform (healthy) and innovation (problematic), the latter having more to do with change that is disconnected from principles engrained in the prescriptive constitution.

Burke’s distinction parallels the amendment/revision antinomy that, explicitly or implicitly, establishes substantive limits to constitutional change through the amendment process. India, for example, has embraced secularism as a critical and essential component of its constitutional identity, an embrace made apparent only partially by its formal constitutional codification. More significant is the historical backdrop to that codification,

⁸⁶ See, for example, David Lewis, *Survival and Identity*, in *THE IDENTITIES OF PERSONS* (Amelie Oksenberg Rorty ed., Univ. Calif. Press 1976); and Derek Parfit, *Personal Identity*, 80 *PHIL. REV.* 3 (1971).

⁸⁷ Lewis, *supra* note 86, at 17–18. Similarly, Thomas Reid wrote: “[Identity] admits of a great change of the subject, providing the change be gradual; sometimes even of a total change. And the changes made... consistent with identity differ from those that are thought to destroy it...” From *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* (1785), excerpted in *PERSONAL IDENTITY* 51 (Raymond Martin & John Barresi eds., Blackwell 2003).

⁸⁸ Parfit, *supra* note 86, at 17.

⁸⁹ FRANCIS P. CANAVAN, *THE POLITICAL REASON OF EDMUND BURKE* 134 (Duke Univ. Press, 1960). The same thought is conveyed in Gerald W. Chapman’s depiction of Burke’s view of the nation as “a ‘moral essence’—a cultural personality in time.” GERALD W. CHAPMAN, *EDMUND BURKE AND THE PRACTICAL IMAGINATION* 90 (Harvard Univ. Press 1967). Accordingly, constitutional change is acceptable and desirable to the extent that it respects what is essential to national continuity.

⁹⁰ *Id.* at 166.

which establishes the prescriptive force of the commitments included in the document. Thus the principle of secularism may be understood as an element of the basic structure of the Constitution, and, as such, may not be subject to amendment, although a specific provision intended to configure secular relations in a particular way may be changed within the constraints of the broader principle. The variability of changing conditions may necessitate modifications in the structure and design of particular institutions, as well as in the manner in which these institutions interact with one another and with other agents, but the transient character of formal arrangements must reflect the larger purposes and principles that are the continuous and unalterable thread of constitutional identity. This is a point well made by the astute scholar of Burke Gerald Chapman who points out that the House of Commons, for example, need not as a matter of prescriptive requirement assume any particular form, even though the basis for the existence of the House “authorizes its permanence as a principle in the constitution.”⁹¹

And so we might think of an amendment as a new chapter in an ongoing constitutional story. How well it fits the existing narrative will be a factor in assessing its quality; it may, like the Fourteenth Amendment in Ireland or the proposed flag burning amendment in the United States, raise concerns about coherence, or what Ronald Dworkin refers to as “integrity.”⁹² But if the lack of fit is so extreme as either to call into question whether the addition has subverted the genre itself—for example, is it still a novel?—or to lead one to conclude that a key element of the plotline has been disregarded, then the legitimacy of the undertaking might well be placed in doubt.⁹³ Constitutionally, these two possibilities translate into first- and second-order amendment defects. Both are serious, even if the culturally contingent elements of the latter reduce somewhat the urgency of the need to impose implied limits. Thus an amendment that assaulted the very foundations of constitutionalism would be direr than one that challenged some constitutional practice or tradition of particular importance to a given regime. It must be emphasized, however, that it is not the introduction of significant and far-reaching change that is per se objectionable; rather, it is the content of this change insofar as it implicates the question of constitutional identity. Indeed, Burke, whose resistance to change has often been exaggerated, wryly pointed out, in that same speech on representation, that when a man

⁹¹ *Id.* at 166.

⁹² RONALD DWORKIN, *LAW'S EMPIRE* 176–275 (Harvard Univ. Press 1986). My example of a constitutional narrative follows Dworkin's chain novel illustration. *Id.* at 228–238.

