The Judicial Role in Constitutional Amendment and Dismemberment

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Thank you for your generous invitation to participate in this International Conference of the Constitutional Court of Taiwan. I am grateful to the Judicial Yuan and to the Judges Academy for hosting me, and also to Chi-Hui Lin for coordinating my visit.

I am especially grateful to Justice Professor Hwang of this Court, a distinguished scholar of public law and international law at the National Taiwan University prior to his appointment to the Court. Though we are divided by an ocean, we have been fruitful collaborators on the new *Global Review of Constitutional Law*, an annual publication that has become an important resource for the study of public law around the world. The *Review* gathers individual country reports on constitutional law developments during the past calendar year. The authors include academics and judges from each jurisdiction, and often the reports are co-authored by judges and scholars. These reports have produced a first-of-its-kind volume that offers our readers systemic knowledge that has been previously limited mainly to local networks and unavailable to a broader readership. Justice Hwang is a co-author of the annual report on Taiwan.

I thank Justice Hwang for his friendly collaboration, for his significant efforts, and for his enthusiastic commitment to this transnational exchange on important topics in constitutional law.

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My subject today is constitutional change. We will focus on the distinction between amendment and dismemberment—a distinction that lies at the core of formal constitutional change. Sometimes entrenched explicitly in constitutional texts and sometimes not, this distinction entails implications both for how to change a constitution and also for whether a given constitutional change is legally valid and democratically legitimate. These implications are rooted in constitutional theory, reflected in political practice, and acknowledged in judicial decisions that interpret and ultimately police the boundary separating amendment from dismemberment.

Today we will put into a larger global context the Taiwan Constitutional Court's interpretation of the power to amend the Constitution of the Republic of China, a constitution that just recently marked its seventieth anniversary. Our approach will be comparative, doctrinal, historical and theoretical. The title of my remarks is fitting for a conference on the Constitutional Court of Taiwan: *The Judicial Role in Constitutional Amendment and Dismemberment*.

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Let me begin where we are standing today, in Taiwan, with a case decided by this Court.

The Constitution codifies no formal limitations on constitutional amendment. Yet the absence of a formally unamendable rule has not deterred the Taiwanese Constitutional Court from striking down a series of constitutional amendments.

In one case, the issued concerned a set of amendments adopted by the National Assembly in 1999. The Court subsequently invalidated these amendments on both procedural and substantive grounds. The case was Constitutional Interpretation No. 499, decided in the year 2000.

The constitutional challenge began when members of the Legislative Yuan filed a petition arguing that the amendment passed by the National Assembly—where votes had been cast in anonymous ballots in the second and third readings—violated the Constitution's codified amendment rules. The challengers argued also that there were irregularities in the vote because some of the amendment proposals had been defeated in the second reading but were still voted on again in the third.

The amendment moreover required the National Assembly to be constituted according to a proportional allocation given to political parties on the basis of votes they had received in the latest election of the Legislative Yuan, a separate constitutional organ. The challengers claimed that, as a result, those persons unaffiliated with a political party would be ineligible for selection to the National Assembly.

The challengers raised other concerns, including that the amendment improperly extended term limits and also sowed confusion about the duration of those limits.

The Court held that the amendment was unconstitutional. Anonymous balloting, the Court explained, violated the principles of "openness and transparency" in the legislative process.

As for the voting irregularities, the Court held that they "contradict the fundamental nature of governing norms and order that form the very basis and existence of the Constitution, and are prohibited by the norms of constitutional democracy."

The rule of proportional representation in the National Assembly based on political party votes received in Legislative Yuan elections violated the principles of "democracy and constitutional rule of law."

The extension of term limits likewise violated the principle of "democratic state of constitutional rule of law."

The Court also explained in general terms how it reached the conclusion that these amendments were unconstitutional:

> Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. . . . The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.

As in other cases around the world where courts have invalidated a constitutional amendment, here in this case the Taiwanese Constitutional Court set the Constitution itself as the standard for lawful constitutional change. The Court explained it cannot allow constitutional changes that are inconsistent with the Constitution because such changes would destroy the Constitution as it is presently understood.

