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# *Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment*

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*A deep tension exists in many parts of the world between commitments to democracy and procedures for constitutional amendment. Amendments are frequently passed that follow formal democratic procedures but are aimed at achieving anti-democratic or “abusive” constitutional aims—i.e., to help powerful presidents extend their term in office, to remove parliamentary or federalism-based checks on executive power, and to narrow or suspend basic human rights protections. Limiting a power of constitutional amendment, therefore, can have clear democratic benefits. One way to do this is via a judicially enforceable doctrine of “unconstitutional constitutional amendment.” While such a doctrine may not be a complete solution to anti-democratic uses of constitutional amendment powers, it can create an additional hurdle to change. But such a doctrine should be approached with caution from a democratic perspective, because it can also create a significant road-block to the legitimate use of amendment procedures as a means of overriding courts decisions deemed unreasonable or unacceptable by a majority of citizens. In order to promote democracy rather than undermine it, any doctrine of unconstitutional constitutional amendment must be limited in scope. This article argues that because threats to a democratic order are so varied, and can be altered or staged by would-be authoritarian actors, limiting the doctrine to a narrow set of institutional provisions or principles defined ex ante is unlikely to be a stable solution. Instead, courts must rely on a broader doctrine that is nonetheless limited to constitutional amendments that clearly pose a substantial threat to core democratic values. This article also argues that an effective way to limit the use of such a doctrine is by tying its use to transnational constitutional norms. Engagement with transnational constitutional law will help to limit both the kinds of principles courts define as fundamental and the sorts of institutional changes that are alleged to pose a substantial threat to those principles. The article shows how engagement with transnational materials can serve as a workable check on a doctrine of unconstitutional*

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constitutional amendment, helping to separate cases where the doctrine must be deployed to defend democracy from cases where its use is unnecessary.

## 1. Introduction

In many parts of the world, constitutional amendment procedures are often used for distinctly anti-democratic constitutional ends.<sup>1</sup> Unelected governments pass amendments designed to formalize their hold on to power; elected governments use amendments to remove constitutional checks and balances; and democratically elected presidents invoke amendment procedures so as to overturn limits on their term in office. All these measures have the potential to undermine commitments to constitutional democracy—or a constitutional system based on free and fair elections, and respect for the rule of law and basic human rights.

To take some recent examples: In Hungary, the incumbent Fidesz regime, after taking power and winning the requisite two-thirds majority of seats necessary to amend the Constitution unilaterally, undertook a series of constitutional amendments to undermine checks on their power, particularly from the Constitutional Court.<sup>2</sup> In Turkey, the dominant Justice and Development Party (AKP) is attempting to strengthen its hold on power by creating a powerful presidency and by centralizing the system of appointment to the Constitutional Court.<sup>3</sup> In Russia, President Putin currently seeks to amend the Constitution to subordinate the country's commercial courts—which have been the only real bastion of judicial independence in the country—to the politically controlled ordinary judiciary.<sup>4</sup> And in a series of recent cases from Latin America, presidents have sought to extend their term limits and prevent themselves from being ousted from power.<sup>5</sup>

A key challenge for both constitutional designers and judges is in making constitutions more robust against these threats. In the article we suggest that the doctrine of unconstitutional constitutional amendment is useful for this end. As normally expressed, the doctrine holds that some constitutional amendments are substantively unconstitutional because they undermine core principles in the existing constitutional

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<sup>2</sup> See, e.g., Kim Lane Scheppele, *Constitutional Courts and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts in Times of Crisis* (with Special Reference to Hungary) (Dec. 2013) (unpublished manuscript, on file with author).

<sup>3</sup> See Seyla Benhabib, *Turkey's Authoritarian Turn*, N.Y. TIMES, June 3, 2013, at A25.

<sup>4</sup> See William Partlett, *Constitutionally Eroding the Rule of Law*, INT'L J. CONST. L. BLOG (Jan. 8, 2014), available at <http://www.icconnectblog.com/2014/01/constitutionally-eroding-the-rule-of-law/>.

<sup>5</sup> Leaders have sought or succeeded in these extensions in Colombia, Venezuela, Ecuador, Honduras, and Nicaragua.

order.<sup>6</sup> As several scholars have argued, checking democratic abuse is one key potential function of the doctrine.<sup>7</sup> Examples of the doctrine's use in both Colombia, and earlier in India, demonstrate its utility as part of the solution against anti-democratic constitutional amendment. In Colombia, the court successfully stopped an attempt by Alvaro Uribe to extend his term for a second time; in India, the doctrine arguably played a role in encouraging an end to abusive constitutional measures in the mid-1970s.<sup>8</sup> The doctrine is far from a perfect solution, but it at least poses a potential roadblock to anti-democratic amendments, which can slow them down or raise their costs in some situations.

An obvious difficulty with a doctrine of unconstitutional amendment is that, once let loose, it may be applied to frustrate normal instances of constitutional change and not just amendments posing a substantial threat to democracy. Experience with countries applying the doctrine demonstrates that this is a real and not just a hypothetical problem: there are many examples of courts overusing the doctrine, for example to protect lines of their own jurisprudence, the correctness of which are clearly open to reasonable disagreement.<sup>9</sup> One of the key functions of constitutional amendment procedures is to provide a means by which democratic majorities can override or “trump” a court decision interpreting the existing constitutional text.<sup>10</sup> Giving courts unfettered power to invalidate amendments for incompatibility with their own prior preferred reading of a constitution will create a clear democratic danger or cost.<sup>11</sup>

The doctrine thus plays a useful role, but must be limited. After canvassing three possible models, we argue that courts should adopt a flexible but weak approach to applying the doctrine: they should be open to protecting a broad range of institutional arrangements and textual provisions, because the challenges posed by abusive constitutionalism are complex and can manifest in a number of different ways. But they should intervene only when they are quite confident that a given constitutional amendment, either alone or in conjunction with other changes, poses a substantial threat to core democratic values.

Our core argument is that in making these determinations, courts should be influenced by a consideration of the institutions and principles found in other constitutional systems. Experience with the doctrine shows that courts often overestimate the threat posed by institutions and practices rooted in a court's own case-law or in a country's peculiar domestic constitutional history. Engagement with transnational constitutionalism is helpful as a check on these impulses: consideration of a broader

<sup>6</sup> See, e.g., Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL L. REV. 321, 332–338 (2011).

<sup>7</sup> See *infra* note 25.

<sup>8</sup> See *infra* Section 3.1–3.2.

<sup>9</sup> See *infra* Section 3.3 (giving examples).

<sup>10</sup> See Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW* 96, 98 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>11</sup> See Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS 251 (1996); Michael Freitas Mohallem, *Immutable Clauses and Judicial Review in India, Brazil and South Africa: Expanding Constitutional Courts' Authority*, 15 INT'L J. HUM. RTS 765, 767 (2011).

universe of cases may cast doubt on a conclusion that a given constitutional value or principle truly is fundamental, or that a given institutional change really poses a substantial threat to such a principle. We thus recommend that courts adopt a practice of grounding their decisions applying the doctrine with a transnational anchor. Further, we give examples—based on a number of recent cases—of how such an anchor would function in practice to achieve more restraint in the doctrine's use.

This article is divided into four sections following this introduction. Section 2 draws out the theoretical tension that frames our contribution: use of the doctrine seems justified in cases where an amendment threatens to erode democracy, but poses a real risk to democratic constitutionalism if used in cases where this risk does not exist or has been overestimated. Section 3 draws on case studies from India and Colombia—two countries where the doctrine has been quite active—to illustrate this tension in action. Section 4 considers different ways to achieve a more limited doctrine. It highlights our solution of adopting a broad doctrine that is limited by a commitment to comparative engagement, and specifically, to transnational anchoring. It also shows how engagement has worked in some cases and would have acted as a plausible limiting principle in others where the doctrine was probably deployed unnecessarily. Section 5 concludes.

## 2. Abusive constitutionalism and a doctrine of unconstitutional constitutional amendment

In this section, we canvass existing literature on the doctrine of unconstitutional constitutional amendment and explain theoretically how the doctrine may be both legitimate and useful as a response to certain kinds of constitutional amendments which threaten the democratic order. Existing work has shown that the doctrine raises special problems of legitimacy not faced by ordinary exercises of judicial review, and thus requires special justification. Existing scholarship also suggests that deployment of the doctrine against constitutional amendments that threaten to erode democracy may provide that justification. This frames the need for our contribution: the doctrine may be both useful and legitimate against particular kinds of amendments that threaten the democratic order, but if courts overuse the doctrine—say by overestimating the threat posed by a particular kind of amendment—then they overstep their role in ways that are particularly problematic. Thus, existing theory demonstrates both a need for the doctrine (at least in the context of fragile democracies) and a need for it to be limited.

### 2.1. The problem of justifying the doctrine

Any doctrine of substantively unconstitutional constitutional amendment faces a peculiar difficulty: it threatens to produce a kind of “ultimate” counter-majoritarian difficulty.<sup>12</sup> In well-functioning democracies, constitutional amendments are

<sup>12</sup> See, e.g., Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1799 (2004) (referring to the doctrine as the “most extreme of counter-majoritarian acts”). *But see* Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980) (rejecting this kind of democratic objection to the doctrine as based on an overly thin conception of constitutional democracy); Barak, *supra* note 6, at 336 (same).

frequently used by legislative or popular majorities for pro-democratic constitutional ends. Ordinary judicial review is a counter-majoritarian act, but at least democratic majorities retain the ability to override judicial decision-making through constitutional amendment. The doctrine of unconstitutional constitutional amendment cuts off this safety valve by allowing courts to review attempts to use the amendment process as override.<sup>13</sup> A key objection to a doctrine of unconstitutional constitutional amendment is thus that it may cut off any avenue—at least short of constitutional replacement—for the public to contribute to shaping the meaning of a constitutional text, including by overruling certain exercises of judicial review. Almost all constitutional theorists agree that constitutional amendment procedures play some important role in securing the democratic legitimacy of a constitutional text.<sup>14</sup>

Constitutional provisions and principles are often quite open-textured in nature, and thus open to multiple different *reasonable* interpretations.<sup>15</sup> Where this is the case, there will be an important role for democratic constitutional judgments: the opinions of popular or legislative majorities may have a stronger claim to respect in the face of such disagreements than the opinions of a majority of a court. Giving popular or legislative major majorities the power to override court decisions, at least through constitutional amendment, is thus pro-democratic. This is particularly true where an amendment has the support of a large legislative or popular majority, and where the limits imposed on a power of amendment are primarily substantive, rather than procedural, in nature.<sup>16</sup>

Where the limits on amendment are procedural, there is always the possibility that the legislature can attempt to reenact an amendment. In some cases, the new procedure may be too onerous for a new amendment to succeed, but there is still some avenue for democratic actors to pursue.<sup>17</sup> Where, in contrast, the limits on a power of amendment are substantive, rather than procedural, it will be far more difficult for democratic majorities to reenact a failed amendment. Doing so will require major changes to the substance of the particular amendment, to the composition or approach of the constitutional court, or (perhaps) to a wholesale replacement of the constitution. None of these options is attractive as a general matter. The first approach is likely to lead to significant distortions in the expression of democratic constitutional

<sup>13</sup> See, e.g., Dixon, *supra* note 10, at 98.

<sup>14</sup> See Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13(3) INT'L J. CONST. L. 575 (2015); Dixon, *supra* note 10, at 98–99.

