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How a Court Becomes Supreme: Defending the Constitution from Unconstitutional Amendments

Richard Albert

HOW A COURT BECOMES SUPREME: DEFENDING THE CONSTITUTION FROM UNCONSTITUTIONAL AMENDMENTS

RICHARD ALBERT*

ABSTRACT

High courts around the world have increasingly invalidated constitutional amendments in defense of their view of democracy, answering in the affirmative what was once a paradoxical question with no obvious answer: can a constitutional amendment be unconstitutional? In the United States, however, the Supreme Court has yet to articulate a theory or doctrine of unconstitutional constitutional amendment. Faced with a constitutional amendment that would challenge the liberal democratic values of American constitutionalism—for instance an amendment restricting political speech or establishing a national religion—the Court would be left without a strategy or vocabulary to protect the foundations of constitutional democracy. In this Article, I sketch eight strategies the Court could deploy in order to defend American constitutional democracy—and to make itself truly supreme by immunizing its judgments from reversal by constitutional amendment.

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* Professor of Law and Nicholson Scholar, Boston College Law School; as of January 1, 2018, Professor of Law, University of Texas at Austin School of Law. Email: richard.albert@bc.edu. For helpful comments and reactions to an earlier draft of this Article, I thank the participants in the Maryland Discussion Group on Constitutionalism (the "Maryland Constitutional Law Schmooze"), held at the University of Maryland Francis King Carey School of Law on March 2–3, 2017. I reserve my biggest thanks to Mark Graber for inviting me to participate in this truly enjoyable gathering. I also take this opportunity to recognize the editorial team at the Maryland Law Review, led by Catherine Gamper and Catherine McGrath, for their valuable help in preparing this Article for publication.

I. INTRODUCTION

Today, two centuries after *Marbury v. Madison*,[1] the United States Supreme Court has yet to become truly supreme. There is more than meets the eye to Chief Justice John Marshall's memorable assertion: "[i]t is emphatically the province and duty of the judicial department to say what the law is."[2] It is true that the power of constitutional review has become a significant source of judicial authority in the United States and indeed around the world, so much so that prominent scholars speak now less of democracy than juristocracy,[3] the critique being that courts today intervene in an extraordinary range of questions that straddle the blurry but still conceptually valuable separation of law from politics.[4] *Marbury* has migrated abroad, empowering courts to determine where the boundary rests between what is constitutional and what is not, and attracting charges of juristocracy where courts have asserted themselves as the true and only guardians of the Constitution.[5]

Yet insofar as the juristocracy critique is rooted in a presupposition of the democratic deficit of courts, it misses an important point: the rulings of constitutional and supreme courts are by default often reversible by constitutional amendment. Amending actors ordinarily have the power to override a judicial opinion where they can gather the majorities needed to pass an amendment repealing the court decision. In the United States, for example, amending actors have on several occasions amended the Constitution to overturn a judgment of the Supreme Court.[6] The upshot is that courts are not truly

1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 177.

3. For the most influential use and elaboration of this term, see RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

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

5. For a discussion of how *Marbury* has traveled the world, see Mauro Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970); Miguel Schor, *Mapping Comparative Judicial Review*, 7 WASH. U. GLOBAL STUD. L. REV. 257 (2008); Mark Tushnet, Marbury v. Madison *Around the World*, 71 TENN. L. REV. 251 (2004).

6. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970), *superseded in part by constitutional amendment*, U.S. CONST. amend. XXVI; Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429

supreme if their judgments are reversible by a constitutional amendment. A court is truly supreme only if its rulings are irreversible.

II. DEFENDING CONSTITUTIONAL DEMOCRACY

A court therefore becomes supreme where its judgments are resistant to constitutional amendment—where what the court says really is final, where there are limits to the power of constitutional amendment, and where the court is the one to identify and enforce those limits.

A. Limitations on the Amendment Power

If we look carefully around the world, we cannot deny as a descriptive matter that there are limits to the amendment power. In countries far and near—from Argentina to Austria, Belize to Brazil, Greece to Hungary, India to Italy, Peru to Portugal, South Africa to Switzerland, Taiwan to Turkey—high courts have with accelerating frequency adopted the doctrine of unconstitutional constitutional amendment, authorizing themselves (sometimes in defiance of the constitutional text) to strike down an amendment for violating their reading of the constitution, whether on procedural or substantive grounds.[7]

What has largely prompted courts to adopt this doctrine is the defense of democracy.[8] Courts have invoked the doctrine to protect what they regard as the fundamental values of their constitutional democracy.[9] In India, for example, the Supreme Court invalidated a constitutional amendment that, in the Court's own view, would have undermined the separation of powers and violated the "basic structure" of the Constitution.[10] In the Czech Republic, the Constitutional Court annulled an amendment that it determined would have changed "the essential requirements for a democratic state governed by the rule of law."[11] And in Belize, to give one final example, the Supreme

(1895), *superseded by constitutional amendment*, U.S. CONST. amend. XI; Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI. For another more complicated example still useful to illustrate the point, see Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendments,* U.S. CONST. amends. XIII, XIV.