Though the Court did not describe its decision in this way, the Court invalidated this constitutional change because the change was a constitutional *dismemberment*, not a constitutional *amendment*. The Court saw its role as protecting the Constitution from changes whose effect was a dismemberment of the Constitution rather than a mere amendment of it.

This distinction between amendment and dismemberment is the foundation for the theory and doctrine of an unconstitutional constitutional amendment. In other words, a court will hold that a constitutional amendment is unconstitutional because the change is not properly a constitutional amendment but more accurately understood as a constitutional dismemberment.

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The distinction between a constitutional amendment and a constitutional dismemberment is central to the study of constitutional change. Scholars have suggested how to differentiate one from the other, constitutional designers have entrenched separate procedures for each, and judges have applied both of these concepts to actual cases and controversies.

Yet what lurks beneath this distinction is a problem of classification: how can we identify a change as either an amendment or as a dismemberment ?

The answer, I wish to suggest, resides in how we understand constitution-making. An amendment is a constitutional change that coheres with the existing constitution and its presuppositions. An amendment is a change whose outcome fits comfortably within the established framework of the constitution. An amendment, then, may be understood as an effort to continue the constitution-making project in the path that began at the founding moment.

Constitutional amendments come in two types: they can be corrective or elaborative. Properly defined, a constitutional *amendment* is a correction made to better achieve the purpose of the existing constitution. The Twelfth Amendment to the United States Constitution, for example, is properly identified as an amendment. The founding Constitution required each presidential

elector to cast two votes for president; the candidate with the most votes would become president and the runner-up, vice president. The election of 1800 exposed the design flaw in this arrangement when two candidates earned the same number of electoral votes. It took three dozen ballots of voting by state delegations for the House of Representatives to ultimately break the tie and select Thomas Jefferson as president. The Twelfth Amendment was designed to reduce the possibility of a tie by requiring electors to differentiate their selections for president and vice-president. It corrected a technical flaw in the original Constitution.

A constitutional amendment can also be elaborative. An elaboration is a larger change than an amendment insofar as it does more than simply repair a fault or correct an error in the constitution. Like a correction, an elaboration continues the constitution-making project in line with the current design of the constitution, though instead of repairing an error in the constitution an elaboration advances the meaning of the constitution as it is presently understood. For example, the Nineteenth Amendment is best understood as an elaborative amendment: it advances the meaning of the Fourteenth and Fifteenth Amendments, making good on the promise of equality in these two Reconstruction Amendments, though here that was promise was extended to a new class of voters not intended for that protection at the time of the proposal and ratification of the revolutionary equality amendments. The Nineteenth Amendment prohibits gender discrimination in voting, an expansion of the franchise that was not corrective in the sense of fixing a design flaw in the constitution but was nonetheless consistent with a plain reading of equality rights as well as the existing framework of the constitution.

A constitutional dismemberment, by contrast, is a constitutional change that departs from our understanding of what the constitution means and indeed allows by its spirit and design. It seeks to transform the constitution into something it is not, resulting in an extraordinary change that is inconsistent with the constitution's framework and presuppositions. A constitutional *dismemberment* is incompatible with the existing framework of the constitution because it seeks to achieve a conflicting purpose. It seeks deliberately to disassemble one or more of a constitution's elemental parts. A constitutional dismemberment alters a fundamental right, a load-bearing institutional structure, or a core feature of the identity of a constitution. It is a constitutional change understood by political actors and the people to be inconsistent with the constitution at the time the change is made. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution without breaking legal continuity.

Constitutional dismemberment is a descriptive concept, not a normative one. A constitutional dismemberment can either improve or weaken liberal democratic procedures and outcomes. For example, the Civil War Amendments to the United States Constitution are better understood as dismemberments. The Thirteenth, Fourteenth, and Fifteenth Amendments consolidated the Union victory over the Confederate States and collectively wrote into the Constitution a ringing declaration of the equality of all persons, if only as an aspiration. Their most important function, however, was to demolish the infrastructure of slavery in the original Constitution. They tore down the major pillars of America's original sin of slavery: the Three-Fifths Clause, the Fugitive Slave Clause, the Migration or Importation Clause, and the Proportionate Tax Clause.