<sup>15</sup> See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366 (2006) (on this problem with all exercises of judicial review). See also Conrado Hübner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449, 459–461 (2005); Rory O'Connell, *Guardians of the Constitution: Unconstitutional Constitutional Norms*, 4 J.C.L. 48, 50, 52 (1999).

<sup>16</sup> See Vicki Jackson, *Unconstitutional Constitutional Amendments: A Window into Constitutional Theory and Transnational Constitutionalism*, in DEMOKRATIE-PERSPEKTIVEN: FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 47, 62 (Michael Bauerle et al. eds., 2013) (arguing that “procedural forms of review are easier to justify than substantive ones”).

<sup>17</sup> See *id.* at 61.

opinion, the second to significant delay and perhaps to collateral costs to the rule of law, and the third to institutional instability.<sup>18</sup>

The key downside to a doctrine of substantively unconstitutional constitutional amendment is thus that it gives courts a more or less unreviewable power to determine the meaning of open-textured constitutional provisions, the scope of which are open to reasonable disagreement. It allows judges in the face of such disagreement to substitute—not once, but twice—their own view of the constitution for that of a legislative and/or popular majority. It thereby gives judges something like *super-strong* judicial review, which goes directly against a recent trend in constitutional theory and design towards *weakening* the finality of judicial review.<sup>19</sup>

## 2.2. Abusive constitutionalism as justification

Many scholars who have defended the doctrine against this special problem of legitimacy have argued that the doctrine can be useful as a way to help preserve so-called fragile democracies against democratic erosion.<sup>20</sup> This is not, to be sure, the only purpose for the doctrine in existing work. Often, as Gary Jacobsohn has noted, the doctrine has been used to protect more “expressive” constitutional commitments, or distinct aspects of a nation’s constitutional identity.<sup>21</sup> In other cases, it has had a backward-looking focus, and sought to guard against a return to some repudiated constitutional past—which may not itself be authoritarian or non-democratic.<sup>22</sup> As Yaniv Roznai has noted, as the doctrine has “migrated” across countries, it has also assumed a complex mix of aims or characters.<sup>23</sup>

Further, many scholars and courts have focused on the formal or textual relationships found in constitutional text and structure as a justification for the doctrine. These scholars argue, for example, that use of the doctrine may be justifiable if explicitly grounded in text, for example in unamendable eternity clauses.<sup>24</sup> Others argue that

<sup>18</sup> See Dixon, *supra* note 10, at 104.

<sup>19</sup> See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) (describing models of judicial review in the UK, New Zealand, and Canada that aimed to reconcile judicial review with democracy by allowing various kinds of democratic override).

<sup>20</sup> See, e.g., Barak, *supra* note 6, at 336 (arguing that in applying the doctrine, “the court is protecting democracy”); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 999–1001 (2011) (analyzing the Indian experience with the doctrine through the lens of consolidating and protecting democracy).

<sup>21</sup> Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763 (2004).

<sup>22</sup> This explains, for example, the eternity clause protecting human dignity in the German constitution. See, e.g., DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 59 (3d ed. 2012); Ulrich Preuss, *The Implications of “Eternity Clauses”: The German Experience*, 44 ISR. L. REV. 428, 445 (2011) (analyzing the role of such clauses in defining the “self” of the polity, and keeping the “memory and appreciation of the constituent power alive”).

<sup>23</sup> See Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013).

<sup>24</sup> See, e.g., Barak, *supra* note 6, at 336 (distinguishing eternity clauses from cases where courts have developed the doctrine without explicit textual support). Jackson makes a similar argument that the doctrine is easier to defend if it merely routes changes from one textually specified mechanism to another, more demanding one—she calls such review “substantive-procedural.” See Jackson, *supra* note 14, at 60–62. See also Vincent J. Samar, *Can a Constitutional Amendment be Unconstitutional?*, 33 OKLA. CITY U. L. REV. 667, 678–687 (2008) (on the substance-procedure distinction).

the doctrine may be defended as a way of defending popular sovereignty, because it limits the amendment power wielded by political institutions while preserving certain fundamental changes amounting to replacement of the constitution to “the people” acting as constituent power. Under this theory, use of the doctrine is democracy-enhancing because it maintains the ultimate power of the “people” over their elected representatives.<sup>25</sup>

The widely held intuition that the doctrine can be defended if utilized to protect against democratic erosion seems to rest on somewhat similar premises. If deployed only against measures that pose a significant threat of democratic erosion, the ultimate counter-majoritarian difficulty may at least be softened. This is both because such amendments may be especially likely to be manipulated rather than real exercises of democratic will and because they threaten to cut off future exercises of democratic decision-making. Our aim here, at any rate, is not to construct a wholly new formal justification for the doctrine, but rather to sharpen the intuition of those who have viewed the threat of democratic erosion as a paradigm case for its proper use. We focus on the question of *how* to use the doctrine rather than on *whether* it should exist.

The problem of constitutional change to erode democracy is a real and increasingly common one. Recent experience has shown a number of examples of “abusive constitutionalism”—cases where would-be authoritarian leaders use the tools of constitutional change to undermine the democratic order.<sup>26</sup> These practices are particularly common in new or “fragile” democracies, or those emerging from a recent history of authoritarian government.<sup>27</sup> Rather than disregarding existing rules and overthrowing civilian governments in such settings, would-be authoritarians often work within the existing legal framework, amending or replacing existing constitutions in order to make regimes notably less democratic. These actions rarely make countries fully authoritarian, or wholly return them to an authoritarian past, but they can make them hybrid or competitive authoritarian regimes that combine features of democracy and authoritarianism.<sup>28</sup> For example, these regimes may continue to hold meaningful elections, but use a number of devices—such as control over institutions like courts, electoral commissions, and the media—to stack the deck in favor of incumbents, so that elections are unfair.<sup>29</sup> The same sort of packing of institutions designed

<sup>25</sup> See, e.g., Joel Colon-Rios, *Beyond Parliamentary Sovereignty and Judicial Supremacy: The Doctrine of Implicit Limits to Constitutional Reform in Latin America*, 44 VICTORIA U. WELLINGTON L. REV. 521 (2013) (arguing that the Latin American variant of the doctrine is based on a reserved competence in the constituent power of the people to make certain fundamental constitutional changes). See also Barak, *supra* note 6, at 332–338 (developing an argument that some changes are beyond the province of political institutions and are reserved to the people).

<sup>26</sup> See Landau, *supra* note 1.

<sup>27</sup> See, e.g., Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

<sup>28</sup> See STEVE LEVITSKY & LUCAN WAX, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* (2010) (arguing that many regimes have become stuck in between democracy and authoritarianism, sharing common features with both).

<sup>29</sup> See *id.* at 3 (defining competitive authoritarianism as “civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents”).

to check incumbents may make the regime less likely to protect minority rights.<sup>30</sup> Modern political science suggests that the degree to which a regime is democratic versus authoritarian is best conceptualized on a spectrum.

An abusive constitutional change, then, can be defined as a change that makes a regime markedly less democratic than it was before—it can be defined as democratic backsliding.<sup>31</sup> Constitutional change is often central to the construction of hybrid or competitive authoritarian regimes. Constitutional amendment may allow leaders to increase their hold on power or to undermine institutions that were previously acting as a check. Overall, the goals of constitutional change in these moments are two-fold: to make it harder to dislodge the incumbent leader or party, and to weaken checks on their exercise of power. Defining the precise contours of those measures that count as pro-versus counter- “democratic” in this context may, of course, be the subject of disagreement, because democracy itself is a contested concept.<sup>32</sup> But there is some evidence that in many of these episodes, different dimensions of democracy erode together: for example, as would-be authoritarians weaken horizontal checks in order to increase their hold on power and render elections increasingly unfair, they are also likely to hamstring institutions, like courts, that are charged with protecting individual rights.

### 2.3. The unconstitutional constitutional amendment doctrine as a “solution” (or speed-bump/deterrent)

The doctrine of unconstitutional constitutional amendment is useful as a partial solution to these threats. It is not the only possible response: another way in which the problem of abusive constitutional amendments can be dealt with at the level of constitutional design is via the use of some form of “tiered” amendment procedure.<sup>33</sup> A system of tiered amendment thresholds has become a part of the comparative constitutional state of the art: many new constitutions include different amendment rules for different parts of the constitution.<sup>34</sup> The point of these schemes is to require more demanding demonstrations of popular will to amend some parts of the constitutional order as opposed to others, thus raising the costs of dangerous forms of constitutional change. Presidential term limits, for example, are sometimes given special protection for precisely that reason.<sup>35</sup>

<sup>30</sup> See *id.* at 5 (noting that in competitive authoritarian regimes, “civil liberties are nominally guaranteed and at least partially respected,” but are “frequently violated”). Members of the opposition, as well as independent media groups, may be harassed and arrested. Institutions charged with protecting civil liberties, like courts, are often packed and under the control of the dominant regime.

<sup>31</sup> See Landau, *supra* note 1, at 195.

<sup>32</sup> On different meanings of democracy, see, e.g., RICHARD POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) (distinguishing between more substantive and more procedural visions of democracy).

<sup>33</sup> Other available mechanisms might also include measures aimed at creating disincentives for individual leaders to engage in such action. See, e.g., JUAN CARLOS CALLERON-ALARCÓN, *THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA* (2009) (discussing issues of individual and collective amnesty, versus ongoing accountability, in the context of transitions to democracy).

<sup>34</sup> See Richard Albert, *Constitutional Handcuffs*, 42 *ARIZ. ST. L.J.* 663, 709 (2010) (giving examples of constitutions using this type of device).

<sup>35</sup> See, e.g., CONST. HOND., 1982, art. 239 (removing from office anyone who proposes the reform of the no-re-election article); 374 (making the no-re-election provision unamendable under any circumstances).

Whether tiering or the doctrine of unconstitutional constitutional amendments is the better response to abusive constitutional change is determined by two factors. One is the relative distribution of political power at the time a constitution is adopted. The more concentrated political power is, the more fragile a tiering strategy is likely to be to subsequent shifts in the power of an already dominant political party or faction; whereas the more dispersed power is, the less likely it is that heightened super-majority requirements will be easily circumvented.<sup>36</sup> The second factor is the degree to which particular threats to the democratic order are foreseen in advance and responded to by constitutional drafters. Often, constitutional tiering appears blind to the problem of abusive constitutionalism, and plays instead an expressive or identity-related purpose.<sup>37</sup> Particular provisions are protected not as a hedge against realistic threats to democracy, but instead in order to elevate fundamental values. The South African Constitution is a case in point: the part of the Constitution that is especially entrenched focuses on protecting values like the principle of human dignity.<sup>38</sup> This sort of entrenchment is unlikely to be effective at preventing the kind of democratic backsliding associated with abusive constitutionalism: actors attempting to create hybrid regimes work by undermining specific institutions and aggrandizing their own power rather than by challenging fundamental values.

An important advantage of an unconstitutional amendment doctrine, therefore, is that it allows judges to respond to these problems *ex post*, in a way that allows them to make careful evaluations of the degree to which a given constitutional change is really anti-democratic.<sup>39</sup> While we focus on a doctrine of unconstitutional constitutional amendment in the remainder of the article, we also acknowledge that it is a close relative of other approaches to constitutional design, such as tiering, the relative attractiveness of which will depend on quite context-specific factors.