7. *See* Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 670–710 (2013).

8. *See* Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. (forthcoming 2018).

9. *See* Richard Albert, *Amendment and Revision in the Unmaking of Constitutions*, *in* EDWARD ELGAR HANDBOOK ON COMPARATIVE CONSTITUTION-MAKING 3–9 (David Landau & Hanna Lerner eds., forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841110.

10. *See* Minerva Mills Ltd. v. Union of India, (1981) 1 SCR 206 (India).

11. Nález Ústavního soudu ze dne 09.10.2009 (US) [Decision of the Constitutional Court of Sept. 10, 2009] sp.zn. PI. ÚS 27/09. For a full English translation, see *2009/09/10-Pl. ÚS 27/09:*

Court struck down an amendment that it believed would "destroy" the Constitution's foundational values of liberal democracy, namely the separation of powers.[12] There are many examples in other jurisdictions of courts doing the same thing.[13]

Two questions present themselves in connection with the United States Constitution: how many times has the Supreme Court invalidated a constitutional amendment passed using Article V?; and what defenses are available in the Court's own jurisprudence to combat an Article V amendment it deems contrary to constitutional democracy in the United States? The answer to both is none.[14] The Court has never invalidated a constitutional amendment passed under Article V, holding in two major cases—one challenging the Eighteenth Amendment and the other the Nineteenth—that the very fact that the amendment had been properly proposed and ratified under Article V was enough to insulate it from unconstitutionality.[15] The Court has therefore rejected a substantive content-based approach to reviewing the constitutionality of constitutional amendments and has instead taken a strictly procedural one: where an amendment conforms to the logistical requirements of Article V, the inquiry as to its constitutionality must end.[16]

B. The Corwin Amendment Then and Now

No wonder, then, that the Corwin Amendment was once proposed in the United States, and could once again be lawfully introduced in Congress.[17] Originally proposed as the Thirteenth Amendment, the Corwin Amendment would have given states the unamendable right to maintain slavery, a protection worded innocuously as the freedom from congressional "interfere[nce]"

Constitutional Act on Shortening the Term of Office of the Chamber of Deputies, § I, ÚSTAVNÍ SOUD, http://www.usoud.cz/en/decisions/20090910-pl-us-2709-constitutional-act-on-shortening-the-term-of-office-of-the-chamber-of-de-1.

12. *See* British Caribbean Bank Ltd. v. Attorney Gen. of Belize, Claim No. 597 of 2011, ¶ 45, http://www.belizejudiciary.org/web/supreme_court/judgements/Legal2012/EIGHTH%20AMENDMENT.pdf.

13. *See* Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011).

14. I have explored elsewhere theoretical foundations of the lack of an unconstitutional constitutional amendments doctrine in the United States. *See* Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURIS. 5, 15–21 (2009). For the best study on the idea of an unconstitutional constitutional amendment, see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

15. *See* Nat'l Prohibition Cases, 253 U.S. 350, 386 (1920); Leser v. Garnett, 258 U.S. 130, 136 (1922).

16. But the Court has invalidated constitutional amendments to state constitutions on substantive grounds for violating the protections of the United States Constitution. *See* Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 242–46 (2016).

17. *See* Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 REV. CONST. STUD. 37, 45–46 (2016).

into their "domestic institutions."[18] The full amendment, introduced in Congress in 1861, reads: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."[19]

The House of Representatives approved the proposal by a vote of 133 to 65, the Senate voted in its favor by a margin of 24 to 12, President James Buchanan signed it even though the Constitution gives the president no formal role in constitutional amendment, and the new President Abraham Lincoln endorsed the amendment proposal in his inaugural address.[20] Three states later ratified the amendment: Ohio in May 1861, Maryland in January 1862, and Illinois in February 1862.[21] By then, however, the Civil War had erupted, and in a twist of fate the amendment that was ultimately ratified as the Thirteenth Amendment accomplished the very opposite of what the Corwin Amendment had been designed to do: it formally abolished slavery.