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When courts are confronted with a constitutional change they determine to be a dismemberment, many courts around the world have invalidated the change because they understand it to be something more than an amendment, something qualitatively different from an amendment—a kind of constitutional change that cannot lawfully be made as a constitutional amendment because it is neither corrective nor elaborative. It is more accurately understood as a transformation. Many courts will not permit political actors to make a constitutional dismemberment because such a transformative change amounts to unmaking the constitution. The reason why Courts will invalidate such changes is not because political actors cannot choose to unmake the constitution where they have the support of the people. It is rather because political actors cannot seek to unmake the constitution using the procedures of constitutional amendment. They must instead write an altogether new constitution—a new constitution that is validated and legitimated by the very process of a new constitution-making effort.

Where courts have relied on the doctrine of unconstitutional constitutional amendment either to invalidate a constitutional amendment or to assert the power to do so, they have often drawn a line separating a constitutional change that amends the constitution from one that destroys it. Constitutional dismemberment is the destruction that courts are preventing when they invalidate an amendment.

Like the Taiwan Constitutional Court, courts in jurisdictions as varied as Belize, the Czech Republic and India have refused to authorize constitutional changes that would destroy the constitution with recourse only to the ordinary procedures of formal constitutional amendment. Let me tell you about a case in each of these three jurisdictions. Note in each of these cases the careful choice of words by each of these high courts. Judges say they are annulling constitutional changes that would "destroy" the constitution—and this courts cannot allow because the task of judges on high courts is to preserve the constitution and to protect it from unconstitutional changes.

In Belize, the Supreme Court invalidated the Eighth Amendment—a change that would have given the legislature plenary power to alter the constitution, with no judicial review. The Court ruled that the change was "unlawful, null and void" because it failed to respect the "balance and harmony" intended by the Constitution and that in the hands of the legislature this power could be used to "remove or destroy any of the basic structures of the Constitution of Belize." Here are the words of the Court, explaining why the amendment was unconstitutional:

> [E]very provision of the Constitution is open to amendment, provided the foundation or basic structure of the Constitution is not removed, damaged or destroyed. … I therefore rule that even though provisions of the Constitution can be amended, the National Assembly is not legally authorized to make any amendment to the Constitution that would remove or destroy any of the basic structures of the Constitution of Belize.

Unlike the Belizean Constitution, the Constitution of the Czech Republic entrenches a formally unamendable rule. Formal unamendability imposes a textual prohibition on

constitutional amendment, even where constitutional actors could assemble the majorities needed to amend the rule value, principle, structure, symbol or institution that is entrenched against amendment. The formally unamendable rule in the Czech Constitution is paired with an interpretative rule, one combining with the other to prevent amending actors from altering, and judges from interpreting, the Constitution in a way that undermines the democratic character of the state. Here is the relevant text of the Czech Constitution:

> Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.
>
> Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.

Both of these rules were recently put to the test when the Constitutional Court evaluated the constitutionality of an amendment that sought to shorten the term of the Chamber of Deputies. The Court invalidated the amendment, and with it the decision of the President to call new elections for the Chamber. The basis of the Court's decision was its duty, in its view, to protect the material core of the Constitution as reflected in the unamendable rule entrenching democracy.

The claim against the amendment was that it was inconsistent with the "constitutional order" insofar as it changed "an essential requirement for a democratic state governed by the rule of law, which, under [] the Constitution cannot be changed."

The Court agreed. The Court began by explaining the significance of the unamendable rule, stressing that the Constitution was founded on "the basic untouchable values of a democratic society." The prohibition against changing the democratic character of the state applies also to judges, stressed the Court. Judges as much as legislators must "protect the material focus of the constitutional order" when the Constitution is threatened by an improper amendment.

In the end, the amendment was an amendment "only in form, but not in substance." The Court likened the amendment to an assault on democracy. And to violate this democracy principle, "even by a majority or unanimous decision of Parliament, could not be interpreted otherwise than a removal of this constitutional state as such."

These courts in Belize and the Czech Republic did not innovate a new theory of constitutional change when they imposed limitations on the power of constitutional amendment. They were following the path traced in a series of important judgments from 1967 to 1981 by the Supreme Court of India, which had itself drawn from American and French political theory and German doctrine to theorize and apply the boundary between amendment and dismemberment.