Overall, then, the threat of abusive constitutionalism is a powerful potential justification for use of the doctrine, but the possibility that courts may overestimate or misunderstand the threat posed by a given amendment is a worrisome challenge to the doctrine's legitimacy. The doctrine, in other words, plays a role in protecting "fragile democracies" but may be in danger of overuse. In the next two parts, we use detailed case studies of Colombia and India in order to show that this tension is real.

### 3. Colombia and India: case studies in the promise and peril of the doctrine

In this section we present two in-depth case studies to show how the doctrine can, when properly deployed, be effective against the threat of abusive constitutional

<sup>36</sup> In a dominant party system like South Africa, for example, it may be that even relatively high super-majority requirements are not effective constraints.

<sup>37</sup> See Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 247 (2013).

<sup>38</sup> See S. AFR. CONST., 1996 art. 74 (making the founding principles of the Constitution, like "human dignity" and "non-racialism and non-sexism," especially difficult to amend by requiring a three-quarters instead of two-thirds approval of parliament).

<sup>39</sup> See Issacharoff, *supra* note 20, at 1002 (noting that the difficulty of *ex ante* specification of what should be protected is a reason for the doctrine of unconstitutional constitutional amendment).

change, and yet also tends to be widely overused against those threats. In the Colombian case, deployment of the doctrine prevented successive amendments to the constitution that would have allowed a president to stay in power indefinitely, with deeply problematic consequences for democracy. In India, deployment of the doctrine helped raise consciousness about the anti-democratic effects of the emergency. While the doctrine is an imperfect solution, it can, under some conditions, be successfully deployed, given the dynamics of hybrid or competitive authoritarian regimes. In other words, it is not necessarily true, given the politics of modern authoritarianism, that “if ever confronted with the felt need to exercise this option, sober heads might well wonder whether it was any longer worth doing.”<sup>40</sup>

These examples do not suggest that a court, acting on its own, will always be able to prevent exercises of abusive constitutionalism. For one, would-be authoritarians also replace their constitutions wholesale in order to further their goals.<sup>41</sup> In other cases, political actors may rely on emergency powers to suspend democratic constitutional limits. An effective solution to the problem of abusive constitutional amendment, then, may push would-be authoritarian actors towards relying more heavily on constitutional suspension or replacement. Moreover, whether a given decision receives at least partial compliance, or instead is either ignored or provokes a backlash against the court, is a complex calculation that depends on the strength of the court as well as the nature and strength of the threat. All we suggest here is that the doctrine is a potentially valuable means of raising the costs of anti-democratic action in ways that can also act as an effective “speed bump” or deterrent.

However, practical experience with the doctrine in the same two countries also suggests that the dangers of overuse are real. In particular, many uses of the doctrine in both India and Colombia seem to be based on an overestimation of the threat that a given constitutional change poses to the democratic order. For example, courts protect their own jurisprudential lines regardless of whether they are really fundamental to democratic constitutionalism. The same appears to be true of many uses elsewhere, some of which are canvassed in Section 4. Thus, there is a pressing need to limit usage of the doctrine, a task we return to below.

### 3.1. Colombia and the indefinite extension of term limits

In Colombia, the Constitution has historically limited presidents to just one term in office: an important check in a region that has been plagued by *caudillos* overstaying their terms. Military dictatorships were rare and brief, and few leaders overstayed their designated term in office.<sup>42</sup> Alvaro Uribe, elected president in 2002, threatened to change this pattern. Uribe—who won as an outsider to the traditional political party

<sup>40</sup> See Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution?: A Comparative Perspective*, 4 INT’L J. CONST. L. 460, 487 (2006).

<sup>41</sup> See Andrew Arato, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, 26 S. AFR. J. HUM. RTS 19, 43 (2010) (noting that replacement followed amendment in an abusive constitutional process in Hungary).

<sup>42</sup> See DAVID BUSHNELL, *THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF* 284–285 (1993).

system—emerged as an unusually popular president by gaining some high-profile successes against the country’s guerrilla groups.<sup>43</sup> After serving out most of his first term and retaining a very high approval rating, Uribe sought and received approval of a constitutional amendment allowing presidents to serve two consecutive terms.<sup>44</sup> This amendment was challenged both on procedural grounds and as an unconstitutional “substitution of the constitution,” but the Constitutional Court upheld the amendment.<sup>45</sup> Later, when his second term was coming to an end, supporters of a still-popular President Uribe passed a proposed referendum through Congress, which would allow presidents to serve for three consecutive terms. The court blocked the attempted third term as an unconstitutional constitutional amendment in 2009.<sup>46</sup>

The first term limit extension was challenged before the Colombian Constitutional Court in the *First Re-election Case* in 2005.<sup>47</sup> The court had previously held that some constitutional changes were so sweeping as to constitute substitutions of the constitutional text rather than amendments of it, but it had never deployed the doctrine to block a constitutional change.<sup>48</sup> The court upheld the amendment at issue, but warned that it was only ruling on the allowance of a second consecutive term.

In reasoning about why the amendment at issue did not constitute a substitution of the Constitution, the court noted that allowing two terms strained the institutional design but did not necessarily break it. Under the scheme of the 1991 Constitution, elected democratic institutions like the presidency and the congress are checked by a series of powerful judicial and non-judicial bodies. The court noted that because these institutions are generally appointed via complex schemes that minimize the ability of any single political figure or institution to control them, allowing presidents to serve two terms would not necessarily give the president the power to pack those institutions.<sup>49</sup> For example, three different institutions—the Supreme Court, Council of State, and President—each control three-person nomination lists for one-third of the Constitutional Court, and the Senate then selects the justice for a non-renewable eight-year term from among those lists.<sup>50</sup> The court found that allowing the president to serve an additional term would allow him or her to exercise “more influence” on the makeup of certain institutions, but it held that this choice was within the “balancing” that could be carried out by institutions charged with reforming the Constitution.<sup>51</sup>

<sup>43</sup> See Kurt Weyland, *Neopopulism and Neoliberalism in Latin America: How Much Affinity?*, 24 *THIRD WORLD Q.* 1095, 1111 (2003).

<sup>44</sup> The Colombian Constitution does not include constitutional tiers: any provision may be amended through a vote of two consecutive Congresses: a simple majority in the first round, and an absolute majority in the second. See *CONSTITUCION POLITICA DE COLOMBIA [C.P.]* art. 375. Given President Uribe’s popularity and the weakness of the Colombian party system, it was thus not difficult for him to receive the required majorities needed to amend the Constitution and to extend his term in office on two separate occasions.

<sup>45</sup> See Decision C-1040 of 2005.

<sup>46</sup> See Decision C-141 of 2010.

<sup>47</sup> See Decision C-1040 of 2005.

<sup>48</sup> See, e.g., Decision C-551 of 2003, §§ VI.30–VI.37 (discussing the doctrine within a case about a proposed referendum).

<sup>49</sup> See Decision C-1040, § 7.10.4.1(ii).

<sup>50</sup> See C.P. art. 239.

<sup>51</sup> Decision C-1040, § 7.10.4.1(ii).

The possibility that the president “could abuse his power,” standing alone, was not enough to invalidate the amendment.<sup>52</sup>

The court again confronted these same issues several years later, however, in the *Second Re-election Case*, following the congressional passage of a proposed referendum designed to allow President Uribe to serve for three consecutive terms. This time, a majority of the court struck down the proposed referendum, both on the grounds that the procedures for approval had been unconstitutional and on the grounds that the amendment constituted a substitution of the Constitution.<sup>53</sup> The court emphasized that the Constituent Assembly had shown great concern over excessive presidential power and in particular over the frequent governance of the country via state of siege in the decades leading up to 1991.<sup>54</sup> It also noted in detail how a president with twelve consecutive years in power would have tremendous power over various institutions of state, including those institutions charged with checking him. This is not only because he would have the power to exercise all of his appointment power over institutions with longer or staggered terms than his own, but also because he would gain influence over many of the other nominating institutions during that time.<sup>55</sup> Further, a three-term president would dominate the media landscape and would be able to use clientelism to amass a large amount of power.<sup>56</sup> The court concluded that the reform would “collapse the principle of the separation of powers.”<sup>57</sup>

Uribe and other actors within the political system complied with this decision with relatively little complaint. The reasons why, however, are complex and in many respects contingent to Colombian politics. First, the Colombian Constitutional Court is a powerful and well-respected institution.<sup>58</sup> Second, Colombian political parties have in recent years been weak and non-institutionalized; Uribe won as an outsider to the party system and never built a durable movement.<sup>59</sup> Many of those who supported him in Congress because of his popularity defected once the judicial decision had been handed down and it became clear that his presidency would soon end. His successor in office, Alvaro Santos, was affiliated with his movement and had served as his Minister of Defense, but broke sharply with Uribe’s policies once elected, and Uribe now serves as a leader of the opposition.<sup>60</sup> Thus, the decision bought time and delayed

<sup>52</sup> See *id.* § 7.10.4.1.(i).

<sup>53</sup> See Decision C-141 of 2010.

<sup>54</sup> The court also noted that the Colombian president had historically been limited to only one term in office, and that the attempt of Rafael Reyes to increase that term in the early twentieth century by constitutional amendment ended in a rejection of Reyes’s governance. See *id.* § 6.3.5.1.3.

<sup>55</sup> *Id.* § 6.3.6.1.1.

<sup>56</sup> See, e.g., *id.* (noting that a president with twelve years in office would, in practice, have a substantial impact on the conformation of Congress).

<sup>57</sup> *Id.* § 6.3.7.

<sup>58</sup> See, e.g., David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT’L L.J. 319, 321 (2010).

<sup>59</sup> On the evolution of the party system in Colombia and its deinstitutionalization, see Eduardo Pizarro Leongomez, *Giants with Feet of Clay: Political Parties in Colombia*, in *THE CRISIS OF DEMOCRATIC REPRESENTATION IN THE ANDES* 78, 78 (Scott Mainwaring et al. eds., 2006).

<sup>60</sup> See, e.g., Santos v. Uribe, *THE ECONOMIST*, Apr. 7, 2012, available at <http://www.economist.com/node/21552204>.

the anti-democratic effort. In the Colombian context with weak, personalist political parties, that delay proved crucial.

### 3.2. India and the emergency

In India, the doctrine of unconstitutional constitutional amendment has a more complicated history. It did not begin life as a doctrine focused on concerns about abusive constitutionalism or a slide toward authoritarian rule. Rather, it was born out of a struggle between the Indian parliament and Supreme Court (SCI) over land reform, nationalization, and the right to property.<sup>61</sup> *I.C. Golaknath v. State of Punjab*,<sup>62</sup> the first case to announce an unconstitutional amendment doctrine in India, was about the power of parliament to remove certain land reform legislation from the scope of judicial review. And *Kesavanda Bharathi v. State of Kerala*,<sup>63</sup> the 1972 case which reformulated the court's doctrine to focus on the "basic structure" of the Indian Constitution, was a case that arose out of a dispute over the effect of Kerala land reform laws and the attempt by the Indian parliament to insulate those laws from any form of judicial review via constitutional amendment.<sup>64</sup>

*Kesavanda*, however, was also a decision handed-down against a growing concern about the potential for abusive constitutionalism in India—or the increasing power of Prime Minister Indira Gandhi.<sup>65</sup> After a long period of conflict between socialists and conservatives, the Congress Party led by Gandhi had split in two in 1969, leaving Gandhi head of a much more cohesive party.<sup>66</sup> Congress had also won a large electoral majority in the 1971 parliamentary elections, giving it power to pass a number of amendments designed to overturn *Golaknath*, and protect land reform and nationalization policies from judicial review.<sup>67</sup> Soon afterward, in response to conflict with Pakistan in Punjab, Gandhi also declared an (external) state of emergency.<sup>68</sup> *Kesavananda* was thus seen by some, at least, as both a form of accommodation to Gandhi and her large electoral victory in 1971, and a warning to Gandhi about the limits of her power to rule without judicial supervision.