Is a Corwin Amendment possible today? Unlike many Constitutions in the world, the United States Constitution does not entrench any current form of unamendability, so nothing is formally off limits to amending actors. Any amendment may be proposed by amending actors, and indeed the kinds of amendments proposed in American history prove the point that anything is fair game. For example, amendments have been proposed to forbid interracial marriage,[22] to ban flag desecration,[23] and to reverse the Supreme Court's decisions in *Roe v. Wade*[24] and *Engel v. Vitale*,[25] the former protecting abortion,[26] and the latter prohibiting prayer in schools.[27] Another proposed amendment would have limited marriage to two persons of the opposite sex.[28]

18. *Id.* at 45.

19. H.R. Res. 80, 36th Cong., 12 Stat. 251 (1861).

20. *See* RICHARD B. BERNSTEIN, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 90–91 (1993).

21. JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 118 (2d ed. 2003).

22. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 166 (2009).

23. *See* Carl Hulse & John Holusha, *Amendment on Flag Burning Fails by One Vote in Senate*, N.Y. TIMES (June 27, 2006), http://www.nytimes.com/2006/06/27/washington/27cnd-flag.html.

24. 410 U.S. 113 (1973).

25. 370 U.S. 421 (1962).

26. *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 41–42 (2015).

27. *Reagan Proposes School Prayer Amendment*, N.Y. TIMES (May 18, 1982), http://www.nytimes.com/1982/05/18/us/reagan-proposes-school-prayer-amendment.html.

28. *See* Laurie Kellman, *Gay Marriage Ban Falls Short of Majority*, WASH. POST (June 7, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700929.html.

III. A JUDICIAL STRATEGY TO PROTECT CONSTITUTIONAL DEMOCRACY

One possibility for protecting the liberal democratic values of American constitutional democracy is to authorize courts to review the substance of constitutional amendments. Yet because the Supreme Court has historically rejected the idea that a constitutional amendment can be unconstitutional on account of its content, the Court does not have a strategy or vocabulary to invalidate a constitutional amendment that, in the Court's view, would at worst break or at best undermine the liberal democratic foundations of constitutional democracy in the United States. The question, then, is this: how have courts around the world exercised the power of constitutional review of constitutional amendments? What strategies, doctrines, theories, and approaches have courts deployed to assert the power to declare a constitutional amendment unconstitutional? Stated differently, though perhaps more directly, how does a court finally become supreme?[29]

The rich jurisprudence of courts across the globe suggest eight strategies the Supreme Court could deploy to defend American constitutional democracy—and by implication to make itself truly supreme by immunizing its judgments from reversal by constitutional amendment.[30] 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. What follows, then, is a roadmap for courts principally in the United States—though also elsewhere—to become supreme in more than name alone, in jurisdictions where the doctrine of unconstitutional constitutional amendment does not yet exist.

A. Procedural Unconstitutionality

One set of strategies is aimed at enforcing the constitutionally mandated procedures for formal amendment. There are three possible procedural violations.

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

29. For the best normative defense of the doctrine of unconstitutional constitutional amendment, see Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures*, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 23 (Richard Albert et al. eds., 2017).

30. I have explored this question in connection with the Constitution of Canada. *See* Richard Albert, *The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada*, 41 QUEEN'S L.J. 143 (2015).

is keyed to a specific set of provisions or principles,[31] 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.[32] If amending actors reduced Rhode Island's senatorial delegation from two to one without getting the State's consent, the Court could invalidate the amendment as procedurally unconstitutional.

Second, some constitutions impose a time limit for passing a constitutional amendment.[33] For instance, the Australian and Italian Constitutions require that an amendment must be debated for a certain period of time before a ratifying vote.[34] Part of the reasoning for imposing a time limit for ratification is contemporaneity: amending actors should discuss the same question under the same societal and political conditions within the same period of time because only this way can we be certain that a successful amendment has the support of a contemporaneous majority of amending actors. Without a time limit for ratification, the extraordinary delay between the original proposal and final ratification of the Twenty-Seventh Amendment to the United States Constitution becomes possible: the amendment was originally proposed in 1789 and finally ratified over two centuries later in 1992.[35] Although the Supreme Court of the United States has deferred to Congress on the question whether an amendment has been ratified sufficiently contemporaneously to its proposal—the Court held that ratification must occur in a "reasonable" period of time after proposal, but that what is "reasonable" must be determined by Congress[36]—the Court could invalidate an amendment for taking too long between proposal and ratification on the theory that democracy requires an implicit time limit for ratifying a constitutional amendment, even where the constitutional text imposes none.

The third procedural basis for invalidating a constitutional amendment is a processual irregularity of some sort. Perhaps the vote was somehow

31. *See* S. AFR. CONST., 1996.

32. U.S. CONST. art. V.

33. *See* Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 952–54 (2014).

34. *See, e.g.*, *Australian Constitution* s 128 (requiring a referendum no longer than six months after Parliament approves proposal); Art. 138 Costituzione [Cost.] (It.) (requiring debate of at least three months).