The Indian Constitution authorizes the legislature to pass most amendments with a bare majority vote in each house, provided two-thirds of all members are present. By comparison to other constitutional democracies, this is a relatively low threshold for constitutional amendment. Moreover, the Indian Constitution does not formally entrench anything against amendment; all constitutional provisions are susceptible to constitutional alteration change, often by simple legislative vote. This constitutional design raises the risk that legislators will

treat the Constitution like a statute, making it as easily amendable and indistinguishable from one.

Faced with this possibility, the Indian Supreme Court in a 1967 case known as *Golaknath* laid the foundation for invalidating a constitutional amendment in the future, holding that the amendment power could not be used to abolish or violate fundamental constitutional rights. A few years later in *Kesavananda Bharati Sripadagalvaru v. Kerala*, the Court held that the amendment power could be used only as long as it did not do violence to the Constitution's basic structure. The concept of the basic structure was said to include the supremacy of the constitution, the republican and democratic forms of government, the secular character of the state, the separation of powers and federalism. In asserting these elements of the basic structure doctrine, the Chief Justice wrote that "every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same." The Chief Justice added:

> The expression "amendment of this Constitution" does not enable Parliament to abrogate or take away, fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity. Within these limits Parliament can amend every article.

A few years later in *Minerva Mills Ltd. v. Union of India*, the Court invoked this basic structure doctrine to invalidate amendments to India's codified amendment rules. The amendments had proposed to amend the Constitution to limit the Court's power to review constitutional amendments. The amendments declared that "no amendment of this Constitution … shall be called in question in any court on any ground" and that "for the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."

The question for the Court was not whether the legislature's amendment power was subject to implicit limits. That question had been resolved in *Kesavananda*. The question was instead whether the legislature could use its amendment power to overrule the Court. The Chief Justice began from the proposition that although "Parliament is given the power to amend the Constitution," it is clear for the Court that this "power cannot be exercised so as to damage the basic features of the Constitution or so as to destroy its basic structure."

The Indian Supreme Court and its interpretation of the Constitution is the juridical foundation of the distinction between amendment and dismemberment.

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When the Taiwan Constitutional Court invalidated the amendment in the year 2000, it was doing something that has become increasingly common for courts across the globe. The doctrine of unconstitutional constitutional amendment has traveled to nearly every region of the world.

Many high courts around the world have given themselves the task of guarding the constitution from changes they believe would destroy its original design—changes that would

dismember the constitution instead of merely to amend it.

This imagery of destruction is familiar in scholarship on constitutional change, so old that it was not new when William Marbury wrote in a 1919 paper published in the *Harvard Law Review* that "it may be safely premised that the power to 'amend' the Constitution was not intended to include the power to *destroy* it."

The power of formal amendment is rarely unlimited. Constitutional states commonly entrench prohibitions on the objects and subjects of the formal amendment power. For example, the French Constitution prohibits amendments to republicanism and to the integrity of the national territory. Similarly, the Brazilian Constitution forbids amendments abolishing federalism. The German Basic Law entrenches the best-known example of a formal amendment prohibition, barring amendments that violate human dignity: "Amendments to this Basic Law affecting [the inviolability of human dignity] shall be inadmissible."

These prohibitions on constitutional amendments create formally unamendable constitutional rules, meaning that they are textually unalterable within that existing constitutional regime even where there is overwhelming support from political actors and the public to amend them. These provisions are therefore impervious to the textually entrenched rules for amendment.

There are many reasons why constitutional designers might entrench a formally unamendable constitutional provision. First, they may wish impose a gag-rule on a particularly contentious matter, freezing the terms of agreement in an unamendable clause so as to free the parties to negotiate other parts of the constitutional bargain. One example is the temporarily unamendable slave trade clauses in the United States Constitution, negotiated in 1787 as a temporary resolution to a divisive matter to which the framers planned to return with dispassion when the temporary unamendability expired in 1808.

Second, making something unamendable is a way for constitutional designers to entrench and thereby to express to the world the constitutional values they believe do or should reflect the core identity of the constitutional state.

Unamendability may serve three additional purposes.