In the short-term, the decision itself proved a largely ineffective attempt to slow down, or deter, abusive constitutional action by Gandhi.<sup>69</sup> Gandhi's immediate response to the decision was to pass over three judges in the majority for appointment

<sup>61</sup> See, e.g., M.K. BHANDARI, *BASIC STRUCTURE OF THE INDIAN CONSTITUTION* 159 (1993).

<sup>62</sup> *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).

<sup>63</sup> *Kesavanda Bharathi v. State of Kerala*, A.I.R. 1973 S.C. 1461.

<sup>64</sup> See Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 490 (2003).

<sup>65</sup> Over time, the doctrine has also developed so as to have a more direct focus on concerns about democracy and the rule of law generally. See, e.g., Pratap Bhanu Mehta, *The Inner Conflict of Constitutionalism: Judicial Review and the "Basic Structure,"* in *INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES* (Zoya Hasan et al. eds., 2002) (highlighting the pro-democratic focus and character of the doctrine, as well as its occasionally unfocused application).

<sup>66</sup> See Amal Ray, *From a Constitutional to an Authoritarian System of Government: Interactions between Politics and the Constitution in India*, 25 J. COMMONWEALTH & COMP. POL. 275, 285–287 (1987).

<sup>67</sup> See Neuborne, *supra* note 64, at 490.

<sup>68</sup> See *id.*

<sup>69</sup> See GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 276–277 (1999).

to the position of chief justice, in direct opposition to norms of seniority governing judicial appointments in India.<sup>70</sup> This, some argue, had a direct impact on the court's willingness to assert robust powers of judicial review in subsequent cases.<sup>71</sup> In 1975, Gandhi also moved to consolidate her rule by declaring a comprehensive internal emergency. During the emergency itself, the SCI declined to apply a doctrine of unconstitutional amendment in order either to protect basic rights to *habeas corpus*, or to attempt to limit Gandhi's ability to remain in office.<sup>72</sup>

In the longer-term, however, the doctrine may well have helped limit the time-frame for abusive constitutionalism in India by subsequently deterring Gandhi from engaging in the kind of electoral manipulation would-be authoritarians often use to remain in office. In 1975, a High Court judge found Gandhi guilty of various breaches of electoral law, which immediately put pressure on her to resign from parliament.<sup>73</sup> Gandhi responded via a variety of measures designed to protect her position, including the emergency itself and the passage of the Election Laws (Amendment) Act, 1975 purporting retrospectively to eliminate relevant provisions of the electoral code. The package included an amendment to the Constitution (the Thirty-Ninth Amendment) deeming Gandhi's election valid, holding that prior electoral law was non-applicable to the prime minister, and placing all electoral laws in the Ninth Schedule to the Constitution (which exempted them from judicial review).<sup>74</sup> In the *Election Case*, in 1975, the SCI allowed Gandhi to remain in office by setting aside the original conviction against her under the earlier electoral code.<sup>75</sup>

In reaching this result in the *Election Case*, however, the SCI simultaneously sounded an important warning to Gandhi about the likely limits of her *future* immunity for any electoral abuse. The basis for the court's decision in the *Election Case* was extremely narrow: it depended on a finding that Gandhi and her supporters did not technically violate relevant limits on electoral spending. At a broader level, the SCI expressly declined to uphold the effectiveness of the Thirty-Ninth Amendment as a means of protecting Gandhi from the legal consequences of any electoral abuse. In addition to more specific objections, three out of five justices found the Thirty-Ninth Amendment to be a violation of the basic structure doctrine, and to that extent an unconstitutional constitutional amendment.<sup>76</sup> When Gandhi decided to declare an end to emergency

<sup>70</sup> See Neuborne, *supra* note 64, at 481–483, 492; R.V.R. Chandrasekhara Rao, *Mrs Indira Gandhi and India's Constitutional Structures: An Era of Erosion*, 22 J. ASIAN & AFR. STUDS 156, 173 (1987).

<sup>71</sup> See Rao, *supra* note 70, at 167.

<sup>72</sup> See A.D.M Jadalpur v. Shiv Kant Shukla, A.I.R 1976 S.C. 1207 (*habeas corpus*); Smt. Indira Gandhi v. Raj Narain, A.I.R. 1976 S.C. 1207 (elections); AUSTIN, *supra* note 69, at 323–343; Neuborne, *supra* note 64, at 494; Anil Kalhan, *Constitution and "Extraconstitution": Colonial Emergency Regimes in India and Pakistan*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 89, 113–116 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010).

<sup>73</sup> See Neuborne, *supra* note 64, at 492; Rao, *supra* note 70, at 168–169.

<sup>74</sup> See, e.g., Jyotirinda das Gupta, *A Season of Caesars: Emergency Regimes and Development in Politics in Asia*, 18 ASIAN SURV. 315, 322–323 (1978).

<sup>75</sup> Smt. Indira Gandhi v. Raj Narain, A.I.R. 1976 S.C. 1207.

<sup>76</sup> For useful discussions, see C.C. Aikman, *The Debate on the Amendment of the Indian Constitution*, 9 U.U.W.L.R. 357, 375–377 (1978); Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, 4 INDIAN J. CONST. L. 47 (2010); Neuborne, *supra* note 64, at 493; Ved P. Nanda, *The Constitutional Framework and the Current Political Crisis in India*, 2 HASTINGS CONST. L.Q. 859, 871–872 (1975).

rule in 1977 and call fresh elections (some say in order to further consolidate her hold on power),<sup>77</sup> she was thus on notice from the SCI about the consequences of any overt attempt to manipulate the electoral process.

The basic structure doctrine affirmed, and applied, by the court in the *Elections Case* meant that no subsequent parliament could effectively protect Gandhi against the legal consequences of a conviction for electoral misconduct, even by constitutional amendment. It was also widely noted in contemporary media accounts that Gandhi was concerned at the time to avoid criminal charges and conviction for her actions in office.<sup>78</sup> The result, one might argue, was a remarkably free and fair set of elections in 1977, which led to a resounding defeat for Gandhi and her two-year period of authoritarian rule.<sup>79</sup>

The fact that a new government, led by the Janata Party, was then elected was itself significant for democracy, as it was the first time since independence a party other than Congress controlled the prime ministership.<sup>80</sup> Within its first year in office, the Janata government also helped restore democratic constitutional rule by repealing key provisions of the Forty-Second Amendment, which had sought to concentrate power in the prime minister at the expense of parliament and state governments.<sup>81</sup> In 1980, in *Minerva Mills*,<sup>82</sup> the SCI declared most of the remaining provisions of the Forty-Second Amendment unconstitutional, under the basic structure doctrine.<sup>83</sup> While Gandhi herself later returned to the parliament and the prime ministership in 1980, she did so without the same overt reliance on anti-democratic tactics.<sup>84</sup>

### 3.3. The danger of the doctrine in Colombia and India

While the cases above demonstrate the potential utility of the doctrine as a response to the threat of abusive constitutionalism, many other uses of the doctrine tend to illustrate the risk that uses have for ordinary exercises of the amendment power. In Colombia, the cases applying the doctrine other than the re-election cases tend to illustrate the risk. In a famous 1994 case, the Colombian Constitutional Court invalidated a law criminalizing the simple possession of drugs. The court cited two basic constitutional principles in its ruling: the right to “free development of personality”<sup>85</sup> and the “liberal and democratic” character of the Colombian state.<sup>86</sup> The court’s

<sup>77</sup> See, e.g., AUSTIN, *supra* note 69, at 394–395; Rao, *supra* note 70, at 173.

<sup>78</sup> See, e.g., *Indira Symbolizing Evil in Politics: EMS*, THE TIMES OF INDIA, Oct. 15, 1978; *Indira Trying Backdoor Entry, Says Veerendra*, THE TIMES OF INDIA, Oct. 26, 1978; *Dismissal of Morarji Warning to Others*, THE TIMES OF INDIA, Jan. 14, 1970; *Ordinance to Amend Act Likely*, THE TIMES OF INDIA, Feb. 11, 1970.

<sup>79</sup> See Kalhan, *supra* note 72, at 116; Neuborne, *supra* note 64, at 494; Ray, *supra* note 66, at 289–289.

<sup>80</sup> See AUSTIN, *supra* note 69, at 393–395.

<sup>81</sup> See Neuborne, *supra* note 64, at 494; Rao, *supra* note 69, at 168.

<sup>82</sup> *Minerva Mills v. Union of India* (1980) 4 S.C.C. 222.

<sup>83</sup> See Katz, *supra* note 11, at 272; Neuborne, *supra* note 64, at 494; Rao, *supra* note 69, at 168.

<sup>84</sup> This is true at least at the national level. For her use of emergency rule/rule by decree in certain states during her second period as Prime Minister, see Ray, *supra* note 66, at 289.

<sup>85</sup> See C.P. art. 16 (“All persons have the right to free development of personality without any limits other than those imposed for the rights of others and the legal order.”).

<sup>86</sup> Decision C-221 of 1994, §§ 6.2.2–6.2.4.

understandings of both relevant principles seem open to reasonable disagreement, and indeed the decision faced political resistance almost from the outset, with most presidential administrations since 1994 seeking to use the constitution to overturn the judgment. One could argue that no person addicted to narcotics is capable of meaningful development of their personality without medical intervention and detoxification. Similarly, democratic principles could be applied to support, rather than undermine, the criminalization of drug use, if one were to argue that citizens could not participate in a meaningful and informed way in the political process under the influence of narcotics.

This appeared to be at least part of the logic of a proposed 2003 referendum question, which cited the desire to “promote and protect an *effective* development of personality” as the basis for a constitutional amendment allowing criminalization of drug possession. The court struck the question down on procedural grounds, prompting several further attempts at constitutional amendment by the Congress.<sup>87</sup> In 2009, the court passed a new amendment prohibiting drug possession but providing for “measures and administrative treatment of a pedagogical, prophylactic, or therapeutic end” rather than criminal sanctions, and requiring the “informed consent of the addict” for those measures to be carried out. This amendment was challenged as a substitution of the Constitution, and the court dismissed the challenge on technical grounds.<sup>88</sup> But the court’s opinion suggested that the case would be different if the state had attempted to recriminalize simple drug possession.

Further, in a series of cases on the civil service system, the court sparred with the political branches on the question of whether bureaucrats appointed provisionally to hold certain posts had to stand for open civil service examinations created in the Constitution of 1991. In a series of laws, the Congress attempted to shield provisional appointments from having their positions opened to competition. Based on a constitutional article stating that “[a]ll public servants will be designated by public meritocratic examination,”<sup>89</sup> the court struck down these efforts because it held that incumbent positions and not just new positions must be made subject to the civil service regime.<sup>90</sup> In 2008, Congress responded by amending the Constitution to create a temporary provision allowing the civil service regime to ratify all incumbent officeholders in their posts during a three-year period without opening their positions to civil service competition. The court struck down the amendment as a substitution of the Constitution, holding that it replaced core principles of “equality” and “meritocracy” that were fundamental to the constitutional order.<sup>91</sup> Yet the shape of the meritocratic regime, and in particular its application to incumbents, appear to raise a

<sup>87</sup> See Decision C-551 of 2003, §§ VI.304–VI.307.