35. *See* Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 678 (1993).

36. Dillon v. Gloss, 256 U.S. 368, 375 (1921) (holding that ratification must occur "within some reasonable time after the proposal"); *see also* Coleman v. Miller, 307 U.S. 433, 456 (1939) (holding that Congress must determine what is reasonable in the interval between proposal and ratification).

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 Supreme Court could peer behind the official results of the amendment vote to interrogate the vote itself. Where the Court finds evidence of a processual 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 a processual irregularity, which concerns 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.[37]

The Supreme Court of the United States 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 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 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

37. KEMAL GÖZLER, JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A COMPARATIVE STUDY 85 (2008) (quoting COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 659–65 (Walter F. Murphy & Joseph Tanenhaus eds. and trans., 1977)).

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.[38]

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.[39] In a leading case, the Indian Chief Justice wrote that amendments were permissible in all cases provided that "in the result the basic foundation and structure of the Constitution remains the same."[40] A similar approach could be taken in the United States 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. The Supreme 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 American constitutional democracy from an unconstitutional constitutional amendment. This category contains two strategies, each of a more recent vintage than the others described above.

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38. *See* Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." (citation omitted) (citing Buckley v. Valeo, 424 U.S. 1, 19 (1976))); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) ("This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' . . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' . . . There is a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" (citations omitted) (first quoting Carey v. Brown, 447 U.S. 455, 467 (1980); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); and then quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

39. *See* Kesavananda Bharati v. State of Kerala, (1973) 36 SCR 1, 4 (India).

40. *Id.* at 165.

In the first of these two strategies, the Supreme Court could find that a constitutional amendment is unconstitutional when measured against an unwritten constitutional norm. Neither entrenched 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.[41] An example of an unwritten constitutional norm in the United States may be the unwritten rule against court packing.[42] 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* on the degree of provincial consent required to make a major change to the Constitution.[43] Nonetheless, a court could depart from this common practice, choosing to enforce a convention 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 that has a charter of rules or practices, there may also be an adjudicatory body responsible for enforcing those rules and practices.[44] 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. Constitutional amendments in Nicaragua in 2004 and Togo in 2005 were held to violate the rules of regional multinational organizations.[45] In the United States, the Supreme Court could conceivably find a constitutional amendment unconstitutional where the amendment is held by an international organization to violate the rules or practices of a charter to which the United States is a signatory.

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

41. For a discussion of how unwritten constitutional norms interact with codified constitutions, see Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387 (2015).

42. *See* Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 OXFORD J. LEG. STUD. 421, 424–25 (2012).

43. Reference re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 759, 880, 904–05 (Can.) (holding, in an advisory ruling known as the "Patriation Reference," that a "substantial degree of provincial consent" was required to formalize the patriation—or in other words the domestication—of the Constitution to Canada away from the legal authority of the United Kingdom).

44. For an important discussion of this possibility, with insightful examples and enlightening analysis, see Yaniv Roznai, *The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments*, 62 INT'L & COMP. L.Q. 557 (2013).

45. *See* Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62. U. MIAMI L. REV. 417, 461–79 (2008).

IV. CONCLUSION—DOES THE UNITED STATES REALLY NEED A TRULY SUPREME COURT?

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.[46] 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, if indeed there is one, given that the doctrine does raise questions about its democratic legitimacy.

In the United States, the extraordinary difficulty of formal amendment may obviate the need for the doctrine of unconstitutional constitutional amendment. Empirical studies have confirmed that the Constitution is one of the world's most difficult, if not the most difficult, to amend.[47] An amendment proposal must survive a gauntlet of multiple veto gates in order to become entrenched in the Constitution. In the process, the amendment proposal is subjected to intense scrutiny in Congress, in state legislatures or conventions, and in the public square more generally. This is the kind of serious scrutiny that may make it unnecessary for the amendment to undergo subsequent judicial review. Not only could judicial review of constitutional amendments in the United States amount to excessive review, but the very thought that a court could invalidate a duly passed constitutional amendment would shake the popular sovereigntist foundations of the Constitution itself.

46. *See* INDIA CONST. art. 368(2).

47. *See, e.g.*, AREND LIJPHART, PATTERNS OF DEMOCRACY 220 (1999); DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006); Astrid Lorenz, *How to Measure Constitutional Rigidity*, 17 J. THEORETICAL POL. 339, 358–59 (2005). For a critique of studies of formal amendment difficulty, see Richard Albert, *The Difficulty of Constitutional Amendment in Canada*, 53 ALTA. L. REV. 85 (2015) and Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenges of Measuring Amendment Difficulty*, 13 INT'L J. CONST. L. 686 (2015).