Constitutional designers may use unamendability to preserve what they view as an integral feature of the state, for example Islamic republicanism in Afghanistan.

They may use it also to transform the state, for example to repudiate an old regime and to adopt a new political commitment, as the Constitution of Bosnia and Herzegovina sought to do by making all human rights formally unamendable.

Constitutional designers may also use formal unamendability for reconciliation, by granting unamendable protections of amnesty or immunity for prior conduct in order to make peace between factions. An example is the former Nigerien Constitution, which gave unamendable grants of amnesty to perpetrators of previous coups.

The task of interpreting formally unamendable constitutional provisions often though not always belongs to courts. Where political actors seek to amend the constitution, or to pass a

simple law, or otherwise to engage in official conduct that is alleged to violate an unamendable provision, courts will evaluate the constitutionality of that action against the interpretable standard set by the unamendable rule. Some unamendable provisions are more definitive than others, and as a consequence leave comparatively little room for interpretation.

Consider, for example, the Algerian Constitution, which makes the national language unamendable, a rule that is more straightforward to interpret than the Namibian Constitution's absolute prohibition on any amendment that "diminishes or detracts" from fundamental rights.

When a Court invalidates a constitutional amendment for violating a formally unamendable rule in the constitution, the Court is defending the constitution from being dismembered, or destroyed, without a new process of constitution-making to rewrite the constitution.

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The rich jurisprudence of courts across the globe suggest eight strategies high courts may employ to defend the Constitution from efforts to dismember it. These are eight strategies courts can use to invalidate a constitutional amendment that seeks to do more than merely correct an error or elaborate the meaning of the constitution within the boundaries and presuppositions of the constitution. Some strategies relate to how to monitor the process of constitutional amendment, others to evaluate the substance of a constitutional amendment, and still others relate to non-constitutional strategies to protect the constitution from attacks to its foundations.

In the time that remains, I will offer a roadmap for courts to invalidate constitutional amendments they regard as illegitimate and unlawful attempts to dismember the constitution.

A. Procedural Unconstitutionality

One set of strategies is aimed at enforcing the constitutionally mandated procedures for formal amendment. Here there are three possible procedural violations courts can invoke to overule an amendment.

First, an amendment can be ruled unconstitutional because it was made using the wrong procedure. Some constitutions—for instance South Africa's—entrench multiple procedures for constitutional amendment, and each is keyed to a specific set of provisions or principles, meaning that one procedure cannot be used to amend a provision that is expressly made amendable by another procedure. Courts could invalidate an amendment for having been passed using the wrong procedure. We can call this a subject-rule mismatch. In the United States, for instance, Article V requires a state to consent to a diminution of its representation in the Senate. If amending actors reduced Rhode Island's senatorial delegation from two to one without securing Rhode Island's consent, the Court could invalidate the amendment as procedurally unconstitutional.

Second, some constitutions impose a time limit for passing a constitutional amendment. For instance, the Australian and Italian Constitutions require that an amendment must be debated for a certain period of time before a ratifying vote. Part of the reasoning for imposing a time limit for ratification is contemporaneity: amending actors should discuss the same question

under the same social and political conditions within the same period of time because only in this way can we be certain that a successful amendment has the support of a contemporaneous majority of amending actors. A court could invalidate an amendment that violates constitutionally-prescribed temporal rules for its adoption and ratification. This second strategy enforces a temporal limitation.

The third procedural basis for invalidating a constitutional amendment is an irregularity in administering the amendment vote. Perhaps the vote was somehow rigged or unfair, or perhaps the voting machines were broken or hacked, or perhaps there was voter suppression or some other challenge that amounts to a non-trivial obstacle to casting one's vote on the amendment, whether, for instance, as a legislator in a parliament or as a voter participating in a referendum. The court could peer behind the official results of the amendment vote to interrogate the vote itself. Where the court finds evidence of such an irregularity, it could invalidate that amendment.

B. Content-Based Unconstitutionality

Another set of strategies for invalidating a constitutional amendment is aimed at evaluating the content of the amendment and its conformity with the existing Constitution. In contrast to the three types of procedural unconstitutionality—which concern *how* an amendment is passed—content-based review involves *what* precisely the amendment is about. Here too there are three possibilities for an unconstitutional constitutional amendment.