<sup>88</sup> See Decision C-574 of 2011, §§ VI.6.11–VI.6.15 (holding that the court was “inhibited” from deciding the case because the complainant had undertaken a “partial, incomplete, and isolated” read of the provision at issue).

<sup>89</sup> C.P. art. 125.

<sup>90</sup> See, e.g., Decision C-037 of 1996; Decision C-901 of 2008.

<sup>91</sup> See Decision C-588 of 2009, § 6.2.2.

complex balancing of values that would normally be within the realm of democratic contestation.

A similar pattern can be observed in India in the context of various courts decisions on the right to property, and attempts by the *Lok Sabha* to override those decisions by constitutional amendment. In its original form, article 31(2) of the Indian Constitution provided that the acquisition of property should be “for public purposes under any law,” and that “the amount” or “principles of compensation” for a taking were to be specified by the *Lok Sabha*. This open-textured formulation was seemingly intentionally adopted by the drafters of the Constitution to allow parliament flexibility to determine the appropriate standard of compensation as part of any land reform program. However, in early cases, both Indian lower courts and the Supreme Court read the word “compensation” to mean strictly market-based compensation.<sup>92</sup> This was despite both the history of article 31(2) in India and evidence from other countries that there were other ways of understanding constitutional requirements of compensation for a taking. The response of the *Lok Sabha* was to enact the First Amendment to the Constitution, which provided that “no law providing for the acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part” (article 31A), and that “without prejudice” to this provision, none of the Acts contained in the Ninth Schedule to the Constitution “shall be deemed” void for inconsistency with the rights in Part 4 of the Constitution (article 31B). The First Amendment also added 13 statutes to the Ninth Schedule, including numerous statutes dealing with land reform.

The SCI, however, ultimately responded to these amendments, first, by giving the language of articles 31A and 31B a very narrow interpretation, and then by finding the relevant amendments unconstitutional for inconsistency with the terms of the previous Constitution.<sup>93</sup> In *I.C. Golaknath v. State of Punjab*,<sup>94</sup> the court held that all constitutional amendments were “laws” within the meaning of article 13(1) of the Constitution, and thus *subject to* rather than supreme over the other provisions in Part 3 of the Constitution, including various fundamental rights. Based on this, it also struck down articles 31A and 31B in their entirety. The attempt by the *Lok Sabha* to override the Supreme Court by asserting a different, quite reasonable vision of the right to property was almost entirely derailed for six years, until the Supreme Court narrowed its definition of constitutional unamendability in *Kesavanda Bharathi v. State of Kerala*.<sup>95</sup>

The examples here suggest that the doctrine is often used in circumstances where the meaning of constitutional norms is open to reasonable disagreement. In particular, judges appear to identify their own core lines of jurisprudence—on questions like

<sup>92</sup> See, e.g., *State of West Bengal v. Bela Banerjee*, A.I.R. 1954 S.C. 170 (“*Bela Banerjee Case*”).

<sup>93</sup> See Neuborne, *supra* note 64, at 489.

<sup>94</sup> *I.C. Golaknath v. State of Punjab*, A.I.R. 1967 S.C. 1643.

<sup>95</sup> *Kesavanda Bharathi v. State of Kerala*, A.I.R. 1973 S.C. 1461.

personal autonomy, property, and meritocracy—as central to the existing constitutional order, even when reasonable minds might differ as to the basic *correctness* of that jurisprudence. This may be rational turf protection, or it may be that judges genuinely over-emphasize the centrality of the values in their own decision-making. Either way, some effort to limit or check the doctrine is important if the doctrine is to advance rather than undermine commitments to democratic constitutionalism. We consider possible solutions in the next section.

#### 4. Transnational engagement and a limited doctrine of unconstitutional constitutional amendment

There is no way around the fact that uses of the unconstitutional constitutional amendment doctrine involve difficult exercises of judgment by high courts. Despite this fact, we argue that courts and scholars should search for a limiting principle to maintain the utility of the doctrine while protecting it against criticism and preventing it from overrunning normal democratic amendment procedures. In this part, we explore three possible doctrinal solutions in turn. Courts, of course, could potentially adopt all three solutions at different times, or in different cases, but we present them as distinct solutions, which courts ought to apply as the basis for a more consistent application of the doctrine.

The most obvious place to start for those searching for a limited doctrine will be a “narrow” doctrine that protects only against the destruction of a small, core set of institutions or principles. But as we note, such a doctrine can be easily evaded through a clever aggregation or staging of anti-democratic action. Perhaps cognizant of that weakness, courts might also adopt a standard that strikes down any amendment with a potential adverse impact on the democratic order. But such a doctrine is likely to be overbroad, sweeping in many amendments that are innocuous. Indeed, this is the classic tension between constitutional rules and standards: constitutional rules generally do more to constrain judicial discretion, but in ways that can prove substantially under- or over-inclusive; whereas constitutional standards leave judges far broader discretion, in ways that can raise distinct democratic or rule of law concerns.<sup>96</sup>

There is, however, we suggest, also a third possibility that splits the difference between these poles: courts should step in only when they are confident that amendments, or packages of amendments, pose a substantial threat to a set of values closely associated with the democratic order. The identification of those threats is necessarily contextual: courts must understand the domestic context and the threat of an amendment or political amendments within that context. But we argue that consideration of transnational material may still be useful as a check or limit on overuse of the doctrine. Courts should, we argue, refer to transnational constitutional law both in determining which values are sufficiently important to be protected, and in figuring out whether, in operation, the amendments at issue actually pose a substantial threat to those values.

<sup>96</sup> See, e.g., Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1993).

#### 4.1. A narrow approach and the problems of evasion and interaction effects

A starting point for a limited doctrine of unconstitutional constitutional amendment is a narrow doctrine. Narrowness might be achieved in two slightly different ways. First, either a court or constitutional designer might attempt to identify and protect a small set of particular institutional provisions. For example, the jurisdiction or appointments procedure for a court, or provisions defining presidential term limits, might be made unamendable. Constitutional tiering procedures, or wholly unamendable eternity clauses, sometimes take this approach to constitutional design. The eternity clauses in the Honduran Constitution, for example, protect a core set of provisions surrounding the presidency, such as the length of the presidential term, the prohibition on re-election, and the prohibition on people in certain high posts serving as president in the following period.<sup>97</sup> These provisions appear to be aimed at preventing the consolidation of power by a particular actor who then remains in the presidency. Judges could develop similar lists of protected provisions via the unconstitutional constitutional amendment doctrine.

A second meaning of narrowness, more commonly seen in practice, would be to protect against the destruction of a relatively narrow set of constitutional principles fundamental to democracy. Many constitutions, like the German Basic Law, have provisions making only a narrow set of provisions unamendable, or immune from change.<sup>98</sup> The Brazilian Constitution is an example of this sort of approach applied to democracy: the Constitution bans amendments that “aim at abolishing”: “the federative form of state,” “the direct, universal, secret, and periodic vote,” “the separation of the Government powers,” and “individual rights and guarantees.”<sup>99</sup> The same kind of list could be developed by judges through the unconstitutional constitutional amendment doctrine, rather than in the constitutional text. For example, Carlos Bernal argues that the unamendability doctrine can justify inclusion of only a small set of principles that are either intrinsic to democratic constitutionalism (rights, separation of powers, and the rule of law), or that make up the core purpose of a particular normative constitutional project (such as participatory democracy in the Colombian case).<sup>100</sup> In other words, a court taking a narrow approach may strike down only an amendment that destroys a small, core set of institutions and values.

The advantage of such an approach is that it protects a broad sphere for constitutional amendment and ensures that the unconstitutional constitutional amendments

<sup>97</sup> See CONST. HOND. art. 374 (“The previous article [defining amendment procedures], the present article, and the constitutional articles referring to the form of government, the national territory, the presidential term, the prohibition on newly being president of the republic, the citizen who has exercised it under any title, and the reference to those who cannot serve as president of the republic for the following period may not be amended in any case.”).

<sup>98</sup> GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl I, art. 79, § 3 (entrenching certain basic values).

<sup>99</sup> CONSTITUICAO FEDERAL [C.F.] [CONSTITUTION] art. 60, para. 4.

<sup>100</sup> See 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).

doctrine will only be used in the most extraordinary cases. The disadvantage, however, is that, like forms of *ex ante* tiering by constitutional designers, it may fail to foresee the range of forms that abusive constitutional amendments can take. It may also frequently be evaded by anti-constitutional actors pursuing a number of different approaches to achieving the same goal—or adopting measures that have an abusive character only by virtue of their interaction with other parallel amendments or legal changes.

Constitutional changes that, by themselves, may not pose any significant threat to democracy may become far more threatening in combination, or in aggregate.<sup>101</sup> In Hungary in 2011, Fidesz defended various anti-democratic changes it made on the grounds that each—individually—was seen around the world in highly democratic constitutions and were normal parts of democratic regimes. In other words, Fidesz introduced a number of elements—like a Constitutional Court with limited jurisdiction over certain matters, a centralized system for judicial appointments, and a centralized system for appointment of other supposedly independent officers and agencies—all of which would prove only weakly problematic in normal democratic orders, when seen in isolation. Many political theorists posit that, to be legitimate, a democracy must provide some form of independent review of state action.<sup>102</sup> But few argue that review of this kind should take any particular form.<sup>103</sup> A court applying a narrow approach would thus have a hard time concluding that any one of these changes destroyed any of the principles found in the list of fundamental democratic norms or values.

On aggregate, however, these kinds of changes may have a deeply anti-democratic impact. As Scheppele has argued, the Hungarian changes together embodied a kind of “frankenstate.”<sup>104</sup> In the case of the Constitutional Court, while its power to review ordinary judicial decisions was expanded, it was stripped of almost all power to review the constitutionality of legislation involving economic legislation (i.e., budgetary and tax legislation) until the country’s public debt fell below 50 percent of GDP.<sup>105</sup> Previous broad standing rules were changed so that any abstract challenge to legislation could only be brought *ex ante* by the parliamentary majority, or *ex post*, by the government, the ombudsman, or a quarter of members of the parliament (when no opposition party had close to 25 percent of votes in parliament).<sup>106</sup> Changes were made to the size

<sup>101</sup> This is a version of Vicki Jackson’s argument about the effect of constitutional “packages,” but focused on notions of abusive constitutional combinations. See Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 *DUKE L.J.* 223, 226 (2001).

<sup>102</sup> See, e.g., Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 *REV. CONST. STUDS* 101 (2004); Frank I. Michelman, *Ida’s Way: Constructing the Respect-Worthy Governmental System*, 72 *FORDHAM L. REV.* 345 (2003); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 *MODERN L. REV.* 1 (2003).

<sup>103</sup> See Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 *GERMAN L.J.* 2249, 2263 (2013).

<sup>104</sup> See Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists do not Work*, 26 *GOVERNANCE* 559 (2013).

<sup>105</sup> See Andras Jakab & Pal Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 *EUR. CONST. L. REV.* 102, 123–124 (2013).