⁹³ As William Harris has pointed out, “[T]he kinds of alteration an example of a genre can bear are limited and . . . going beyond these limits will not only change the characteristics of the example but also will change the genre that it represents.” WILLIAM HARRIS, *THE INTERPRETABLE CONSTITUTION* 171 (Johns Hopkins Univ. Press 1993).

says he only means “a moderate and temperate reform,” what he really means to do is “as little good as possible.”⁹⁴

4.

“At bottom,” wrote one of the dissenting Indian judges in *Kesavananda*, “the controversy in these cases is as to whether the meaning of the Constitution consists in its being or in its becoming.”⁹⁵ He then called attention to the country’s national symbol, the *chakra*, which is the wheel that appears on the Indian flag. It signifies, he said, that the Constitution is “a becoming, a moving equilibrium.”⁹⁶ Hence he concluded that “true democracy and true republicanism” are incompatible with judicial review of constitutional amendments. His error was in creating a false dichotomy between being and becoming. As Burke reminds us, “[B]y preserving the method of nature in the conduct of the state, in what we improve, we are never wholly new; in what we retain, we are never wholly obsolete.”⁹⁷ What a constitution becomes can never be considered separately from what it has been; it is, in Burke’s words, “a deliberate election of ages and generations.”

But the Indian justice’s further point was well taken. He was concerned that an expansion of the Court’s review function to pass on the legality of constitutional amendments might “blunt the people’s vigilance, articulateness and effectiveness.”⁹⁸ That concern should not be taken lightly; indeed, it is as valid as when it was expressed years ago in Judge Learned Hand’s eloquent thought about self-government and the judiciary. “This much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.”⁹⁹ The problem of the unconstitutional constitutional amendment will not be solved by a blind faith in the courts to save us from the immoderate excesses of the amendment process. After demonstrating that there are applications of that process that do exceed acceptable limits, it may be prudent for those who have done so to then rely on the people to see that such amendments are not passed. But such reliance first requires knowing why there *are* limits and why this matters.

⁹⁴ Burke, *supra* note 73, at 278.

⁹⁵ *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 1986.

⁹⁶ *Id.* at 2010.

⁹⁷ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 38 (Bobbs-Merrill 1955).

⁹⁸ *Kesavananda Bharati v. State of Kerala*, *supra* note 33, at 2009.

⁹⁹ LEARNED HAND, THE SPIRIT OF LIBERTY 164 (Alfred A. Knopf 1953).

Thus, understanding that constitutional change may produce an unconstitutional result does not in itself indicate a particular remedy. Indeed, the degree to which we choose to endow courts with a judicial review responsibility over constitutional amendments should depend at least in part on the relative ease or difficulty of altering the document. While Hand's point is universally applicable, the provision in some polities for straightforward and simple amending increases the likelihood that in these places deeply problematic change could occur while the spirit of moderation remained generally prevalent. Elsewhere the amendment process itself encourages, if not guarantees, moderation. What Lawrence Sager has aptly called "the obduracy of the Constitution to amendment"¹⁰⁰ may, as he points out, be structurally conducive to achieving change agreeable "to generations unborn in circumstances unknown."¹⁰¹ This is a point with which Edmund Burke would no doubt agree. Where, as in the U.S. case, amending the Constitution is such a formidable undertaking, there should perhaps be a much stronger presumption against the exercise of judicial review than, say, in India, where the adoption of amendments is only slightly more challenging than the enactment of ordinary law. In principle, however, it might be desirable to keep the option open, if for no other reason than that this could serve to remind politicians and citizens that, as Gödel understood, constitutional change is inherently bounded. But if ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing.

¹⁰⁰ LAWRENCE SAGER, *JUSTICE IN PLAIN CLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE* 82 (Yale Univ. Press 2005).

¹⁰¹ *Id.* at 164.