The first relates to what we might identify as the founding principles of a constitution. A constitutional amendment might violate an important principle deemed constitutive of the Constitution itself. We can trace this idea to the German Federal Constitutional Court. In a judgment early in its existence in 1951, the Court adopted the reasoning of the Bavarian Constitutional Court:

> That a constitutional provision itself may be null and void is not conceptually impossible just because it is a part of the Constitution. There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.

A court could take this route, striking down an amendment for breaching one or more principles the court identifies as fundamentally rooted in the founding moment. An example in the United States might be the founding non-establishment norm that makes it unacceptable for amending actors to pass a constitutional amendment establishing a national religion.

The second strategy under these content-based defenses against an unconstitutional constitutional amendment is to interpret a constitution as anchored in an evolved, non-negotiable norm that may not have been evident at the founding, but that the judiciary has over the course of developing its jurisprudence identified as a special norm that sits at the apex of the constitutional order. A constitutional amendment to ban flag burning in the United States, for example, could be held unconstitutional for violating the norm of wide latitude for political speech, currently the most strongly protected form of speech under the Supreme

Court's First Amendment case law.

The third strategy under these content-based defenses against an unconstitutional constitutional amendment is to define an amendment as a new constitution in disguise. All constitutions have an internal architecture, and changes made to their architectural core amount to more than mere amendments. This was the theory underlying the Indian Supreme Court's idea of the "basic structure doctrine," which the Court created to protect the Constitution from revolutionary transformations made with recourse to the simple rules of constitutional amendment. A similar approach could be taken where, for instance, a constitutional amendment purported to transform the system of government from a presidential to a parliamentary one. Such a change would amount to considerably more than we expect of a constitutional amendment. A high court might therefore conclude that this was a new constitution masquerading as an amendment.

C. Notional Forms of Unconstitutionality

There is a third category of unconstitutionality, more notional than conventional, but nevertheless a source of useful judicial tools to defend the foundational values of a constitutional democracy from an unconstitutional constitutional amendment. This category contains two strategies, each of a more recent vintage than the others described above.

In the first of these two strategies, a court could find that a constitutional amendment is unconstitutional when measured against an unwritten constitutional norm. Neither codified in the constitutional text nor the result of the court's jurisprudence, an unwritten constitutional norm underpins the constitutional order and allows it to operate the way it does. An example of an unwritten constitutional norm in the United States may be the unwritten rule against court packing. Common law courts do not ordinarily enforce unwritten constitutional norms because they are creatures of politics, not of law, as the Canadian Supreme Court explained in its *Patriation Reference* concerning the degree of provincial consent required to make a major change to the Constitution. Nonetheless, a court could depart from this common practice of non-enforcement and choose to enforce an unwritten constitutional norm as a rule that binds amending actors when they undertake to amend the constitution.

The second of these strategies involves supra-constitutional law: where a country is a member of an international organization governed by a charter of rules, there may also be an adjudicatory body responsible for enforcing those rules. In the case of a signatory country amending its constitution in violation of this international charter, the adjudicatory body could find the amendment in conflict and therefore incompatible with the organization's charter of rules. Amendments in Nicaragua in 2004 and Togo in 2005 were held to violate the rules of regional multinational organizations. A domestic court could also enforce these supra-constitutional rules.

Each of these strategies is possible on the level of theory. In reality, though, the particular configuration of constitutional politics in a given country could preclude their use.

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The doctrine of unconstitutional constitutional amendment can be useful in the defense of

constitutional democracy but it is susceptible to misapplication, just as any other judicial doctrine. It can also be a superfluous device in the arsenal of defenses to attacks on liberal constitutionalism.

The doctrine is most important in countries where the constitution may be easily amended, as in India, whose Constitution is in most cases amendable by a simple legislative majority. In contexts like these, courts can serve as a check on bare legislative majorities that might exploit the permissive rules of constitutional amendment to make transformative constitutional changes without sufficient deliberation or popular support. This is the strongest justification for the doctrine of unconstitutional constitutional amendment.

The legal philosopher John Rawls asks an important question in his book *Political Liberalism*: Would a constitutional amendment repealing the First Amendment to the United States Constitution be a valid use of Article V? For Rawls, the answer is no.