<sup>106</sup> See Kriszta Kovács & Gabor Attila Tóth, *Hungary’s Constitutional Transformation*, 7 *EUR. CONST. L. REV.* 183, 193 (2011).

of the Constitutional Court (to increase the number of judges from 11 to 15), and to the process by which judges were nominated (so as to eliminate the potentially diversifying role of a constitutional nominating committee).<sup>107</sup> Changes were also made to the method of appointment for independent agencies, including the ombudsman, charged with maintaining other checks and balances, and initiating review before the constitutional court. The prevalence of this kind of institutional complexity or interaction effect meant that guarding against a single change to a single constitutional provision was unlikely to stop abuses of constitutional change.

#### 4.2. A potential adverse impact standard and the problem of overbreadth

Courts alert to the weaknesses of a truly narrow approach may attempt to strengthen it by adopting a potential adverse impact standard. Under this model, any reform that involves a threat of anti-democratic action would be invalidated.<sup>108</sup> The purpose of such a move would be to eliminate the possibility for evasion through piecemeal changes, or the possibility of a narrow doctrine being radically under-inclusive, by virtue of its failure to address the interactive or cumulative effect of various abusive constitutional amendments.

The Colombian Constitutional Court has at times suggested this kind of position. The court in the *First Re-election Case* upheld the amendment in part by holding that the complaints of the challengers went to possible consequences of allowing re-election, rather than to the institutional design. In the court's view, the fact that a second term could be used by Uribe to consolidate power and weaken checks did not mean that the institutional design itself replaced the constitution.<sup>109</sup> In contrast, in the *Second Re-election Case*, the court argued at length about the practical effects that the change was likely to have. For example, the court noted that because of the president's practical ability to shape congressional elections, and because congressional elections were held every two years, a president with twelve years in office was likely to have significant control over the Congress.<sup>110</sup> The court made similar arguments about the composition of checking institutions: because a president would have so much power to shape the membership of judiciaries and other bodies, it is plausible that he would control most of these institutions by the end of twelve years.<sup>111</sup> The court's shift towards a potential impact standard aided it in striking down the second re-election.

The consequence of a court adopting this kind of potential adverse impact standard, however, is to convert a narrow doctrine of constitutional unamendability into

<sup>107</sup> See Jakab & Sonnevend, *supra* note 105, at 130.

<sup>108</sup> This may be closest to how the Brazilian eternity clauses have been interpreted in practice. The Brazilian courts have interpreted their mandate to strike down actions that "aim at abolishing . . . individual rights and guarantees" to control amendments that dealt with the details of tax policy. See, e.g., *Acao Direta de Inconstitucionalidade da Emenda Constitucional N. 03/93*, ADI-MC 926 DF.

<sup>109</sup> See Decision C-1040 of 2005, § 7.10.4.1.(i) (noting that the petitioners attacking the law raised "concerns of a practical type" about the impact of the reform, rather than the institutional design itself).

<sup>110</sup> See Decision C-141 of 2010, § 6.3.6.1.1.

<sup>111</sup> See *id.*

one that is extremely broad. Take, for example, the Colombian judgments on drug possession and on the composition of the civil service.<sup>112</sup> Both decisions could be read as saying that the respective amendments at issue, although not themselves destroying core democratic principles, had a potential adverse impact on those principles. For example, the Congress's intransigence in opening up posts held by incumbent civil servants is not a major change to the democratic order. But it could be used as part of a program of anti-democratic action in conjunction with other factors, because it might form part of a concerted attempt to undermine state capacity or to stack the bureaucracy with political cronies. The court's insistence that the amendment violated basic principles of meritocracy and equality may best be read as an argument that the changes raised a possible threat of movement in that direction. These kinds of claims could be made across a very broad range of cases, and thus a potential adverse impact standard is likely to prove overbroad.

### 4.3. A broad but weak standard: transnational constitutionalism as a limiting principle

We argue that a better approach to the doctrine is broad but weak. It is broad in the sense that it does not attempt to identify a narrow set of institutions or values *ex ante*, because it recognizes that anti-democratic actors can attack democratic constitutionalism through a number of different routes. It is weak in the sense that it strikes down only constitutional changes that it is confident will have a substantial adverse impact, either alone or in conjunction with other changes, on the democratic order. The real challenge for constitutional drafters, and judges endorsing the idea of such a principle for the first time, is thus to find ways of encouraging a somewhat more restrained or neo-Thayerian use of a broad doctrine.<sup>113</sup> At the heart of such an approach is a willingness to trust judges with broad discretion to enforce the minimum requisites of democracy, or an acceptance of the view, advanced by leading judges such as (former Israeli Chief Justice) Aharon Barak, that the role of a court in any democracy "is to protect the constitution *and* democracy."<sup>114</sup> At the same time, such an approach attempts to find ways of discouraging judges from over-using that discretion, so as to enforce a thicker or more contested view of democracy.

Increased judicial deference, or restraint, is one of the classic ways in which judicial review is "weakened" in the face of this kind of broad formal judicial authority.<sup>115</sup> A broad but weak doctrine of unconstitutional constitutional amendment also has important advantages over narrower versions of the doctrine: it provides a basis for invalidating any amendment a court identifies as abusive in a particular

<sup>112</sup> See *supra* Section 3.

<sup>113</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that a statute should not be invalidated under a doctrine of judicial review unless its invalidity is not "open to rational question").

<sup>114</sup> See Barak, *supra* note 6, at 126.

<sup>115</sup> See Mark Tushnet, *From Judicial Restraint to Judicial Engagement: A Short Intellectual History*, 19 GEO. MASON L. REV. 1043, 1043–1047 (2012).

constitutional context. A broad doctrine may not protect or include every aspect of the existing constitution, but it will generally protect the core values or principles that stand behind each aspect of the constitution. In applying such a doctrine, a court will not be confined to invalidating amendments that earlier constitutional drafters, or judges, foresaw as a potential threat to democracy. Nor will it be limited to invalidating amendments that, standing alone, have a necessary tendency to undermine democracy. Instead, a court will be free to evaluate the impact of a particular amendment on democratic norms by reference to the entire context in which such amendment operates. This will include current political conditions and realities, and any previous or concurrent amendments with the potential to have an adverse impact on democracy. There will thus be no truly abusive constitutional act that cannot be brought under the umbrella of such a principle.

At the same time, a weakened doctrine attempts to address the other danger associated with a narrow (but strong) doctrine of unconstitutional constitutional amendment, namely that the doctrine will be applied so expansively as to cover any amendment with the *potential* to have an adverse impact on democracy. The key question a judge should ask is the following: based on the actual impact of this amendment and what has come before it or is occurring in parallel in a particular country, does this particular amendment clearly pose a substantial threat to democracy or to democratic constitutionalism? In the mold of Thayerian review of ordinary legislation, the doctrine asks whether any reasonable observer would likely conclude that there was a substantial threat to the democratic order, regardless of their particular conception of democracy.<sup>116</sup> If the answer is yes, the doctrine suggests that a court should invalidate the particular amendment. But if the answer is instead that reasonable minds could differ, a court should exercise restraint and decline to apply the doctrine.

The broad but weak approach seems to be closest to the way the doctrine is actually viewed in places like Colombia and India. Neither court has attempted to delineate a narrow or exhaustive list of fundamental constitutional principles *ex ante*, but instead both have sought to work these principles out on a case-by-case basis. A good example is the relatively broad doctrine endorsed by the Constitutional Court in Colombia: the court treats any element of the Constitution as part of the “defining core” if it can be considered as an “essential and defining feature of the Constitution considered as a whole.”<sup>117</sup> The difference between the result of the court’s decision in the *First and Second Term-Limits Cases* can also be seen as adopting a broad and context-sensitive definition of the fundamental requirements of democracy: the court’s decision that a third term would have limits on independent institutions that a second term would not was based on the cumulative effect of the amendments.<sup>118</sup> Similarly, both the Colombian Constitutional Court and Indian Supreme Court have counseled substantial restraint in the use of the doctrine, in order to prevent it from

<sup>116</sup> See Thayer, *supra* note 113.

<sup>117</sup> See Decision C-1040 of 2005, § 7.10.3.

<sup>118</sup> See *supra* Section 2.3(a).

collapsing into a form of super-judicial-supremacy or calcifying the existing constitutional order.<sup>119</sup>

The gap is between the weak form of the doctrine endorsed by the courts and the broader use of the doctrine sometimes seen in practice. The doctrine is vague and hard to operationalize at two distinct stages: (1) the identification of which principles and values must be protected against substantial adverse impact, and (2) the determination of whether a given constitutional amendment actually has such a substantial impact. Both determinations necessarily rely on careful consideration of the domestic context. In the Colombia *Second Re-election Case*, for example, the court's determination was based both on Colombian history and on the likely impact of extra terms on the rest of the institutional order. The court considered, in light of the country's own constitutional history, that the separation of powers values impacted by the change were fundamental to the constitutional order, and in particular that the threat of presidents overstaying their terms was a focus of domestic constitutionalism.<sup>120</sup> It also concluded, in light of the domestic institutional design, that a second extension of term limits would substantially impact that value. For example, the change would likely allow Uribe to control most or all of the institutions that were supposed to check his power.<sup>121</sup>

The problem is that purely domestic considerations may lead a court to err on the side of over-inclusion both in the determination of which values and principles to protect and in the determination of whether those values or principles are seriously threatened by a given change.<sup>122</sup> When a country has had a particular institutional arrangement in place for a long time, it may sometimes appear to judges that the arrangement is in fact necessary to—or definitional of—democracy. If a particular institution or practice has always been part of the democratic arrangements of that country, or has been for a long time, one natural inference may be that this is because of the importance of the relevant institution or arrangement to democracy. But this need not be true. Institutional arrangements may endure in some cases as a matter of pure chance, or political contingency.

Engagement with transnational constitutional law is useful as a limitation on this threat of overuse. By engagement, we mean judicial consideration of institutional practices and jurisprudence across a range of other democratic constitutional systems. This kind of consideration should be used as a second look or check against an

<sup>119</sup> See, e.g., Decision C-1040 of 2005, § 7.10.4.1 (“[This test] demands very careful action from the constitutional judge, who although indeed possessing the guardianship of the integrity of the Constitution, cannot forget that, in the design realized by the constituent power, the balancing about changes that may be made to the constitution in accord with the times was entrusted, without material limits, to the power of constitutional reform.”).

<sup>120</sup> See, e.g., Decision C-141/10, § 6.3.5.1.3 (reviewing notable incidents of presidents seeking to exceed their terms in Colombian constitutional history).

<sup>121</sup> See *id.* § 6.3.6.1.1.

<sup>122</sup> Another arguable example, in the context of constitutional commitments to secularism, is the decision of the Turkish Constitutional Court in the *Headscarf Case*. See, e.g., 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).

initial judicial impulse that a value impacted by a constitutional change actually is fundamental to democracy, or that a given constitutional change actually does pose a threat to that value.

First, comparative engagement can be helpful for identifying whether a value truly is fundamental. For example, in the case involving incumbent civil servants, the Colombian court held that “meritocracy” was a fundamental value that must be protected against substitution.<sup>123</sup> Engagement with transnational constitutionalism would have been helpful in casting doubt on that conclusion. While most legal orders seem to have some version of competitive examination and tenure protection for civil servants in order to improve and depoliticize the bureaucracy, few seem to view it as a fundamental or overriding constitutional value. In contrast, in the re-election cases the court focused largely on the principle of the separation of powers. Consideration of other constitutional orders, both within and outside of Latin America, would tend to confirm that the court was seizing on a truly fundamental value. Even modern parliamentary systems seem to focus on some version of checks on legislative power, either through courts or other independent ombudsmen.<sup>124</sup>

More commonly, engagement with transnational law will help a court with a second question: does a constitutional amendment at issue, either alone or in conjunction with a package of reforms, actually constitute a substantial threat to a fundamental value identified by the court? For example, in the Indian case *Golak Nath*, the court found that market-based compensation for any taking or appropriation of property was a core part of a right to property and thus formed an unamendable provision of the Indian Constitution. Prior to independence, under British rule, property was protected in India by a mix of common law and statutory arrangements that invariably provided market-based compensation for any (official or routine) taking of property.<sup>125</sup> Most of the judges who sat on the Supreme Court of India in its early decades were also lawyers who had been trained in and worked in this tradition.<sup>126</sup> The perception for these judges may well have been that market-based compensation was such a longstanding part of the British tradition of constitutionalism and the rule of law that it had to be a fundamental part of constitutionalism. Engagement with transnational material would have been helpful in showing that democratic regimes around the world rely on a variety of different mechanisms for protecting rights to property, and thus in casting some doubt on this conclusion.

In Taiwan, in 2000, the Constitutional Court applied an unconstitutional amendment doctrine to invalidate changes to the term and method of election of the National

<sup>123</sup> See Decision C-588 of 2009, §§ 6.2.2.

<sup>124</sup> See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 663 (2000) (noting that most modern parliamentary systems endorsed a version of “constrained parliamentarism”); Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531 (2009) (noting that it was in fact possible to create a separation of powers within a parliamentary system, and was commonly done).

<sup>125</sup> See AUSTIN, *supra* note 69, at 124 (discussing this background and English common law notions of market-based takings).

<sup>126</sup> See George H. Gadbois Jr., *Indian Supreme Court Judges: A Portrait*, 3 L. & SOC’Y REV. 317 (1968).

Assembly, a complex institution that possessed some powers of constitutional amendment and impeachment but which was much weaker than the country's main parliamentary chamber (the Legislative Yuan).<sup>127</sup> The court ultimately relied on a mix of procedural and substantive grounds in reaching this conclusion.<sup>128</sup> But on the substance it found that moving toward a method of indirect election—a system of proportional representation based on a party's representation in the Legislative Yuan—was a violation of “the constitutional order of democracy.”<sup>129</sup> While there were important arguments against these particular changes,<sup>130</sup> their basic direction could be seen as *pro-*, rather than *anti-*, democratic. The National Assembly was an institution inherited from China, which had often served to limit the potential of locally elected democratic governments to pursue their agenda.<sup>131</sup> Limiting the status of the National Assembly could thus have been seen as a move toward greater democratic self-government in Taiwan.<sup>132</sup> (Indeed, the Assembly was entirely abolished in 2005, by way of a further constitutional amendment.<sup>133</sup>)

The Taiwanese court saw the relevant changes as undermining fundamental commitments to democracy, as understood in Taiwan. Broad engagement with transnational practices would have suggested that strong reliance on norms of direct elections for additional parliamentary or constituent chambers is not necessarily essential to democracy. While the National Assembly is a more complex institution than a standard second chamber or Senate, Meg Russell found in a survey of 190 national parliaments in 2011, that, out of 78 bicameral systems, only 21 had a system of pure direct election.<sup>134</sup> Seventeen in fact had a system of pure indirect election; and a further 17 a system of appointment for members of the upper house.<sup>135</sup> Engaging with the full diversity of electoral systems, in this context, might have made the court more hesitant to conclude that full direct election of the National Assembly was a necessary requirement of democracy, even in the particular circumstances of Taiwan.<sup>136</sup>

And in a case originating from Nicaragua, an international court (the Central American Court of Justice) ruled that constitutional amendments that strengthened the National Assembly relative to the president were unconstitutional constitutional

<sup>127</sup> See JY Interpretation No. 499 (2000/03/24).

<sup>128</sup> See *id.*

<sup>129</sup> See *id.*

<sup>130</sup> See Yun-Han Chu, *Democratic Consolidation in the Post-KMT Era: The Challenge of Governance*, in TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS 88, 90–93 (Muthiah Alagappa ed., 2001).

<sup>131</sup> See, e.g., JOHN F. COPPER, CONSOLIDATING TAIWAN'S DEMOCRACY 15 (2005).

<sup>132</sup> For broader consideration of these trends, see TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106–113 (2003).

<sup>133</sup> See *Constitutional Changes Approved in Taiwan*, N.Y. TIMES, June 8, 2005, available at [http://www.nytimes.com/2005/06/07/world/asia/07iht-taiwan.html?\\_r=0](http://www.nytimes.com/2005/06/07/world/asia/07iht-taiwan.html?_r=0).

<sup>134</sup> See Meg Russell, *Elected Second Chambers and Their Powers: An International Survey*, 83 POL. Q. 117, 118–120 (2012).

<sup>135</sup> See *id.*

<sup>136</sup> For the degree to which the opinion did explicitly engage with at least some transnational sources, in ways that are relatively unusual in Taiwan, see Wen-Chen Chang & Jiunn Rong-Yeh, *Judges as Discursive Agent: The Use of Foreign Precedents by the Constitutional Court of Taiwan*, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES 373 (Tana Groppi & Marie-Claire Ponthoreau eds., 2013).

amendments because they violated the principle of the separation of powers, essentially converting a presidential regime into a parliamentary one.<sup>137</sup> The amendments gave the Assembly the power to confirm presidential appointments for members of the cabinet and other posts. Appointment of certain other positions, like the Superintendent of Banks, was placed entirely in the hands of the legislature. Finally, a super-majority of 60 percent of the Assembly was given the power to remove members of the cabinet.<sup>138</sup> The court's conclusion that these changes constituted a violation of the principle of separation of powers would have been undercut by consideration of comparative constitutionalism. Presidential systems demonstrate a wide range of arrangements for appointment and removal procedures. Some systems, including the United States, require legislative approval for cabinet positions; many others do so for quasi-independent institutions like a Superintendent of Banks.<sup>139</sup> Many presidential systems allow for legislative censure or other removal procedures for executive officials.<sup>140</sup> In comparative perspective, the proposed changes appear less likely to be an unconstitutional constitutional amendment than they would be in isolation.<sup>141</sup>

In contrast, the Colombian re-election cases give some support to the value of comparative engagement as a limiting principle for the doctrine. In both cases, the court turned to comparative experience as part of its reasoning on whether the relevant extension in term limits actually posed a substantial threat to the separation of powers. In the *First Re-election Case*, the court stressed the fact that two-term presidential systems, although rare in Colombian constitutional history, were not unusual in the rest of the world and in particular that “there was no definitive consensus” within the region on one-term versus two-term presidencies.<sup>142</sup> It also noted that these differing choices reflected competing policy concerns, for example about the gains from potentially more coherent policy being weighed against the risk of abuse of power. In the *Second Re-election Case* the court in a very brief survey noted a normal policy range in the interaction of term limits and term lengths of between four and eight years in pure presidential systems, particularly within the region.<sup>143</sup> It thus held that the current

<sup>137</sup> See Expediente 69-01-03-01-2005, Corte Centroamericana de Justicia, Mar. 1, 2005, available at <http://cendoc.cj.org.ni//ExpedientesFichaLectura.aspx?id=92>.

<sup>138</sup> For background on the case, see Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structures and Revision: A Preliminary Appraisal*, 62 U. MIA. L. REV. 417, 466–67 (2008). Note that the Nicaraguan constitutional text differentiated “partial” from “total” reform, and establishes different procedures for the two routes. See CONST. NICARAGUA, arts. 193, 194.

<sup>139</sup> See, e.g., U.S. CONST., art. II, § 2; CONST. COL., art. 150, cl. 7 (giving the Congress the power to determine appointment procedures for any Superintendent).

<sup>140</sup> See, e.g., CONST. ARG., § 101 (giving the president power to censure and remove the chief of the Cabinet, although not other cabinet posts, by a vote of an absolute majority); CONST. COL., art. 135, § 7 (allowing the Congress to vote no-confidence in ministers through an absolute majority of both chambers, which results in removal).

<sup>141</sup> The case of course also raised important issues regarding the proper scope of international involvement in contested issues of domestic constitutional interpretation. See Schnably, *supra* note 185, at 459–460; Rosalind Dixon & Vicki Jackson, *Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests*, 48 WAKE FOREST L. REV. 149 (2013).

<sup>142</sup> See Decision C-1040 of 2005, § 7.10.4.1(iii).

<sup>143</sup> See Decision C-141 of 2010, § 6.3.5.1.1.

institutional design of eight years constituted an “outer limit, beyond which there are serious risks of perversion of a regime.”<sup>144</sup> The comparative survey in the first decision helped to check any conclusion that the amendment allowing two terms, although an outlier within domestic constitutional history, was a substantial threat to democracy. The comparative survey in the second decision helped to confirm that the allowance of twelve consecutive years in office may be a substantial threat.

Our suggestion that transnational constitutional law is useful as a limiting principle raises several key questions. First, it raises a denominator problem: which countries, defined either geographically, by shared history or in terms of types of political system, will serve as a proper basis for comparison? This decision, we suggest, is ultimately best attacked case-by-case, rather than in the abstract. In the re-election cases, for example, the court focused on presidential systems, and it focused largely although not entirely on Latin America. Both choices are defensible. Term limits in pure presidential systems are not directly comparable to term limits in parliamentary (or semi-presidential) systems; the president in a pure presidential system has exceptional powers and independence from the rest of the political system. Further, the issue of executive overreaching may have a special historic significance in Latin America, making it reasonable for the court to focus largely on that region.<sup>145</sup>

With these caveats, however, the process of comparison should aspire to be relatively broad-ranging or comprehensive within the world of constitutional democracies. Otherwise, the danger may be that, in selecting a particular subset of countries for comparison, a judge will be drawn to countries that tend to confirm their preexisting bias about the kinds of features that are fundamental to democracy.<sup>146</sup> Indeed, if comparison is too narrow or selective, it may even tend to encourage judges to apply an even less democratically sensitive version of the doctrine—because of an ability to generate apparent additional support for the doctrine’s application in (highly selected) comparative sources.<sup>147</sup> The relevant process of comparative engagement we propose can thus best be understood as a form of truly transnational engagement: a commitment to anchoring judgments about the fundamental nature of certain institutional arrangements to the existence of some degree of overlapping consensus among a large number of democratic countries as to the appropriateness or importance of such arrangements, or, conversely, to anchoring judgments about the unconstitutionality

<sup>144</sup> *Id.* § 6.3.5.1.3.

<sup>145</sup> Although the court might have considered presidential systems with similar histories of dictatorship outside of the region, like the Philippines. See Susan Rose-Ackerman, Diane Alferez Desierto, & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 *BERKELEY J. INT’L L.* 246 (2011).

<sup>146</sup> For a similar critique of the Czech Constitutional Court’s engagement with comparative sources as unduly narrow in applying the doctrine, see Kieran Williams, *When a Constitutional Amendment Violates the “Substantive Core”: The Czech Constitutional Court’s September 2009 Early Elections Case*, 36 *REV. CENT. & E. EUR. L.* 33, 48–50 (2011).