In Rawls' understanding, an amendment repealing the First Amendment would result in a new United States Constitution, even though that amendment would be formally codified in the "old" constitution as a mere amendment and despite there being no new codified constitution.

This Rawlsian view reflects the dominant conventional view of constitutional change: either the constitution is amended consistent with the constitution, or the amendment is so transformative that we cannot call it an amendment and we must instead recognize that conceptually it seeks to create a new constitution by dismembering a foundational element in the old constitution.

This moreover reflects the dominant position that courts have taken to invalidate amendments that seek to do more than merely amend the constitution. The late political scientist Walter Murphy echoes Rawls. And both echo the core of Carl Schmitt's theory of constitutional change—that political actors are limited in how they can exercise the amendment power by the constitution itself.

We are now in a position to see clearly that the power to dismember the constitution may be understood as a power to unmake it. Courts have sought to guard the constitution from changes that destroy its original framework.

When courts in Belize, the Czech Republic, India and here in Taiwan have imposed or enforced limits on the amendment power, they have understood themselves as protecting the power of the people to give their consent to a transformative constitutional change. For these courts, a constitutional change that amounts to a dismemberment cannot be authorized only by ordinary political actors alone acting in moments of ordinary politics; it requires the validation of the people acting directly or through institutions speaking validly in their name. It is the absence of this critical popular component in the process of constitutional change that has driven courts to invalidate constitutional amendments that masquerade as constitutional dismemberments.

The Supreme Court of Belize insisted that the Constitution "cannot be amended out of existence" but it said nothing of the power to dismember the constitution. Such a transformative constitutional change could be legitimated only using participatory procedures

more involved than the ones the Eighth Amendment required for its own passing.

The same is true of the Czech Republic. To rewrite the Constitution to undermine its commitment to democracy would require procedures beyond the ones the Constitution provides for amendment.

These are echoes of the Indian Supreme Court's elaboration of the "basic structure" doctrine. No amendment, the Court explained, can violate the presuppositions of the Constitution. Doing so would "destroy" the Constitution's identity, informally replacing it using procedures that are insufficiently popular to authorize the unmaking of the Constitution.

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There is a deeper theoretical basis for explaining and justifying why courts believe themselves justified to identify and enforce by the weight of their judgments limits on the amendment power. And that is that only the constituent power can dismember the constitution; only the constituent power can unmake a constitution and in so doing create a new one.

The constituted powers, in contrast, are bound by the rules within which they are designed to operate—rules that the constituent power establishes at the moment of constitution-making, whether at the founding or at an intervening moment when the constituent power comes to life again to remake the constitution.

The distinction between amendment and dismemberment maps onto the difference between the constituted and constituent powers.

The constituted powers of government may amend the constitution and the constituent power may dismember it, unmaking and remaking it in the process.

The constituted power is limited; the constituent power is plenary. The former is subject to the constitution that has created it and the rules that govern its function and power, while the latter is subject neither to the constitution as a meta-restraint nor to the constitutional text's codified rules on the procedural or subject-matter restrictions on its exercise.

Under this prevailing theory, the implication for courts is that any constitutional change that threatens to unmake the constitution may be accomplished only by the constituent power using the powers of dismemberment. Courts, in their role as guardians of the constitution, must protect the constitution from unconstitutional change by amendment, whether or not the constitutional text sets any limits on the amendment power.

These limits may be read directly from the text where it codifies an unamendable rule. These limits may also be inferred from the structure and spirit of the constitution. Or they may be interpreted as necessary corollaries to the framework of the constitution.

However courts choose to identify them and justify their validity, these limitations on the amendment power are fundamental to existing theories of constitutional change that deny that there can ever exist a plenary amendment power unbound by higher constitutional rules and norms.

The lessons from the case law and constitutional theory may be summed up in one phrase, which for me will be my concluding remark: the distinction between amendment and dismemberment is central to the self-understanding of courts seeking to protect the people's constitution from its unmaking by procedures not authorized by the people themselves.

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Thank you once again for this very special invitation to participate in this unique conference focused on the fascinating work of an important court. It is an honor to be here.