<sup>147</sup> This is, of course, a general danger of transnational comparison, at least when done crudely or disingenuously. See, e.g., Ernest A. Young, *Foreword—Comment: Foreign Law and the Denominator Problem*, 119 *HARV. L. REV.* 148 (2005); Roger P. Alford, *In Search of a Theory of Constitutional Comparativism*, 52 *U.C.L.A. L. REV.* 639 (2006).

of proposed changes to the relative *absence* of such newly proposed arrangements in most constitutional democracies.

A second key question deals with the relationship between domestic and transnational constitutionalism. A danger with transnational engagement is that it may undervalue institutional arrangements or constitutional principles that are fundamental despite being distinctive to particular constitutional orders. The strongest possible form of the transnational engagement requirement, for example, would hold that courts could *only* invalidate constitutional amendments if they instantiated constitutional principles or practices not found in any relevant constitutional order.

But this is not the process of comparison that we would recommend or that most courts are likely to adopt. As Jackson argues, cross-national comparison may be useful partly for sharpening ways in which domestic constitutional values or institutions truly are both distinctive and fundamental.<sup>148</sup> For example, a German constitutional judge considering the importance of party-banning and the other institutions of militant democracy across countries might find little consensus as to whether these institutions should exist in democratic orders. In light of distinctive features of German constitutional history, however, there is still a strong argument that these features are fundamental to German constitutionalism.<sup>149</sup> Transnational engagement will nonetheless act as a second look, forcing constitutional judges to articulate compelling reasons why a value or institution is fundamental despite not being seen as essential elsewhere.

A related qualification to our recommendation arises from amendments that are packaged or sequenced through time in order to evade judicial review. The “frankenstate,” where political actors cobble together multiple elements found in other judicial systems in a deeply anti-democratic way, is a case in point.<sup>150</sup> This kind of interaction effect poses a difficult challenge to any theory of the doctrine of unconstitutional constitutional amendment. Too rigid an application of a doctrine of transnational anchoring could mean that this version of the doctrine is particularly susceptible to the difficulty. Take the 2011 changes to the Hungarian Constitution. Taken individually, all of these changes had some global precedent, or support, in other constitutional democratic systems: there has always been significant variation among democratic systems in the jurisdiction they give to courts to engage in judicial review *ex ante* or *ex post*, especially in regard to budgetary or economic matters. Similarly, constitutional courts in democratic systems are appointed in a range of different ways, with some countries adopting a model of pure executive control, others a model of pure judicial or parliamentary control, and others a hybrid of these mechanisms.<sup>151</sup> The same can

<sup>148</sup> See VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 103–116 (2009). Jackson is writing in the general context of constitutional interpretation, but the benefits of transnational engagement may be especially important in the particular context of unconstitutional constitutional amendment, where standards for use of the doctrine are particularly scarce and the dangers of doctrinal overuse especially acute.

<sup>149</sup> See, e.g., Russell A. Miller, *Balancing Security and Liberty in Germany*, 4 J. NAT'L SEC. L. & POL'Y 369 (2010).

<sup>150</sup> See *supra* text accompanying note 149 (discussing the “frankenstate” problem in the context of Hungary).

<sup>151</sup> See, e.g., ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 47–49 (2000).

be said for the appointment of independent agencies. A mechanical comparison of the various constitutional changes in Hungary with global constitutional practices would thus lead to the conclusion that none of these changes was a threat to constitutional democracy, when in fact there is significant evidence that—in combination—these changes are not seen elsewhere and do pose a significant threat.<sup>152</sup>

If a norm of transnational anchoring is applied in a more sophisticated way, however, it can offer at least a partial response to this limitation. Even if all elements of a given program, taken individually, are found elsewhere, the combination of elements may not be.<sup>153</sup> Or even if they are found elsewhere, they have been enacted in a quite different context, where political actors had far less transparently anti-democratic or self-interested political motives. Thus, a sufficiently flexible and *contextual* approach rooted in transnational norms may be effective against this sort of threat.<sup>154</sup> Litigants and judges must pay attention not only to the practices and principles at issue in a given constitutional amendment, but also to the institutional context within which an amendment is proposed. A given practice may occur elsewhere, but only in conjunction with a broader set of supporting institutions: say, weak courts with other strong checking institutions like ombudsmen and human rights commissions. If litigants and judges find that internationally, an institutional practice exists but only in conjunction with a broader set of supporting institutions, and those supporting institutions are either absent or in the process of repeal domestically, this supports judicial use of the doctrine of unconstitutional constitutional amendment. In contrast, if the supporting institutions are present domestically, this counsels judicial restraint. A sophisticated vision of the doctrine does put more pressure on judicial competence, but we would expect these costs to be manageable as both judges and litigants (who can provide judges with relevant information) become accustomed to this kind of transnational engagement.

Finally, we note that our proposal is somewhat similar to one made by Lech Garlicki and Zofia Garlicka, who argue that binding or emerging principles of international law could be used as a basis for judging the substantive legitimacy of constitutional amendments that entrench on individual rights.<sup>155</sup> There are important differences, however, in looking at rules of international law versus surveying practice across democratic constitutional systems. Our approach may be more pragmatically workable, because international law has tended not to concern itself with the domestic

<sup>152</sup> See, e.g., *Hungary Court Says Judge Retirement Law Unconstitutional*, REUTERS, July 16, 2012 (discussing criticism by the European Union), available at <http://uk.reuters.com/article/2012/07/16/uk-hungary-judges-court-idUKBRE86F0LS20120716>.

<sup>153</sup> This is more or less how the Venice Commission responded to Fidesz's protestations that the elements of its program were all found elsewhere. See Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 of the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, Mar. 16–17, 2012), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDLAD\(2012\)001](http://www.venice.coe.int/webforms/documents/?pdf=CDLAD(2012)001).

<sup>154</sup> We are indebted to Vicki Jackson for pressing us on this point.

<sup>155</sup> See Lech Garlicki & Zofia V. Garlicka, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, 44 ISR. L. REV. 343 (2011).

structural norms that are the linchpin of efforts at democratic erosion. Thus, in many cases the relevant rules of international law may not exist. Further, our approach more clearly focuses on inhibiting doctrinal overuse because it focuses on sources that are just as likely to reflect transnational dissensus or non-convergence, as well as convergence.

As the complexities explored here make clear, it is too strong to speak about transnational engagement as providing a binding *constraint* on judges. The value of such comparison is not that it strictly binds or constrains judges. Rather, it is that comparison has the capacity to provide a valuable cue, or check, to judges about their potential biases or blind spots about the difference between what is truly fundamental to a democracy of their particular kind, and what merely appears so based on long history or the judge's own subjective preconceptions.

## 5. Conclusion

We focus in this article on a well-known doctrine in comparative constitutional law: the doctrine of unconstitutional constitutional amendment. We do so from the vantage point of a particular concern about democracy, and the capacity of such a doctrine to advance or detract from democratic constitutional values. Constitutional amendment procedures, we show, are often used to advance distinctly anti-democratic constitutional ends. Imposing substantive, judicially enforced limits on this kind of abusive constitutional action can thus be directly democracy-promoting: it can help slow down, or increase the costs, of such action, in a way that ultimately reduces both its effectiveness once commenced, and likelihood of success at the outset. At the same time, we show how many uses of the doctrine seem to interfere with legitimate democratic values and uses of amendment. Comparative experience with the doctrine shows that it is routinely overused against constitutional changes that appear unlikely to pose a substantial threat to the fundamental values of a democratic order. Indeed, it may be that most uses of the doctrine, in most countries where it is active, have been unnecessary.

This article takes a modest step towards reconciling these advantages and disadvantages by focusing on ways to achieve limitations on the doctrine's scope. A constitutional change should only be struck down by judges if they are confident that that change, either alone or in conjunction with other proposed changes, poses a substantial threat to the democratic order. This determination depends on detailed knowledge of domestic constitutional history and design, but transnational comparison may be a valuable check against overuse. Transnational engagement may help to determine whether an identified value truly is fundamental, or whether a given institutional change truly poses a substantial threat to that value. Engagement is not a cure-all, but it is a step towards a more limited and justifiable doctrine.

When done right, in a “deliberative” or “reflective” mode, almost all processes of constitutional comparison have the capacity to promote more reasoned decision-making by domestic judges, or an approach by judges that is more self-aware of the judge's

own ingoing biases or perspective.<sup>156</sup> This is one of the key arguments in favor of comparative engagement in a range of constitutional settings.<sup>157</sup> What we are proposing in terms of comparative engagement seeks to fully exploit this “checking” function by using comparison as a means of highlighting potential judicial biases about the representativeness of national democratic practices within the universe of democratic practices generally. Our proposal is a natural extension of existing ideas about constitutional comparison, but one that connects it to new and interesting ideas about the role of certain deliberative processes, on the part of judges, in promoting more principled judicial decisions.

A topic for future consideration is how these same ideas might apply to attempts by constitutional courts, or indeed constitutional “outsiders,” to limit potentially abusive forms of constitutional replacement.<sup>158</sup> As Mark Tushnet notes, no positive legal norm can completely constrain a process of constitutional replacement.<sup>159</sup> Yet it still may be possible for courts or other actors to employ legal doctrines to slow down or discourage certain forms of anti-democratic constitutional replacement. An important question is whether transnational anchoring could either help ground or limit the role played by law and legal institutions in processes of replacement. By investigating this topic in future work, we also hope to explore further the relationship between processes of constitutional replacement and the effectiveness of a doctrine of unconstitutional constitutional amendment.

Finally, in proposing an unconstitutional amendment doctrine grounded in evolving transnational constitutional norms, we are also contributing to a broader debate about constitutional design. A doctrine of unconstitutional constitutional amendment is a close relative of more formal, *ex ante* attempts to create explicit forms of “tiering” in a constitutional amendment rule. One of the distinguishing features of the doctrine, however, is that it can be developed either at the stage of formal constitutional design, by constitutional drafters, or at a later stage of judicial interpretation. The same is true for the notion of a transnational anchoring as a potential “check” on the doctrine: a constitution could at the outset seek to tie judgments about the substantive validity of amendments to transnational norms. One of the contributions of a study of this doctrine, therefore, is to remind us about the permeability between processes of constitutional design and interpretation. Formal acts of constitutional design will mean little without some form of sympathetic interpretation by courts or subsequent legislators.<sup>160</sup> Equally, many acts of constitutional interpretation, particularly in the early years of a constitution, will closely resemble earlier acts of formal

<sup>156</sup> See Vicki C. Jackson, *The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 INDIANA L. J. 819 (1999).

<sup>157</sup> See Jackson, *supra* note 156.

<sup>158</sup> See Dixon & Jackson, *supra* note 141.

<sup>159</sup> See Mark Tushnet, *Peasants with Pitchforks, and Toilers with Twitter: Constitutional Revolutions and the Constituent Power*, 13(3) INT’L J. CONST. L. 639 (2015).

<sup>160</sup> See, e.g., Rosalind Dixon, *Partial Constitutional Codes* (2014) (unpublished manuscript, on file with author).

constitutional design: they will involve a mix of legal and political judgment, and creativity as well as fidelity to past actors, all in the name of helping create and consolidate a new democratic polity. A focus on the doctrine of constitutional unamendability provides one helpful lens through which to see this relationship. As a doctrine that is equally the product of formal design choices and judicial interpretation, it helps remind us of the deep connections between interpretation and design in the project of democratic constitution-making.